

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable Heath P. Taylor, Circuit Court Judge

Case No. 2021-CP-18-1217

Treveen Gethers,

Petitioner,

v.

State of South Carolina,

Respondent.

APPENDIX

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1 (WHEREUPON, the jury resumed deliberations at
2 approximately 9 a.m. on November 19th, 2010.)

3 THE COURT: All right. Ms. Rogers, I'm looking
4 for your client's parents. Are they here?

5 There they are.

6 Let me speak with you all. And again, I want
7 you to know that I speak to you really with a lot of
8 consideration for you. And I want you to know, just as I
9 discussed with you before we began the trial of this case,
10 these are the most difficult, the most difficult cases for
11 the victim's family, and certainly for the defendant's
12 family, and they are heartbreaking, particularly for the
13 family.

14 I say that because my next words to you may seem
15 like I don't understand and I don't appreciate that, so I
16 begin by telling you that I do.

17 When the jury comes back with its verdict, the
18 verdict will be read and there must not be any outbursts
19 from anyone. And that is very difficult to ask of folks,
20 and I am aware of that. But this jury, who has worked so
21 hard, is entitled to your maintaining your composure and
22 your decorum, and so I ask, understanding that I am asking
23 a lot, but I am asking that you be mindful of that.

24 If you do not believe that you can maintain your
25 composure -- and, of course, I have no idea what the

1 verdict is. I know it's one of two things, but I don't
2 know what it is, but I ask if you have any concerns about
3 your ability to maintain your composure, that you leave
4 the courtroom now.

5 Very well. Unfortunately if there is an
6 outburst, that will be contempt of court, and I will have
7 to handle it as contempt of court, which will make me very
8 sad.

9 Very well. Anything from the State before we
10 bring the jury out?

11 MR. HILTON: Nothing from the State.

12 THE COURT: From the Defense?

13 MS. ROGERS: No, Your Honor.

14 THE COURT: Very well. If we could have the
15 jury, please.

16 (The jury came into open court at approximately
17 10:36 a.m.)

18 THE COURT: All right. Ms. Salkowski, it is my
19 understanding that your jury has reached its verdict; is
20 that correct?

21 THE JUROR: Yes, Your Honor.

22 THE COURT: If you'll please pass it to
23 Mr. Taylor.

24 (The jury forelady complies.)

25 THE COURT: All right. Yes, ma'am.

VOLUME II OF II

STATE OF SOUTH CAROLINA
 IN THE SUPREME COURT

Appeal from Dorchester County
 Frank R. Addy, Circuit Court Judge

RECEIVED

JUN - 9 2016

SC SUPREME COURT

TREVEE GETHERS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-000284

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1 (Whereupon the verdict of the jury is published
2 as follows:)

3 VERDICT

4 THE CLERK: In regards to the State of South
5 Carolina, County of Dorchester versus Trevee J. Gethers,
6 Indictment No. 2007-GS-18-1755, the jury finds the
7 defendant guilty of murder.

8 Ladies and gentlemen of the jury, if this was
9 your verdict in the jury room and is still your verdict,
10 please raise your right hand.

11 THE COURT: Let me observe for the record that
12 all of our jurors had their hands raised.

13 Anything further from the State before we
14 dismiss the jury?

15 MR. HILTON: Nothing from the State, Your Honor.

16 THE COURT: Anything from the Defense?

17 MS. ROGERS: Would you please poll the jury,
18 Your Honor?

19 THE COURT: Very well.

20 (A discussion was held off the record.)

21 THE COURT: Ladies and gentlemen, I apologize
22 for the disruption, and I will deal with that later. That
23 is not appropriate.

24 But, ladies and gentlemen, I'm going to call
25 your name, and as your name is called, I'm going to ask

1 you to stand and I have two questions for you, and they
2 are this: Was this your verdict in your jury room, and
3 does it continue to be your verdict? And those are going
4 to be the questions I'm going to ask of you.

5 I'm going to begin with Ms. Diane Piksa.

6 Was this your verdict in your jury room?

7 THE JUROR: Yes.

8 THE COURT: And is it your -- does it continue
9 to be your verdict?

10 THE JUROR: Yes.

11 THE COURT: Thank you.

12 And next, Bryan Galloway.

13 Mr. Galloway, was this your verdict in your jury
14 room?

15 THE JUROR: Yes, ma'am.

16 THE COURT: Does it continue to be your verdict?

17 THE JUROR: Yes, ma'am.

18 THE COURT: And Patricia Minus. Ms. Minus, was
19 this your verdict in your jury room?

20 THE JUROR: Yes, ma'am.

21 THE COURT: Does it continue to be your verdict?

22 THE JUROR: Yes, ma'am.

23 THE COURT: And Cory Burchard, is that right?

24 THE JUROR: Burchard.

25 THE COURT: Burchard. Mr. Burchard, was this

1 your verdict in your jury room?

2 THE JUROR: Yes, ma'am.

3 THE COURT: Does it continue to be your verdict?

4 THE JUROR: Yes, ma'am.

5 THE COURT: Ms. Salkowski, was this your verdict
6 in your jury room?

7 THE JUROR: Yes, Your Honor.

8 THE COURT: And does it continue to be your
9 verdict?

10 THE JUROR: Yes, Your Honor.

11 THE COURT: Very well.

12 Angela Ammons. Ms. Ammons, was this your
13 verdict in your jury room?

14 THE JUROR: Yes, ma'am.

15 THE COURT: And does it continue to be your
16 verdict?

17 THE JUROR: Yes, ma'am.

18 THE COURT: Betty Alston Campbell. Did I do
19 that right?

20 THE JUROR: Betty Campbell Alston.

21 THE COURT: Betty Campbell Alston, was this your
22 verdict in your jury room?

23 THE JUROR: Yes, Your Honor.

24 THE COURT: Does it continue to be your verdict?

25 THE JUROR: Yes, Your Honor.

1 THE COURT: Franklin Raynor. Mr. Raynor, was
2 this your verdict in your jury room?

3 THE JUROR: Yes, Your Honor.

4 THE COURT: Does it continue to be your verdict?

5 THE JUROR: Yes, Your Honor.

6 THE COURT: And Linda Newman, was this your
7 verdict in your jury room?

8 THE JUROR: Yes, ma'am.

9 THE COURT: And does it continue to be your
10 verdict?

11 THE JUROR: Yes, ma'am.

12 THE COURT: Dwight Beavers, was this your
13 verdict in your jury room?

14 THE JUROR: Yes, Your Honor.

15 THE COURT: And does it continue to be your
16 verdict?

17 THE JUROR: Yes, Your Honor.

18 THE COURT: And Cynthia Brown. Ms. Brown, was
19 this your verdict in your jury room?

20 THE JUROR: Yes, Your Honor.

21 THE COURT: Does it continue to be your verdict?

22 THE JUROR: Yes, Your Honor.

23 THE COURT: And Joseph Rowell. Mr. Rowell, was
24 this your verdict in your jury room?

25 THE JUROR: Yes, ma'am.

1 THE COURT: And does it continue to be your
2 verdict?

3 THE JUROR: Yes, ma'am.

4 THE COURT: I find that all of our jurors have
5 been polled, that each and every juror has indicated that
6 this verdict of guilt was their verdict in their jury room
7 and it continues to be their verdict here in the
8 courtroom.

9 Anything further from the State?

10 MR. HILTON: Nothing, Your Honor.

11 THE COURT: From the Defense?

12 MS. ROGERS: No, Your Honor.

13 THE COURT: Very well. Ladies and gentlemen, I
14 want to thank you for your service on this jury. I want
15 to thank you for your service on this panel this week.
16 You have obviously given us so very, very much of your
17 dear and precious time and I am so grateful to you for
18 every single solitary tick of the clock.

19 These matters are not easy, but you have given
20 to our way of life, to our system of justice so much of
21 your time and I am truly, truly grateful to you for it.

22 This obviously concludes your service on this
23 jury. This concludes your service on our jury panel this
24 week.

25 And you are now at liberty to talk about this

1 case should you wish to talk about it. You are going to
2 be going home and whoever's been so curious, you can
3 tonight certainly say, I am at liberty now to talk about
4 this case. It's perfectly okay with me if you say, You
5 can take me to dinner. That's perfectly fine.

6 Now, ladies and gentlemen, let me just share
7 with you that the lawyers in this case, lawyers in every
8 case, are practitioners. We call it the practice of law
9 because the practice of law is just that, it is a
10 profession at which you continue to improve, you continue
11 to get better. And you may or may not hear from these
12 young lawyers as they improve their skills, they may want
13 to know from you what was helpful and what wasn't helpful.

14 If you get such a phone call from these lawyers
15 or they approach you at some point when they happen to see
16 you and they ask you, if you're comfortable talking about
17 that, that is perfectly fine. You will provide them a
18 service as they try to get better at what they do.

19 If you don't want to talk about it, that is
20 absolutely perfectly fine, too. And you just tell them, I
21 don't want to talk about it.

22 Now, for 13 years I have been telling jurors
23 this, and I know it concerns them, but I want to tell you
24 that this has never happened, but I'm afraid if I don't do
25 it with every jury panel then it will happen and here it

1 is.

2 Ladies and gentlemen, should you have somebody
3 approach you and want to talk about this case and you tell
4 them you don't want to talk about it and they don't
5 respect your wishes, I want you to contact Ms. Graham, our
6 Clerk of Court, and she will contact me and I will
7 intercede on your behalf.

8 Again, I haven't had that happen. Arguably
9 maybe sort of kind of once, but really not. But I always
10 tell jurors that so if it should ever happen you would
11 know who to call, because I'm there for you in that event.
12 I don't want somebody telling you you've got to talk to
13 them if you don't want to talk to them. And I'm afraid
14 I'll jinx it, that one time I don't tell the jury panel
15 that it will happen, so I don't think that's going to
16 certainly, and certainly won't happen with these lawyers,
17 but I tell you in an abundance of caution.

18 Now, I used to tell jurors that the check was in
19 the mail because I really thought it was, and then
20 Ms. Graham looked at me and said, "Don't tell them that,
21 it's not true." but it does soon get in the mail. But
22 our trip to Tahiti, yeah, it's in Jedburg. It is a very
23 small token of all that you have given to us.

24 Ladies and gentlemen, I certainly wish for you
25 and your families a very happy holiday season as we are

1 approaching that time. And if you have any suggestions or
2 comments or questions, you've given up so much of your
3 time, I am delighted to give you some of mine.

4 If you have any questions or concerns or
5 comments, you can leave a note, or if you want to speak
6 with me for whatever reason, I'll be happy to do that if
7 you'll just let Ms. Salisbury know as she escorts you back
8 into your jury room. And I think what I'm going to ask
9 you to do is if you want to escort back into your jury
10 room, that's fine.

11 For your informational purposes, I'm going to
12 proceed to sentencing. Sometimes jurors wish to observe
13 that, sometimes they don't. It's completely -- you are
14 now a member of the public and this is a public place. So
15 if you wish to be present, you are welcome to return to
16 the audience. You certainly can return right here to your
17 jury box. And if you do not, then you certainly may go
18 about your business.

19 Remember, those of you who are leaving us and
20 need something for your employer, we'll be delighted to
21 get that for you down in the Clerk's office. They will
22 get you a statement that says where you have been and what
23 you have been up to.

24 Our Clerk's office is directly below us. Those
25 of you who are elevator riders, take a left on the first

1 floor. Those of you who are stair walkers, take a right.
2 It's at the bottom of the steps. Go to the Clerk's office
3 and tell them you need something for your employer and
4 they will get that for you promptly.

5 It has been an honor, it has been a privilege of
6 mine to serve with you in this capacity. And should our
7 paths ever cross again in this capacity, it would likewise
8 be an honor and a privilege.

9 Again, I wish you all a safe and happy holiday,
10 and at this time you are free to go. You are free to stay
11 but are likewise free to go.

12 Ms. Salisbury, just let me know if there are any
13 jurors that wish to speak and I will come right to them.

14 (The jury was excused from open court at
15 approximately 10:46 a.m.)

16 SENTENCING

17 THE COURT: All right. If you have your
18 sentencing sheet filled out, if you all would come
19 forward, please, with your client.

20 All right. And, Mr. Hilton, I am happy to hear
21 from you, and of course I'm happy to hear from Ms. Rogers
22 and any family members if they wish to speak.

23 MR. HILTON: Yes, Your Honor. You heard the
24 facts of the trial. We started on Monday with hearings.
25 You heard all the testimony that was presented to the jury

1 and some that we decided for different reasons not to
2 present to the jury. You heard testimony that was
3 inadmissible for other reasons.

4 But one thing I wanted to point out was one
5 thing that I don't think I made as clear to the jury as I
6 need to make to Your Honor, and that was the positioning
7 of Mr. Robinson when he was shot in that vehicle.

8 You heard from Agent Ila Simmons that testified
9 in reference to the gunshot residue.

10 THE COURT: Yes.

11 (A brief pause was taken while some jurors
12 returned to the courtroom.)

13 MR. HILTON: You heard from Agent Ila Simmons in
14 reference to the gunshot residue, and her testimony in
15 conjunction with the pathologist's testimony about the
16 positioning of the arm -- I'm just going to stop for a
17 second if that's all right.

18 THE COURT: Sure. Let them come in.

19 (A brief pause was taken while some jurors
20 entered the courtroom.)

21 THE COURT: Was anyone else coming? No. Okay.

22 MR. HILTON: Thank you, Your Honor. May it
23 please the Court.

24 THE COURT: Sure.

25 MR. HILTON: What I was saying was you heard

1 from Agent Presnell (sic) with SLED in reference to the
2 gunshot residue, her testimony in conjunction with Dr.
3 Presnell's testimony about the location and the alignment
4 of the arm, and both of those experts together indicate
5 that the arm positioning was in a hands-up defensive,
6 defenseless position to a person, Trevee Gethers, who shot
7 him with either a .38 or a .357 revolver-style pistol.
8 And there's just no excuse for that type of conduct.

9 The jury's convicted him of murder, and we just
10 ask that a sentence be imposed upon Mr. Gethers that's
11 appropriate to the crime that he committed.

12 THE COURT: Very well.

13 MR. HILTON: And I do not know if the family
14 wishes to address the Court. I would just ask they be
15 given that opportunity if need be.

16 THE COURT: I'm happy to hear from you.
17 Absolutely. Come on around.

18 And again, for our record, if you would simply
19 state your name. I know who you are, but our record must
20 reflect who is speaking.

21 MS. ROBINSON: My name is Jestine S. Robinson.

22 THE COURT: Yes, ma'am.

23 MS. ROBINSON: I would just like to say to the
24 jury, thank you for allowing the truth to come forward.

25 And I would just like to say to Mr. and Mrs.

1 Gethers, I know your pain because I know you feel the same
2 pain that I felt on September the 17th.

3 I still have a 15-year-old son that I cannot
4 even bring to talk about his dad. They went to school
5 together every day. And when I have to watch my sons ask
6 me what they would normally ask their dad, and half the
7 time I can't answer. My husband was a person.

8 Trevee, I say to you, if you had asked him for
9 the money, he would have given it to you, no problem. He
10 was that kind of person. He was that type of person.

11 He grew up -- his dad died when he was six years
12 old. He always felt for children that didn't have a
13 parent in the home, and he did what he can. I have nieces
14 and nephews that would come here and tell you the same
15 thing.

16 Trevee, you would never know what you took from
17 us.

18 THE DEFENDANT: I didn't take nothing.

19 MS. ROBINSON: You will never know what you took
20 from us.

21 So I would just like to say that I feel for his
22 family because I know the pain that they're feeling and I
23 pray that they will be able to get well.

24 But, Trevee, I never -- I asked God to never
25 hate the person, and I never even pointed a finger at him,

1 but I thank God that it's over. But I still have to go on
2 with my life and watch my two sons and my family without.

3 THE COURT: You certainly must go forward and
4 know that Mr. Robinson would want you to go forward. You
5 know that he would want you to go forward knowing that he
6 watches from above and he loves you, and he loves you
7 still.

8 And you have many tasks yet to be done with
9 those children. And while it's not fair for you to be
10 doing it alone, he expects, you know he does, and he knows
11 you're up to the task because you obviously come from only
12 a place of love, and a person that comes from that place
13 can accomplish probably all things, but certainly many,
14 many things.

15 I am so sorry for your sadness. You didn't ask
16 for this. This was completely placed upon you. Your
17 beloved husband was a victim, and you are a victim. And
18 for that I am so sorry.

19 But this will bring you closure. This will
20 cause you sadness, but this will bring you closure. And
21 you will know that you have seen it through.

22 You have guarded him, you've protected him, and
23 you've done that which is appropriate. And I want you to
24 take peace, peace, in the fact that you have done that.
25 And I certainly wish you well.

1 Yes, ma'am. And again if you would just
2 identify yourself for the record.

3 MS. SINGLETON: Yes, I am Earlene Singleton.
4 Earl was my brother-in-law and Jestine is my sister. And
5 I would like to tell the jury thank you for your decision.
6 It's not an easy one.

7 And to Mr. Hilton, thank you.

8 And to everyone, thank you.

9 But I just want to say that the day my
10 brother-in-law died, a part of me went with him.

11 Earl wasn't just a brother-in-law. Earl was the
12 person -- he and I were employed at South Carolina State
13 University. You could go to that place right now and ask
14 anyone there about Earl. There's still people who worked
15 there and it's three years later and you would ask them a
16 question about Earl and they would break down and cry.

17 Earl was the man who went beyond the call of
18 duty, not just in his home, in the church, on the job.
19 Even when this happened to him, he was trusting.

20 When my sister kept having abortions, they
21 finally conceived Darius, and the day Darius was born, my
22 brother and I said that he can't keep this up, it's too
23 much. We thought it was all just a fad. But my
24 brother-in-law, the day he died, he brought Darius to my
25 house to get his cleats.

1 He kept Darius in something. Every season if it
2 wasn't basketball season, football season, whatever, he
3 was a family man. And when my husband died suddenly of a
4 heart attack, my son was nine at the time, Earl stepped up
5 to the plate, which he was already doing. Earl took my
6 son, he did more for my son than my own husband was doing.

7 Earl was a jovial person who trusted everybody
8 and anybody. If he had asked Earl for the money, Earl
9 would have given him the shoes off his feet or the shirt
10 on his back. That's the kind of person Earl was.

11 Even our former president at South Carolina
12 State University went to high school with Earl. People
13 still can't believe that a person like Earl was murdered.

14 But -- and just like what was said about the
15 family, we weren't taught to hover hatred. That's not us.
16 But justice must prevail.

17 Justice must -- and I say to everyone in this
18 courthouse today that we pray for one another because
19 we'll need it. And no remorse towards his family. None
20 towards any of the families, but justice prevails. And I
21 thank God for having the opportunity -- and you, and I
22 thank you and the court system here for such a fine job
23 while we were here.

24 Thank you all so much.

25 THE COURT: Thank you for your time.

1 MR. HILTON: I think that's all, Your Honor.

2 THE COURT: Very well. Thank you.

3 Yes, ma'am, Ms. Rogers, on behalf of the
4 defendant.

5 MS. ROGERS: Yes, Your Honor.

6 As the Solicitor pointed out, you also saw
7 evidence that the jury was not privy to and was
8 inadmissible. And you will note that my client has
9 maintained his innocence from the beginning.

10 The testimony that Russell speaks of regarding
11 the experts and the position of the hands, I believe she
12 also said they could have been on the steering wheel. So
13 I would just ask you to keep that in mind in also making
14 your decision, that even the expert couldn't say that it
15 was in fact a defensive pose.

16 My client has been incarcerated for the past
17 three years as you know and has had no issues in the jail,
18 has gotten every certification I think you can get at
19 Berkeley County and has been a peaceable person while
20 there, and we ask that you take that into consideration.

21 THE COURT: Very well. Anyone that wishes to
22 speak on his behalf?

23 MS. HOLMES: I will.

24 THE COURT: Yes. All right.

25 MS. HOLMES: My name is Sadie Holmes. I'm

1 Trevee's aunt, one of his aunties.

2 THE COURT: Yes, ma'am.

3 MS. HOLMES: I lived in North Carolina for
4 awhile so I wasn't around for much of his upbringing, but
5 during the time I would come home and visit and everything
6 I would always get a chance to be around him. I am so
7 sorry for this situation. There's no win here. No win
8 here.

9 THE COURT: No, there is not.

10 MS. HOLMES: And with all due respect, you've
11 got a young man out here doing this and you have an older
12 gentleman out here doing this. There is no win in this
13 situation.

14 But I ask the Court to please consider that he
15 was a young man. He has grown. He is showing that he is
16 trying to change his life around.

17 And I apologize to the family to the highest,
18 because the pain you all feel, we are feeling it, too. We
19 really are. This is a mess, but we seriously apologize.

20 And I just want to hug him. I haven't hugged
21 him in about three years. Can I just put my arms around
22 him?

23 THE COURT: Okay. All right.

24 That will be sufficient. Thank you very, very
25 much.

1 MS. HOLMES: Thank you.

2 THE COURT: And thank you for your words.

3 MS. TAYLOR: I'm Trevee's sister.

4 THE COURT: And your name is?

5 MS. TAYLOR: Michelle Taylor.

6 THE COURT: Yes, ma'am.

7 MS. TAYLOR: He is a good kid. My brother would
8 never, never do anything like this. I'm sorry to the
9 family, but I know my brother. I apologize, but he's a
10 good kid. He's always made good grades in school, done
11 all kind of activities in school, and he would help
12 anyone. He would never hurt anyone. I'm so sorry.

13 That's all I have to say. But can I hug my
14 brother?

15 THE COURT: All right.

16 MS. ROGERS: Your Honor, do you mind if I step
17 in the hall and see if his mom has composed herself enough
18 to speak on his behalf?

19 THE COURT: If she wishes to speak I will
20 certainly let you do that, yes.

21 (A brief pause was taken.)

22 MS. ROGERS: She's not able.

23 THE COURT: Too distraught?

24 MS. ROGERS: Yes, Your Honor.

25 THE COURT: Very well. And, Mr. Gethers, of

1 course under our law you certainly have a right to speak
2 if you wish as well.

3 THE DEFENDANT: I have nothing to say, Your
4 Honor.

5 THE COURT: All right. Very well.

6 And anyone else who wishes to speak on his
7 behalf, Ms. Rogers?

8 MS. ROGERS: No, Your Honor.

9 THE COURT: Very well.

10 MR. HILTON: Your Honor, he does have a prior
11 record. He has a PWID, either methamphetamine or cocaine
12 base, and he also has a possession of a pistol by a person
13 under 21.

14 THE COURT: When was he convicted of that?

15 MR. HILTON: When?

16 THE COURT: When.

17 MR. HILTON: The drug charge was back in --

18 MS. ROGERS: 2007.

19 MR. HILTON: 2007. And then the pistol charge,
20 do you know the date of that?

21 MS. ROGERS: March the 7th, 2007, is the
22 pistol charge.

23 MR. HILTON: And he is on probation for the
24 pistol charge and I think Probation would like to address
25 that at the appropriate time.

1 THE PROBATION AGENT: Your Honor, he does have a
2 four year suspended to three years probation sentence, and
3 we would just ask that the revocation run concurrent to
4 any sentence.

5 THE COURT: Very well. Has he been served the
6 warrant?

7 THE PROBATION AGENT: He was served with a
8 warrant when he was originally taken and brought into
9 custody on the charges he's here for now.

10 THE COURT: Very well. Would you like to
11 address the probation matter further, Ms. Rogers?

12 MS. ROGERS: Again, Your Honor, I would like to
13 say that it seems that 2007 was a year that wasn't so well
14 for my client, and he has grown and matured since then,
15 and I believe as the man that he is today and not the boy
16 he was then, he would not have violated his probation in
17 any way and would have complied fully.

18 THE COURT: All right. Mr. Gethers -- and to
19 the family, I want you to know that as Mr. Gethers' family
20 hugged him, I know you can't do that. And I felt that and
21 I saw you watch that and I know you can't do that. So I
22 wanted you to accept that acknowledgment also.

23 Mr. Gethers, first of all, I am going to revoke
24 the four years on your gun charge.

25 And with regards to this murder charge, I'm

1 going to commit you to the State Department of Corrections
2 for a period of 45 years.

3 When you come out of prison you will be 64 years
4 old. Hopefully at this point you will not pose such a
5 tremendous threat to our community.

6 By statute, sir, you are entitled to credit for
7 the time that you have served, which is what makes it
8 approximately that you will be 64 years old.

9 That concludes this matter.

10 MR. HILTON: Thank you, Your Honor.

11 MS. ROGERS: Thank you, Your Honor.

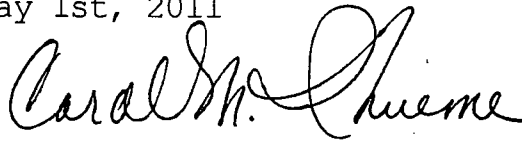
12 THE COURT: Very well.

13 (The proceedings were concluded.)

14 *** END OF REQUESTED TRANSCRIPT OF RECORD ***
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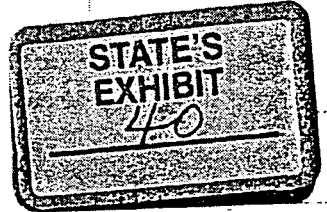
1 CERTIFICATE OF REPORTER
2
34 STATE OF SOUTH CAROLINA)
5)
6 COUNTY OF DORCHESTER)
78 I, CAROL M. THUEME, RPR, Official Court Reporter for
9 the 11th Judicial Circuit of the State of South Carolina,
10 do hereby certify that the foregoing is a true, accurate
11 and complete Transcript of Record of the proceedings had
12 and evidence introduced in the trial of the captioned
13 case, relative to appeal, in the Court of General Sessions
14 for Dorchester County, South Carolina, on the 18th and
15 19th days of November, 2010.16 I do further certify that I am neither of kin,
17 counsel nor interest to any party hereto.
18

19 May 1st, 2011

20 
2122 CAROL M. THUEME, RPR
23 Circuit Court Reporter24 AS TRANSCRIBED FOR:
25 BONNIE H. KELLY
Circuit Court Reporter

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GETHERS, TREVEE JOXTEER

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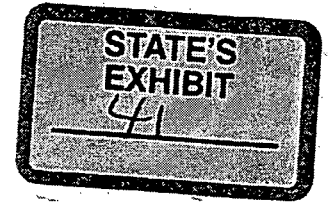
Trenee J. Joxteer
NAME FIRST NAME MIDDLE NAME SURNAME

STATE IDENTIFICATION NO.	DATE OF BIRTH	MM	DD	YY	SEX	RACE	HEIGHT	WEIGHT	EYES	HAIR
933010JC3	06/11/1983				M	B	511	153	BRO	BLK

528
524

Charleston County Sheriff's Office

Detention Center



0001178670 **Name:** GETHERS, TREVEE JOXTEER

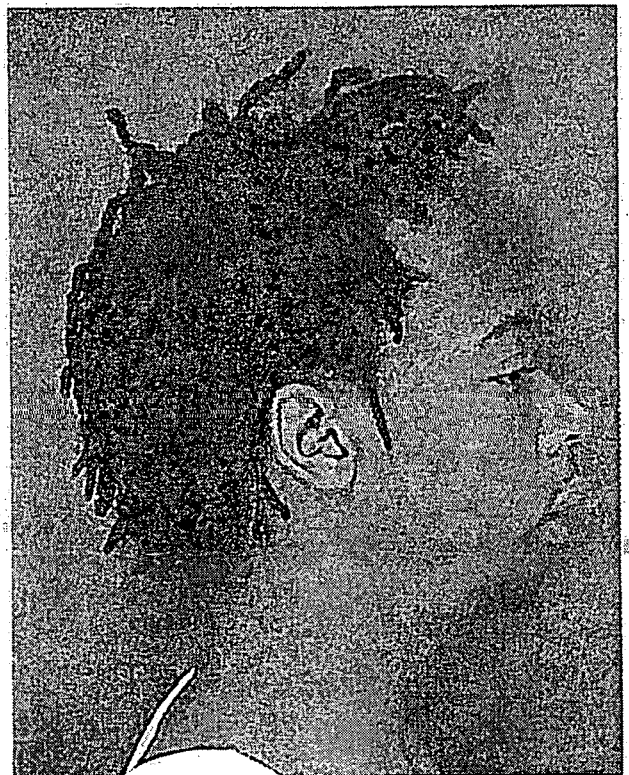
Date of Birth:

Booking Date: 05/11/07

Race: B

Sex: M

Height: 5'8"



STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Dorchester County

Diane Schafer Goodstein, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TREVEE J. GETHERS,

APPELLANT

FINAL BRIEF OF APPELLANT

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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court judge erred when she did not grant appellant's motion for a directed verdict when the evidence adduced at trial did not rise above mere suspicion that he was guilty of murder because the circumstantial evidence merely suggested that he was near the murder scene when the decedent was fatally shot?

STATEMENT OF THE CASE

Trevee Gethers was indicted for murder by the Dorchester County grand jury during its December 3, 2007 term. He was tried before the Honorable Diane Goodstein and a jury between November 15- 19, 2010. He was represented by Sara Jane Rogers, Esquire. The State was represented by Russell D. Hilton and Harrison Bell, Jr., Esquires. He was convicted and sentenced to 45 years incarceration.

This appeal timely follows.

ARGUMENT

The trial court judge abused his discretion when he did not grant appellant's motion for a directed verdict when the evidence adduced at trial did not rise above mere suspicion that he was guilty of murder because the circumstantial evidence merely suggested that he was near the murder scene when the decedent was fatally shot.

Treveen Gethers was convicted of the murder of Earl Robinson which occurred on September 17, 2007. On that date, the decedent had earlier borrowed \$200 from his son, Marcus. The decedent was then found in an apartment complex, and seated in the driver's seat of a white Toyota Sequoia. R. 71, ll. 18-22. He had been shot once in the arm, with the bullet entering his chest and mortally wounding him. R. 221, ll. 5-23.

Neighbors in the apartment complex heard arguing in the parking lot just prior to the gunshots, although no one identified appellant as the one arguing with the decedent. R. 52, l. 12- 53, l. 7. The apartment complex was known as a very high crime area and gunshots were "fairly common." R. 63, l. 7. An officer with the Dorchester County sheriff's office confirmed that there were many fights and drug-related calls that occurred in the

area. R. 72, l. 24- 73, l. 6. As law enforcement conducted their investigation, they took into their custody a number of cigarette butts, a .40 caliber gunshot shell, and a Bluetooth telephone headset. R. 84, ll. 8-23. Law enforcement did not have analyzed the cigarette butts that were located in the immediate area of the car. R. 84, ll. 22-23. The .40 caliber bullet was determined not to be relevant to the crime scene. R. 89, l. 3.

Law enforcement also extracted 34 latent fingerprints from the decedent's car. R. 89, ll. 16-19. Three people were identified based on the presence of the fingerprints found on the car but they were never pursued in connection with this investigation. R. 119, ll. 19-

22. Later in their investigation, law enforcement obtained a buccal swab from appellant and obtained his DNA profile. R. 101, ll. 4-9.

Appellant's DNA was found on the Bluetooth telephone headset that was found in the apartment complex. Significantly, the telephone was not found close to where the decedent's body was located:

A. That was just inside the first crime scene tape that was stretched across the road. It was actually in front of Apartment . It was not located anywhere around the vehicle. It was between Apartment and , the apartment complex to the right. It was in that area on the road as you came in.

R. 123, ll. 4-9 (emphasis added).

Brandee Kieffer was appellant's girlfriend and recalled that, around the time of this crime, she and appellant switched cars. R. 144, l. 16-147, l. 19. Veronica K. was another friend of appellant's. R. 155, l. 23- 156, l. 2. She testified that on the date the decedent was killed, she was supposed to meet with him. He was expected to bring her money that evening, R. 156, ll. 14 – 25, because he intended to have sex with Ms. K. who was 14 years old at the time. R. 158, l. 1 -- 159, l. 9; R. 176, ll. 10-14. That evening, she was using her friend, Maggie Reid's, telephone. R. 157, ll. 1 -- 2. At some point, after the decedent was killed, Ms. K. and the appellant drove to Virginia, and then eventually traveled to New York. R. 164, l. 4 -- 165, l. 2.

During their investigation, law enforcement obtained the telephone that belonged to the decedent, and which was located in his car, and noticed a number of telephone calls that he made to his son and to the telephone that was registered to Reid, Ms. K.'s friend. R. 188, l. 18- 189, l. 17. Their investigation led them to identify appellant's telephone number. R. 192, ll. 2 -- 25. Law enforcement obtained search warrants based on telephone calls

between Ms. K. and the appellant, but those searches did not uncover anything of evidentiary value. Law enforcement also had identified appellant's fingerprints located on the passenger side of the decedent's car. Other fingerprints were also located on the car, but they were not identified by law enforcement. R. 262, ll. 8-12. Law-enforcement never located the murder weapon even after exhaustively searching the area. R. 193, l. 5 -- 197, l. 18. Ultimately, Ms. K. and the appellant were located in New York City. R. 199, ll. 2 -- 19.

Ms. K. gave a statement to law enforcement that suggested that she had appellant meet with the decedent in order to take his money. At trial, she did not testify to these facts, but her statement was found admissible as a prior inconsistent statement. R. 208, l. 2- 209, l. 23; R. 204, ll. 6- 16. In change for cooperation, Ms. K.'s charge of murder remained in the jurisdiction of Family Court. R. 279, ll. 7-11.

Appellant's DNA was located on the Bluetooth headset that was found in the apartment complex. R. 328, l. 2 -- 330, l. 25. Appellant did not testify at trial. R. 343, ll. 4 - 7.

At the close of the State's case, counsel made a motion for directed verdict, which was renewed at the end of the case. R. 346, ll. 10-18. The trial court judge denied the motions. R. 346, ll. 19 -- 21.

The trial court judge erred when she denied appellant's motion for a directed verdict because the evidence adduced at trial did not rise above the level of providing a "mere suspicion" that appellant was guilty of murder.

A case should be submitted to the jury when the evidence is circumstantial "if there is any substantial evidence which reasonably tends to prove the guilt of the accused or from

which his guilt may be fairly and logically deduced.” State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000); see also State v. Williams, 321 S.C. 327, 332, 468 S.E.2d 626, 629 (1996). “The jury weighs the evidence but when there is an absence of evidence, it becomes the duty of the trial judge to direct a verdict . . .” State v. Schrock, 283 S.C. 129, 134, 322 S.E.2d 450, 452-53 (1984). Evidence must constitute positive proof of facts and circumstances which reasonably tends to prove guilt. Id. at 133, 322 S.E.2d at 452 (citing State v. Manis, 214 S.C. 99, 51 S.E.2d 370 (194)). State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011). The circuit court should not refuse to grant the directed verdict motion when the evidence merely raises a suspicion that the accused is guilty. “Suspicion” implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof. State v. Lollis, 343 S.C. 580, 541 S.E.2d 254 (2001). See also State v. Cherry, 361 S.C. 588, 606 S.E.2d 475 (2004). In this case, the evidence presented by the State did not rise above the level of mere suspicion.

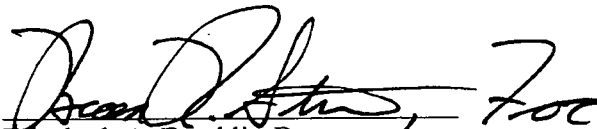
The trial court judge erred by not granting appellant’s motion for a directed verdict because the evidence did constitute positive proof of facts and circumstances which reasonably tended to prove his guilt of murder. At most, the evidence proved that appellant had a relationship with a young woman who had a relationship with the decedent. Her statement tending to implicate appellant merely raised a suspicion that appellant was guilty, since it was made under circumstances militating against its trustworthiness because it was induced by a deal from the state. And, in any event, she did not testify against appellant during trial. All then, that was left to connect appellant to the murder, was appellant’s telephone, found in the apartment complex, and phone calls between Ms. ^K and appellant. Additionally, appellant’s fingerprints on the *outside* of

the car did not constitute evidence that appellant was guilty of committing murder. For these reasons, the trial court judge erred, and appellant respectfully asks this Court to reverse his conviction and order a directed verdict of acquittal.

CONCLUSION

For the preceding reason, appellant respectfully asks this Court to reverse his conviction and order a directed verdict of acquittal.

Respectfully submitted,



Elizabeth A. Franklin-Best
Appellate Defender

ATTORNEY FOR APPELLANT

This 7th day of May, 2012.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."


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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dorchester County
Diane Schafer Goodstein, Circuit Court Judge

THE STATE,

RESPONDENT,

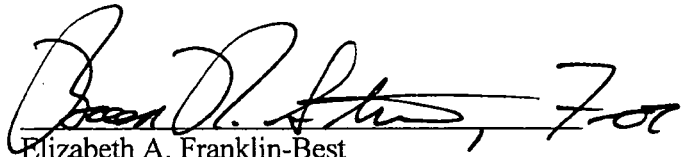
V.

TREVEE J. GETHERS,

APPELLANT

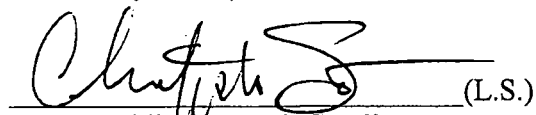
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant and Designation of Matter in the above referenced case has been served upon William Edgar Salter, III, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, South Carolina 29201, this 7th day of May, 2012.


Elizabeth A. Franklin-Best
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 7th day of May, 2012.



Notary Public for South Carolina (L.S.)

My Commission Expires: May 16, 2021 .

**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

**Appeal from Dorchester County
Diane Schafer Goodstein, Circuit Court Judge**

THE STATE,

RESPONDENT,

v.

TREVEE J. GETHERS,

APPELLANT.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF CASE

The Dorchester County Grand Jury indicted Appellant, Trevee J. Gethers (Gethers) at the December 3, 2007 term of court for murder (2007-GS-18-1755), for the shooting death of Robert Earl Robertson. **R. pp. ____-__**. On November 15-17, 2010, he received a jury trial before the Honorable Diane Schafer Goodstein. The jury found Gethers guilty of murder and Judge Goodstein sentenced him to forty-five years imprisonment. **Tr. pp. 520-21.**¹

Dorchester County Assistant Public Defender Sara Jane Rogers represented Gethers at trial. Senior Assistant Solicitor Harrison Bell, Jr., and Russell D. Hilton, of the First Circuit Solicitor's Office, prosecuted him.

A timely notice of appeal was served and filed.

¹She also revoked four years of a probationary sentence on an unrelated gun charge. **Tr. p. 520.**

ARGUMENT

Gethers' challenge to the trial judge's denial of his directed verdict motion is not preserved for this Court's review because he only made a general motion for a directed verdict at trial and did not raise the arguments he now presents. Alternatively, the trial judge properly denied Gethers' directed verdict motion because the State presented direct and substantial circumstantial evidence at trial that reasonably tended to prove that he murdered the victim, Robert Earl Robinson, or from which his guilt could be inferred.

Gethers maintains that the trial judge erroneously denied his motion for a directed verdict, claiming that "[a]t most, the evidence proved that appellant had a relationship with a young woman who had a relationship with the decedent." After discounting this co-defendant witness' statement implicating him as untrustworthy, he contends that the only evidence that connected him to the murder was his "telephone, found in the apartment complex, and phone calls between Ms. [REDACTED] and appellant." **Brief of Appellant, p. 8.** Respondent submits that his challenge to the trial judge's trial judge's denial of his motion is not preserved for this Court's review because he only made a general motion for a directed verdict at trial and he did not raise the arguments he presents to this Court. Alternatively, the trial judge properly denied Gethers' motion for a directed verdict because the State presented direct and substantial circumstantial evidence at trial that reasonably tended to prove that he murdered the victim, Robert Earl Robinson, or from which his guilt could be inferred.

A. Proceedings in the trial court.

1. The prosecution's evidence.

The direct and circumstantial evidence presented by the State was that the victim, Earl Robinson, lived in Walterboro, South Carolina in September 2007. On the night of September 17, 2007, the victim called his son, Marcus Brothers, "about 8:30 p.m." and he asked if Marcus had any money that he could borrow. Marcus did have money and agreed to loan some to him. When the

victim called again at 9:24 p.m., he said "he was going away" and needed cash. Marcus again agreed to loan money to him. **Tr. pp. 218-19; 379.**

The two men met at a Horizon Gas Station that is near Marcus' residence a few minutes after 10:00 p.m., and Marcus loaned \$ 200.00 to his father.² The victim and Marcus engaged in some small talk and he purchased a fountain drink before leaving. Although the victim never told Marcus why he need the money, this was not unusual because the men often helped each other financially, when necessary. Also, Marcus and the victim's wife, Jestine Robinson, testified that Earl would often help out others who needed it. **Tr. pp. 219-24; 230; 379.**

Jestine Robinson testified that her husband told her on September 17th that he had to go somewhere. Because her SUV blocked his vehicle in their driveway, he took her 2001 Toyota Sequoia (*see State's Exhibit 4*), which he had washed the preceding Wednesday. Neither Mrs. Robinson nor Marcus knew Gethers or had seen him before court proceedings began in this case. Sometime after the murder, the coroner returned slightly over \$ 199.00 to Mrs. Robinson. **Tr. pp. 223; 225-230.**

Within an hour after getting the loan from his son, the victim was murdered. Shortly before 11:00 p.m. on the night of September 17, 2007, Kimberly and Michael Ritchey were in the stairway leading to their upstairs apartment at _____ Apartments in Dorchester County (*see State's Exhibit 1*), and Michael was smoking a cigarette. They heard what sounded like two men yelling and screaming. Kimberly testified that the argument was about "money." Both Kimberly and Michael testified that this was not unusual in the apartment complex. So, Kimberly went back

² Their meeting was corroborated by the store's surveillance video (*State's Exhibit 30*), which was published to the jury. **Tr. pp. 220-21.** The victim had also called him again, at 10:02 p.m. **Tr. p. 397.**

upstairs to check on their small children, while Michael remained on the steps. **Tr. pp. 138-39; 142-43; 145-146; 149.**

While she was in the children's bedroom, which overlooks the parking lot, she heard at least one gunshot. She then went back outside. By this time, Michael Ritchey was at the bottom of the steps and headed toward the vehicle because it was still running. In fact, the vehicle almost struck him. He yelled at Kimberly to "[c]all the cops and she did so. **Tr. pp. 139-40; 142-43.**

Michael Ritchey testified that he did not see anyone, but that he heard the two people "yelling and screaming. After Kimberly went to check on the children, Michael heard a gunshot. He immediately ran down the steps and toward a car that had pulled out of a space in the parking lot and appeared to be trying to turn around. As Michael got the license tag number, the vehicle "jumped the curb into the grass and almost hit me because it backed out to the road and stopped in the middle of the road . . . with the motor running." **Tr. pp. 146-47.**

Michael walked over to the vehicle and put his hands on the glass in the rear of the vehicle to see if any children were in it, but he did not see any. Next, he walked up to the front door of the vehicle and saw someone "slumped over laying with their head against the passenger's seat." When Michael opened up the door to check on this person, he saw "blood everywhere and kind of freaked out." He did not see anyone running either in the direction of a nearby Bi-Lo or toward the

Apartments that are located a short distance away from . **Tr. p. 148. See also State's Exhibit 1.**

Shanika Moon lived in the apartment directly below the Ritcheys in September 2007. On the night of September 17th, she looked out of her window saw two people in an SUV that was "closed, parked forward." She could not identify either person in the vehicle and she could not hear any

argument. She sat back down but soon heard "a 'pop-pop' noise." She looked back out and again saw the SUV. However, she did not call 911 because she often heard shots. **Tr. pp. 150-54.**

The Dorchester County Sheriff's Department received several 911 calls reporting the shooting, the first of which was received at 10:57 p.m. **Tr. p. 380, lines 14-21; p. 382, lines 19-20.** Then-Officer Willard Driggers happened to be in front of Apartments when the dispatcher sent out the call, and he arrived on the scene within a minute. He was quickly followed by then-Officer Christopher Freshman, who pulled in behind him. Both officers saw a white Toyota Sequoia SUV. The doors on the vehicle were closed, the windows were up and the vehicle's engine was "revving at high RPMS." There was no one in the area. **Tr. pp. 154-56; 158; 160-62.**

Officer Driggers approached the SUV (see **State's Exhibit 2**) and he saw a person in the front seat, who was "slumped over." Wearing latex gloves, he opened the driver's door. There was blood on the seat and it did not appear that the person in the SUV (the victim) was breathing. Also, "the smoke from the gunpowder was still floating inside the vehicle." So, Officer Driggers reached in and turned off the ignition. The officers then secured the scene. **Tr. pp. 156-59; 161-62.**

Det. Earl Asbell, also with the Dorchester County Sheriff's Department, testified that he was the "lieutenant over the crime scene unit" at the time of the murder. With the assistance of another officer, he processed the crime scene at Apartments on September 17th. He explained that whenever there was a shooting, his unit collects "everything in the proximity," even if it is later determined that the item(s) collected are not involved in the crime. In this case, he first photographed the vehicle and everything around it. Next, he photographed the victim as seated in the vehicle, before removing the victim's wallet and obtaining the victim's driver's license. He also photographed (see **State's Exhibit 3**) and seized the victim's cell phone. **Tr. pp. 164-66; 168-69.**

Then, he seized a .40 caliber shell casing off of the road, some 40 or 50 feet from the SUV, that was ultimately determined to be irrelevant because the victim was shot by either a .38 or .350 magnum bullet.³ He also seized a Bluetooth and earpiece associated with it. The Bluetooth was still blinking, indicating that it was activated. *See State's Exhibits 23-25*. These were found in the road and near a path between Apartments and Apartments. *See State's Exhibit 1*. Also, the Bluetooth "appeared to have been . . . either run over or it fell apart when it hit the road because the earpiece was separated from it." *Tr. pp. 170-72; 174-75; 212-14; 216*.

Det. Asbell had the SUV towed to the Sheriff's Department's garage and it was processed for fingerprints the following morning. In all, officers lifted thirty-four latent prints from the vehicle. He also photographed the latent prints that he found, and those lifts were submitted to the Charleston Police Department for analysis. *Tr. pp. 175-86; 339; 343-46*.

Det. John Garrison testified that he was the Dorchester County Sheriff Department's lead investigator in this case. There was no suspect identified immediately after the murder. He spoke to the victim's family and subpoenaed the phone records for the victim's cell phone. Although the victim had called a number earlier on the day of September 17th, it was determined that the woman with whom he had spoken did not have any involvement in the case. However, there were a series of calls from and to a specific number on the night of the 17th, and it was discovered that the telephone number was for a cell phone owned by a Maggie Reid. *Tr. pp. 276-80*.

Officers located Ms. Reid at her residence in Apartments and the records for her

³ Det. Asbell saw some cigarette butts that night but he did not seize them because they were located over forty feet from the SUV and "[e]verything took us in a different direction." *Tr. p. 170, lines 12-23; p. 208, line 17 - p. 209, line 10*. There is absolutely no evidence that these cigarette butts were relevant to this case.

cell phone (**State's Exhibit 42**) were then obtained. They obtained information that the initial results of the fingerprint analysis from AFIS showed that Gethers' prints were on the SUV at roughly the same time that they obtained the cell phone records for Reid's phone. **Tr. p. 280; 282-83; 333-36; 345-46.**

Ms. Reid testified that she lived in Apartments in September 2007. Veronica K. and Veronica's mother lived in the apartment beneath her. Veronica was dating a man nicknamed "City" at the time. Veronica was with her mother when her mother picked up Reid from work at 4:15 p.m. on September 17th. Veronica borrowed Ms. Reid's phone on the way home and again later that evening. **Tr. pp. 327-31.**

During the night of September 17th, Ms. Reid had gone to the K.'s apartment to look for her phone but was told that Veronica was not home. At that time, Reid saw City sitting on the back of his car, talking to Veronica. Reid finally got the phone back the next morning. **Tr. pp. 331-32.**

After learning that Gethers' prints were on the SUV, that Veronica K. had used Reid's phone to call him numerous times and that there was a close relationship between Gethers and Veronica, the Sheriff's Department obtained his cell phone records. **State's Exhibit 43.** Officers also executed search warrants at both Veronica's apartment and Gethers' residence on the morning of September 19th. Unfortunately, they did not find anything relevant to the case. Officers were also unable to locate either of the suspects. **Tr. pp. 283-84; 286-89.**

However, they spoke to Brandee Kiefer. They learned that Gethers had swapped cars with Kiefer and that he was driving her Kia. **Tr. pp. 288-89.** Keifer testified that she was romantically involved with Gethers in September 2007. When she got off from work on the night of Tuesday, September 18th, Gethers had taken her Kia Spectra (*see State's Exhibit 31*) and had left his Lincoln

for her to drive. **Tr. pp. 235-39.**

Keifer told detectives that she kept calling Gethers but he did not answer. Also, when she finally did speak to him, he told her that he would be back in three or four hours. However, he never returned. Also, she had to go to Virginia to pick up her car. Although she claimed that she did not remember telling detectives that “[w]hen I spoke to [Gethers], he said not to tell anyone . . . that they were in Virginia,” she did not dispute that she said this. **Tr pp. 239-42; 245.**

Det. Garrison obtained an arrest warrant for Gethers charging him with murder on the morning of September 19th. He entered the warrant information and information that Gethers may be driving Kiefer’s Kia into the N.C.I.C. database. On September 20th, the Sheriff’s Department was notified that the Kia had been found at a truck stop off of the interstate in New Kent, Virginia. No one was in the car and it had been vandalized. **Tr. pp. 286-90.**

On September 22nd, the Sheriff’s Department received a telephone call from the New York City Police Department informing them that Veronica K. had been apprehended using a fake ID. Also, she was accompanied by a man using the ID of “Dante Hubbard.” It was determined that the man was Gethers. Eventually, both suspects were returned to South Carolina. **Tr. p. 290.**

Detective Steve Morelli also assisted in the investigation. He testified that the phone records of Gethers’ (**State’s Exhibit 42**), Ms. Reid’s (**State’s Exhibit 43**), and the victim’s cell phones showed the following:

- At 4:33 p.m., there was a call from Ms. Reid’s cell phone to the victim’s cell phone;
- At 4:34 p.m., there was a call from Ms. Reid’s cell phone to Gethers’ cell phone;
- Between 5:11 and 5:12 p.m., there were three calls from Ms. Reid’s cell

phone to Gethers' cell phone;

- At 6:55 p.m., Gethers' phone called Ms. Reid's phone;
- At 8:47, 8:48 and 8:55 p.m., there were calls from Ms. Reid's cell phone to Gethers' phone;
- At 8:57 p.m., there was a call from Ms. Reid's cell phone to the victim's cell phone;
- At 9:24 p.m., "[t]he victim called his son;"
- At 9:47 p.m., Ms. "Reid's phone called the victim's phone;"
- At 9:50 p.m., the victim dialed Ms. Reid's cell phone and, then Ms Reid's phone dialed the victim's cell phone;
- At 10:02 p.m., the victim called Ms. Reid's phone;
- At 10:04 p.m., "the victim contacted his son;"
- At 10:34 p.m., Ms. Reid's phone dialed the victim's phone;
- At 10:41 p.m., the victim called Ms Reid's phone;
- At 10:49 p.m. and at 10:51 p.m., Ms. Reid's phone dialed the victim's phone;
- At 10:56 p.m., Ms Reid's phone called Gethers' phone;
- At 10:57 p.m. and at 10:58 p.m., Ms. Reid's phone dialed the victim's phone;⁴
- After 10:58 p.m. on September 17th, Ms. Reid's phone did not call the victim's phone;
- At 11:40 p.m., Gethers' cell phone called Ms. Reid's phone;

Tr. pp. 378-83; State's Exhibits 42-43. There were also calls from the victim to Ms. Reid's phone on the 17th. **Tr. pp. 384-85.**

⁴ Again, the 911 calls began at 10:57 p.m. **Tr. p. 380.**

Although Veronica K. was Gethers' co-defendant, she was called as a prosecution witness.⁵ She testified that she had lived at _____ Apartments and that she was fourteen years old in 2007. She admitted that she knew the victim on September 17th 2007. He had initially been a family friend but he wanted to become romantically involved with her. She admitted that she spoke to the victim about bringing her some money on September 17th, and that she was using the cell phone of Ms. Reid, a friend of Veronica who lived upstairs from her, on the 17th. **Tr. pp. 246-49; 267.**

According to Veronica, she called the victim earlier that day and asked him for money. However, she was with her mother. The victim told her that he had money, but he did not want her mother to know he was going to give her money because he was planning on having sex with Veronica that night. He also told her to call him back later that night. In their numerous phone conversations, she told him to meet her at _____ Apartments and to call her before he got there so that she would know when to leave her apartment. **Tr. pp. 248-49.**

Veronica claimed that she "never got a chance to give" the victim directions to _____, but she stated that he did know how to find _____ Apartments. She further claimed that she ultimately stopped calling the victim because she assumed that he had changed his mind about giving her money. Also, she admitted that she had talked to Gethers, a/k/a "City," about the victim on the 17th and that she had asked Gethers to pick up the money for her because she did not want to have sex with the victim. Gethers supposedly told her that "he was going to have to call me back because he wasn't sure if he was going to do that." **Tr. pp. 249-51.**

Veronica claimed that the victim drove a white Explorer. Although the victim did not know

⁵ The parties stipulated that "the State has entered into an agreement whereby Veronica [K.]'s charge of murder will remain under the jurisdiction of the Family Court provided Ms. [K.] testifies truthfully and cooperates in the prosecution of this defendant, Trevee Gethers." **Tr. p. 374.**

Gethers, she testified that her plan was to tell the victim that her mother would not let her out of the apartment and that she would send her "friend," Gethers, to pick up the money. **Tr. p. 251.** Unfortunately, she was not very truthful in her testimony from this point forward. First, she denied telling Gethers what the victim was driving or where to pick up the money from the victim. **Tr. pp. 251-52.**

Then, she denied telling the police several matters in a March 9, 2009 statement that she had given. (**State's Exhibit 33, R. pp. ____ - ____**). She only she admitted telling officers that the victim said he would bring her "the money, but he wasn't going to keep bringing [her] the money without getting some," and that "I knew we were running from something." **Tr. pp. 253-55.**

Veronica did admit that she and Gethers had gone to Virginia in Kiefer's Kia, and that they had left it somewhere. She likewise admitted that she and Gethers had taken a bus to New York; that she was using Tambora Ravenel's ID; that she learned that Gethers was using the ID of a Dante Hubbard; and that State's Exhibit 34 were the ID cards that they had used. She testified that Ravenel was her friend and that Hubbard was someone she knew. However, she claimed that she did not know Hubbard's address. While she admitted that Gethers' was a "[p]retty close friend" and that she did not "want to see anything happen to him," she denied that he was her boyfriend. Also, she claimed that she only used Ravenel's ID so that she could buy cigarettes. **R. pp. 255-58; 266; 268-69.**

In light of Veronica K.'s responses concerning her statement to the Sheriff's Department, which was given in the presence of her attorney and after she had waived her rights under *Miranda v. Arizona*, 384 U.S. 436 (1966) (*see Tr. pp. 292-93*), the State was permitted to introduce a redacted version of it, as **State's Exhibit 33**, and it was published to the jury through Det. Garrison.⁶ In her

⁶ The trial judge's ruling on this issue is at **Tr. pp. 293-98.**

statement, she said that:

I called Mr. Earl for some money. He said he would bring the money, but he wasn't going to bring me money without getting some. He wanted some in the past, but I kept tricking him. I told him to go to the Haven Oaks because I didn't want my momma to know about Mr. Earl bringing me the money. Mr. Earl was bringing me more than \$50.00 because I asked him for some money. He thought we were going to a motel. I told Trevee Gethers "City" to get the money because I didn't want to mess with Mr. Earl. I told Trevee that Mr. Earl was in a white Sequoia because that's what Mr. Earl told me he was driving. I didn't tell Trevee to shoot Mr. Earl, I just told Trevee to get the money. I didn't know Trevee shot Mr. Earl. . . . I called Trevee after [(sic)] to see if he got the money, and he said no. Trevee said that Mr. Earl wouldn't give him the money. I didn't see Trevee until the next day and he said we had to go because he got in some stuff. I knew we were running from something. We went to a lady's house in Virginia on the air base. We went to Dro mama's house. [(sic)] Dro and Tam followed us to Virginia. Then we took the bus to New York. I have gotten money from Mr. Earl before and that's how I knew I could call him for money.

Question: Has Mr. Earl ever been to before?

Answer: Yes, he has brought me money there behind Bi-Lo, but I still had to give him directions.

State's Exhibit 33, R. pp. ____-____. See also Tr. pp. 298-300.

Despite a diligent search, the murder weapon was not found. Nor did officers locate a shell casing for the bullet that killed the victim. **Tr. pp. 284-85.** However, SLED Agent Frank Dan DeFreese, an expert in firearms analysis, testified that the bullet that killed the victim was "most consistent with bullets that we have found loaded into .38 special caliber and .357 magnum caliber cartridges," and that the crimping cannellure on the bullet suggested that the gun was a revolver, as opposed to a semi-automatic pistol. **Tr. pp. 394-97.**

Also, SLED Agent Ila Simmons, who was qualified as an expert in trace evidence and gunshot residue, testified that a gunshot residue test performed on the victims hands early in the morning after the murder (**Tr. pp. 173-74**) revealed the presence of metals on the palm and the back

of his right hand that "could be associated with gunshot residue."⁷ And on the palm of the left hand there were also metals that were consistent with gunshot residue." Agent Simmons further opined that her findings were "most consistent with someone having or being in the vicinity of the weapon when it was discharged because the concentrations that we found are more consistent with being in front of a gun when it's discharged than handling or firing a gun." **Tr. pp. 408; 411-16.**

Officer Kalisha Gill testified that she is a forensic latent print examiner for the Charleston Police Department. Det. Asbell submitted the latent prints that he had lifted from the Robinsons' SUV to her for analysis. When she ran these prints through A.F.I.S., she got a "hit." The prints "came back to the fingerprint card bearing the name [of] Trevee Gethers." **Tr. pp. 339-46.**

However, A.F.I.S. is only a tool used to narrow the list of potential suspects and a conclusive match can only be made after manual comparison of latent prints with known standards. So, she was provided a set of Gethers' major case prints (**State's Exhibit 40**), which she compared with the latent prints that had been submitted.⁸ She also received known prints from Quintavious Dominique Davis, the victim, Veronica K., Michael Amos Ritchey, Jr., and Donsurvi Chisholm. However, she did not receive known prints of either Mrs. Robinson or Marcus Brothers. **Tr. pp. 346-47; 353-54.**

Using the locations to which Det. Asbell testified that he had lifted prints, **State's Exhibit 26**, and Officer Gill expert analysis, the State presented the following evidence regarding the latent prints found on the recently-washed SUV:

⁷ The parties stipulated that there was a complete chain of custody for the gunshot residue samples from the time of the collection until they were tested. **Tr. p. 373.**

⁸ Javon Wright testified that he is employed at the Charleston County Detention Center, where he took a set of Gethers' fingerprints and palm prints (**State's Exhibit 40**) when he booked Gethers, on May 11, 2007. **Tr. pp. 322-25.**

- **State's Exhibit 20** (latent lift number 10), which was taken from the passenger rear door in the center of the door, was Gethers' left palm;
- **State's Exhibit 22** (latent lift number 8), which was taken from "just above the pinstripes on the passenger's front door, was Gethers' left index finger;
- **State's Exhibit 16** (latent lift number 3), which was taken from the door post on the passenger's side front door, was Gethers' left index finger;
- **State's Exhibit 18** (latent lift number 5), which was taken from the door post on the passenger side rear door, was Gethers' left middle finger and his left palm;
- **State's Exhibit 17** (latent lift number 4), which was taken from the passenger rear door to the center of the door, was Gethers' left thumb;
- **State's Exhibit 19** (latent lift number 11), which was also taken from the passenger rear door in the center of the door, was Gethers' left thumb;
- **State's Exhibit 12** (latent lift number 19), which was taken from the edge of the driver's door, was the left middle and left ring fingers of Michael Ritchey;
- **State's Exhibit 9** (latent lift number 22), which was taken from the glass of the driver's side rear window, was Michael Ritchey's right palm;
- **State's Exhibit 8** (latent lift number 21), which was taken from the rear driver's window close to the front door, was Michael Ritchey's left palm;
- **State's Exhibit 6** (latent lift number 23), which was taken from the diver's side quarter panel between the back door and the window, was the victim's right middle and right ring fingers;
- **State's Exhibit 11** (latent lift number 16), which was taken from the driver's side door to the left of center of the door, was the victim's left middle finger and Michael Ritchey's left palm;
- **State's Exhibit 14** (latent lift number 12), which was taken from the "rear passenger's side edge just above the pinstripe, was the victim's left middle and left ring fingers.

Tr. pp. 347-53. *See also* Tr. pp. 176-87 (Testimony of Earl Asbell); State's Exhibit 26.

Later in the investigation, a Buccal swab of Gethers' DNA was obtained pursuant to a search

warrant.⁹ **Tr. pp. 186-88.** Also, the Bluetooth headset was submitted to SLED's DNA laboratory for testing. SLED Agent Lilly Gallman, a forensic DNA analyst, testified that she was able to develop a DNA profile off of the Bluetooth headset.¹⁰ She was also able to determine that the profile "was a mixture of at least three individuals. The DNA profile of the major contributor to that particular mixture was from an unknown male individual." **Tr. pp. 420-24.**

Agent Gallman placed the profile into the Combined DNA Index System (CODAS), which is a DNA database, and this resulted in a "hit:" the DNA of the major contributor to the profile matched Gethers' DNA. Because so many samples are in the CODAS database, she followed protocol and requested a standard of Gethers' DNA to guard against possible error. She thereafter compared the standard obtained from Gethers (**State's Exhibit 48**) to the profile developed from the Bluetooth headset. When she did so, she found that "the major contributor in . . . the swabs that came from the Bluetooth headset[] matched the DNA profile of Trevee Gethers." Also, she opined that "[t]he probability of randomly selecting an unrelated individual having a DNA profile matching the major contributor to this mixture is approximately one in 26 quadrillion." **Tr. pp. 424-28.**¹¹

Dr. Erin Presnell, a forensic pathologist employed at the Medical University of South Carolina, performed the autopsy on the victim. Dr. Presnell explained that the victim had "one major injury." She described this injury as follows:

He has a single gunshot wound. It actually enters in his right arm. It goes through his right arm just through the soft tissue, exits the right arm and goes into the right chest.

⁹ This was done on September 3, 2010. **Tr. pp. 187-88.**

¹⁰ The parties stipulated that there was a complete chain of custody for both the Buccal swabs and the Bluetooth headset. **Tr. pp. 373-74.**

¹¹ There are roughly 6.5 billion people on earth. **Tr. p. 429.**

It hits the right lung. It goes through the heart as well as the aorta, which is the main blood vessel taking blood to the rest of your body. It goes through the left lung and also hits the left rib and partially exits. So you actually have a hole in the skin where the bullet's exiting, where the bullet's still there and hanging on right there. So this is a partial exit gunshot wound.

Tr. pp. 307; 311-12.

Dr. Presnell testified that the bullet had traveled "pretty much straight across," but "slightly backwards on him a little bit." **Tr. p. 312.** She opined that her findings were consistent with the victim's right arm being either raised in a defensive posture or on the steering wheel when the shot was fired. Also, assuming the victim was seated in the driver's seat when shot, she opined that the shot came from the passenger side of the vehicle. She further opined that the gunshot wound was the cause of death; and she explained that, because the wound pierced the heart and aorta, "I can't imagine him being conscious over the seconds range" after the shooting. **Tr. pp. 318-22.**

The other "defining characteristic" of this wound was that the presence of "a fairly concentrated amount of stippling marks around the entrance wound to his arm." Based upon this finding, Dr. Presnell opined that it was "close-range gunshot wound" that had been fired "within a yard or less from him." Dr. Presnell recovered the bullet from the body. **Tr. pp. 312-14.**

2. The directed verdict motion and ruling.

At the close of the prosecution's case, Gethers moved for a directed verdict, but he did not make any argument in support of his motion. **Tr. p. 432, lines 10 - 12.** Without calling upon the State to respond, the trial judge denied his motion. She found that:

it is not for the Court to weigh the evidence, that is for the jury. It's for the Court to determine whether or not there is evidence on each and every element, including any inferences reached, and of course from which the jury can reasonably determine guilt. And I find that there is evidence on each and every element from which the jury could reasonably determine guilt, and I would respectfully deny your motion.

Tr. p. 432, lines 13-22.

Prior to the defense's closing argument, Gethers renewed his directed verdict motion, and the trial judge again denied it. Tr. p. 467, lines 21-25.

B. Discussion.

The State initially submits that Gethers' argument is not properly before this Court on appeal because, as shown, counsel only made a general motion for a directed verdict, and it is settled that "a general directed verdict motion . . . does not preserve any issue for appeal." *State v. Sterling*, Op. No. 27096, 2012 WL 652455, 7 (S.C.S.Ct, Feb. 19, 2012) (citing *State v. Bailey*, 298 S.C. 1, 377 S.E.2d 581 (1989)). Having failed to present his present arguments to the trial judge, they may not be raised on appeal because "[a] party cannot argue one ground for a directed verdict in trial and then an alternative ground on appeal." *Bailey*, 298 S.C. at 5, 377 S.E.2d at 584.

Even assuming *arguendo* that this Court finds that his argument is not procedurally barred, the trial judge's ruling must be affirmed. In *State v. Odems*, 395 S.C. 582, ___, 720 S.E.2d 48, 50 (2011), the South Carolina Supreme Court recently set forth the applicable law governing the review of directed verdict motions in criminal cases:

On appeal from the denial of a directed verdict, this Court must view the evidence in the light most favorable to the State. *State v. Lollis*, 343 S.C. 580, 583, 541 S.E.2d 254, 256 (2001) (citing *State v. Burdette*, 335 S.C. 34, 46, 515 S.E.2d 525, 531 (1999)). The defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. *State v. McHoney*, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001). However, if there is any direct or *substantial* circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury. *State v. Pinckney*, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000) (emphasis added). A circuit judge should grant a directed verdict motion when the evidence merely raises a suspicion the accused is guilty. *State v. Schrock*, 283 S.C. 129, 132, 322 S.E.2d 450, 451-52 (1984).

(Emphasis in original). See also *State v. Bostick*, 392 S.C. 134, 139, 708 S.E.2d 774, 776-77 (2011)

(setting forth standard where State relies solely on circumstantial evidence).

Applying this standard to the case at bar, the trial judge's ruling must be affirmed because, notwithstanding Gethers' argument to the contrary, the State presented both direct and substantial circumstantial evidence reasonably tending to prove his guilt of murder. First, Mr. and Mrs. Ritchey heard two men arguing in the parking lot immediately before the shooting. Before Mr. Ritchey could reach the victim's still-running SUV, the assailant had fled. Likewise, the first officer on the scene arrived within moments of the dispatch for the shooting and he did not see anyone running, even though the smoke from the gunpowder was still in the cabin when he opened the SUV. However, a Bluetooth headset, which was still activated and had Gethers' DNA on it, was found between the area of the parking lot, where the victim's car had been, and Apartments, where Gethers' co-defendant and girlfriend, Veronica K. lived.

Second, the phone records (*see State's Exhibits 42-43*) reflected the calls between Veronica and the victim, and between Veronica and Gethers. She called Gethers up until almost the time of the shooting and, despite numerous calls to the victim's phone before the shooting, she did not call the victim after 10:58 p.m., one minute after the 911 calls had been placed. Also, Ms. Reid testified that Veronica was dating Gethers at the time and that she saw Gethers talking to Veronica on the night of the 17th.

Third, Veronica K.'s statement, *State's Exhibit 33*, also clearly implicates Gethers in the crime. In it, she admitted that she asked Gethers to get money from the victim and she told him what vehicle the victim was driving. She further indicates that he later told her that he did not get the money, which was corroborated by the testimony of the victim's wife that over \$ 199.00 of the \$ 200.00 the victim had borrowed from his son was returned to her.

Her statement also implicates Gethers in the murder, including evidence of flight from the jurisdiction and the use of a car that did not belong to Gethers and fake identification cards to elude capture. In the statement, she stated that "I didn't tell Trevee to shoot Mr. Earl, I just told Trevee to get the money. I didn't know Trevee shot Mr. Earl." Veronica also said that "I didn't see Trevee until the next day and he said we had to go because he got in some stuff. I knew we were running from something." **State's Exhibit 33, R. p. ____.**

The evidence of flight was corroborated by both Det. Garrison and Kiefer. Clearly, flight from prosecution is admissible as evidence of guilt in South Carolina. *State v. Pagan*, 357 S.C. 132, 591 S.E.2d 646 (2003); *State v. Al-Amin*, 353 S.C. 405, 578 S.E.2d 32 (Ct.App. 2003). Evidence of flight has been held to constitute evidence of defendant's guilty knowledge and intent. *Pagan, supra*; see also *State v. Thompson*, 278 S.C. 1, 292 S.E.2d 581 (1982) (finding that evidence of flight was admissible to show guilty knowledge, intent, and that defendant sought to avoid apprehension), *overruled on other grounds, State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991). Moreover and unlike the factual scenario in *Odems*, the totality of the circumstances in this case created an inference that Gethers had knowledge that law enforcement would look for him and Veronica in connection with the shooting. *Contra Odems*, 395 S.C. at ___, 720 S.E.2d at 52. *Accord Pagan, supra*; *State v. Beckham*, 334 S.C. 302, 315, 513 S.E.2d 606, 612 (1999).

Further, testimony of prior inconsistent statements may be "used as substantive evidence when the declarant testifies at trial and is subject to cross examination." *State v. Copeland*, 278 S.C. 572, 581, 300 S.E.2d 63, 69 (1982); see also *In re Richard D.*, 388 S.C. 95, 100, 693 S.E.2d 447, 450 (Ct.App. 2010) ("Even if the family court had limited the admissibility of the statement, that does not negate the fact that consideration of the statement as substantive evidence in a directed

verdict analysis would have been proper under *Copeland* and [*State v. Stokes*, 381 S.C. 390, 673 S.E.2d 434 (2009)]”); *State v. Smith*, 309 S.C. 442, 447–48, 424 S.E.2d 496, 499 (1992) (exclusion prior inconsistent statement of defendant's nephew constituted reversible error); *State v. Ferguson*, 300 S.C. 408, 411, 388 S.E.2d 642, 644 (1990) (exclusion of victim's prior inconsistent statement as substantive evidence was harmless error when other evidence was cumulative of statement); *State v. Crawford*, 362 S.C. 627, 634, 608 S.E.2d 886, 890 (Ct.App. 2005) (co-conspirator's later testimony did not obviate the efficacy of the first statement made closer in time to the event in question); *State v. Caulder*, 287 S.C. 507, 513, 339 S.E.2d 876, 880 (Ct.App. 1986) (trial court erroneously instructed jury to disregard witness's prior inconsistent statement for substantive purposes). Gethers’ argument that Veronica K.’s statement was untrustworthy is contrary to well settled authority that, in reviewing an appeal from denial of a directed verdict motion, this Court must view the evidence in the light most favorable to the State.” *E.g., Lollis*, 343 S.C. at 583, 541 S.E.2d at 256; *Burdette*, 335 S.C. at 46, 515 S.E.2d at 531. His argument likewise ignores that “[i]n reviewing a motion for directed verdict, the trial judge is concerned with the existence of evidence, not with its weight.” *State v. Curtis*, 356 S.C. 622, 633, 591 S.E.2d 600, 605 (2004); *State v. Kelsey*, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998).

Both Veronica’s statement and her testimony reveal a crystal clear motive in this case: greed for the money that the victim was carrying and, inferably, the killing occurred when Gethers did not get they money as he and Veronica had planned. Additionally, Respondent would note that Gethers’ fingerprints and palm print from his left hand - and only his - were found on the passenger’s side of the recently-washed white Toyota Sequoia SUV that was driven by the victim. Prints belonging to Mr. Ritchey were found elsewhere on the vehicle, and circumstantially corroborated his testimony.

This was important because the pathologist opined that the victim was shot from the passenger's side of the car. There was also no evidence that the victim was armed.

Thus, this case is readily distinguishable from *Odems*, *Bostick* and *Lollis*, cases where the Court held that the State's evidence created only a mere suspicion of guilt. For instance, in *Odems*, the Court found that "[t]he State's case against Petitioner relied primarily on three pieces of circumstantial evidence: (1) the fact that less than ninety minutes after the burglary, police located Petitioner in the getaway car with the burglars and the stolen goods; (2) Petitioner fled from law enforcement; and (3) Petitioner asked an uninvolved person to lie for him." *Odems*, 395 S.C. at ___, 720 S.E.2d at 51. Also, in *Bostick*, the State only presented evidence that "(1) investigators found personal items belonging to Polite, including a watch and two sets of car keys, in a burn pile located on the Bostick family property; (2) Bostick's shoes contained a pattern that matched gasoline, and gasoline was the accelerant used to start the house fire; (3) and investigators found blood on the clothes Bostick was wearing the day of the murder, but that evidence could not be matched to Polite's DNA." However, no motive was established. *See Odems*, 395 S.C. at ___, 720 S.E.2d at 50 (citing *Bostick*, 392 S.C. at 141–42, 708 S.E.2d at 778).

Here, however, there was an undeniable motive. Moreover, the direct and circumstantial evidence was such that "all of the circumstances proven [were] consistent with each other and taken together, point[ed] conclusively to the guilt of [Gethers] to the exclusion of every other reasonable hypothesis." *Contra Odems*, 395 S.C. at ___, 720 S.E.2d at 52. Therefore, the trial judge's ruling must be affirmed.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment of the lower

court and Gethers conviction be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

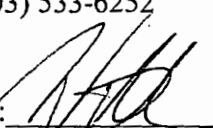
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By: 
WILLIAM EDGAR SALTER, III

ATTORNEYS FOR RESPONDENT

March 28, 2012.

WES

**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

**Appeal from Dorchester County
Diane Schafer Goodstein, Circuit Court Judge**

THE STATE,

RESPONDENT,

v.

TREVEE J. GETHERS,

APPELLANT.

**DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL**

In addition to the matter designated by the Appellant, Respondent proposes the following to be included in the Record on Appeal:

1. State's Exhibit 1 (aerial photograph);
2. State's Exhibit 2 (photograph);
3. State's Ex. 3 (photograph);
4. State's Ex. 4 (crime scene photograph);
5. State's Ex. 26 (diagram);
6. State's Ex. 32 (statement of Brandee Kiefer); and
7. State's Exhibit 33 (statement of Veronica Kitt).

To facilitate the preparation of the Final Brief, Respondent requests that counsel for Appellant retain the page numbers of the trial transcript in the Record on Appeal, in addition to the new page numbers. Respondent would also point out that the name of prosecution witness Veronica K. should be redacted in accordance with the South Carolina Supreme Court's August 13, 2007 *Order RE: Interim Guidance Regarding Personal Data Identifiers and Other Sensitive*

Information in Appellate Court Filings because she was only fourteen years old at the time of the murder and seventeen at the time of trial

The undersigned hereby certifies this Designation contains no matter which is irrelevant to this appeal.

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

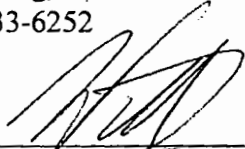
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By:


WILLIAM EDGAR SALTER, III

ATTORNEYS FOR RESPONDENT

March 28, 2012.

**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

**Appeal from Dorchester County
Diane Schafer Goodstein, Circuit Court Judge**

THE STATE,

RESPONDENT,

v.

TREVEE J. GETHERS,

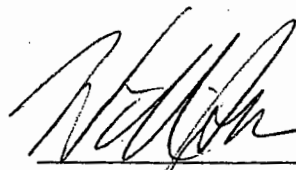
APPELLANT.

PROOF OF SERVICE

I, William Edgar Salter, III, counsel for the Respondent, certify that I have served the within Initial Brief of Respondent on Appellant by depositing two (2) copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, Elizabeth A. Franklin-Best, Esquire, South Carolina Office of Appellate Defense, P.O. Box 11589, Columbia, South Carolina 29211-1589.

I further certify that all parties required by Rule to be served have been served.

This 28th day of March, 2012.



WILLIAM EDGAR SALTER, III

Office of Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEY FOR RESPONDENT

**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.

Treveen J. Gethers, Appellant.

Appellate Case No. 2010-178687

Appeal From Dorchester County
Diane Schafer Goodstein, Circuit Court Judge

Unpublished Opinion No. 2012-UP-576
Submitted October 1, 2012 – Filed October 24, 2012

AFFIRMED

Appellate Defender Elizabeth A. Franklin-Best, of
Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney
General John W. McIntosh, Senior Assistant Deputy
Attorney General Salley W. Elliott, and Senior Assistant
Attorney General Harold M. Coombs, Jr., all of
Columbia; and Solicitor David Michael Pascoe, Jr., of
Orangeburg, for Respondent.

PER CURIAM: Trevee J. Gethers appeals his conviction of murder, arguing the trial court erred in denying his motion for a directed verdict because the State failed to produce sufficient evidence to prove Gethers murdered the victim. We affirm¹ pursuant to Rule 220(b), SCACR, and the following authorities: *State v. Weston*, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006) ("When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight."); *id.* ("When reviewing a denial of a directed verdict, [an appellate court] views the evidence and all reasonable inferences in the light most favorable to the state."); *id.* at 292–93, 625 S.E.2d at 648 ("If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the [c]ourt must find the case was properly submitted to the jury.").

AFFIRMED.

FEW, C.J., and WILLIAMS and PIEPER, JJ., concur.

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

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

TREVEE J. GETHERS,

APPELLANT

Appeal from Dorchester County

Diane Schafer Goodstein, Circuit Court Judge

Opinion No. 2012-UP-576

Appellate Case No. 2010-178687

PETITION FOR REHEARING

On October 24, 2012, this Court affirmed Appellant's murder conviction and sentence in an unpublished opinion. State v. Trevee J. Gethers, 2012-UP-576 (Ct. App. filed Oct. 24, 2012). Appellant respectfully requests this Court grant his Petition for Rehearing and direct a verdict of acquittal in his favor.

Although this Court recited no facts to support its decision, this Court cited State v. Weston, 367 S.C. 279, 625 S.E.2d 641 (2006) for the legal standard used when considering a directed verdict motion. Appellant agrees with this Court that Weston, *supra*, provides an accurate discussion of the current state of the law in this area. However, when the law is applied to the facts presented at

Appellant's trial, the only conclusion is that the trial judge erred in failing to direct a verdict of acquittal. When the evidence against a defendant is circumstantial, the trial judge should submit the case to the jury only "if there is any substantial evidence which reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced." State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000). "The jury weighs the evidence but when there is an absence of evidence, it becomes the duty of the trial judge to direct a verdict." State v. Schrock, 283 S.C. 129, 134, 322 S.E.2d 450, 452-53 (1984). Evidence must constitute positive proof of facts and circumstances, which reasonably tends to prove guilt. Id. at 133, 322 S.E.2d at 452 (citing State v. Manis, 214 S.C. 99, 51 S.E.2d 370 (194); see also State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011)). A trial judge should grant a directed verdict motion when the evidence merely raises a suspicion that the accused is guilty. State v. Lollis, 343 S.C. 580, 541 S.E.2d 254 (2001). In this case, the evidence presented by the prosecution did not rise above the level of a mere suspicion.

Appellant was convicted of the September 17, 2007 murder of Earl Robinson. On that date, the decedent had earlier borrowed \$200 from his son, Marcus. He was found in his SUV in a parking area of an apartment complex. R. 71, ll. 18-22. He had been shot once in the arm, with the bullet entering his chest and mortally wounding him. R. 221, ll. 5-23. Neighbors in the apartment complex heard arguing in the parking lot just prior to the gunshots. R. 52, l. 12- 53, l. 7. The apartment complex was known as a very high crime area and gunshots were "fairly common." R. 63, l. 7; R. 72, l. 24- 73, l. 6. Law enforcement obtained a buccal swab from appellant and obtained his DNA profile. R. 101, ll. 4-9. Appellant's DNA was found on the Bluetooth telephone headset that was found in the apartment complex. Significantly, the headset was "not located anywhere around the vehicle." R. 123, ll. 4-9.

Veronica K. was appellant's friend. R. 155, l. 23- 156, l. 2. She testified that on the date the decedent was killed, she was supposed to meet with the decedent, have sex with him and receive money from him. R. 156, ll. 14 – 25; R. 158, l. 1 - 159, l. 9; R. 176, ll. 10-14. That evening, she was using Maggie Reid's telephone. R. 157, ll. 1-2. At some point, Veronica and Appellant drove to Virginia, and then eventually traveled to New York. R. 164, l. 4 - 165, l. 2. During the investigation, law enforcement obtained the decedent's telephone, and noticed a number of telephone calls that he made to his son and to the telephone that was registered to Reid, Veronica's friend. R. 188, l. 18 - 189, l. 17. Their investigation led them to identify Appellant's telephone number. R. 192, ll. 2-25. Law enforcement also had identified Appellant's fingerprints located on the passenger side of the decedent's car. Law-enforcement never located the murder weapon even after exhaustively searching the area. R. 193, l. 5 - 197, l. 18.

Veronica gave a statement to law enforcement that suggested that she had Appellant meet with the decedent in order to take his money. At trial, she did not testify to these facts, but her statement was found admissible as a prior inconsistent statement. R. 208, l. 2- 209, l. 23; R. 204, ll. 6- 16. In exchange for cooperation, Veronica's charge of murder remained in the jurisdiction of Family Court. R. 279, ll. 7-11.

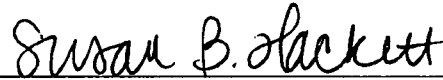
At the close of the State's case, counsel made a motion for directed verdict, which was renewed at the end of the case. R. 346, ll. 10-18. The trial court judge denied the motions. R. 346, ll. 19 -- 21.

The trial court judge erred when she denied Appellant's motion for a directed verdict because the evidence adduced at trial did not rise above the level of providing a "mere suspicion" that Appellant was guilty of murder. The trial court judge erred by not granting Appellant's motion for a directed verdict because the evidence did constitute positive proof of facts and

circumstances which reasonably tended to prove his guilt of murder. At most, the evidence proved that Appellant had a relationship with a young woman who had a relationship with the decedent.

Appellant respectfully requests this Court grant his Petition for Rehearing and direct a verdict of acquittal in his favor.

Respectfully submitted,

A handwritten signature in cursive script, reading "Susan B. Hackett", is written over a horizontal line.

Susan B. Hackett
Appellate Defender

This 6th day of November, 2012.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 2, 2013.

The South Carolina Court of Appeals

The State, Respondent,

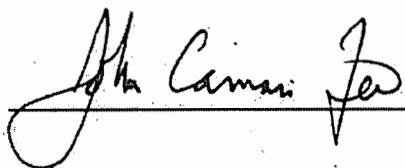
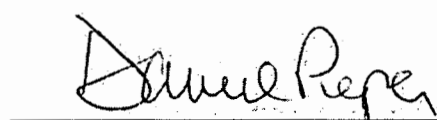
v.

Treveen J. Gethers, Appellant.

Appellate Case No. 2010-178687.

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 _____ C.J.
 _____ J.
 _____ J.

Columbia, South Carolina

cc: W. Edgar Salter, III
Elizabeth Anne Franklin-Best

FEB 25 2013

FILED

February 22, 2013

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Dorchester County

Diane Schafer Goodstein, Circuit Court Judge

Opinion No. 2012-UP-576 (S.C. Ct. App. filed 10/24/2012)

07-GS-18-1755

THE STATE,

RESPONDENT,

V.

TREVEE J. GETHERS,

PETITIONER

Appellate Case No. 2013-000617

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER.

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on February 22, 2013.

QUESTION PRESENTED

Did the Court of Appeals err in affirming Petitioner's conviction for murder and the trial judge's failure to direct a verdict of acquittal where the evidence adduced at trial did not rise above mere suspicion because the circumstantial evidence suggested only that Petitioner was near the murder scene when the decedent was fatally shot?

STATEMENT OF THE CASE

Petitioner was indicted for murder by the Dorchester County Grand Jury during its December 3, 2007 term (2007-GS-18-1755). R. 431-432. He was tried before the Honorable Diane Schafer Goodstein and a jury beginning on November 15, 2010. R. 1. He was represented by Sara Jayne Rogers. The state was represented by Russell D. Hilton and Harrison Bell, Jr. R. 1. He was convicted and sentenced to forty-five years' incarceration. R. 406, lines 4-7; R. 425, line 25 – R. 426, l. 2. Petitioner filed a timely notice of appeal, which was perfected by Elizabeth A. Franklin-Best of the Office of Appellate Defense. On October 24, 2012, the Court of Appeals affirmed Petitioner's conviction and sentence in an unpublished opinion. App. 1-2; State v. Gethers, 2012-UP-576 (Ct. App. filed Oct. 24, 2012). On November 6, 2012, Petitioner filed a petition for rehearing. App. 3-7. By order filed February 22, 2013, the Court of Appeals denied the petition for rehearing. App. 8.

Petitioner now files this timely petition for writ of certiorari.

ARGUMENT

The Court of Appeals erred in affirming Petitioner's conviction for murder and the trial judge's failure to direct a verdict of acquittal where the evidence adduced at trial did not rise above mere suspicion because the circumstantial evidence suggested only that Petitioner was near the murder scene when the decedent was fatally shot.

Relevant facts

Petitioner was convicted of the murder of Earl Robinson which occurred on September 17, 2007. Earlier on that date, the decedent had borrowed \$200 from his son, Marcus. The decedent was found seated in the driver's seat of a white Toyota Sequoia in the parking lot of apartment complex. R. 69, l. 3 - R. 72, l. 5. He had been shot once in the arm, with the bullet entering his chest and mortally wounding him. R. 221, ll. 5-23.

Neighbors in the apartment complex heard arguing in the parking lot just prior to the gunshots, although no one identified Petitioner as the one arguing with the decedent. R. 52, l. 12 – R. 53, l. 12; R. 61, lines 4-8. The apartment complex was known as a very high crime area and gunshots were “fairly common.” R. 63, ll. 5-7; R. 56, ll. 12-15 (testimony by a neighbor that “arguments happen a lot” in the neighborhood); R. 60, ll. 19-23 (testimony by a neighbor that arguments were “common around there” and he had “learned to tune it out”); R. 66, ll. 6-12 (testimony by a neighbor that hearing “pop-pop” was not unusual and “it always happened in the neighborhood”); R. 67, ll. 6-14 (testimony by a neighbor that violence was a common occurrence at the apartment complex); R. 77, ll. 9-15 (testimony by a police officer that the area was violent and he responded to multiple shootings there). An officer with the Dorchester County Sheriff's Office confirmed that there were many fights and drug-related calls that occurred in the area. R. 72, l. 24 – R.73, l. 6. As law enforcement conducted their investigation, they seized a number of cigarette

butts, a .40 caliber gunshot shell, and a Bluetooth telephone headset. R. 84, ll. 8-19. Law enforcement did not analyze the cigarette butts that were located in the immediate area of the car. R. 84, ll. 20-23. The .40 caliber bullet was determined not to be relevant to the crime scene. R. 88, l. 20 - R. 89, l. 3.

Law enforcement also extracted thirty-four latent fingerprints from the decedent's car. R. 89, ll. 14-19. Three people were identified based on the presence of the fingerprints found on the car, but they were never pursued in connection with this investigation. R. 119, ll. 16-22. Later in their investigation, law enforcement obtained a buccal swab from Petitioner and obtained his DNA profile. R. 101, ll. 4-9.

Petitioner's DNA was found on the Bluetooth telephone headset that was found in the middle of the road near the apartment complex. Significantly, the telephone headset was not found close to where the decedent's body was located:

That was just inside the first crime scene tape that was stretched across the road. It was actually in front of Apartment It was not located anywhere around the vehicle. It was between Apartment and , the apartment complex to the right. It was in that area on the road as you came in.

R. 123, ll. 4-9 (emphasis added).

Brandee Kiefer, Petitioner's girlfriend, recalled that around the time of this crime, she and Petitioner switched cars. R. 144, l. 18 – R. 147, l. 19. Veronica K. was another friend of Petitioner's. R. 155, l. 25 – R. 156, l. 2. She described the decedent as her friend as well. R. 156, ll. 3-13. She testified that on the date the decedent was killed, she was supposed to meet with him. He was expected to bring her money that evening because he intended to have sex with K. who was fourteen-years old at the time. R. 156, l. 14 – R. 159, l. 9; R. 176, ll. 10-14. That evening, she was using her friend, Maggie Reid's, telephone. R. 157, ll. 1 - 2. At some point, after the decedent

was killed, K. and Petitioner drove to Virginia, and then eventually traveled to New York. R. 164, 1. 4 – R. 165, 1. 2.

During their investigation, law enforcement obtained the telephone that belonged to the decedent, and noticed a number of telephone calls that he made to his son and to the telephone that was registered to Reid, K.'s friend. R. 188, 1. 18 – R. 189, 1. 17. Ultimately, their investigation led them to identify Petitioner's telephone number. R. 192, 11. 2-25. Law enforcement obtained search warrants based on telephone calls between K. and Petitioner, but those searches did not uncover anything of evidentiary value. Law enforcement also had identified Petitioner's fingerprints located on the passenger side of the decedent's car. Other fingerprints were also located on the car, but they were not identified by law enforcement. R. 193, 11. 6-10; R. 196, 11. 15-17; R. 262, 11. 8-12. Law enforcement never located the murder weapon even after exhaustively searching the area. R. 193, 1. 5 – R. 197, 1. 18. Ultimately, K. and Petitioner were located in New York City. R. 199, 11. 2 - 19.

K. gave a statement to law enforcement that suggested that she had Petitioner meet with the decedent in order to take his money. At trial, she did not testify to these facts, but her statement was found admissible as a prior inconsistent statement. R. 208, 1. 2 - R. 209, 1. 23; R. 204, 11. 6-16. In exchange for cooperation, K.'s charge of murder remained in the jurisdiction of Family Court. R. 279, 11. 7-11.

Petitioner's DNA was located on the Bluetooth headset that was found in the middle of the road at the apartment complex. R. 328, 1. 2 – R. 330, 1. 25. Petitioner did not testify at trial. R. 343, 11. 4 - 7.

At the close of the prosecution's case, counsel made a motion for directed verdict, which was renewed at the end of the case. R. 346, 11. 10-18. The trial court judge denied the motions. R. 346, 11. 19 -- 21.

Discussion

The trial court judge erred when she denied Petitioner's motion for a directed verdict because the evidence adduced at trial did not rise above the level of providing a "mere suspicion" that Petitioner was guilty of murder. The Court of Appeals erred in affirming the trial judge's decision.

A defendant is entitled to a directed verdict when the prosecution fails to provide evidence of the offense charged. State v. Brown, 103S.C. 437, 88 S.E.2d 1 (1916); State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006); State v. McHoney, 344 S.C. 85, 97 S.E.2d 30, 36 (2001). "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused," the trial judge may deny the motion for directed verdict. State v. Lollis, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001); State v. Pinckney, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000); State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000). When the prosecution relies exclusively on circumstantial evidence, the trial judge must direct a verdict in the defendant's favor unless there is any substantial circumstantial evidence which reasonably tends to prove the guilt of the defendant or from which his guilt may be fairly and logically deduced. State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011); State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000). Likewise, a directed verdict is appropriate when the evidence produced "merely raises a suspicion the accused is guilty." Lollis, 343 S.C. at 584, 541 S.E.2d at 256; State v. Arnold, 361 S.C. 386, 389-390, 605 S.E.2d 529, 531 (2004); State v. Schrock, 283 S.C. 129, 132, 322 S.E.2d 450, 451-452 (1984); State v. Muhammed, 338 S.C. 22, 524 S.E.2d 637 (Ct. App. 1999). Our courts define suspicion as "a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." Lollis, 343 S.C. at 584, 541 S.E.2d at 256; State v. Hyder, 242 S.C. 372, 131 S.E.2d 96 (1963).

In Mitchell, 341 S.C. at 409, 535 S.E.2d at 127, the South Carolina Supreme Court held the lower court erred in failing to direct a verdict where the only evidence presented against the defendant was his fingerprint at the scene of the burglary. Likewise, the Lollis Court directed a verdict of acquittal in the defendant's favor where the state presented no direct evidence that Lollis was involved in setting fire to his home. The only circumstantial evidence against Lollis was that his wife admitted to the arson, he had placed valuables in storage prior to the fire, he possessed a key to the storage unit, and he allegedly had financial troubles. Our state supreme court found this evidence insufficient. Lollis, 343 S.C. at 584-585, 541 S.E.2d at 256-257.

In State v. Odems, 395 S.C 582, 720 S.E.2d 48 (2012), the Court held the defendant was entitled to a directed verdict based upon a lack of substantial circumstantial evidence that the defendant was involved in the burglary. Although Odems was in a car with other individuals who admittedly burglarized a home, the state failed to provide substantial circumstantial evidence that Odems was present during the home invasion. The witness who saw individuals at the home claimed she saw two, not three as were found in the car. Fingerprints collected from the stolen goods did not match Odems, but matched the other individuals in the car. One of the individuals who admitted his involvement claimed Odems was picked up after the burglary at a gas station. Id. at 588, 720 S.E.2d at 51. As explained by the Odems Court, although our courts have abandoned the traditional circumstantial evidence jury charge, the language of the charge is instructive in making a directed verdict determination. The traditional charge provided:

Every circumstance relied upon by the State be proven beyond a reasonable doubt; and ... all of the circumstances proven be consistent with each other and taken together, point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis.

Id. at 590, 720 S.E.2d at 52 (quoting State v. Hernandez, 382 S.C. 620, 626 n.2, 677 S.E.2d 603, 606 n.2 (2009)).

In one of the Supreme Court's most recent circumstantial evidence case, State v. Bostick, 392 S.C. 134, 141, 708 S.E.2d 774, 778 (2011), the Court held the prosecution failed to present substantial circumstantial evidence of Bostick's guilt. Rather, the state's evidence was capable of producing only a suspicion of Bostick's guilt. Id. Although the police found items belonging to the victim in a burn pile behind the home of Bostick's mother, the Court held no evidence linked Bostick to the evidence in the burn pile and the prosecution presented no testimony that Bostick had control over the burn pile. Id. at 137-141, 708 S.E.2d at 775-778. The only other evidence presented against Bostick was that he had a chemical pattern that matched gasoline on his shoes and gasoline was used to start the fire at the victim's home, and DNA from blood on Bostick's jeans excluded ninety-nine percent of the population, but the expert could not testify the DNA matched the victim. Id. at 142, 708 S.E.2d at 778.

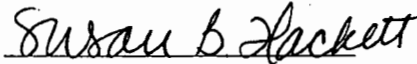
The trial court judge erred by not granting Petitioner's motion for a directed verdict because the evidence did constitute positive proof of facts and circumstances which reasonably tended to prove his guilt of murder. At most, the evidence proved that Petitioner had a relationship with a young woman who had a relationship with the decedent. Her statement tending to implicate Petitioner merely raised a suspicion that Petitioner was guilty, since it was made under circumstances militating against its trustworthiness because it was induced by a deal from the state. And, in any event, she did not testify against Petitioner during trial. All then, that was left to connect Petitioner to the murder, was Petitioner's Bluetooth telephone headset, found in the apartment complex parking lot, and phone calls between K. [REDACTED] and Petitioner.

Additionally, Petitioner's fingerprints on the *outside* of the car did not constitute evidence that Petitioner was guilty of committing murder.

CONCLUSION

For these reasons, the trial court judge erred, and Petitioner respectfully asks this Court to reverse his conviction and order a directed verdict of acquittal.

Respectfully submitted,


Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER.

This 15th day of May, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Dorchester County
Diane Schafer Goodstein, Circuit Court Judge

Opinion No. 2012-UP-576 (S.C. Ct. App. filed 10/24/2012)
07-GS-18-1755

THE STATE,

RESPONDENT,

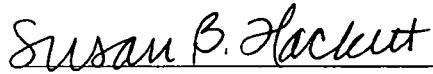
V.

TREVEE J. GETHERS,

PETITIONER

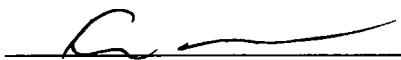
CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on William Edgar Salter, III, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and the S.C. Court of Appeals this 15th day of May, 2013.


Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 15th day
of May, 2013.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: October 2, 2013

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

**Appeal from Dorchester County
Diane Schafer Goodstein, Circuit Court Judge
Appellate Case No. 2013-000617**

THE STATE,

RESPONDENT,

v.

TREVEE J. GETHERS,

PETITIONER.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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Attorney General**

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STATEMENT OF ISSUE ON APPEAL

Did the Court of Appeals err in affirming Petitioner's conviction for murder and the trial judge's failure to direct a verdict of acquittal where the evidence adduced at trial did not rise above mere suspicion because the circumstantial evidence suggested only that Petitioner was near the murder scene when the decedent was fatally shot?

COUNTERSTATEMENT OF ISSUES ON APPEAL

- I. Whether Gethers' arguments challenging to the trial judge's denial of his directed verdict motion are preserved for this Court's review because he only made a general motion for a directed verdict at trial and he did not raise the arguments he now presents?
- II. Whether the Court of Appeals correctly upheld the trial judge's ruling denying Gethers directed verdict motion because the State presented direct and substantial circumstantial evidence at trial that reasonably tended to prove that he murdered the victim, Robert Earl Robinson, or from which his guilt could be inferred?

ADDITIONAL SUSTAINING GROUND

- III. Whether the Court of Appeals erred by failing to find that Gethers' argument was not properly before it on appeal because Gethers only made a general motion for a directed verdict at trial and he did not make any of the arguments at trial that have been subsequently made on appeal?

STATEMENT OF CASE

The Dorchester County Grand Jury indicted Petitioner, Trevee J. Gethers (Gethers), on December 3, 2007, for murder (2007-GS-18-1755), in connection with the shooting death of Robert Earl Robertson. **R. pp. 431-32.** On November 15-17, 2010, Gethers received a jury trial before the Honorable Diane Schafer Goodstein. The jury found him guilty of murder and Judge Goodstein sentenced him to forty-five years imprisonment. **R. pp. 425-26.**¹ Dorchester County Assistant Public Defender Sara Jane Rogers represented Gethers at trial. Senior Assistant Solicitor Harrison Bell, Jr., and Russell D. Hilton, of the First Circuit Solicitor's Office, prosecuted him. **R. p. 1.**

Gethers timely served and filed a notice of appeal. On October 24, 2012, the Court of Appeals affirmed his conviction and sentence in an unpublished opinion. *State v. Gethers*, 2012-UP-576 (Ct. App. filed Oct. 24, 2012), **App. pp. 1-2.** On November 6, 2012, Gethers filed a Petition for Rehearing. **App. pp. 3-7.** The Court of Appeals denied rehearing in an Order filed on February 22, 2013. **App. 8.**

Gethers thereafter filed a timely Petition for Writ of Certiorari. Respondent now makes its Return to Petition for Writ of Certiorari.

¹She also revoked four years of a probationary sentence on an unrelated gun charge. **R. p. 425.**

ARGUMENTS

I. Gethers' challenges to the trial judge's denial of his directed verdict motion are not preserved for this Court's review because he only made a general motion for a directed verdict at trial and he did not raise the arguments he now presents. Alternatively, the Court of Appeals correctly upheld the trial judge's ruling denying Gethers directed verdict motion because the State presented direct and substantial circumstantial evidence at trial that reasonably tended to prove that he murdered the victim, Robert Earl Robinson, or from which his guilt could be inferred.

Gethers maintains that the trial judge erroneously denied his motion for a directed verdict, claiming that "[a]t most, the evidence proved that appellant had a relationship with a young woman who had a relationship with the decedent." After discounting this co-defendant witness' statement implicating him as untrustworthy, he contends that the only evidence that connected him to the murder was his "telephone, found in the apartment complex, and phone calls between Ms. [REDACTED] and appellant." **Brief of Appellant, p. 8.** Respondent submits that his challenge to the trial judge's trial judge's denial of his motion is not preserved for this Court's review because he only made a general motion for a directed verdict at trial and he did not raise the arguments he presents to this Court. Alternatively, the Court of Appeals correctly upheld the trial judge's ruling denying Gethers directed verdict motion because the State presented direct and substantial circumstantial evidence at trial that reasonably tended to prove that he murdered the victim, Robert Earl Robinson, or from which his guilt could be inferred.

A. Proceedings in the trial court.

1. The prosecution's evidence.

The direct and circumstantial evidence presented by the State was that the victim, Earl Robinson, lived in Walterboro, South Carolina in September 2007. On the night of September 17,

2007, the victim called his son, Marcus Brothers, "about 8:30 p.m." and he asked if Marcus had any money that he could borrow. Marcus did have money and agreed to loan some to him. When the victim called again at 9:24 p.m., he said "he was going away" and needed cash. Marcus again agreed to loan money to him. **R. pp. 127-28; 284.**

A few minutes after 10:00 p.m., the two men met at a Horizon Gas Station near Marcus' residence and Marcus loaned \$ 200.00 to his father.² The victim and Marcus engaged in some small talk and the victim purchased a fountain drink before leaving. Although the victim never told Marcus why he needed the money, this was not unusual because the men often provided financial help to each other, when necessary. Also, Marcus and the victim's wife, Jestine Robinson, testified that Earl would often help out others who needed it. **R. pp. 128-33; 139; 284.**

Jestine Robinson testified that her husband told her on September 17th that he had to go somewhere. Because her SUV blocked his vehicle in their driveway, he took her 2001 Toyota Sequoia (*see State's Exhibit 4*), which he had washed the preceding Wednesday. Neither Mrs. Robinson nor Marcus knew Gethers or had seen him before court proceedings began in this case. Sometime after the murder, the coroner returned slightly over \$ 199.00 to Mrs. Robinson. **R. pp. 132; 134-139.**

Within an hour after getting the loan from his son, the victim was murdered. Shortly before 11:00 p.m. on the night of September 17, 2007, Kimberly and Michael Ritchey were in the stairway leading to their upstairs apartment in a Dorchester County apartment complex (*see State's Exhibit 1*), and Michael was smoking a cigarette. They heard what sounded like two men yelling and

² Their meeting was corroborated by the store's surveillance video (*State's Exhibit 30*), which was published to the jury. **R. pp. 129-30.** The victim had also called him again, at 10:02 p.m. **R. p. 302.**

screaming. Kimberly testified that the argument was about "money." This was not unusual in the apartment complex. So, Kimberly went back upstairs to check on their small children and Michael remained on the steps. **R. pp. 52-53; 56-57; 59-60; 63.**

While Kimberly was in the children's bedroom, which overlooks the parking lot, she heard at least one gunshot. She then went back outside. By this time, Michael Ritchey was at the bottom of the steps and headed toward the vehicle because it was still running. In fact, the vehicle almost struck him. He yelled at Kimberly to "[c]all the cops" and she did so. **R. pp. 53-54; 56-57.**

Michael Ritchey did not see anyone, but he heard the two people "yelling and screaming." After Kimberly went to check on the children, Michael heard a gunshot. He immediately ran down the steps and toward a car that had pulled out of a space in the parking lot and appeared to be trying to turn around. As Michael got the license tag number, the vehicle "jumped the curb into the grass and almost hit me because it backed out to the road and stopped in the middle of the road . . . with the motor running." **R. pp. 60-61.**

Michael walked over to the vehicle and put his hands on the glass in the rear of the vehicle to see if any children were in it, but he did not see any. Next, he walked up to the front door of the vehicle and saw someone "slumped over laying with their head against the passenger's seat." When Michael opened up the door to check on this person, he saw "blood everywhere and kind of freaked out." He did not see anyone running either in the direction of a nearby Bi-Lo or toward another apartment complex that is located a short distance away from his. **R. p. 62. See also State's Exhibit 1.**

Shanika Moon lived in the apartment directly below the Ritcheys in September 2007. On the night of September 17th, she looked out of her window saw two people in an SUV that was "closed,

parked forward." She could not identify either person in the vehicle and she could not hear any argument. She sat back down but soon heard "a 'pop-pop' noise." She looked back out and again saw the SUV. However, she did not call 911 because she often heard shots. **R. pp. 64-68.**

The Dorchester County Sheriff's Department received several 911 calls reporting the shooting, the first of which was received at 10:57 p.m. **R. p. 285, lines 14-21; p. 287, lines 19-20.** Then-Officer Willard Driggers happened to be in front of the apartment complex when the dispatcher sent out the call, and he arrived on the scene within a minute. He was quickly followed by then-Officer Christopher Freshman, who pulled in behind him. Both officers saw a white Toyota Sequoia SUV. The doors on the vehicle were closed, the windows were up and the vehicle's engine was "revving at high RPMS." There was no one else in the area. **R. pp. 68-70; 72; 74-76.**

Officer Driggers approached the SUV (see **State's Exhibit 2**) and he saw a person in the front seat, who was "slumped over." Wearing latex gloves, he opened the driver's door. There was blood on the seat and it did not appear that the person in the SUV (the victim) was breathing. Also, "the smoke from the gunpowder was still floating inside the vehicle." So, Officer Driggers reached in and turned off the ignition. The officers then secured the scene. **R. pp. 70-73; 75-76.**

Det. Earl Asbell, also with the Dorchester County Sheriff's Department, testified that he was the "lieutenant over the crime scene unit" at the time of the murder. With the assistance of another officer, he processed the crime scene at the apartment complex parking lot on September 17th. He explained that whenever there was a shooting, his unit collects "everything in the proximity," even if it is later determined that the item(s) collected are not involved in the crime. **R. pp. 78-80; 82-83.**

In this case, he first photographed the vehicle and everything around it. Next, he photographed the victim as seated in the vehicle, before removing the victim's wallet and obtaining

the victim's driver's license. He also photographed (*see State's Exhibit 3*) and seized the victim's cell phone. **R. pp. 78-80; 82-83.**

Then, he seized a .40 caliber shell casing off of the road, some 40 or 50 feet from the SUV, that was ultimately determined to be irrelevant because the victim was shot by either a .38 or .350 magnum bullet.³ He also seized a Bluetooth and earpiece associated with it. The Bluetooth was still blinking, indicating that it was activated. *See State's Exhibits 23-25.* These were found in the road and near a path between the apartment complex where the shooting occurred and some nearby apartments. *See State's Exhibit 1.* Also, the Bluetooth "appeared to have been . . . either run over or it fell apart when it hit the road because the earpiece was separated from it." **R. pp. 84-86; 88-89; 121-23; 125.**

Det. Asbell had the SUV towed to the Sheriff's Department's garage and it was processed for fingerprints the following morning. In all, officers lifted thirty-four latent prints from the vehicle. He also photographed the latent prints that he found, and those lifts were submitted to the Charleston Police Department for analysis. **R. pp. 89-100; 248; 252-55.**

Det. John Garrison testified that he was the Dorchester County Sheriff's Department's lead investigator in this case. There was no suspect identified immediately after the murder. He spoke to the victim's family and subpoenaed the phone records for the victim's cell phone. Although the victim had called a number earlier on the day of September 17th, it was determined that the woman with whom he had spoken did not have any involvement in the case. However, there were a series of calls from and to a specific number on the night of the 17th, and it was discovered that the

³ Det. Asbell saw some cigarette butts that night but did not seize them because they were located over forty feet from the SUV and "[e]verything took us in a different direction." **R. p. 84, lines 12-23; p. 117, line 17 - p. 118, line 10.** There is absolutely no evidence that these cigarette butts were relevant to this case.

telephone number was for a cell phone owned by a Maggie Reid. **R. pp. 185-89.**

Officers located Ms. Reid at her residence in nearby apartments and the records for her cell phone (**State's Exhibit 42**) were then obtained. They obtained information that the initial results of the fingerprint analysis from AFIS showed that Gethers' prints were on the SUV at roughly the same time that they obtained the cell phone records for Reid's phone. **R. p. 189; 191-92; 242-45; 254-55.**

Ms. Reid testified that she lived in the apartments near the crime scene in September 2007. Veronica K. and Veronica's mother lived in the apartment beneath her. Veronica was dating a man nicknamed "City" at the time. Veronica was with her mother when her mother picked up Reid from work at 4:15 p.m. on September 17th. Veronica borrowed Ms. Reid's phone on the way home and again later that evening. **R. pp. 236-40.**

During the night of September 17th, Ms. Reid had gone to the K.'s apartment to look for her phone but was told that Veronica was not home. At that time, Reid saw "City" sitting on the back of his car, talking to Veronica. Reid finally got the phone back the next morning. **R. pp. 240-41.**

After learning that Gethers' prints were on the SUV; that Veronica K. had used Reid's phone to call him numerous times; and that there was a close relationship between Gethers and Veronica, the Sheriff's Department obtained his cell phone records. **State's Exhibit 43.** Officers also executed search warrants at both Veronica's apartment and Gethers' residence on the morning of September 19th. Unfortunately, they did not find anything relevant to the case. Officers were also unable to locate either of the suspects. **R. pp. 192-93; 195-98.**

However, they spoke to Brandee Kiefer. They learned that Gethers had swapped cars with Kiefer and that he was driving her Kia. **R. pp. 197-98.** Kiefer testified that she was romantically involved with Gethers in September 2007. When she got off from work on the night of Tuesday,

September 18th, Gethers had taken her Kia Spectra (*see State's Exhibit 31*) and had left his Lincoln for her to drive. **R. pp. 144-48.**

Keifer told detectives that she kept calling Gethers but he did not answer. Also, when she finally did speak to him, he told her that he would be back in three or four hours. However, he never returned. Also, she had to go to Virginia to pick up her car. Although she claimed that she did not remember telling detectives that "[w]hen I spoke to [Gethers], he said not to tell anyone . . . that they were in Virginia," she did not dispute that she said this. **R. pp. 148-51; 154.**

Det. Garrison obtained an arrest warrant for Gethers charging him with murder on the morning of September 19th. He entered the warrant information and information that Gethers may be driving Kiefer's Kia into the N.C.I.C. database. On September 20th, the Sheriff's Department was notified that the Kia had been found at a truck stop off of the interstate in New Kent, Virginia. No one was in the car and it had been vandalized. **R. pp. 195-99.**

On September 22nd, the Sheriff's Department received a telephone call from the New York City Police Department informing them that Veronica K. had been apprehended using a fake ID. Also, she was accompanied by a man using the ID of "Dante Hubbard." It was determined that the man was actually Gethers. Eventually, both suspects were returned to South Carolina. **R. p. 199.**

Detective Steve Morelli also assisted in the investigation. He testified that the phone records of Gethers' (*State's Exhibit 42*), Ms. Reid's (*State's Exhibit 43*), and the victim's cell phones showed the following:

- At 4:33 p.m., there was a call from Ms. Reid's cell phone to the victim's cell phone;
- At 4:34 p.m., there was a call from Ms. Reid's cell phone to Gethers' cell phone;

- Between 5:11 and 5:12 p.m., there were three calls from Ms. Reid's cell phone to Gethers' cell phone;
- At 6:55 p.m., Gethers' phone called Ms. Reid's phone;
- At 8:47, 8:48 and 8:55 p.m., there were calls from Ms. Reid's cell phone to Gethers' phone;
- At 8:57 p.m., there was a call from Ms. Reid's cell phone to the victim's cell phone;
- At 9:24 p.m., "[t]he victim called his son;"
- At 9:47 p.m., Ms. "Reid's phone called the victim's phone;"
- At 9:50 p.m., the victim dialed Ms. Reid's cell phone and, then Ms Reid's phone dialed the victim's cell phone;
- At 10:02 p.m., the victim called Ms. Reid's phone;
- At 10:04 p.m., "the victim contacted his son;"
- At 10:34 p.m., Ms. Reid's phone dialed the victim's phone;
- At 10:41 p.m., the victim called Ms Reid's phone;
- At 10:49 p.m. and at 10:51 p.m., Ms. Reid's phone dialed the victim's phone;
- At 10:56 p.m., Ms Reid's phone called Gethers' phone;
- At 10:57 p.m. and at 10:58 p.m., Ms. Reid's phone dialed the victim's phone;⁴
- After 10:58 p.m. on September 17th, Ms. Reid's phone did not call the victim's phone;
- At 11:40 p.m., Gethers' cell phone called Ms. Reid's phone;

R. pp. 283-88; State's Exhibits 42-43. There were also calls from the victim to Ms. Reid's phone on the 17th. **R. pp. 289-90.**

⁴ Again, the 911 calls began at 10:57 p.m. **R. p. 285.**

Although Veronica K. was Gethers' co-defendant, she was called as a prosecution witness.⁵ She testified that she had lived at apartments near the crime scene and that she was fourteen years old in 2007. She also admitted that she knew the victim on September 17th 2007. He had initially been a family friend but he wanted to become romantically involved with her. She admitted that she spoke to the victim about bringing her some money on September 17th and that she was using the cell phone of Ms. Reid, a friend who lived upstairs from her, on the 17th. **R. pp. 155-58; 176.**

Veronica testified that she called the victim earlier that day and asked him for money. However, she was with her mother. The victim told her that he had money, but he did not want her mother to know he was going to give her money because he was planning on having sex with Veronica that night. He also told her to call him back later that night. In their numerous phone conversations, she told him to meet her at apartments where the murder occurred and to call her before he got there so that she would know when to leave her apartment. **R. pp. 157-58.**

Veronica claimed that she "never got a chance to give" the victim directions to the crime scene, but she stated that he did know how to find her apartment complex. She further claimed that she ultimately stopped calling the victim because she assumed that he had changed his mind about giving her money. Also, she admitted that she had talked to Gethers, a/k/a "City," about the victim on the 17th and that she had asked Gethers to pick up the money for her because she did not want to have sex with the victim. Gethers supposedly told her that "he was going to have to call me back because he wasn't sure if he was going to do that." **R. pp. 158-60.**

Veronica claimed that the victim drove a white Explorer. Although the victim did not know

⁵ The parties stipulated that "the State has entered into an agreement whereby Veronica [K.'s] charge of murder will remain under the jurisdiction of the Family Court provided Ms. [K.] testifies truthfully and cooperates in the prosecution of this defendant, Trevee Gethers." **R. p. 279.**

Gethers, she testified that her plan was to tell the victim that her mother would not let her out of the apartment and that she would send her "friend," Gethers, to pick up the money. **R. p. 160.** Unfortunately, she was not very truthful in her testimony from this point forward. First, she denied telling Gethers what the victim was driving or where to pick up the money from the victim. **R. pp. 160-61.**

Then, she denied telling the police several matters in a March 9, 2009 statement that she had given. (**State's Exhibit 33, R. pp. 429-30**). She only she admitted telling officers that the victim said he would bring her "the money, but he wasn't going to keep bringing [her] the money without getting some," and that "I knew we were running from something." **R. pp. 162-64.**

Veronica did admit that she and Gethers had gone to Virginia in Kiefer's Kia, and that they had left it somewhere. She likewise admitted that she and Gethers had taken a bus to New York; that she was using Tambora Ravenel's ID; that she learned that Gethers was using the ID of a Dante Hubbard; and that State's Exhibit 34 were the ID cards that they had used. She testified that Ravenel was her friend and that Hubbard was someone she knew. However, she claimed that she did not know Hubbard's address. While she admitted that Gethers' was a "[p]retty close friend" and that she did not "want to see anything happen to him," she denied that he was her boyfriend. Also, she claimed that she only used Ravenel's ID so that she could by cigarettes. **R. pp. 255-58; 266; 268-69.**

In light of Veronica K.'s responses concerning her statement to the Sheriff's Department, which was given in the presence of her attorney and after she had waived her rights under *Miranda v. Arizona*, 384 U.S. 436 (1966) (*see R. pp. 201-02*), the State was permitted to introduce a redacted version of it, as State's Exhibit 33, and it was published to the jury through Det. Garrison.⁶ In her

⁶ The trial judge's ruling on this issue is at **R. pp. 202-07.**

statement, she said that:

I called Mr. Earl for some money. He said he would bring the money, but he wasn't going to bring me money without getting some. He wanted some in the past, but I kept tricking him. I told him to go to the _____ because I didn't want my momma to know about Mr. Earl bringing me the money. Mr. Earl was bringing me more than \$50.00 because I asked him for some money. He thought we were going to a motel. I told Trevee Gethers "City" to get the money because I didn't want to mess with Mr. Earl. I told Trevee that Mr. Earl was in a white Sequoia because that's what Mr. Earl told me he was driving. I didn't tell Trevee to shoot Mr. Earl, I just told Trevee to get the money. I didn't know Trevee shot Mr. Earl. . . . I called Trevee after [(sic)] to see if he got the money, and he said no. Trevee said that Mr. Earl wouldn't give him the money. I didn't see Trevee until the next day and he said we had to go because he got in some stuff. I knew we were running from something. We went to a lady's house in Virginia on the air base. We went to Dro mama's house. [(sic)] Dro and Tam followed us to Virginia. Then we took the bus to New York. I have gotten money from Mr. Earl before and that's how I knew I could call him for money.

Question: Has Mr. Earl ever been to [the apartments where he was killed] before?

Answer: Yes, he has brought me money there behind Bi-Lo, but I still had to give him directions.

State's Exhibit 33, R. pp. 429-30. See also R. pp. 207-09.⁷

Also, SLED Agent Ila Simmons, who was qualified as an expert in trace evidence and gunshot residue, testified that a gunshot residue test performed on the victims hands early in the morning after the murder (**R. pp. 87-88**) revealed the presence of metals on the palm and the back of his right hand that "could be associated with gunshot residue."⁸ And on the palm of the left hand

⁷ Despite a diligent search, the murder weapon was not found. Nor did officers locate a shell casing for the bullet that killed the victim. **R. pp. 193-94**. However, a SLED expert in firearms analysis, testified that the bullet that killed the victim was "most consistent with bullets that we have found loaded into .38 special caliber and .357 magnum caliber cartridges," and that the crimping cannellure on the bullet suggested that the gun was a revolver, as opposed to a semi-automatic pistol. **R. pp. 299-02**.

⁸ The parties stipulated that there was a complete chain of custody for the gunshot residue samples from the time of the collection until they were tested. **R. p. 278**.

there were also metals that were consistent with gunshot residue.” Agent Simmons further opined that her findings were “most consistent with someone having or being in the vicinity of the weapon when it was discharged because the concentrations that we found are more consistent with being in front of a gun when it's discharged than handling or firing a gun.” **R. pp. 313; 316-21.**

Officer Kalisha Gill, a forensic latent print examiner for the Charleston Police Department, testified that Det. Asbell submitted the latent prints that he had lifted from the Robinsons' SUV to her for analysis. When she ran these prints through A.F.I.S., she got a “hit.” The prints “came back to the fingerprint card bearing the name [of] Trevee Gethers.” **R. pp. 248-55.**

However, A.F.I.S. is only a tool used to narrow the list of potential suspects and a conclusive match can only be made after manual comparison of latent prints with known standards. So, she was provided a set of Gethers' major case prints (**State's Exhibit 40**), which she compared with the latent prints that had been submitted.⁹ She also received known prints from Quintavious Dominique Davis, the victim, Veronica K., Michael Amos Ritchey, Jr., and Donsurvi Chisholm. However, she did not receive known prints of either Mrs. Robinson or Marcus Brothers. **R. pp. 255-56; 262-63.**

Using the locations to which Det. Asbell testified that he had lifted prints, State's Exhibit 26, and Officer Gill expert analysis, the State presented the following evidence regarding the latent prints found on the recently-washed SUV:

- **State's Exhibit 20** (latent lift number 10), which was taken from the passenger rear door in the center of the door, was Gethers' left palm;
- **State's Exhibit 22** (latent lift number 8), which was taken from “just above the pinstripes on the passenger's front door, was Gethers' left index finger;

⁹ Javon Wright is employed at the Charleston County Detention Center. He testified that he took a set of Gethers' fingerprints and palm prints (**State's Exhibit 40**) when he booked Gethers, on May 11, 2007. **R. pp. 231-34.**

- **State's Exhibit 16** (latent lift number 3), which was taken from the door post on the passenger's side front door, was Gethers' left index finger;
- **State's Exhibit 18** (latent lift number 5), which was taken from the door post on the passenger side rear door, was Gethers' left middle finger and his left palm;
- **State's Exhibit 17** (latent lift number 4), which was taken from the passenger rear door to the center of the door, was Gethers' left thumb;
- **State's Exhibit 19** (latent lift number 11), which was also taken from the passenger rear door in the center of the door, was Gethers' left thumb;
- **State's Exhibit 12** (latent lift number 19), which was taken from the edge of the driver's door, was the left middle and left ring fingers of Michael Ritchey;
- **State's Exhibit 9** (latent lift number 22), which was taken from the glass of the driver's side rear window, was Michael Ritchey's right palm;
- **State's Exhibit 8** (latent lift number 21), which was taken from the rear driver's window close to the front door, was Michael Ritchey's left palm;
- **State's Exhibit 6** (latent lift number 23), which was taken from the diver's side quarter panel between the back door and the window, was the victim's right middle and right ring fingers;
- **State's Exhibit 11** (latent lift number 16), which was taken from the driver's side door to the left of center of the door, was the victim's left middle finger and Michael Ritchey's left palm;
- **State's Exhibit 14** (latent lift number 12), which was taken from the "rear passenger's side edge just above the pinstripe, was the victim's left middle and left ring fingers.

R. pp. 256-62. See also R. pp. 90-101 (Testimony of Earl Asbell); State's Exhibit 26.

Later in the investigation, a Buccal swab of Gethers' DNA was obtained pursuant to a search warrant.¹⁰ **R. pp. 100-02.** Also, the Bluetooth headset was submitted to SLED's DNA laboratory for testing. SLED Agent Lilly Gallman, a forensic DNA analyst, testified that she was able to develop

¹⁰ This was done on September 3, 2010. **R. pp. 101-02.**

a DNA profile off of the Bluetooth headset.¹¹ She was also able to determine that the profile “was a mixture of at least three individuals. The DNA profile of the major contributor to that particular mixture was from an unknown male individual.” **R. pp. 325-29.**

Agent Gallman placed the profile into the Combined DNA Index System (CODAS), which is a DNA database, and this resulted in a “hit:” the DNA of the major contributor to the profile matched Gethers’ DNA. Because so many samples are in the CODAS database, she followed protocol and requested a standard of Gethers’ DNA to guard against possible error. She thereafter compared the standard obtained from Gethers (**State’s Exhibit 48**) to the profile developed from the Bluetooth headset. When she did so, she found that “the major contributor in . . . the swabs that came from the Bluetooth headset[] matched the DNA profile of Trevee Gethers.” Also, she opined that “[t]he probability of randomly selecting an unrelated individual having a DNA profile matching the major contributor to this mixture is approximately one in 26 quadrillion.” **R. pp. 329-33.**¹²

Dr. Erin Presnell, a forensic pathologist employed at the Medical University of South Carolina, performed the autopsy on the victim. Dr. Presnell explained that the victim had “one major injury.” She described this injury as follows:

He has a single gunshot wound. It actually enters in his right arm. It goes through his right arm just through the soft tissue, exits the right arm and goes into the right chest. It hits the right lung. It goes through the heart as well as the aorta, which is the main blood vessel taking blood to the rest of your body. It goes through the left lung and also hits the left rib and partially exits. So you actually have a hole in the skin where the bullet's exiting, where the bullet's still there and hanging on right there. So this is a partial exit gunshot wound.

¹¹ The parties stipulated that there was a complete chain of custody for both the Buccal swabs and the Bluetooth headset. **R. pp. 278-79.**

¹² There are roughly 6.5 billion people on earth. **R. p. 334.**

R. pp. 216; 220-21.

Dr. Presnell testified that the bullet had traveled "pretty much straight across," but "slightly backwards on him a little bit." **R. p. 221.** She opined that her findings were consistent with the victim's right arm being either raised in a defensive posture or on the steering wheel when the shot was fired. Also, assuming the victim was seated in the driver's seat when shot, she opined that the shot came from the passenger side of the vehicle. She further opined that the gunshot wound was the cause of death; and she explained that, because the wound pierced the heart and aorta, "I can't imagine him being conscious over the seconds range" after the shooting. **R. pp. 227-31.**

The other "defining characteristic" of this wound was that the presence of "a fairly concentrated amount of stippling marks around the entrance wound to his arm." Based upon this finding, Dr. Presnell opined that it was "close-range gunshot wound" that had been fired "within a yard or less from him." Dr. Presnell recovered the bullet from the body. **R. pp. 221-23.**

2. The directed verdict motion and ruling.

At the close of the prosecution's case, Gethers moved for a directed verdict, but he did not make any argument in support of his motion. **R. p. 337, lines 10 - 12.** Without calling upon the State to respond, the trial judge denied his motion. She found that:

it is not for the Court to weigh the evidence, that is for the jury. It's for the Court to determine whether or not there is evidence on each and every element, including any inferences reached, and of course from which the jury can reasonably determine guilt. And I find that there is evidence on each and every element from which the jury could reasonably determine guilt, and I would respectfully deny your motion.

R. p. 337, lines 13-22.

Prior to the defense's closing argument, Gethers renewed his directed verdict motion, and the trial judge again denied it. **R. p. 372, lines 21-25.**

B. Discussion.

The State initially submits that Gethers' argument is not properly before this Court on appeal because, as shown, counsel only made a general motion for a directed verdict, and it is settled that "a general directed verdict motion . . . does not preserve any issue for appeal." *State v. Sterling*, 396 S.C. 599, 612, 723 S.E.2d 176, 183 (2012) ("A general directed verdict motion, however, does not preserve any issue for appeal") (citing *State v. Bailey*, 298 S.C. 1, 377 S.E.2d 581 (1989)). Having failed to present his present arguments to the trial judge, they may not be raised on appeal because "[a] party cannot argue one ground for a directed verdict in trial and then an alternative ground on appeal." *Bailey*, 298 S.C. at 5, 377 S.E.2d at 584.¹³

Even assuming *arguendo* that the Court finds that his argument is not procedurally barred, the trial judge's ruling must be affirmed. In *Odems*, 395 S.C. at 586, 720 S.E.2d at 50, this Court set forth the applicable law governing the review of directed verdict motions in criminal cases:

On appeal from the denial of a directed verdict, this Court must view the evidence in the light most favorable to the State. *State v. Lollis*, 343 S.C. 580, 583, 541 S.E.2d 254, 256 (2001) (citing *State v. Burdette*, 335 S.C. 34, 46, 515 S.E.2d 525, 531 (1999)). The defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. *State v. McHoney*, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001). However, if there is any direct or *substantial* circumstantial evidence

¹³ It does not appear that the Court of Appeals relied upon the procedural bar. See App. p. 2. As a result, Respondent as raised this procedural bar as an additional sustaining ground. Likewise, neither the Initial Brief of Appellant (IBOA, pp. 5-9), nor the Petition for Rehearing (App. pp. 3-7), presented the analysis of *State v. Mitchell*, 341 S.C. 406, 535 S.E.2d 126 (2000), *State v. Lollis*, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001), or *State v. Odems*, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011), found at pp. 9-10 of the Petition for Writ of Certiorari, although *Mitchell* and *Lollis* were cited in the Initial Brief. Therefore, it would be improper for this Court to consider his arguments on certiorari. See Rule 208 (b)(1)(D), SCACR ("particular issue to be addressed shall be set forth in distinctive type, followed by discussion and citations of authority"); *Jinks v. Richland County*, 355 S.C. 341, 585 S.E.2d 281, 282 n. 3 (2003) (an issue must also be argued fully in the initial brief of appellant to be preserved for the Court's consideration); *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (the failure to provide arguments or cite to authority in support of argument constitutes abandonment of issue on appeal); Rule 242(d)(2); SCACR ("Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari . . ."); *Camp v. Springs Mortgage Corp.*, 310 S.C. 514, 516, 426 S.E.2d 304, 305 (1993) (declining to address issue not addressed by the court of appeals and not raised in petition for rehearing).

reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury. *State v. Pinckney*, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000) (emphasis added). A circuit judge should grant a directed verdict motion when the evidence merely raises a suspicion the accused is guilty. *State v. Schrock*, 283 S.C. 129, 132, 322 S.E.2d 450, 451–52 (1984).

(Emphasis in original). *See also State v. Bostick*, 392 S.C. 134, 139, 708 S.E.2d 774, 776–77 (2011) (setting forth standard where State relies solely on circumstantial evidence).

Applying this standard to the case at bar, the trial judge's ruling must be affirmed because, notwithstanding Gethers' argument to the contrary, the State presented both direct and substantial circumstantial evidence reasonably tending to prove his guilt of murder. First, Mr. and Mrs. Ritchey heard two men arguing in the parking lot immediately before the shooting. Before Mr. Ritchey could reach the victim's still-running SUV, the assailant had fled. Likewise, the first officer on the scene arrived within moments of the dispatch for the shooting and he did not see anyone running, even though the smoke from the gunpowder was still in the cabin when he opened the SUV. However, a Bluetooth headset, which was still activated and had Gethers' DNA on it, was found between the area of the parking lot where the victim's car had been and the nearby apartments, where Gethers' co-defendant and girlfriend, Veronica K. lived.

Second, the phone records (*see State's Exhibits 42–43*) reflected the calls between Veronica K. and the victim, and between Veronica and Gethers. She called Gethers up until almost the time of the shooting. Also, although she made numerous calls to the victim's phone before the shooting, she did not call the victim after 10:58 p.m., which was only one minute after the 911 calls had been placed. Also, Ms. Reid testified that Veronica was dating Gethers at the time and that she saw Gethers talking to Veronica on the night of the 17th.

Third, Veronica K.'s statement, *State's Exhibit 33*, also clearly implicates Gethers in the

crime. In it, she admitted that she asked Gethers to get money from the victim and she told him what vehicle the victim was driving. She further indicates that he later told her that he did not get the money, which was corroborated by the testimony of the victim's wife that over \$ 199.00 of the \$ 200.00 the victim had borrowed from his son was returned to her.

Her statement also implicates Gethers in the murder, including evidence of flight from the jurisdiction and the use of a car that did not belong to Gethers and fake identification cards to elude capture. In the statement, she stated that "I didn't tell Trevee to shoot Mr. Earl, I just told Trevee to get the money. I didn't know Trevee shot Mr. Earl." Veronica also said that "I didn't see Trevee until the next day and he said we had to go because he got in some stuff. I knew we were running from something." **State's Exhibit 33, R. p. 429-30.**

The evidence of flight was corroborated by both Det. Garrison and Kiefer. Clearly, flight from prosecution is admissible as evidence of guilt in South Carolina. *State v. Pagan*, 357 S.C. 132, 591 S.E.2d 646 (2003); *State v. Al-Amin*, 353 S.C. 405, 578 S.E.2d 32 (Ct.App. 2003). Evidence of flight has been held to constitute evidence of defendant's guilty knowledge and intent. *Pagan, supra*; see also *State v. Thompson*, 278 S.C. 1, 292 S.E.2d 581 (1982) (finding that evidence of flight was admissible to show guilty knowledge, intent, and that defendant sought to avoid apprehension), *overruled on other grounds*, *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991). Moreover and unlike the factual scenario in *Odems*, the totality of the circumstances in this case created an inference that Gethers had knowledge that law enforcement would look for him and Veronica in connection with the shooting. *Contra Odems*, 395 S.C. at 589-90, 720 S.E.2d at 52. *Accord Pagan, supra*; *State v. Beckham*, 334 S.C. 302, 315, 513 S.E.2d 606, 612 (1999).

Further, testimony of prior inconsistent statements may be "used as substantive evidence

when the declarant testifies at trial and is subject to cross examination.” *State v. Copeland*, 278 S.C. 572, 581, 300 S.E.2d 63, 69 (1982); *see also In re Richard D.*, 388 S.C. 95, 100, 693 S.E.2d 447, 450 (Ct.App. 2010) (“Even if the family court had limited the admissibility of the statement, that does not negate the fact that consideration of the statement as substantive evidence in a directed verdict analysis would have been proper under *Copeland* and [*State v. Stokes*, 381 S.C. 390, 673 S.E.2d 434 (2009)]”); *State v. Smith*, 309 S.C. 442, 447–48, 424 S.E.2d 496, 499 (1992) (exclusion prior inconsistent statement of defendant's nephew constituted reversible error); *State v. Ferguson*, 300 S.C. 408, 411, 388 S.E.2d 642, 644 (1990) (exclusion of victim's prior inconsistent statement as substantive evidence was harmless error when other evidence was cumulative of statement); *State v. Crawford*, 362 S.C. 627, 634, 608 S.E.2d 886, 890 (Ct.App. 2005) (co-conspirator's later testimony did not obviate the efficacy of the first statement made closer in time to the event in question); *State v. Caulder*, 287 S.C. 507, 513, 339 S.E.2d 876, 880 (Ct.App. 1986) (trial court erroneously instructed jury to disregard witness's prior inconsistent statement for substantive purposes). Gethers’ argument that Veronica K.’s statement was untrustworthy is contrary to well settled authority that, in reviewing an appeal from denial of a directed verdict motion, this Court must view the evidence in the light most favorable to the State.” *E.g., Lollis*, 343 S.C. at 583, 541 S.E.2d at 256; *Burdette*, 335 S.C. at 46, 515 S.E.2d at 531. His argument likewise ignores that “[i]n reviewing a motion for directed verdict, the trial judge is concerned with the existence of evidence, not with its weight.” *State v. Curtis*, 356 S.C. 622, 633, 591 S.E.2d 600, 605 (2004); *State v. Kelsey*, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998).

Both Veronica’s statement and her testimony reveal a crystal clear motive in this case: greed for the money that the victim was carrying and, inferably, the killing occurred when Gethers did not

get the money as he and Veronica had planned. Additionally, Respondent would note that Gethers' fingerprints and palm print from his left hand - and only his - were found on the passenger's side of the recently-washed white Toyota Sequoia SUV that was driven by the victim. Prints belonging to Mr. Ritchey were found elsewhere on the vehicle, and circumstantially corroborated his testimony. This was important because the pathologist opined that the victim was shot from the passenger's side of the car. There was also no evidence that the victim was armed.

Thus, this case is readily distinguishable from *Odems*, *Bostick* and *Lollis*, cases where the Court held that the State's evidence created only a mere suspicion of guilt. For instance, in *Odems*, the Court found that "[t]he State's case against Petitioner relied primarily on three pieces of circumstantial evidence: (1) the fact that less than ninety minutes after the burglary, police located Petitioner in the getaway car with the burglars and the stolen goods; (2) Petitioner fled from law enforcement; and (3) Petitioner asked an uninvolved person to lie for him." *Odems*, 395 S.C. at 590-91, 720 S.E.2d at 51. Also, in *Bostick*, the State only presented evidence that "(1) investigators found personal items belonging to Polite, including a watch and two sets of car keys, in a burn pile located on the Bostick family property; (2) Bostick's shoes contained a pattern that matched gasoline, and gasoline was the accelerant used to start the house fire; (3) and investigators found blood on the clothes Bostick was wearing the day of the murder, but that evidence could not be matched to Polite's DNA." However, no motive was established. See *Odems*, 395 S.C. at 586-87, 720 S.E.2d at 50 (citing *Bostick*, 392 S.C. at 141-42, 708 S.E.2d at 778).

Here, however, there was an undeniable motive. Moreover, the direct and circumstantial evidence was such that "all of the circumstances proven [were] consistent with each other and taken together, point[ed] conclusively to the guilt of [Gethers] to the exclusion of every other reasonable

hypothesis.” *Contra Odems*, 395 S.C. at 590, 720 S.E.2d at 52 .

II. The Court of Appeals erred by failing to find that Gethers' argument was not properly before it on appeal because Gethers only made a general motion for a directed verdict at trial and he did not make any of the arguments at trial that have been subsequently made on appeal. [Additional Sustaining Ground]

It does not appear that the Court of Appeals found that Gethers' argument was procedurally barred, although he did not make the same argument in the trial court. **App. p. 2.** Therefore, as an additional sustaining ground, Respondent submits that the Court of Appeals erred by failing to find that Gethers' argument was not properly before it on appeal because Gethers only made a general motion for a directed verdict at trial and he did not make any of the arguments at trial that have been subsequently made on appeal.

As argued above, Gethers' argument was not properly before the Court of Appeals and is not properly before this Court on certiorari because, as shown, counsel only made a general motion for a directed verdict, and it is settled that "a general directed verdict motion . . . does not preserve any issue for appeal." *Sterling*, 396 S.C. at 612, 723 S.E.2d at 183 ("A general directed verdict motion, however, does not preserve any issue for appeal") (citing *Bailey*, *supra*). Having failed to present his present arguments to the trial judge, they may not be raised on appeal because "[a] party cannot argue one ground for a directed verdict in trial and then an alternative ground on appeal." *Bailey*, 298 S.C. at 5, 377 S.E.2d at 584. Therefore, certiorari must be denied.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should deny certiorari to review the judgment of the lower court and Gethers's conviction.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

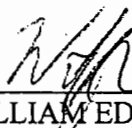
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By: 
WILLIAM EDGAR SALTER, III

ATTORNEYS FOR RESPONDENT

July 12, 2013.

WES

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

**Appeal from Dorchester County
Diane Schafer Goodstein, Circuit Court Judge
Appellate Case No. 2013-000617**

THE STATE,

RESPONDENT,

v.

TREVEE J. GETHERS,

PETITIONER.

CERTIFICATE OF SERVICE

I, William Edgar Salter, III, counsel for the Respondent, certify that I have served the within Return to Petition for Writ of Certiorari and Certificate of Compliance on Petitioner by depositing three (3) copies of the same in the United States mail, first class, postage prepaid, addressed to his attorney of record, Susan B. Hackett, Esq., SCCID/Division of Appellate Defense, PO Box 11589, Columbia, South Carolina 29211-1589.

I further certify that all parties required by Rule to be served have been served.

This 12th day of July, 2013.



WILLIAM EDGAR SALTER, III

Office of Attorney General
P. O. Box 11549
Columbia, South Carolina 29211
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ATTORNEY FOR RESPONDENT

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

**Appeal from Dorchester County
Diane Schafer Goodstein, Circuit Court Judge
Appellate Case No. 2013-000617**

THE STATE,

RESPONDENT,

v.

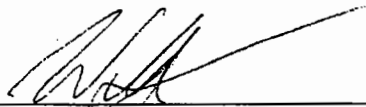
TREVEE J. GETHERS,

PETITIONER.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Return to Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and does not include, or partially redacts, personal data identifiers, Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings, 375 S.C. 56, 650 S.E.2d 462 (2007)(requiring redaction of social security numbers, names of minor children, financial account numbers, and home addresses).

This 12th day of July, 2013.



**WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General
Office of Attorney General
P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305
ATTORNEY FOR RESPONDENT**

The Supreme Court of South Carolina

The State, Respondent,

v.

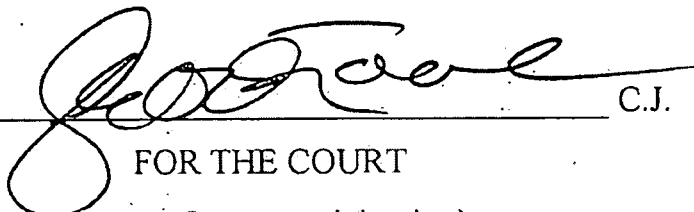
Treveen J. Gethers, Petitioner.

Appellate Case No. 2013-000617

Lower Court Case No. 2007-GS-18-1755

ORDER

Petitioner seeks a writ of certiorari to review the Court of Appeals' opinion in *State v. Gethers*, Op. No. 2012-UP-576 (S.C. Ct. App. filed Oct. 24, 2012). The petition is denied.


C.J.
FOR THE COURT
(Beatty, J., not participating)

Columbia, South Carolina

May 7, 2014

cc:

The Honorable Jenny Abbott Kitchings

The Honorable Cheryl L. Graham

Susan Barber Hackett, Esquire

W. Edgar Salter, III, Esquire

RECEIVED

MAY 7 2014

SC OFFICE OF
APPELLATE COUNSEL

FORM 5

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF DORCHESTER)Trevee Gethers SCD# 343706)
Full name and prison number (if any) of Applicant.)2014-CP-18- 1287)

v.)

APPLICATION FOR

State of South Carolina)

POST-CONVICTION RELIEF)

INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention Perry Correctional Institution, Pelzer, SC.
2. Name and location of Court which imposed sentence Dorchester, General Sessions
3. Name(s) of co-defendant(s) (if any) none
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2007-GS-18-1755 (murder)
 - (b) _____
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) November 16, 2010 (45-years)
 - (b) _____

- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty trial by jury _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
yes _____
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. South Carolina Court of Appeals _____
- ii. South Carolina Supreme Court _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. denied relief _____
- ii. denied cert. _____
- iii. _____
- (c) the date of each such result:
- i. October 24, 2012 _____
- ii. May 7, 2014 _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. 2012-UP-576 (S.C.Ct.App. filed October, 2012) _____
- ii. (attached hereto) _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) n/a _____
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) INEffective Assistance of Counsel
- (b) Denial of Right to a fair trial
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) see attached memorandum of law in support
- (b) see attached memorandum of law in support
- (c) _____
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? no
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? no
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? no
- (d) any other petitions, motions or applications in this or any other Court? no
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. n/a
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. n/a
- ii. _____
- iii. _____
- iv. _____
- (c) the disposition thereof:
- i. n/a
- ii. _____
- iii. _____

- iv. _____
- (d) the date of each such disposition:
- i. n/a
- ii. _____
- iii. _____
- iv. _____
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
- i. n/a
- ii. _____
- iii. _____
- iv. _____
14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?
first filing for post conviction relief
15. If you answered "yes" to (14) identify:
- (a) which grounds have been presented:
- i. n/a
- ii. _____
- iii. _____
- (b) the proceedings in which each ground was raised:
- i. n/a
- ii. _____
- iii. _____
16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
- (a) first filing for post conviction relief
- (b) _____
- (c) _____
17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? _____
- (b) your trial, if any? yes _____
- (c) your sentencing? yes _____
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? yes _____
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? no _____
18. If you answered "yes" to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
- i. Sara Jayne Rogers, Esquire, Dorchester Bar
- ii. same as above
- iii. Susan Barbra Hacket, Esquire, S.C.Appellant Defense
- (b) the proceedings at which each such attorney represented you:
- i. trial
- ii. sentencing
- iii. appeal
19. State clearly the relief you seek in filing this application:
- vacte sentence and conviction and grant new trial
20. Are you now under sentence from any other court that you have not challenged?
- no

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER
IN THE COURT OF COMMON PLEAS

Indictment NO.2007-GS-18-1755

Treveen Gethers -- Applicant,

-Vs-

State of South Carolina -- Respondent,

MEMORANDUM OF LAW IN SUPPORT OF
APPLICATION FOR POST CONVICTION RELIEF
PURSUANT TO S.C.CODE ANN.
§§17-27-20 THROUGH §17-27-160

Treveen Gethers
PCI
430 Oaklawn Rd.
Pelzer, SC. 29669

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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF DORCHESTER) (2007-GS-18-1755)

Treveen Gethers)
Applicant,) MEMORANDUM OF LAW IN SUPPORT OF
-vs-) APPLICATION FOR POST CONVICTION
State of South Carolina) RELIEF PURSUANT TO S.C.CODE ANN.
Respondent,) §§17-27-20 THROUGH §17-27-160
_____)

COMES NOW, above captioned Applicant, Treveen Gethers, pro-se, seeking relief in this Honorable , claiming that his rights were violated during trial, to include, but not limited to his Sixth Amendment right to the Effective Assistance of Counsel and his Fourteenth Amendment right to a fair trial that is protected by United States Constitution, and the South Carolina Constitution.

Applicant would submit that the issues presented, statement of facts and citations of authorities relied on will show unto this Honorable Court that Applicant is entitled to relief sought herein.

Respectfully Submitted,

/s/ Treven Gethers
Treveen Gethers

Applicant, pro-se

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CLERK OF COURT
DORCHESTER COUNTY

ISSUE (A)

WAS COUNSEL INEFFECTIVE FOR FAILING TO OBJECT WHEN THE TRIAL COURT SHIFTED THE BURDEN OF PROOF BY TELLING THE JURY THEY, THE JURY WERE TO "SEARCH FOR THE TRUTH", THUS RELIEVING THE STATE OF THEIR BURDEN OF PROVING APPLICANT GUILTY BEYOND A REASONABLE DOUBT?

FACTS

At the onset of the trial, the Trial Court made the following comments to the jury, as was recorded:

Now, before we begin this trial, I want to tell you that this trial probably will be different from what you may expect. Many people do not have the chance to attend and to be a part of a jury in an actual court trial as you are now doing, and they may think, you may think, that from watching television or movies or reading books, that trials are always full of high drama, intense action and riveting circumstances.

While all these things may be true as times --- and I can tell you that based on my experience they are true at times -- this trial is not for entertainment. It is a -- and it may be the --- fundamental party of democracy, a search for the truth in an effort to make sure that justice is done between the State and Mr. Gethers.

Searching for the truth and making sure that justice is done is often slow, deliberate, and repetitive, the opposite no doubt of what you may have seen on television, read in books, or perhaps in the movies.

(Tr.p.121, L.25 -p.121, L.1-18).

As is seen in the above the Court has instructed the jury to "search for the truth" in an effort to make sure that justice is done between the State and Applicant. The Court then further went on as is seen in the above and explained to the jury what "searching for the truth" is.

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CLERK OF COURT
DORCHESTER COUNTY
Joseph B. Jackson

The Court then went on to make further comments regarding "a search for the truth", as was recorded:

The attorneys before you are advocates for the parties they represent, but first and foremost, they are officers of the court, sworn to uphold the integrity and fairness of our judicial system and to help you in a search for the truth. You should expect them to be professional, competent and ethical in their representation of their clients.

(Tr.p.122, L.23-25 -p.123, L.14).

As is seen in the above the Court has told the jury that the "attorney(s) before them are advocates for the clients they represent, and it is their job to help the jury "in a search for the truth." Applicant would assert that the Trial Court has successfully "shifted the burden of proof" from the State to the jury by instructing the jury "to search for the truth, thus clearly relieving the State of "their" burden since the Trial Court told the jury the "Attorney(s) were advocates for "their clients" and "the attorneys jobs was to help the jury "search for the truth."

Applicant would assert a reasonable jurist would have interpreted this to mean that [both] Attorneys would present their side of the version of events and it was for the jury to "search for the truth" and decide who version they believe. Clearly this relieved the State of their burden of proving Applicant guilty beyond a reasonable doubt.

DISCUSSION

The United States Supreme Court recognized that the "Prosecution must prove each and every element of the crime charged beyond a reasonable doubt," citing *In re Winship*, 397 U.S. 158 (1970), and the burden of proof on any element cannot be shifted to the defense, because in so doing it decreases the [State's] burden of proving the crime beyond a reasonable doubt.

Jury instructions which charge the jury to "seek the truth" are disfavored because they "[run] the risk of unconstitutionally shifting the burden of proof to the defendant, *State v. Needs*, 333 S.C. 134, 155, 508 S.E.2d 587, 567-68 (1998).

The standard for reviewing an unambiguous jury instruction is whether there is a reasonable likelihood that the jury applied it in a way that violates the Constitution, See *Estelle v. McGuire*, 502 U.S. 62, 112 S.Ct. 475 (1991), see also *Boyde v. California*, 494 U.S. 370, 110 S.Ct. 1190 (1990).

The Court in *State v. Aleskey*, 538 S.E.2d 248, 251 (2000), relied on *United States v. Gonzales-Balderas*, 11 F.3d 1218 (5th Cir.1994), in analyzing a contested jury instruction regarding "...seek the truth" language. The Fifth Circuit Court of Appeals in a nearly identical situation where the Court had instructed the jury: "Remember at all times you are the judges -- judges of the facts. Your sole interest is to "seek the truth" from the evidence in the case, Gonzales, supra at 1223.

The Court in Gonzales explained:

As an abstract concept, "seeking the truth" suggest determining whose version of events is more likely true, the government's or the defendant's and thereby intimates a preponderance of the evidence standard. Such an instruction would be error if used in the explanation of the concept of proof beyond a reasonable doubt. *Id.*

In a more recent South Carolina case, *State v. Daniels*, 401 S.C. 251, 737 S.E.2d 473 (S.C.2012), the Court analyzed the "seek the truth" language and concluded that jurors are sworn to declare the facts of the case as they are proved from the evidence and placed before them, 50A CJS Juries §1 (2004). The very term "jury" connotes a deliberative body of persons *Id.* While a judge sits as a public officer who presides over, conducts and administers the law by virtue of office, and does so cloaked in judicial authority, *Id.* Judges §7 (2004). Judge and juries are not, together.

The Daniels Court concluded that while their functions may act as complement to one another, it is erroneous to imply that they somehow work hand in hand, and any blurring of their roles serves as unnecessary and improper distraction.

Applicant would submit the constitutional framework governing criminal trials is a highly technical body of law developed by the United States Supreme Court and by State Courts under the U.S Supreme Court's guidance. It is inappropriate to jeopardize the Constitutionality of the trial by instructing the jury to "search for the truth". Applicant would assert a reasonable jurist could have interpreted this as placing the burden of the jury to search

for the truth", especially after the Court instructed the jury that the jury should "search for the truth" in an effort to make sure that justice is done [between] "the State" and "Mr. Gethers". The Court then went on to instruct the jury "the attorneys before you are advocates for the parties they represent, and then went on to instruct the jury the attorney's jobs is to [help] the "jury in a search for the truth", and the jury should expect them to be competent and ethical in their representation of their clients. Here there can be no doubt the jury after being told to "search for the truth" and that the Prosecution represented the State as "a client", surely a reasonable jurist would have assumed the Court was telling the jury "whose version of events is more likely true, the governments or the defendants, which clearly takes on the assumption that the burden was shifted in violation of due process, (emphasis supplied).

Applicant asserts he was denied the effective assistance of counsel when counsel failed to object to the trial Court telling the jury to "search for the truth". Here counsel's performance was deficient and Applicant was prejudiced thereby as the State's burden was shifted by this instruction, Strickland v. Washington, 466 U.S. 668, 687 (1984).

Applicant is entitled to a new trial on this issue.

ISSUE (B)

WAS COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO THE TRIAL COURT'S JURY INSTRUCTIONS ON MALICE THAT RESULTED IN A MANDATORY PRESUMPTION IN VIOLATION OF DUE PROCESS WHEN THE TRIAL COURT FAILED TO INSTRUCTED THE JURY THAT THEY WERE FREE TO "ACCEPT OR REJECT" THE INFERENCE OF MALICE FROM THE USE OF A DEADLY WEAPON BASED ON THEIR CONSIDERATION OF THE EVIDENCE AND THEY COULD GIVE IT SUCH WEIGHT AS THEY DETERMINED?

FACTS

During closing summation to the jury Applicant's counsel made the following statement, as was recorded:

Murder is defined by the South Carolina Code of law as the Solicitor has already informed you is the killing of any person with malice aforethought, either express or implied.
(Tr.p.474, L.8-11)

As is seen in the above underlined portions Counsel has told the jury that malice is either "express or implied".

Coming directly after Counsel's just finished closing the Trial Court gave the following instructions regarding murder, as was recorded:

Ladies and Gentlemen, the defendant Mr. Gethers, is charged with murder. The State must prove beyond a reasonable doubt that the defendant, Mr. Gethers, killed another person with malice aforethought.
Now, malice is hatred, ill will, or hostility towards another person. It is the intentional doing of a wrongful act without just cause or excuse and with an intent to inflict an injury or under the circumstances that the law will infer an evil intent.
(Tr.p.488, L.15-23).

As is seen in the above underlined portion of the Court's instruction, the Court has defined malice as "the intentional doing

of a wrongful act" without just cause or excuse.

The Court further instructed the jury:

Now, malice aforethought may be express or inferred. The terms "express" and "inferred" do not mean different kinds of malice but merely the manner in which malice may be shown to exist; that is either of course by direct or by inference from the facts and circumstances which are proved.

Express malice is shown where a person speaks words express hatred or ill will for another, or when the person prepares beforehand to do the act, such as lying in wait, or any other acts going to show that the deed was within the defendant's mind would be express malice.

Now, malice may be inferred from conduct showing a total disregard for human life. Inferred malice may also arise when the deed is done with a deadly weapon A deadly weapon is any article, instrument, or substance which is likely to cause death or great bodily harm. (Tr.p.489, L.6-22).

As is seen the Court has now instructed the jury with on the elements of malice, thus being "express" and "inferred" malice.

Applicant would assert, as is seen in the above underlined portion of the Court's instructions the Court has told the jury that "malice is inferred when the deed is done with a deadly weapon", and then the Court goes on simply instructs the jury on [examples] of what instruments could be "deadly weapons", but the Court fails to instruct the jury that they can "accept or reject" the inference of malice from the use of a deadly weapon based on their consideration of the evidence presented and that they can give it such weight as they so determine.

Applicant would submit the Court's instructions in this regard has resulted in a "mandatory presumption" which is a violation of Due Process and the resulting implication is a structural error in the Constitutional mechanism of Applicant's trial.

DISCUSSION

In a long line of cases, culminating in *Yates v. Evatt*, 500 U.S. 391 (1991), the United States Supreme Court recognized that the prosecution must prove each and every element of the crime charged beyond a reasonable doubt, citing *In re Winship*, 397 U.S. 158 (1970). The burden of proof on any element cannot be shifted to the defense; because in so doing it decreases the State's burden of proving the crime beyond a reasonable doubt.

As early as 1975 the U.S. Supreme Court considered a Maine Rule which required the defendant charged with murder to prove that he acted in the heat of passion in order to reduce the homicide to manslaughter. The Court determined that a State could not shift the burden on any element of the crime to the defendant, finding the risk described to be intolerable, reversing the conviction, *Mullaney v. Wilbur*, 421 U.S. 684, 701 (1975).

The Supreme Court overturned another conviction in *Sandstrom v. Montana*, 442 U.S. 510 (1979). Montana law provided that a person could be charged with deliberate homicide when that person "purposely or knowingly" caused the death of another and, at Sandstrom's trial, the trial judge instructed the jury that, "the law presumes that a person intends the ordinary consequences of his voluntary acts," *Id* at 512.

After considering Sandstrom's argument, the Court agreed that the effect of that was to shift the burden of proof to Sandstrom on a critical element of the offense. The Court reiterated that a State must prove every element beyond a reasonable doubt and

the defendant cannot be required to prove any elements of his defense or disprove any element of his crime, holding a "reasonable juror might have interpreted the instructions either as a conclusive presumption or as a burden shifting presumption, but either interpretation, the Court rendered the instruction unconstitutional." Id.

In *Francis v. Franklin*, 472 U.S. 307 (1985), the Court found that the use of a "rebuttable" presumption was also unconstitutional for the same reason set forth in *Sandstrom*, supra.

Following *Sandstrom v. Montana*, *Mullaney v. Wilbur* and *Francis v. Franklin*, the case of *Yates v. Evatt*, 310 S.E.2d 805 (1982), 474 U.S. 896 (1985) (*Yates v. Aiken*) and 500 U.S. 391 (1991), wound it's way through the judicial system on identical issues.

Therefore, this matter is thus solid *stare decisis* in South Carolina. While *Yates* was winding it's way through the judicial system, the case of *State v. Elmore*, 279 S.C. 417, 308 S.E.2d 781 (1985) was presented with a "mandatory presumption" jury instruction. The *Elmore* Court instructed the lower courts the proper suggested instruction is: "The law says if one intentionally kill another with a deadly weapon, the implication of malice may arise . If facts, are proved beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would simply be an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive."

After giving the suggested instruction, the *Elmore* Court stated: "WE CAUTION THE BENCH, THAT HERAFTER ONLY SLIGHT DEVIATIONS FROM THIS CHARGE WILL BE TOLERATED, Id 308 S.E.2d at 784.

In 1985 shortly after Elmore was decided our Court in *State v. Peterson*, 335 S.E.2d 800 (S.C.1985), the Court held: "the judge should make it clear to the jury that it is free to "accept or reject" these permissive inferences depending on it's view of the evidence", citing *State v. Woods*, 282 S.C. 18, 316 S.E.2d 673 (1984), *State v. Lewellyn*, 281 S.C. 199, 314 S.E.2d 326 (1984), and *State v. Elmore*, 279 S.C. 417, 308 S.E.2d 781 (1983).

The standard for reviewing an unambiguous jury instruction is whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that violates the constitution, *Estelle v. McGuire*, 502 U.S. 62, 112 S.Ct. 475 (1991), *Boyde v. California*, 494 U.S. 370, 110 S.Ct. 1190 (1990).

In the instant matter, State's witness Dr. Presnell testified that the cause of death was a "gunshot" would that went through both lungs, heart and the aorta, Tr.p.318, L.25 -p.319, L.1.

Therefore the State proved the victim was killed with a gun, and therefore the jury needed to look no further than the Court's instructions that "malice may be inferred from the use of a deadly weapon" in order to find the element of malice. Applicant would submit the Court's instructions resulted in a "mandatory presumption" since the Court [failed] to instruct the jury they could "accept or reject" the inference of malice based on their view of and consideration of the evidence and give it such weight as they so determine. Rather here the Court simply told the jury the State must prove the killing was done with malice aforethought and then the Court instructed the jury that "malice is inferred from

the use of a deadly weapon" and therefore [if] the State proved the victim was killed with a deadly weapon then: it was mandatory that malice existed.

Applicant would submit that the State's burden of proof was not only substantially lightened but also shifted in violation of due process. If the jury followed the Trial Court's instructions and it must be presumed that they did, then the jury had to look no further than the State simply proving the victim was killed with a deadly weapon (gun). The Court's failure to instruct the jury they could "accept or reject" the inference of malice based on their consideration of the evidence and give such weight as they so determine, the Judge merely instructed the jury to direct a verdict for the State.

Applicant asserts the Counsel should have objected to the Court's failure to instruct the jury regarding the "accepting or rejecting" the inference of malice from the use of a deadly weapon, as well as the failure to give the Elmore charge.

Here Counsel's performance was deficient and Applicant was prejudiced thereby, Strickland v. Washington, 466 U.S. 668, 687 (1984).

Applicant should receive a new trial on this issue.

ISSUE (C)

WAS COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO THE TRIAL COURT IMPERMISSIBLY COMMENTED ON THE FACTS OF THE CASE DURING THE COURT'S CHARGE ON EXPRESS MALICE, THAT WAS TO BE DETERMINED BY THE JURY?

FACTS

During Applicant's trial the Court made the following comment to the jury while instructing the jury on the elements of malice, as was recorded:

Express malice is shown when a person speaks words which express hatred or ill will for another, or when the person prepares beforehand to do the act, such as lying in wait, or any other acts going to show that the deed was within the defendant's mind would be express malice.

As is seen in the above underlined portions of the Court's malice instructions on "express malice" the Court has told the jury that when a person "prepares beforehand" to do the act such as "lying in wait or "any other acts" going to show that the deed was within the defendant's mind would be express malice.

Applicant would submit the Court has impermissibly commented on the facts of the case and prematurely directed a verdict for the State. During trial Officer John Garrison testified for the State. While testifying Garrison was allowed to read the alleged statement given by alleged co-defendant Veronica K. [REDACTED]. In pertinent part the statement reads: "I called Mr. Earl for some money", "I told (Applicant) to get the money because I didn't want to

mess with Mr. Earl (victim). I told (Applicant) that Mr. Earl was in a white Sequoia because that's what Mr. Earl told me he was driving." "I didn't tell Applicant to shoot Mr. Earl, I just told Applicant to get the money, I didn't know Applicant shot Mr. Earl "I called Applicant to see if he got the money, and he said no."

Applicant would submit that under the [facts] as presented by the State, a reasonable juror could have interpreted the Trial Court's instructions on express malice as reiterating the very facts as put forth by the State, and when considering the last statement made by the Trial Court... "any other acts.." "...would be express malice." Here the Court told the jury that express malice existed simply because the State had Officer Garrison read K. [REDACTED]'s statement into the record which [if] believed was ".any other act" as presented by the State. Applicant would submit that a jurist of reasonable could have easily interpreted the Court's instructions on "express malice" as being a judicial comment on the facts of the case.

DISCUSSION

Impermissible comments on the facts of a case is prohibited in South Carolina, See, South Carolina Constitution, art. V, §21, and as the Court said in State v. Hartley, 414 S.E.2d 182 at 183-83: "Judges shall not charge juries in respect to matters of fact ,but shall declare the law, State v. Bagwell, 201 S.C. 387, 23 S. E,2d 244 (1942)(A judge cannot express in his charge, or intimate any opinion as to the weight or sufficiency of testimony without violating the prohibition of the Constitution as to charging upon

the facts). 75 AM.Jur.2d Trial §1203 at 693 (1991)(the trial court may not instruct the jury what weight should be given [to the evidence] or even that any particular evidence is or is not entitled to receive weight or consideration from them), Cf. State v. Edwards, 127 S.C. 116, 120 S.E. 490 (1923)("Wherein Our Supreme Court held the absence of motive is a mere circumstance to be considered by the jury and rejected an instruction that the absence of motive may raise a reasonable doubt as to the defendant's guilt because it was a charge on the facts), Id.

Applicant asserts that a reasonable jurist could have interpreted the Trial Court's comments regarding "express malice" that mirrored the facts as put forth by the State as directing a verdict. Here, Applicant would submit the Trial Court impermissibly comments on the facts of the case and relieved the State from the burden of persuasion of proving Applicant guilty beyond a reasonable doubt, but also acted in a manner that found the facts that were to be determined by the jury.

Applicant would submit the Trial Court acted in a manner to serve the Prosecution, and this was an abuse of power that denied Applicant his right to a fair trial.

Applicant asserts Counsel should have objected, as here Counsel's performance was deficient and Applicant was clearly prejudiced thereby, Strickland v. Washington, 466 U.S. 668, 687 (1984).

Applicant should receive a new trial on this issue.

CONCLUSION

WHEREFORE, based on the foregoing Applicant will respectfully pray this Honorable Court will find that Applicant was denied his Sixth Amendment right to the Effective Assistance of Counsel, and the prejudice incurred denied him his Fourteenth Amendment right to a fair trial.

THEREFORE, Applicant respectfully prays this Honorable Court will grant the requested relief of a new trial.

Respectfully Submitted,

/s/ Trevee Gethers

Trevee Gethers

Applicant, pro-se

STATE OF SOUTH CAROLINA)

County of Greenville)

VERIFICATION

I, Treva Gethers, 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.

Treva Gethers

SWORN to and subscribed before me this 18th
day of June, 2014.

Angie C. Merchant (L.S.)
Notary Public

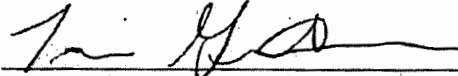
My Commission Expires: 1-23-2023

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Angie C. Merchant
CLERK OF COURT
DORCHESTER COUNTY

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

I, Treva Gathers, 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:

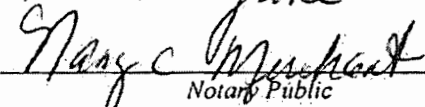
- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.



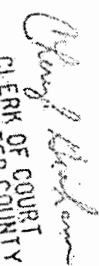
Applicant

SWORN or affirmed to and subscribed before me this

18th day of June, 2014.


Notary Public

My Commission Expires: 1-23-2022

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 CLERK OF COURT
 MONROE COUNTY

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	C.A. No. 2014-CP-18-1287
COUNTY OF DORCHESTER	)	
	)	
Treveen Gethers,	)	
S.C.D.C. No. 343706,	)	
	)	
Applicant,	)	
	)	RETURN
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

In response to the post-conviction relief application filed July 3, 2014, the Respondent would show this Court:

I.

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Dorchester County Clerk of Court's orders of commitment. The Dorchester County Grand Jury indicted the Applicant at the December 2007 term of General Sessions for Murder (2007-GS-18-1755). Sara Jayne Rogers, Esquire represented Applicant. The State called Applicant's case for trial before the Honorable Diane S. Goodstein where he was found guilty. On November 19, 2010, Judge Goodstein sentenced Applicant to forty-five (45) years' imprisonment.

A notice of appeal was filed at the South Carolina Court of Appeals. Elizabeth A. Franklin-Best, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal. The court of appeals affirmed Applicant's conviction and sentence on October 24, 2010. State v. Gethers, Op. No. 20120-UP-576 (S.C. Ct. App. filed October 24, 2012). Applicant's writ of certiorari to the South Carolina Supreme court was denied

on May 7, 2014. The Remittitur was sent on May 15, 2014.

Attached herewith and incorporated herein by reference are the records of the Orangeburg County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the trial transcript, and the appellate records.

II.

In his application for post-conviction relief, the Applicant alleges he is being held in custody unlawfully for the following reason:

- I. Ineffective assistance of counsel.
 - a. Failed to object to impermissible burden shifting during the Court's opening remarks
 - b. Failed to object to impermissible jury charge instructing jurors that "they were free to 'accept or reject' the inference of malice from the use of a deadly weapon."
 - c. Failed to object when the Court impermissibly commented on the facts of the case during the jury charge

III.

Respondent asserts Applicant's allegation that his attorney was ineffective is without merit. Respondent asserts Applicant's attorney rendered effective assistance well within the standard of "reasonableness within professional norms" for a defense attorney.

Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

The proper measure of performance is whether the attorney provided representation

within the range of competence required in criminal cases. The courts presume counsel “rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. Applicant must overcome this presumption in order to receive relief. See Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under prevailing professional norms.” Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S. Ct. at 2065). Second, counsel’s deficient performance must have prejudiced the Applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. “A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

Respondent submits Applicant cannot satisfy either requirement of the Strickland v. Washington test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983) (citing Norman v. State, 276 S.C. 278, 277 S.E.2d 707 (1981)).

IV.

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

V.

WHEREFORE, having made its Return, Respondent requests that a hearing be held on the issue of ineffective assistance of counsel.

Respectfully submitted,

ALAN WILSON
Attorney General

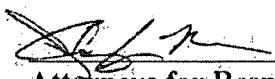
JOHN W. MCINTOSH
Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

J. CLAYTON MITCHELL
Assistant Attorney General

P.O. Box 11549
Columbia, S.C. 29211

By:


Attorneys for Respondent

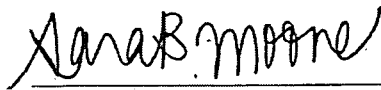
February 24th, 2015

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF DORCHESTER	)	
	)	
	)	2014-CP-18-1287
	)	
TREVEE GETHERS, #343706	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
_____	)	

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Rodney D. Davis, Esquire
Lowcountry Law Office
4000 Faber Place Drive, Suite 300
Charleston, South Carolina 29405

DATED this 24th day of February, 2015.



 Sara B. Moore, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF DORCHESTER) FIRST JUDICIAL CIRCUIT

TREVEE GETHERS,)
APPLICANT,) TRANSCRIPT OF RECORD
V.) 2014-CP-18-1287
STATE OF SOUTH CAROLINA,)
RESPONDENT.)

OCTOBER 28, 2015

ST. GEORGE, SOUTH CAROLINA

B E F O R E:

THE HONORABLE FRANK R. ADDY, JR., PRESIDING JUDGE

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

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** NO EXHIBITS WERE MARKED **

1 Wednesday, October 28, 2016

2 THE COURT: Attorney General, What is the next
3 case, please.

4 MR. MITCHELL: Trevee Gethers.

5 THE COURT: Go ahead and call the case, if you
6 would for me, please.

7 MR. MITCHELL: This is Mr. Gethers vs. The State of
8 South Carolina, case number 2014-CP-18-1287. Mr. Gethers
9 was indicted in December of 2007 for murder. He was
10 represented on these charges by Ms. Sara Jayne Rogers.
11 He was tried before Judge Goodstein. He was found guilty
12 in November of 2010. He was sentenced to 45 years of
13 imprisonment.

14 Notice of appeal was filed where his conviction was
15 affirmed in an unpublished opinion. That was filed
16 October of 2012. He's filed this application,
17 post-conviction relief, July 3rd of 2014, where he's
18 alleged various aspects of ineffective assistance of
19 counsel. I think specifically what we are going forward
20 on is a failure to object to the solicitor's comment in
21 opening, failure to object to a mugshot photo being
22 introduced, failure to request a voluntary manslaughter
23 charge, and I believe one other allegation. I'll let
24 Mr. Davis speak to that. I know that Mr. Gethers is
25 present and represented by Counsel Davis.

1 THE COURT: All right. Mr. Davis?

2 MR. DAVIS: Judge, the only other thing is there
3 was an instruction given as to malice and we would have
4 an argument about that.

5 THE COURT: Under the Belcher?

6 MR. DAVIS: Correct. There was no objection to
7 that, and other than that I think the State --

8 THE COURT: Did the case predate or postdate
9 Belcher, the trial?

10 MR. DAVIS: Give me a moment. I just had that,
11 Judge.

12 (PAUSE.)

13 MR. DAVIS: Belcher was decided October 12th of
14 '09. The sentence was November 19th, 2010.

15 THE COURT: All right. Very good. Call your first
16 witness then, please.

17 MR. DAVIS: Your Honor, out of an abundance of
18 caution I would ask you, if you don't mind, I certainly
19 have gone over with him the risks and benefits of going
20 forward. It's my understanding he wishes to go forward
21 but if you could review that on the record with him in an
22 abundance of caution.

23 THE COURT: All right. Certainly.

24 Mr. Gethers, if you would, just raise your right
25 hand. I have to ask you a few questions.

1 TREVEE GETHERS, after having been duly
2 sworn, testified as follows:

3 THE COURT: You are Trevee?

4 THE APPLICANT: Yes, sir.

5 THE COURT: Trevee Gethers. Mr. Gethers, you
6 understand, of course, Mr. Davis is representing you on
7 this case and he has told me to inquire of you about the
8 ramifications of going forward. I'm told that you
9 received a 45-year sentence; is that correct, sir?

10 THE APPLICANT: Yes, sir.

11 THE COURT: Obviously, if you succeed at
12 post-conviction relief the State of South Carolina can
13 try you again and you would be facing -- because it's a
14 homicide charge you would be facing up to life
15 imprisonment and a minimum of 30 years; do you understand
16 that, sir?

17 THE APPLICANT: Yes, sir.

18 THE COURT: So there's no guarantee that you'll get
19 another 45-year sentence if you succeed at PCR. You
20 could get something a lot worse; you understand that,
21 sir?

22 THE APPLICANT: Yes, sir.

23 THE COURT: Now, obviously, if you don't succeed at
24 PCR you can appeal the Court's ruling, and assuming that
25 the Court is affirmed you would simply continue to serve

1 out that 45-year sentence that you are currently doing;
2 do you understand that, sir?

3 THE APPLICANT: Yes, sir.

4 THE COURT: All right. Knowing all that do you
5 want to go forward with this hearing today?

6 THE APPLICANT: Yes, sir.

7 THE COURT: All right. So you do want to pursue
8 your rights under post-conviction relief, correct, sir?

9 THE APPLICANT: Yes, sir.

10 THE COURT: Very good.

11 All right. Mr. Davis, call your first witness.

12 MR. DAVIS: Thank you very much, Your Honor. We
13 would call Mr. Gethers to the stand.

14 THE COURT: Sir, of course, you're still under
15 oath. Just come around and have a seat, please.

16 DIRECT EXAMINATION

17 BY MR. DAVIS:

18 Q. Mr. Gethers, we are here today based on your
19 application for post-conviction relief on your conviction
20 for the murder charge in 2010; is that correct?

21 A. Yes, sir.

22 Q. As a little background, were you represented by
23 someone before Mr. Rogers?

24 A. Yes, sir. I actually had three different
25 attorneys.

- 1 Q. And can you tell the Judge about those attorneys?
- 2 A. My first attorney was Marva Hardee Thomas.
- 3 THE COURT: Would you say that again.
- 4 A. Marva Hardee Thomas.
- 5 THE COURT: Do you know how to spell that, sir?
- 6 A. M-a-r-v-a, first name, H-a-r-d-e-e.
- 7 THE COURT: And then Thomas?
- 8 A. And then Thomas.
- 9 THE COURT: Thank you.
- 10 Q. And that was an appointment at the Public
- 11 Defender's Office; do you recall? Was she with the
- 12 Public Defender's Office when she represented you?
- 13 A. Yes, sir.
- 14 Q. And then at some point there was an attorney
- 15 substituted for her?
- 16 A. Yes, sir.
- 17 Q. And who was that?
- 18 A. John Witherspoon.
- 19 Q. And there was a co-defendant in this case, correct?
- 20 A. Yes, sir.
- 21 Q. And who was that?
- 22 A. Veronica K. [REDACTED].
- 23 Q. Okay. And was she also represented by the Public
- 24 Defender's Office?
- 25 A. Yes, sir.

1 Q. And so then at some point after that were you given
2 another attorney?

3 A. Yes, sir.

4 Q. And who was the attorney after that?

5 A. Well -- well, John Loy was the attorney after Marva
6 Hardee. It was John Loy, but it was a conflict of
7 interest because he represented her, also.

8 Q. And all of these would have been attorneys with the
9 Public Defender's Office here in Dorchester County?

10 A. Yes, sir.

11 Q. And ultimately were you given another attorney to
12 represent you independent of the Public Defender's
13 Office?

14 A. Yes, sir.

15 Q. And who was that?

16 A. John Witherspoon, his name is, after John Loy.

17 Q. And I apologize. You've already testified to that.
18 After he was on the case, then who?

19 A. Sara Rogers.

20 Q. And is that the attorney who went to court with
21 you?

22 A. Yes, sir.

23 Q. Through this trial?

24 A. Yes, sir.

25 Q. Is that the attorney you have complaints about --

1 A. Yes, sir.

2 Q. -- in your application?

3 Let's talk to the Judge a little bit about the
4 communication between you and Ms. Rogers. How long did
5 she work with you on the case before this went to trial?
6 How long was she your attorney?

7 A. She was appointed to my case like four months
8 before I went to trial.

9 Q. Okay. And in those four months did she share with
10 you the discovery from the State in your case?

11 A. No, sir. Throughout the 38 months that I was in
12 the county I never received a Rule 5 from any of my
13 attorneys, my own personal copy.

14 Q. I understand your testimony you never got a copy of
15 the Rule 5. Was there any discussions, though, with you
16 and Ms. Rogers about what was contained in the Rule 5
17 materials?

18 A. Yes, sir.

19 Q. Okay. Did she discuss with you how strong or weak
20 that evidence was?

21 A. Yes, sir.

22 Q. And what was her opinion about the case?

23 A. She believed that the evidence was weak, that the
24 State couldn't prove beyond a reasonable doubt.

25 Q. And she conveyed this to you in person, correct?

- 1 A. Yes, sir.
- 2 Q. In the four months that she represented you before
3 you went to trial on this charge can you tell the Court
4 how many times you would have met with her in person?
- 5 A. I believe we met twice.
- 6 Q. And that would have been at the county jail?
- 7 A. Yes, sir.
- 8 Q. And how lengthy were those meetings?
- 9 A. They were probably like an hour long a piece.
- 10 Q. Did you all discuss a potential defense to this
11 charge?
- 12 A. On the first -- the first visit I believe she told
13 me that she didn't have all of my paperwork from the
14 previous attorney. So there wasn't much we could go over
15 on the first visit, but the second visit we went over
16 more detail.
- 17 Q. Okay. And so that more detailed second visit would
18 she have -- let me ask this first. Would she have
19 explained to you what the State had to prove to convict
20 you of murder?
- 21 A. Yes, sir.
- 22 Q. Okay. So she went over the elements of the
23 defense. Did she also discuss potential defenses?
- 24 A. No, sir.
- 25 Q. Was there any discussion about resolving this case

1 any other way other than going trial with Ms. Rogers?

2 A. No, sir.

3 Q. Now, just for a second -- I know we are here
4 focussed on Ms. Rogers's representation when she went to
5 trial with you but at some point was there an offer from
6 the State to resolve this case?

7 A. Yes, sir. The first offer came when John
8 Witherspoon had my case. It was a 20 year manslaughter
9 plea, and the second time, I believe -- the second time
10 that Ms. Rogers came to see me she told me that the plea
11 was still on the table. That was like a couple of days
12 before my trial.

13 Q. The second of the two meetings with Ms. Rogers was
14 days ahead of your actual trial?

15 A. Yes, sir.

16 Q. Okay. And at that point that offer was still
17 available?

18 A. I believe so.

19 Q. That was conveyed to you by Ms. Rogers?

20 A. Yes, sir.

21 Q. Do you remember any discussions, any lengthy
22 discussions with Ms. Rogers about whether to take that
23 offer or not?

24 A. No, sir.

25 Q. Ultimately, you did not accept that offer, correct?

1 A. Yes, sir.

2 Q. And you went to trial on the murder charge?

3 A. Yes, sir.

4 Q. Did she express an expert opinion on whether you
5 should accept that offer or go to trial?

6 A. No, sir. I mean, all three of the lawyers that I
7 had basically was telling me that they couldn't -- they
8 don't think the State could prove beyond a reasonable
9 doubt that I committed the crime so I would have good
10 chances of going to trial.

11 Q. Mr. Gethers, the Court has a copy of your
12 transcript and has reviewed your packet so we don't need
13 to go in great detail but can you generally explain to
14 the Judge your understanding of the State's evidence
15 against you.

16 A. I believe they had -- my fingerprint was found on
17 the passenger rear door. A bluetooth earpiece was found
18 like 50 feet away from the vehicle. They had a statement
19 from Ms. Veronica K. [REDACTED]. That's about it right there.

20 Q. And so it was that evidence that you would have
21 reviewed with Ms. Rogers and it was her opinion that it
22 was a weak case by the State; is that correct?

23 A. Yes, sir.

24 Q. During these two meetings prior to going to court
25 did you have any discussions with Mr. Rogers about

1 whether you would testify or not?

2 A. No, sir.

3 Q. I'm sorry?

4 A. No, sir.

5 Q. Did you have any understandings after -- during or
6 after these two meetings as to what Ms. Rogers' argument,
7 what her defense for you would be.

8 A. Her defense was that the State could only prove
9 mere presence and mere presence wasn't enough to convict
10 me.

11 Q. All right. When the trial started, when the trial
12 started one of the first things that we noticed on the
13 record is the Judge addressing the jury about the
14 process; do you recall that?

15 A. Yes, sir.

16 Q. Is there any complaint about that initial
17 discussion with the jury by the Judge? Do you have a
18 complaint about that?

19 A. Yes, sir.

20 Q. And what was that?

21 A. Well, the Judge told the jury that they should
22 search for the truth to make sure that justice was done
23 between the State and me and -- yeah. That the State
24 should search for the truth in an effort to make sure
25 that justice was done.

- 1 Q. I'm going to kind of do it in reverse. Did
2 Ms. Rogers make any objection to that?
- 3 A. Ms. Rogers did not make an objection.
- 4 Q. Do you feel she should have?
- 5 A. I believe she should have made an objection.
- 6 Q. Why is that?
- 7 A. Because from my understanding of the law it isn't
8 for the jury to search for the truth. It's for the State
9 to prove beyond a reasonable doubt that I committed the
10 crime.
- 11 Q. The next stage in the trial process would have been
12 opening statements, and is there a complaint you have
13 about the opening statement by the Solicitor's Office?
- 14 A. Yes, sir.
- 15 Q. And what's that complaint?
- 16 A. The solicitor talked about me robbing the victim in
17 his opening statement but there was never any evidence of
18 a robbery.
- 19 Q. Okay. Did Ms. Rogers object to the reference of
20 the State that you attempted to rob the victim?
- 21 A. No, sir, she did not.
- 22 Q. Had you been charged at any point with armed
23 robbery?
- 24 A. No, sir.
- 25 Q. Strong armed robbery?

1 A. No, sir.

2 Q. Common law robbery?

3 A. No, sir.

4 Q. And, again, just to be clear, what charge did you
5 go to trial on?

6 A. Murder.

7 Q. During testimony in an attempt to identify you
8 there was testimony by an officer dealing with a
9 photograph of you; do you recall that?

10 A. Yes, sir.

11 Q. And what complaints do you have about that
12 testimony?

13 A. Where Ms. Rogers failed to object to the
14 introduction of the photo mugshot of me from a prior
15 arrest.

16 Q. And do you recall any -- do you recall testimony
17 concerning that photograph identifying it as a mugshot or
18 identifying it as a photograph from a prior arrest; do
19 you recall that?

20 A. Yes, sir. The State witness testified on the stand
21 that it was indeed a mugshot. He even gave the date of
22 mugshot, which didn't match up to the date that I got
23 arrested for the murder charge.

24 Q. Do you recall testimony in addition to the fact
25 that this was a prior arrest photo -- do you remember

1 testimony about that fingerprints were obtained during
2 that arrest booking process? Do you recall that?

3 A. Yes, sir.

4 Q. Can you tell the Court about that briefly.

5 A. Yes, sir. They admitted it in the fingerprint file
6 from the previous arrest also into evidence, along with
7 the mugshot.

8 Q. Do you recall whether there was testimony allowed
9 in evidence about what offense that arrest -- the mugshot
10 photo arrest was for?

11 A. For PWID.

12 Q. That's literally what it was for. Do you recall
13 whether the testimony about what the charge was, was
14 presented in court?

15 A. No, sir. I can't recall.

16 Q. That's all right. The Court has the record of the
17 transcript on that. And, again, to be clear, during that
18 testimony was there any objection by Ms. Rogers?

19 A. There was no objection.

20 Q. Following testimony and after arguments by the
21 attorneys do you recall the period of time where the
22 Judge gave the jury the jury instructions?

23 A. Yes, sir.

24 Q. There's two different things I want to talk to you
25 about on that. First of all, do you have complaints

1 about your lawyer's conduct during the jury instructions?

2 A. Yes, sir.

3 Q. The Judge instructed the jury as to murder; do you
4 recall that?

5 A. Yes, sir.

6 Q. And many other instructions, but was there any
7 instruction as to a lesser included offense of voluntary
8 manslaughter?

9 A. No, sir.

10 Q. Had you discussed that option with Ms. Rogers?

11 A. We talked about the plea.

12 Q. And can you explain that a little more further for
13 the Judge?

14 A. We talked about the manslaughter plea. She talked
15 about the Judge should give the voluntary manslaughter
16 charge to the jury but I don't think the Judge ever did.

17 Q. Two parter. Do you recall Ms. Rogers ever asking
18 the Judge, actively ask the Judge to give that
19 instruction?

20 A. No, sir. She did not.

21 Q. Secondly, do you recall Ms. Rogers objecting to the
22 fact that the Judge did not give that instruction?

23 A. No, sir.

24 Q. There was a second part of the Judge's instructions
25 that you have a complaint about your attorney, correct?

1 A. Yes, sir.

2 Q. What other instruction do you have a complaint
3 about?

4 A. Well, Ms. Rogers failed to object to the trial
5 judge's jury instructions on malice that resulted in the
6 mandatory presumption because the Judge failed to inform
7 te jury that they were free to accept or reject the
8 inferences of malice from use of a deadly weapon based on
9 a consideration of the evidence.

10 Q. That instruction was given by the Court to the
11 jury, correct?

12 A. Yes, sir.

13 Q. Was not asked for by Ms. Rogers?

14 A. No, sir.

15 Q. But it was not objected to by Ms. Rogers?

16 A. No, sir.

17 Q. Let me is you so we get a better response. Did
18 Ms. Rogers object to the instruction on malice the Court
19 gave?

20 A. She did not object.

21 Q. Your Honor, if I could have just a moment.

22 (PAUSE.)

23 Q. Mr. Gethers, as to the grounds that we've already
24 presented to the Court is there any other explanation on
25 any of the grounds that you want the Judge to hear about?

1 A. No, sir.

2 Q. Mr. Gethers, are there any other complaints about
3 Ms. Rogers' performance that we have not yet put on the
4 record that you want the Judge to hear about?

5 A. No, sir.

6 Q. Okay, Mr. Gethers. The Attorney General has some
7 questions for you.

8 THE COURT: Cross?

9 CROSS-EXAMINATION

10 BY MR. MITCHELL:

11 Q. Good afternoon, Mr. Gethers.

12 A. Good afternoon.

13 Q. So Ms. Rogers was your fourth attorney; is that
14 right?

15 A. Yes, sir.

16 Q. Okay. Now, you testified you didn't have a copy of
17 the discovery yourself but, I mean, you had been over
18 that discovery with your previous lawyers, also; is that
19 right?

20 A. Not with Ms. Marva Hardee Thomas but John
21 Witherspoon I did once, and with Ms. Rogers I did once.

22 Q. So she went over it with you as well?

23 A. Yes, sir.

24 Q. You knew the evidence the State was planning to
25 presence though, didn't you?

1 A. A lot of things came up during my trial that I
2 didn't even know because I didn't have time to look over
3 my Rule 5 because I never gotten one.

4 Q. I mean, you knew that Ms. [K.] or Ms. [K.] was
5 possibly going to testify against you, right?

6 A. Yes, sir, I knew.

7 Q. And, I mean, you knew that your fingerprints had
8 been found on the victim's car, right, or truck?

9 A. Yes, sir.

10 Q. And that your DNA matched on the bluetooth headset,
11 right --

12 A. Yes, sir.

13 Q. -- that was found? And that offer that was made,
14 the 20 years, that was voluntary manslaughter, correct?

15 A. Yes, sir.

16 Q. And you still had a chance to accept that just
17 before the trial?

18 A. She told me about it. She told me it was still on
19 the table but the Judge didn't refer that to me or
20 anything like that.

21 Q. But at that point you obviously didn't accept that
22 offer, right?

23 A. I didn't.

24 Q. And that was on advice of counsel?

25 A. Yes, sir.

1 Q. So her advice to you is that you thought you had a
2 chance to beat this case; is that right or --

3 A. Yes, sir.

4 Q. But you wanted to go to trial though, right?

5 A. Yes, sir.

6 Q. That wasn't your defense that it was self defense
7 or anything like that, right?

8 A. Sir?

9 Q. You didn't put up a self defense case or anything
10 like that, did you?

11 A. I never went over that with any of my attorneys.

12 Q. Okay. But you didn't -- you never told your
13 attorney or any of your attorneys that you and the victim
14 had gotten into a fight and that you were acting in self
15 defense, did you?

16 A. No, sir.

17 Q. That wasn't your version of events, was it?

18 A. No, sir.

19 Q. It was kind of your strategy that, you know, you
20 were there at some point but you didn't commit this
21 murder, right?

22 A. Yes, sir.

23 Q. Okay. Because I think you -- I mean, at that point
24 you really didn't deny that you were around the scene at
25 some point, right?

- 1 A. Yes, sir.
- 2 Q. Okay. It was just the strategy that you had noting
3 to do with it, right?
- 4 A. Yes, sir.
- 5 Q. And the part about the statement where the State --
6 in the opening statement when they say something about
7 that you intended to rob the victim, right?
- 8 A. Yes, sir.
- 9 Q. So when they said that that was kind of their --
10 partially their theory of the case?
- 11 A. Yes, sir.
- 12 Q. So it was kind of that you and Ms. [REDACTED] had
13 concocted -- or that you were going go get this money
14 from the victim and that the State's position was that
15 you were going to rob him if he didn't give it to you,
16 right?
- 17 A. Yes, sir.
- 18 Q. Okay. And that's kind of what, you know, the --
19 that's supported a bit by Ms. [REDACTED]; is that right?
- 20 A. No, sir.
- 21 Q. Okay.
- 22 A. She never said anything about robbery.
- 23 Q. Okay. You were just there to get money from him
24 though, right? That was her testimony?
- 25 A. Yes, sir.

1 Q. No further questions. Thank you.

2 THE COURT: Anything on redirect?

3 MR. DAVIS: Just very briefly, Your Honor.

4 REDIRECT EXAMINATION

5 BY MR. DAVIS:

6 Q. Mr. Gethers, in response to the State's
7 questioning, since you did not have a copy of your
8 discovery you said some things -- some unexpected things
9 came up at trial. I think that was your testimony.

10 A. Yes, sir.

11 Q. Can you expand on that a little bit to the Court.
12 What came up unexpectedly because you did not have your
13 Rule 5 to review?

14 A. Veronica's statements. I had heard about her
15 statement but I never got a chance to read her full
16 statement until the day of my trial.

17 Q. So you knew the gist of what she was going to say
18 but not the details?

19 A. Yes, sir.

20 Q. And what specific details that came up at trial
21 were surprising to you?

22 A. Are you taking about in the statement?

23 Q. Well, in the testimony. If you didn't have the
24 statement to review prior to trial, and you didn't,
25 correct?

1 A. Sure.

2 Q. And so some unexpected things came up at trial
3 pertaining to her and her statement. What would those
4 have been?

5 A. Well, she said that she didn't know if I got the
6 money or something like that.

7 Q. All right. Thank you, Mr. Gethers. No other
8 questions.

9 MR. DAVIS: Thank you, Your Honor.

10 THE COURT: All right. Thank you. You can step
11 down.

12 Call your next witness, please.

13 MR. DAVIS: We would call Ms. Rogers, Your Honor.

14 SARA J. MCCLELLAN, after having been duly
15 sworn, testified as follows:

16 DIRECT EXAMINATION

17 BY MR. DAVIS:

18 Q. And forgive me, Ms. Rogers. I spoke with the
19 Attorney General just briefly. I'm probably calling you
20 by the wrong name now; is that correct?

21 A. Yes, sir.

22 Q. Okay. What is your name now?

23 A. McClellan.

24 Q. McClellan?

25 A. Sara McClellan.

1 Q. Can you spell it.

2 A. M-c-C-l-e-l-l-a-n.

3 Q. Thank you. Ms. McClellan, you did represent
4 Mr. Gethers at his trial for the murder charge back in
5 2010?

6 A. Yes, sir.

7 Q. Was it your advice to him to proceed to trial?

8 A. Not exactly. We had several conversations about
9 pleading and ultimately he would repeatedly say he was
10 not pleading to something he did not do.

11 Q. It's accurate that he did not get from you a hard
12 copy of his discovery; is that right?

13 A. To the best of my memory, yes. I was informed that
14 he had been given everything. When I got the case from
15 Mr. Witherspoon I was told that everything was pretty
16 much ready for trial. He just was physically unable to
17 go forward with the trial.

18 Q. And you obtained the case a few months before the
19 trial, correct?

20 A. Probably three, four months.

21 Q. Now, at this time in the fall of 2010, late fall,
22 how many murder cases had you handled up to that point?

23 A. None.

24 Q. How many trials had you handled up to that point?

25 A. Criminal trials or...

1 Q. Yes. I'm sorry. Yes.

2 A. Probably five or six. Not a lot. I was mostly a
3 family court attorney at that point.

4 Q. I think this is clear but the case was with
5 Mr. Witherspoon because of a conflict from the Public
6 Defender's Office; is that your understanding?

7 A. Yes, sir.

8 Q. Then Mr. Witherspoon was incapacitated in some way
9 and you were appointed to take over the case?

10 A. I was not appointed. I was asked by
11 Mr. Witherspoon and one of his associates, and that
12 associate and I went to visit Mr. Gethers in the jail and
13 I was introduced and he was asked if that would be okay,
14 and he said yes. So it was given to me.

15 Q. Okay. Did you at any time request a funding order
16 for an investigator for this murder case?

17 A. I did not. It was already in the file from
18 Mr. Witherspoon's paperwork. He had -- I'm not sure if
19 he received funding or it was done as a favor but there
20 was an investigator that did that.

21 Q. And you worked with the investigator once you came
22 on or that had already been --

23 A. It had already been done.

24 Q. And in the three to four months leading up to the
25 trial you had a couple meetings with Mr. Gethers to

1 prepare for trial?

2 A. Yes, sir.

3 Q. Were you the sole attorney or was there a second
4 chair with you?

5 A. No, sir. It was just me.

6 Q. Did you at any time see the need or did you, in
7 fact, request a continuance for the trial?

8 A. I don't believe so. If I remember correctly he had
9 already waited so long, I want to say five or six years,
10 that he was ready to proceed.

11 Q. Meaning Mr. Gethers?

12 A. Yes. I'm sorry.

13 Q. We have a transcript of the record, of course. Do
14 you recall any in-chambers or off-the-record discussions
15 with the Court about a lesser included instruction of
16 voluntary manslaughter?

17 A. I believe so, yes.

18 Q. And what do you recall about that?

19 A. There was the plea deal. Like I said, he did not
20 want to plead, and in chambers prior to trial it was
21 discussed and ultimately decided that it wasn't going to
22 happen.

23 Q. And when we say it wasn't going to happen, are you
24 meaning taking the plea?

25 A. The lesser charge. The plea for the lesser charge.

1 He had not taken that. So in chambers prior to the trial
2 it was discussed between the State's attorney and myself
3 with the Judge that they were not going to proceed with
4 the lesser charge during the trial basically because he
5 turned down the plea.

6 Q. The State made an offer, he rejected it. The State
7 says, Fine, we are going to prosecute him on a murder not
8 the voluntary --

9 A. Yes, sir.

10 Q. -- is that my understanding?

11 Okay. Fair enough, and I appreciate that. At this
12 time, of course, is pretrial. At that time, were there
13 any discussions about potential jury charges?

14 A. Not at that time. No, sir.

15 Q. But it's clear that any offer from the State on
16 something lower than murder the ship had sailed, correct?

17 A. Yes, sir.

18 Q. All right. During the trial or at the end before
19 jury charge and verdict would there have been any
20 off-the-record or in-chambers discussions about any
21 lesser included charges to the jury?

22 A. Yes. I believe so.

23 Q. And can you explain those to the Court.

24 A. It was discussed as a whole with the jury charges.

25 I had consulted with some other attorneys that had been

1 practicing for a long time, kind of gone over what my
2 requests were going to be in the meeting with the Judge
3 and the State. And ultimately, the jury was instructed
4 on the murder charge, and that was the only thing that
5 the Judge and the State felt were appropriate based on
6 our earlier conversations of A, not charging him with the
7 lesser included during the trial; and B, that nothing in
8 the trial gave rise for that charge of the lesser
9 included offense.

10 Q. Okay. So that was the discussion between the
11 solicitor, yourself, and the Judge in chambers?

12 A. Yes, sir.

13 Q. That was never -- those discussions were never
14 placed on the record?

15 A. To the best of my knowledge, no, sir.

16 Q. And with the Judge indicating that the lesser
17 instruction was not going to be given there was no
18 objection made by you on the record?

19 A. No, sir.

20 Q. And you didn't -- other than those discussions, you
21 didn't, in fact, either file with the clerk of court a
22 proposed jury instruction of voluntary manslaughter. You
23 didn't do that, did you?

24 A. I don't believe so.

25 Q. And you didn't submit it as a court's exhibit, a

1 proposed charge for voluntary manslaughter?

2 A. I don't believe so.

3 Q. This was, again, November of 2010. Were you
4 familiar at that time with the State vs. Belcher case
5 dealing with the instruction on malice?

6 A. I probably read it but I can't tell you with a
7 hundred percent certainty. I no longer practice law so I
8 don't have the file or any of that to see what I had
9 written in my notes.

10 Q. Whether you were familiar with Belcher or not you
11 did not object to the Judge's instruction about inferring
12 malice by the use of a weapon? There was no objection
13 from you on that?

14 A. No, sir.

15 Q. Last thing, and I do want to get to what you just
16 testified to, you no longer practice, correct?

17 A. Yes, sir.

18 Q. There was an order of disbarment from --

19 MR. MITCHELL: Objection, relevance.

20 MR. DAVIS: It goes to the competency, Your Honor.

21 It goes to the very issue we are dealing with which is
22 the presumption that she was effective, so that, I
23 believe, brings this absolutely relevant and doesn't have
24 any tendency to make any fact more or less likely.

25 THE COURT: Well, the Court will take judicial

1 notice of the order from July, I believe, of this year.
2 It's a matter of public record. If there's something
3 specific that you want to inquire with her about as it
4 relates to this case you are free to do so, but the Court
5 can't take judicial notice of her current status and the
6 reasons that she's no longer practicing.

7 MR. DAVIS: Thank you, Your Honor. I'll move on
8 from that.

9 BY MR. DAVIS:

10 Q. You also just testified you no longer have this
11 file; is that correct?

12 A. No, sir.

13 Q. You no longer maintain a law office?

14 A. No, sir.

15 Q. We hadn't talked before your testimony here today?

16 A. No, sir.

17 MR. DAVIS: Your Honor, if I could have just a
18 moment?

19 THE COURT: Certainly.

20 (WHEREUPON, Mr. Davis has a brief conversation
21 privately with the Applicant.)

22 BY MR. DAVIS:

23 Q. Ms. McClellan, that's all the questions I have for
24 you. Thank you.

25 THE COURT: Attorney General?

1 A. Yes, sir.

2 Q. And that you were familiar enough with the --
3 familiar with the facts and with everything the State
4 planned to present at that point?

5 A. Yes, sir. I spent a lot of time with
6 Mr. Witherspoon and one of his assistants or associates
7 that had worked on the case going over things, looking
8 through the case. I spent some time with the solicitor
9 discussing what they had, looking at evidence, and I
10 spent a lot of time with my client going over that
11 evidence.

12 Q. Now, were you here when he testified previously?

13 A. Yes, sir.

14 Q. In his testimony I think he testified he only met
15 with you a couple of times and discussions were kind of
16 bare; is that true?

17 A. No, sir.

18 Q. So when you -- what did you discuss when you met
19 with him leading up to the trial?

20 A. The first time, as I said, that one was probably
21 brief because I was introduced to him and it was asked if
22 it was okay if I represented him or not.

23 The second time I was still going through some of
24 his file. So we discussed pretty much the getting to
25 know you part of it, who he was, what he did in the

1 community.

2 I believe at that point we might have discussed the
3 plea and theories of the case. And the third time we
4 went over evidence, we went over what other people were
5 testifying to, whether or not he would testify, his
6 family would testify, what Ms. K. [REDACTED] was going to say. I
7 also met with his family before the trial.

8 Q. So you reviewed just about everything that the
9 State had planned to present, like including Ms. K. [REDACTED],
10 alleged co-defendant's statement?

11 A. Yes, sir.

12 Q. And if you don't mind, can you give us just a quick
13 factual background -- or summary of what the allegations,
14 what the State hoped to prove at least.

15 A. The State hoped to prove that he and Ms. K. [REDACTED] were
16 basically in on it together. Ms. K. [REDACTED] had lured the
17 victim there with the promise of sex or sexual favors,
18 and asking for money. And Mr. Gethers was going to then
19 rob him instead of sending Ms. K. [REDACTED] out, and the robbery
20 went bad. The victim ended up being shot, and they ran.

21 Q. When you say ran, they went to Virginia and then to
22 New York; is that right?

23 A. Yes, sir.

24 Q. And they were using, I believe, one of Ms. K. [REDACTED]'s
25 friend's cars at that point?

- 1 A. I believe so.
- 2 Q. It wasn't one of their own cars?
- 3 A. No, sir.
- 4 Q. So they fled -- or the State alleged that they fled
5 and they were fleeing because of what happened, right?
- 6 A. Yes, sir.
- 7 Q. And they were then apprehended in New York with
8 fake IDs?
- 9 A. Trying to commit a robbery, yes, sir.
- 10 Q. And then they were extradited down here to face
11 charges of murder, right?
- 12 A. Yes, sir.
- 13 Q. And Ms. K. [REDACTED] was also charged with murder, correct?
- 14 A. I believe so.
- 15 Q. You mentioned that there was an alleged robbery.
16 That was the State's position, that it was a planned type
17 of situation where Mr. Gethers would get the money from
18 the victim as kind of a guise where Ms. K. [REDACTED] had lured
19 him there; is that right?
- 20 A. Yes, sir.
- 21 Q. And that's not said very well. I apologize.
- 22 A. That's okay.
- 23 Q. So in the opening statement the solicitor says --
24 he does mention that Mr. Gethers was there to rob the
25 victim, and you think that had factual support --

1 MR. DAVIS: Objection, Your Honor, calls for
2 speculation.

3 THE COURT: He can ask if it was consistent with
4 what her understanding of the State's theory was.

5 BY MR. MITCHELL:

6 Q. Right. Did that mesh with what you thought the
7 evidence would possibly show?

8 A. Yes, sir.

9 Q. So did you see that comment as objectionable?

10 A. No, sir. And frankly, I felt objecting to it would
11 probably even draw more attention, draw more attention
12 than just letting it go.

13 Q. Just letting it go. Because there could have been
14 some testimony that yeah, you know, he was there to rob
15 the victim, right?

16 A. Yes, sir. If I recall correctly it was in one of
17 Ms. K. [REDACTED]'s letters or statement.

18 Q. There was also some testimony regarding that the
19 Judge thought -- the Judge instructed the jury to seek
20 the truth. Did you see that as objectionable?

21 A. No, sir.

22 Q. So the way the investigation went was NCIC hit in
23 New York when they were arrested, and when I say they,
24 Mr. Gethers and Ms. K. [REDACTED], correct?

25 A. Yes, sir.

1 Q. And then Mr. Gethers' fingerprints were taken and
2 used to match fingerprints taken at the scene; is that
3 right?

4 A. I believe so, yes, sir.

5 Q. And that's also when a mugshot photo was introduced
6 of him. Do you recall that?

7 A. During the trial?

8 Q. Yes, ma'am.

9 A. I believe -- I believe so.

10 Q. So it was kind of part of the investigation how --
11 it kind of showed how step by step --

12 MR. DAVIS: Objection, Your Honor, leading.

13 THE COURT: Overruled.

14 BY MR. MITCHELL:

15 Q. It was part that the investigators were putting
16 this together and that's kind of how they were presenting
17 the case. Do you agree with that?

18 A. Yes, sir. The testimony was -- of that particular
19 officer, if I recall, was talking about how we got to
20 this point.

21 Q. It was kind of a step by step, like first we did
22 this, then we checked out the video at the convenience
23 store --

24 A. Yes, sir.

25 Q. -- etcetera?

1 All right. There's also testimony about a
2 voluntary manslaughter charge. Now, I know there was
3 some negotiations as far as pleading guilty to voluntary
4 manslaughter but was there any evidence to support a
5 voluntary manslaughter charge, in your opinion?

6 A. No, sir.

7 Q. And let's talk about that a little bit. Your
8 theory of the case wasn't that there was a fight and
9 that, you know, he accidentally killed the victim. It
10 was just that it was not Mr. Gethers, right?

11 A. Yes, sir.

12 Q. So, you know, and kind of each witness you
13 cross-examined you went through and asked about the
14 background of the area and the apartment complex, right?

15 A. Yes, sir.

16 Q. Why did you do that?

17 A. is a bad area. It's a high crime area;
18 murders, shootings, robberies, stuff like that happens
19 every day.

20 Q. So there was testimony from lay witnesses and law
21 enforcement -- well, they are also lay witnesses, but law
22 enforcement and other witnesses that it was a violent
23 area and that it was not unusual to have -- hear gunshots
24 or have violent events happen, right?

25 A. Yes, sir.

1 Q. Okay. And there was even a shell casing found
2 right near the murder scene that had nothing to do with
3 the crime; is that correct?

4 A. Yes, sir.

5 Q. As far as the Belcher instruction goes, was there
6 any evidence presented to mitigate the murder or -- I
7 mean, it really was -- the defense was that Mr. Gethers
8 did not -- was not involved with this killing, right?

9 A. Yes, sir. The basic defense or theory was that he
10 might have been a drug dealer but that didn't make him a
11 murder, and that this victim was one of his major clients
12 and he wouldn't have taken money out of his pocket like
13 that.

14 Q. Okay.

15 A. So there was no evidence at all about, like, maybe
16 there was a fight or maybe -- there was nothing to
17 mitigate presented.

18 MR. MITCHELL: One second, Your Honor.

19 THE COURT: Yes, sir.

20 (PAUSE.)

21 BY MR. MITCHELL:

22 Q. There was really no other evidence tying him to the
23 murder. I mean, there may have been evidence that he
24 came in contact with the victim, correct?

25 A. Yes, sir. There was no smoking gun so-to-speak.

1 Q. Literally and figuratively.

2 A. Yeah.

3 Q. So there never was a murder weapon recovered,
4 right?

5 A. No, sir.

6 Q. And Ms. K. [REDACTED] was kind of supposed to be the State's
7 star witness?

8 A. Yes, sir.

9 Q. And she was not quite cooperative with the State
10 while she testified, correct?

11 A. No, sir.

12 Q. I think she even denied making a statement to law
13 enforcement completely?

14 A. Yes, sir.

15 Q. So her testimony -- I'll withdraw that. Excuse me.
16 I believe that's all the questions I have. Thank you.

17 THE COURT: Redirect?

18 MR. DAVIS: Thank you, Your Honor.

19 REDIRECT EXAMINATION

20 BY MR. DAVIS:

21 Q. Let's start there at the end. Do you recall that
22 there was evidence and testimony that a witness heard
23 what they believed was a heated argument? Do you recall
24 that?

25 A. No, sir.

1 Q. One of the apartment renters or homeowners?

2 A. No, sir, but if it's in the transcript then
3 obviously it happened.

4 Q. Do you recall evidence and/or testimony of the fact
5 -- I'm sorry. Let me go back. It was your understanding
6 that one connection between Mr. Gethers and the victim
7 was through other illegal activity; is that fair enough?

8 A. Yes, sir.

9 Q. There was evidence in the record and/or testified
10 to that there was money owed from the victim to
11 Mr. Gethers for drugs previously?

12 A. Yes, sir.

13 Q. During any of your discussions with Mr. Gethers did
14 you explain to him that this would be your first murder
15 trial?

16 A. Yes, sir. I believe either during that first
17 meeting when I was introduced to him --

18 Q. But --

19 A. -- or second one. It was fairly early on.

20 Q. But to be clear, you were not appointed on this
21 case, correct?

22 A. No, sir.

23 Q. Mr. Gethers nor his family hired you directly,
24 correct?

25 A. No, sir.

1 Q. Simply, Mr. Witherspoon because of his condition
2 asked you to step in, take over, correct?

3 A. Yes, sir.

4 Q. And that information was presented to Mr. Gethers
5 at the jail one of the early meetings with him; is that
6 fair?

7 A. Yes, sir, and he was given that option.

8 (WHEREUPON, Mr. Davis has a brief conversation
9 privately with the Applicant.)

10 MR. DAVIS: Thank you, Ms. McClellan. No other
11 questions.

12 Thank you, Your Honor.

13 THE COURT: Nothing from you?

14 MR. MITCHELL: Nothing from the State.

15 EXAMINATION

16 BY THE COURT:

17 Q. Just a couple of points of clarification by me, if
18 you don't mind. There was reference made to a mugshot
19 photo of the defendant being introduced into evidence for
20 purposes of identification.

21 First of all, expand a little bit, if you could,
22 why the State was seeking its introduction. And second
23 of all, because I don't have that photo with me and I
24 don't think it's a part of the record, but was the
25 photograph itself modified in any way so as to minimize

1 any suggestion that it was a mugshot? Can you kind of
2 take those two things and address those for me, please?

3 A. The State was discussing the mugshot in its
4 presentation of how they came to associate Mr. Gethers
5 with this crime and how they got him back to South
6 Carolina, and I do not recall if it was altered.

7 Q. All right. So the mugshot was one of the methods
8 that the police used to identify him, positively identify
9 him when he was apprehended in New York or that's one of
10 the items that they used to initially identify him and
11 make him a suspect down here and then -- or both?

12 A. I believe both.

13 THE COURT: Okay. All right. Follow up based on
14 my questions from the applicant?

15 MR. DAVIS: One moment, Your Honor. I don't
16 believe so but if you'll give me a moment.

17 THE COURT: Sure.

18 (PAUSE.)

19 BY THE COURT:

20 Q. Let me ask you this. This was, I believe, a
21 Dorchester case. Do you know if the mugshots taken at
22 that particular point in time, were they taken with a
23 person just being in orange or were they draped like they
24 are doing now with kind of the black turtleneck, for lack
25 of a better word, that's sort of...

1 A. No, sir. I believe it would have been just a
2 regular prisoner type --

3 Q. Regular orange-type thing?

4 A. Or stripes. One or the other.

5 THE COURT: Okay.

6 MR. DAVIS: And, Your Honor, give me just one
7 moment. We have one issue.

8 THE COURT: All right. Go ahead.

9 While he's looking, do you have any follow-up
10 questions of her?

11 MR. MITCHELL: I do not, Your Honor.

12 FURTHER REDIRECT EXAMINATION

13 BY MR. DAVIS:

14 Q. Ms. McClellan, do you recall that that -- the
15 exhibit, just for the record, again, thankfully my client
16 has pointed me out to page 324, I think is when it is.
17 At the bottom of 24, State's Exhibit 41, it's a mugshot.
18 They describe it as mugshot photo, booking date 5-11-07.
19 So that exhibit. Do you recall it having two photographs
20 on it, a front-facing and side-facing photograph? Do you
21 recall that?

22 A. No, sir.

23 Q. But there's no dispute that the arrest from which
24 that photo was derived was unrelated to this incident?

25 A. No. Yeah.

1 Q. They were separate?

2 A. They were separate. Yes. They were separate
3 incidents.

4 Q. By a few years?

5 A. Yes.

6 MR. DAVIS: Thank you, Your Honor.

7 MR. MITCHELL: Nothing further.

8 THE COURT: Ms. McClellan, thank you very much for
9 coming. You can step down.

10 Any additional witnesses?

11 MR. MITCHELL: The State has no witnesses.

12 MR. DAVIS: Your Honor, we'd ask to call

13 Mr. Gethers to that one issue, the mugshot issue only.

14 THE COURT: All right. You can come on up. You
15 are still under oath, of course, Mr. Gethers.

16 DIRECT EXAMINATION

17 BY MR. DAVIS:

18 Q. Mr. Gethers, as to the issue we are taking about,
19 the mugshot exhibit that was admitted into evidence in
20 your trial, okay?

21 A. Yes, sir.

22 Q. Do you recall reviewing that photograph -- or that
23 exhibit?

24 A. Yes, sir.

25 Q. On that exhibit that was admitted -- first of all,

1 was it a picture of you?

2 A. Yes, sir.

3 MR. MITCHELL: Objection. The record speaks for
4 itself.

5 THE COURT: Fair enough. I don't have the record
6 though, so go ahead.

7 BY MR. DAVIS:

8 Q. On that exhibit --

9 THE COURT: Or that exhibit. I don't have the
10 exhibit. I got the record.

11 Q. -- with the photo of you, was it a single photo or
12 more than one photo?

13 A. No. It was the typical photo mugshot, photo one
14 view in frontwards and one sideways.

15 Q. Okay. So two photos on the same exhibit?

16 A. Yes, sir.

17 Q. Thank you, Mr. Gethers. No other questions.

18 MR. DAVIS: Thank you, Your Honor.

19 THE COURT: No follow-up based on that?

20 MR. MITCHELL: No further questions.

21 THE COURT: Thank you, sir.

22 MR. DAVIS: And that would be the applicant's
23 presentation, Your Honor.

24 THE COURT: All right. Very good. I do have a
25 good feel for the situation. I need look at Belcher a

1 second time but certainly if you all want to highlight
2 anything or give me any particular argument that would be
3 fine.

4 Attorney General, if you happen to have a copy of
5 that photograph, I'm sure it's in the record somewhere,
6 maybe not in your possession but if it would be possible
7 to perhaps scan that and maybe make that a part of the
8 record at a later point in time, if possible, and let me
9 look at it.

10 But anything that you all want to point out or
11 argue to me at this point, Gentlemen?

12 MR. DAVIS: Judge, if I may just briefly, I'm not
13 going belabor. Basically, we had five main points; the
14 Court's instruction, search for the truth, the State's
15 opening talking about robbery an unchartered offense, the
16 mugshot admission, no request for voluntary manslaughter
17 as a lesser included, and then no objection to malice.
18 I'm not going to belabor those.

19 One thing I do want to highlight, Your Honor, if I
20 can find it, that during -- the plaintiff testified that
21 some things unexpected came up at trial, that had he had
22 full discovery, that had there been more meaningful and
23 frequent meetings with Ms. McClellan he would have been
24 more prepared.

25 One of the issues that I want to just make a

1 connection, I'm not sure it's clear from the testimony,
2 he did not have his co-defendant's statement to review
3 prior to trial. It was in discovery but he did not have
4 it. At trial there's testimony where she said she's not
5 sure whether he got money or not.

6 Now, the reason I want to highlight that is that is
7 something the State -- even reviewing in the transcript,
8 the State at the end connected her knowledge that the
9 perpetrator -- and the co-defendant alleged, of course,
10 Mr. Gethers did not obtain any money and then money was
11 found on the body of the victim, was crucial.

12 So at first blush, the fact that he didn't have
13 that to review, and first blush the statement she's not
14 sure if he got the money may seem like a throwaway line.
15 The State connected that quite precisely in closing.

16 Now, I will confess to the Court, I don't believe
17 that is the one and sole argument we have that would
18 cause a jury to return a different verdict, but I just
19 want to make that factual causal connection there that
20 that's why that is relevant.

21 In summary, there are errors here by counsel that
22 do rise to the level of ineffectiveness. I'll not
23 enumerate them. You paid close attention, you have the
24 transcript, you've taken judicial notice of
25 Ms. McClellan's current status, and those fundamental

1 failures as to the process of the trial and instructions
2 to the jury at the end of the trial we have shown that
3 that would have to a reasonable jury cause the outcome to
4 be different.

5 I would argue that certainly if the Court is
6 impressed that the verdict of guilt was the wrong verdict
7 then we've met our burden, but even if we have shown that
8 there is significant reasonable doubt that a unanimous
9 verdict would not have been rendered that would have
10 changed the outcome as well.

11 A mistrial, hung jury certainly does not acquit my
12 client but is a different outcome than a conviction on a
13 murder charge. For all those reasons, Your Honor, we
14 respectfully submit that we have presented sufficient
15 evidence to jump both hurdles of Strickland and we would
16 ask for relief in this case to overturn the conviction.
17 Thank you, Your Honor.

18 THE COURT: Thank you.

19 Anything, Attorney General?

20 MR. MITCHELL: Judge, I'll just start with the
21 opening argument. I think there was evidence to support
22 that there was a plan to rob the victim in place. I
23 don't think that's -- there's no deficiency there because
24 I think the record ended up supporting that.

25 As the testimony came out, as far as Judge

1 Goodstein's comments that the jury is there to seek the
2 truth, I don't see any problem with that in any way at
3 all. I see that in the transcripts all the time.

4 As far as the mugshot goes, I think that that
5 really was just part of the State's case in proving how
6 they identified Mr. Gethers. It was kind of how they
7 puzzled the entire case together on that. And it was
8 admitted, and I note that on 324 and 325 there's a
9 mention to -- it's admitted subject to a condition, and
10 we don't see what that condition is. And that may be
11 kind of what she was getting at with whether there was
12 some kind of modification to where it would just be a
13 picture and not an actual mugshot with a jail suit.

14 THE COURT: That's why I'm kind of curious as to
15 what actually went back to the jury, and I don't know
16 that any of the attorneys involved in this action or the
17 Court involved in this action really understands that.
18 It's a digital image. That can be manipulated in a
19 thousand different ways to minimize any sort of
20 prejudice, and so I saw that and that's kind of why I
21 threw that out there and that's kind of why I'm still
22 curious as to what that photo looks like, not that that's
23 particularly damning to either case.

24 MR. MITCHELL: As far as the voluntary
25 manslaughter, I don't think there's any -- there was no

1 evidence to support that kind of charge. There was no
2 evidence that there was a sudden heat of passion or
3 there's provocation, anything like that. I mean, I think
4 the defense that was put up was that it was not me, I was
5 not there when this happened. I was there maybe at some
6 point, that's why some of my stuff was there, but it's
7 not that, you know, we were in a fight. This justifies,
8 you know, my actions here. There was no evidence in
9 support of the charge for voluntary manslaughter.

10 I think as far as Belcher goes it's kind of on the
11 same ring there. Belcher, that instruction is still
12 proper but -- I'll read it to you exactly. The implied
13 malice instruction has no place in a murder case where in
14 a prosecution where evidence is presented that would
15 reduce, mitigate or excuse or justify the killing.

16 I don't think there's any evidence presented that
17 would reduce, mitigate or justify the killing. That
18 wasn't the defense. The defense was I was not there.
19 There was nothing presented to -- it just goes right
20 along with the voluntary bit, I think, nothing to reduce
21 that charge or mitigate an altercation when you deny the
22 altercation ever happened.

23 And I think as far as he argued failure to preserve
24 the voluntary manslaughter charge for appeal, I don't
25 think that would be meritorious on appeal for the same

1 reasons. I don't think it was -- you know, would be
2 properly admitted -- or properly given to the jury. And
3 I think that's all I have. Thank you, Judge.

4 MR. DAVIS: Your Honor, if I may just to that.
5 Every element must be proved on the murder. On a self
6 defense claim, which was not presented here, and that's
7 clear from today's testimony, the client would have had
8 to testify to set up a defense. However, if there's
9 evidence in the record that malice was lacking, and I
10 would argue that the Court could and should have given
11 voluntary manslaughter, and the defense attorney could
12 and should have argued for it and objected that it was
13 absent from the charge.

14 In common parliaments it's the compromised verdict.
15 Guilty of murder, not guilty, or the compromised verdict.
16 It is appropriate and does not require the defense to
17 present evidence if the State is failing in evidence on
18 the malice. I would argue that that's where it would
19 come in play. Thank you, Your Honor.

20 THE COURT: Very good.

21 Gentlemen, thank you very much. As usual, I will
22 take it under advisement. There are portions of this
23 transcript I have not read so allow me at least -- I've
24 been promising everybody else that you'll have a Form 4
25 by the end of week. This one may take a bit longer,

1 okay, just because the transcript is rather long. So
2 bear with me. If you don't hear from me within two weeks
3 somebody send me a reminder, but I generally try and have
4 these things resolved as quickly as possible. Okay?
5 Very good.

6 MR. MITCHELL: Thank you.

7 (WHEREUPON, the hearing was concluded.)

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1 C E R T I F I C A T E

2

3 I, Sharon L. Vizer, Official Court Reporter for the
4 First Judicial Circuit of the State of South Carolina, do
5 hereby certify that the foregoing is a true, accurate and
6 complete transcript of record of all the proceedings had
7 and the evidence introduced in the hearing of the
8 captioned case in Circuit Court on the 28th day of
9 October 2015.

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

12

13 April 11, 2016

14 s/Sharon L. Vizer

15 SHARON L. VIZER

16 CIRCUIT COURT REPORTER

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STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER

Trenee Gethers, #343706,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

2014-CP-18-01287

ORDER OF DISMISSAL

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RECORDED
CLERK OF COURT
DORCHESTER COUNTY

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed July 3, 2014. Respondent filed a Return on February 26, 2015, requesting an evidentiary hearing be convened. Rodney D. Davis was appointed by the Dorchester Clerk of Court. An evidentiary hearing was held on October 28, 2015, at the Dorchester County Courthouse. Applicant was represented by Mr. Davis. Respondent was represented by J. Clayton Mitchell, Esquire, of the South Carolina Attorney General's Office.

At the PCR hearing, Applicant testified on his own behalf. Also testifying were Applicant's trial counsel Sara Jayne McClellan¹, Esquire. This Court had before it the Dorchester County Clerk of Court records, Applicant's South Carolina Department of Corrections records, appellate records, the PCR application, the Return, the appellate records, and the transcript.

I. PROCEDURAL HISTORY

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Dorchester County Clerk of Court's orders of commitment. The Dorchester County Grand Jury indicted the Applicant at the December 2007 term of General Sessions for Murder (2007-GS-18-1755). Ms. McClellan represented Applicant. The State called Applicant's case for trial

¹ Formerly Ms. Sara Jayne Rogers.



before the Honorable Diane S. Goodstein where he was found guilty. On November 19, 2010, Judge Goodstein sentenced Applicant to forty-five (45) years imprisonment.

A notice of appeal was filed at the South Carolina Court of Appeals. Elizabeth A. Franklin-Best, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal. The Court of Appeals affirmed Applicant's conviction and sentence on October 24, 2010. State v. Gethers, Op. No. 20120-UP-576 (S.C. Ct. App. filed October 24, 2012). Applicant's writ of certiorari to the South Carolina Supreme court was denied on May 7, 2014. Remittitur was sent on May 15, 2014.

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

- I. Ineffective assistance of trial counsel in:
 - a. Failing to object to Judge Goodstein's opening instruction;
 - b. Failing to object the solicitor's comments regarding robbery as a motive despite the fact that Applicant was not indicted for robbery;
 - c. Failing to object to the admission of Applicant's booking photo; and
 - d. Failing to request a voluntary manslaughter charge.

II. APPLICABLE LAW

In a post-conviction relief action, Applicant bears the burden of proving the allegations in the application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel

rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, Applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the Clerk of Court records regarding the subject convictions, the transcript, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

As a matter of general impression, this Court finds Applicant's testimony and assertions to be not credible. In contrast, this Court finds Counsel's testimony to be credible. These credibility findings have been applied to the Court's findings and conclusions set forth below.

Ineffective Assistance of Trial Counsel

Failure to Object to Judge Goodstein's Comments

First, Applicant alleges Counsel was ineffective in failing to object to Judge Goodstein's opening comments to the jury. He alleges that the comments were inappropriate and prejudicial. When speaking to the jury before the trial began, Judge Goodstein explained the trial's procedure and cautioned jurors to temper any expectations:

It is a – and it may be the – fundamental part of democracy, a search for the truth in an effort to make sure that justice is done between the State and Mr. Gethers. Searching for the truth and making sure that justice is done is often slow, deliberative, and repetitive, the opposite no doubt of what you may have seen on television, read about in books, or perhaps in movies.

(Trial Tr. p. 122, lines 11-18). Applicant argues the "search for the truth" portion is inappropriate and that an objection should have been made.

This Court finds Counsel's failure to object was not erroneous. Counsel credibly testified that she did not find the statements objectionable. These remarks are part of the standard opening instructions for many judges, and Judge Goodstein's opening remarks are not an instruction on the law. Additionally, because Judge Goodstein properly instructed the jury on the burden and standard of proof at the close of the case, any error was clearly harmless and did not affect the result.

Solicitor's Comments Regarding Robbery

Applicant alleges Counsel was ineffective for failing to object to the solicitor discussing robbery as a motive for the murder when Applicant was not indicted for robbery. During opening statements the solicitor stated:

Ladies and gentleman of the jury, September 17, 2007, the victim in that case, Mr. Robert Earl Robinson, lost his life to that man sitting right over there at the defense table in his attempt to rob Mr. Robinson of a few dollars. And what did he get from it? Not one red cent.

(Trial Tr. p. 131, line 12-18). Applicant argues that since he was not charged with robbery that the State could not claim that he robbed the victim.

This Court finds Applicant has failed to meet his burden in proving Counsel was ineffective. Robbery was part of the *res gestae* of the crime, and the solicitor was permitted to argue the State's theory of the case. See State v. King, 334 S.C. 504, 512, 514 S.E.2d 578, 582 (1999) ("The *res gestae* theory recognizes evidence of other bad acts may be an integral part of the crime with which the defendant is charged, or may be needed to aid the fact finder in understanding the context in which the crime occurred."). These comments would also be admissible under Rule 404(b) of the South Carolina Rules of Evidence which allows prior bad act evidence to be presented to the jury if offered to show motive. Accordingly, trial counsel was not ineffective for failing to object. Applicant has failed to present any credible evidence to show how the result of the trial would have been different if an objection had been made. This allegation is denied and dismissed.

Applicant's Booking Photo

Applicant also alleges Counsel was ineffective for failing to object Applicant's booking photo being offered as evidence. A booking photo of Applicant was admitted during the testimony of Javon Wright, a Charleston County Detention Center employee. (Trial Tr. p. 324, line 15 – p. 325, line 16).

This Court finds the booking photo was offered in a relevant line of questioning. See (Trial Tr. p. 323-26). Testimony was elicited concerning prints lifted from the automobile where the victim was found murdered. Applicant was identified based upon an earlier set of case prints (State's Exhibit 40) taken from that earlier arrest. The booking photo tied those prints to Applicant. Counsel testified credibly to this effect and agreed that the photo was admitted to

show how law enforcement identified Applicant as a suspect in the murder. Accordingly, the photo was introduced for identification purposes. Applicant has failed to prove Counsel was ineffective in failing to object. Applicant has also failed to prove that if an objection had been made, that it would have been successful and would have changed the result of the trial. This allegation is denied and dismissed.

Jury Charges

Finally, Applicant alleges Counsel was ineffective in failing to request a voluntary manslaughter charge and for failing to object to the inference of malice from the use of a deadly weapon instruction.

This Court finds no evidence existed to warrant a voluntary manslaughter charge. A judge is only required to charge a jury on a lesser-included offense if evidence exists that suggests that the lesser, rather than the greater, crime was committed. State v. Gourdine, 322 S.C. 396, 398, 472 S.E.2d 241, 242 (1996). There must be evidence that the defendant committed the lesser-included offense to entitle him to a jury charge on the offense. State v. Mathis, 287 S.C. 589, 594, 340 S.E.2d 538, 541 (1986). No evidence existed to show a sufficient legal provocation or a sudden heat of passion. See State v. Locklair, 341 S.C. 352, 360, 535 S.E.2d 420, 424 (2000) ("Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation."). Therefore, Counsel was not ineffective for failing to request such an instruction.

This Court also finds Applicant failed to meet his burden in proving Counsel was ineffective in failing to object to the jury instruction regarding the inference of malice from the use of a deadly weapon. Belcher held that the "use of a deadly weapon" implied malice instruction was no longer proper where evidence is presented that "would reduce, mitigate,

excuse or justify the killing (or the alleged assault and battery with intent to kill)." State v. Belcher, 385 S.C. 597, 610, 685 S.E.2d 802, 809 (2009). This Court finds this instruction was a correct statement of law in light of the absence of evidence tending to reduce the homicide from a murder to a lesser degree of manslaughter. Counsel's testimony that she did not request the lesser included charge because no evidence was presented to support it and because it was inconsistent with their defense of mere presence is both credible and persuasive. Accordingly, Counsel was not ineffective for not requesting a voluntary instruction or for not objecting to the inference of malice instruction.

As a final matter, Counsel Davis notes that Counsel was disbarred in July 2015. The Court has reviewed the order of our Supreme Court, and the Court finds nothing in the order indicating a pattern of inadequate representation of clients at trial. Accordingly, the Court finds that Applicant has failed to demonstrate any causal link between Counsel's professional disciplinary history and the alleged deficiencies of representations at trial. Accordingly, the Court finds Applicant has failed to meet his burden of demonstrating Counsel's representation fell below professional norms. Applicant has also failed to prove any resulting prejudice that would entitle him to relief.

All Other Allegations

As to any and all allegations that were raised in this matter and not specifically addressed in this order, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

IV. CONCLUSION

Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application.



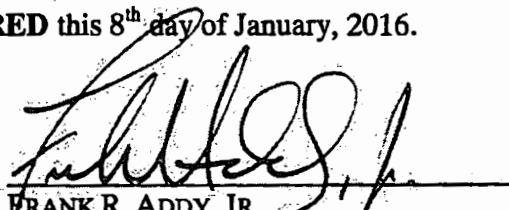
Applicant failed to demonstrate counsels' performance was unreasonable under prevailing professional norms. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625; Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009). Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 8th day of January, 2016.


FRANK R. ADDY, JR.
Presiding Judge

Greenwood, South Carolina

WITNESSES

Garrison, John

DCSO

Agency Case #: 07009049

ARREST WARRANT NUMBER

K269291

Arrested: Oct 02, 2007

ACTION OF GRAND JURY

TRUE BILL

DATE 11-29-07

representer of Grand Jury
date: November 29, 2007

VERDICT

DOCKET NO. 2007GS18-1755

The State of South Carolina

County of

DORCHESTER

COURT OF GENERAL SESSIONS

December 03, 2007 TERM

THE STATE

vs.

Treveen J. Gethers

Indictment for

MURDER

SC Code: 16-03-10 / 16-03-20

Class: FEL-X

After being fully advised as to my legal rights, I
hereby waive presentment to the Grand Jury.

Defendant

I
hereby appear in my own proper person and
plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

CLERK OF COURT
DORCHESTER COUNTY

2010 NOV 24 AM 11:08

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CHERYL

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representer of Petit Jury
date:

STATE OF SOUTH CAROLINA) 2011 MAR -2 PM 12: 19 INDICTMENT
COUNTY OF DORCHESTER) 2007GS18-1755

At a Court of General Sessions, convened on December 03, 2007 the Grand
Jurors of Dorchester County present upon their oath:

MURDER

The defendant, Trevee J. Gethers, did in Dorchester County on or about September 17, 2007, with malice aforethought, kill one Robert Earl Robinson by means of shooting the victim, and the said victim did die as a proximate result thereof, this being in violation of section 16-3-10 of the South Carolina Code of Laws, as amended and the common law of South Carolina.

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



Donald Sorenson, Solicitor

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Dorchester County

Frank R. Addy, Circuit Court Judge

RECEIVED

JUN - 9 2016

SC SUPREME COURT

TREVEE GETHERS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-000284

PETITION FOR WRIT OF CERTIORARI

LARA M. CAUDY
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER

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1.

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to object to the admission of Petitioner's mugshot from his prior arrest approximately four months before the murder where no demonstrable need of the mugshot was established, the mugshot plainly suggested to the jury that Petitioner had a prior record, and the origin of the mugshot was clear as it stated "Charleston County Sheriff's Office Detention Center" at the top of the photograph and listed the "booking date."

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2.

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to object to the trial court's opening instruction to the jury that the trial was a "search for the truth in an effort to make sure that justice is done" since this instruction was fundamentally incorrect, was burden shifting, and misdirected the jury's inquiry from the beginning of the trial forward from the correct legal question of whether the state had proved Petitioner's guilt beyond a reasonable doubt.

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ISSUES PRESENTED

1.

Whether Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to object to the admission of Petitioner's mugshot from his prior arrest approximately four months before the murder where no demonstrable need of the mugshot was established, the mugshot plainly suggested to the jury that Petitioner had a prior record, and the origin of the mugshot was clear as it stated "Charleston County Sheriff's Office Detention Center" at the top of the photograph and listed the "booking date?"

2.

Whether Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to object to the trial court's opening instruction to the jury that the trial was a "search for the truth in an effort to make sure that justice is done" since this instruction was fundamentally incorrect, was burden shifting, and misdirected the jury's inquiry from the beginning of the trial forward from the correct legal question of whether the state had proved Petitioner's guilt beyond a reasonable doubt?

STATEMENT

Procedural History

A Dorchester County Grand Jury indicted Petitioner at the December 3, 2007 term of the Court of General Sessions for the offense of murder. App. 710-711. His case was called to trial on November 15, 2010 before the Honorable Diane Schafer Goodstein, and a jury. App. 1. Assistant Solicitors Russell Hilton and Harrison Bell represented the state, and Sara Jayne Rogers¹ represented Petitioner. App. 1. On November 19, 2010, the jury found Petitioner guilty. App. 501, ll. 3-12. He was sentenced by Judge Goodstein to forty-five years imprisonment. App. 520, l. 25 – 521, l. 2.

The Court of Appeals affirmed Petitioner's conviction and sentence. State v. Gethers, 2012-UP-576 (S.C. Ct. App. Filed October 24, 2012); App. 567-568. This Court denied the petition for writ of certiorari to review the Court of Appeals' decision. App. 617. William Edgar Salter represented the state, and Elizabeth Franklin-Best represented Appellant.

On July 3, 2014, Petitioner filed an application for post-conviction relief (PCR) raising the issues argued in this petition. App. 618-642. The state filed a return to this application dated February 24, 2015. App. 643-647. The matter proceeded to an evidentiary hearing on October 28, 2015 before the Honorable Frank R. Addy, Jr. App. 648. Assistant Attorney General J. Clayton Mitchell represented the state, and Rodney D. Davis represented Petitioner. App. 648. By order dated January 8, 2016, Judge Addy denied Petitioner relief. App. 702-709.

This petition for writ of certiorari follows.

¹ Rogers was placed on interim suspension by this Court in December 2011 and later disbarred from the practice of law in July 2015 for professional misconduct involving dishonesty, fraud, deceit, and misrepresentation, among other improper conduct, including failing to keep client funds safe. In re Rogers, 413 S.C. 187, 775 S.E.2d 387 (2015). She had only practiced law for three years before being suspended.

Facts at Trial

The state alleged at trial that Petitioner shot and killed Robert Earl Robinson during an attempted armed robbery in the parking lot of an apartment complex in Summerville. The evidence against Petitioner was mostly circumstantial.

Around 9:30 pm on September 17, 2007, the decedent met his son at a gas station and borrowed two hundred dollars. He told his son “he had to make a little run” and then left. App. 218, l. 12 – 220, l. 9. Minutes before 11:00 pm, dispatch received several 911 calls from residents at the Oak Haven Apartments in Summerville, who reported shots fired in the area. When officers with the Dorchester County Sheriff’s Office responded, they found a Toyota Sequoia parked in the middle of “the lane of travel” of the parking lot with the engine running. The decedent was sitting in the front seat slumped over. He was not breathing. App. 155, l. 1 – 156, l. 16; App. 161, ll. 3-20; App. 278, ll. 6-12. It was later determined that he died from a single gunshot wound to his right arm that entered his chest and struck both lungs and his heart. App. 312, ll. 4-14.

During its investigation, law enforcement discovered the decedent had exchanged numerous telephone calls shortly before his death with a fourteen year old named Veronica, who was a family friend of the decedent. The police also discovered that during this same time period, Veronica had been communicating by telephone with Petitioner. App. 279, l. 18 – 280, l. 16; App. 283, l. 2 – 284, l. 10; App. 286, l. 24 – 287, l. 2; App. 377, l. 16 – 384, l. 8.

While processing the scene, investigators collected a “Bluetooth headset” that was lying in the middle of the road about fifty feet from the Toyota Sequoia. App. 170, ll. 8-19; App. 171, ll. 19-23. They also lifted numerous latent prints from the outside of the decedent’s vehicle. App. 175, ll. 14-19. A latent fingerprint examiner with the South Carolina Law Enforcement Division (SLED) determined that several of these prints belonged to Petitioner. App. 345, l. 11 – 350, l. 7.

On September 22, 2007, Petitioner and Veronica were located in New York City. Both allegedly presented a “fake ID” when questioned by officers with the New York Police Department (NYPD). After their identification was confirmed, they were returned to South Carolina where they were charged with murder. App. 290, ll. 2-24. On March 9, 2009, Veronica and her attorney met with investigators at the Dorchester County Sheriff’s Office. App. 291, l. 7 – 292, l. 10; App. 302, ll. 10-18. She ultimately gave a written statement after the state agreed to keep her case under the jurisdiction of the Family Court. App. 374, ll. 7-11.

In her statement, Veronica allegedly said she called the decedent on September 17, 2007 and asked for money. The decedent agreed to bring her money, but said he would not do so “without getting some.” Veronica claimed she told Petitioner “to get the money because [she] didn’t want to mess with Mr. Earl [the decedent].” In her statement, she said she told Petitioner the decedent was driving a Toyota Sequoia. Afterwards, she allegedly asked Petitioner “if he got the money, and he said no.” Petitioner said the decedent “wouldn’t give him the money.” Veronica claimed in the statement that she did not know Petitioner shot the decedent, but the next day Petitioner allegedly said “we had to go because he got in some stuff.” They ultimately travelled to Virginia by car and then to New York by bus. App. 299, l. 2 – 300, l. 23.

Veronica disavowed most of this statement during her testimony at trial. She admitted she spoke with the decedent by telephone on September 17, 2007 and asked him to bring her money. She said the decedent agreed to bring her money and “was planning to have sex with [her] later on that night.” However, when she called to arrange where they were going to meet and give him directions, the decedent “stopped picking up the phone, so [she] just thought he was lying about bringing [her] the money.” App. 247, l. 3 – 250, l. 9.

Veronica testified that she told Petitioner she “needed him to go pick up money for me” because she “didn’t want to have sex with him [the decedent],” but Petitioner told her “he was going to have to call [her] back because he wasn’t sure if he was going to do that.” She said she “never told him [Petitioner] where to go” since he said he was busy. App. 250, l. 19 – 252, l. 3. She also never told Petitioner the decedent was driving a Toyota Sequoia. After the decedent stopped responding and Petitioner said he was busy, Veronica “just left it alone.” App. 250, ll. 6-9; App. 251, l. 22 – 252, l. 3.

Pursuant to a search warrant, law enforcement collected a buccal swab from Petitioner on September 2, 2010 so it could compare his DNA to evidence collected at the scene. This swab was sent to SLED. App. 187, l. 4 – 188, l. 13. A DNA analyst at SLED determined that DNA lifted from the “Bluetooth headset” found near the decedent’s vehicle matched the DNA profile of Petitioner. App. 425, l. 6 – 428, l. 15.

The jury ultimately convicted Petitioner of murder. App. 501, ll. 3-12. He was sentenced by Judge Goodstein to forty-five years imprisonment. App. 520, l. 25 – 521, l. 2.

ARGUMENT

1.

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to object to the admission of Petitioner's mugshot from his prior arrest approximately four months before the murder where no demonstrable need of the mugshot was established, the mugshot plainly suggested to the jury that Petitioner had a prior record, and the origin of the mugshot was clear as it stated "Charleston County Sheriff's Office Detention Center" at the top of the photograph and listed the "booking date."

Relevant Facts

During the middle of trial, Investigator John Garrison with the Dorchester County Sheriff's Office testified "that the latent prints that had been located on the [outside] passenger side of the Sequoia [the decedent's vehicle] came back to the defendant [Petitioner]." App. 287, ll. 15-17. He said this fact was used by law enforcement to obtain an arrest warrant for Petitioner for murder. App. 286, l. 23 – 288, l. 1.

Shortly after Garrison's testimony, the state called Javon Wright, an employee of the Charleston County Detention Center, as a witness. Wright testified that at the time of booking, a "set of fingerprints" are collected from an arrestee as well as a photograph. He identified the "major case prints" he collected from Petitioner when he was previously booked at the detention center. These "major case prints," which include prints of all ten fingers and the palms of both hands, were admitted into evidence as State's Exhibit No. 40.

Wright also identified the photograph he took of Petitioner at the time of his prior booking. This booking photograph was admitted into evidence as State's Exhibit No. 41 *without objection*. When asked to tell the jury about this exhibit, Wright stated, "It's a **mugshot of Trevee Gethers**

[Petitioner], **booking date 5-11-07.**”² App. 323, l. 5 – 325, l. 6 (emphasis added). He further agreed that the arrestee in the mugshot admitted as State’s Exhibit No. 41 “appear[ed] to be the individual seated at the defense table.” App. 325, ll. 7-9.

Trial counsel did not object to the admission of Petitioner’s mugshot from his previous arrest nor did she object to Wright’s prejudicial testimony about the exhibit. App. 325, ll. 10-16.

The court admitted State’s Exhibit No. 40, which was the copy of Petitioner’s “fingerprint card,” with a “condition in place.” App. 325, l. 17 – 326, l. 10. It was later revealed that the “condition” was based on an agreement by the parties to redact “the fingerprint card” because the card “listed his [Petitioner’s] charge that he was booked in on as distribution of Schedule 1, 2, or 3 controlled substance.” Therefore, the actual “fingerprint card” was later substituted for a copy with the listed charge redacted. App. 370, l. 6 – 371, l. 4.

However, trial counsel did not request any redactions on State’s Exhibit No. 41, including “Charleston County Sheriff’s Office Detention Center,” or “Booking Date: 05/11/07” or Petitioner’s basic background information, such as his height and date of birth. See App. 524.

The state subsequently called Kalisha Gill, an expert latent fingerprint examiner with SLED. Gill testified that she received a set of latent prints from the Dorchester County Sheriff’s Office related to this case. She ran the prints through AFIS, the Automated Fingerprint Identification System, and received “a hit.” The “hit” “came back to the fingerprint card bearing the name Trevee Gethers [Petitioner].” App. 345, l. 11 – 346, l. 8. After receiving the “hit,” Gill “manually compared” the latent prints submitted with Petitioner’s known fingerprints and positively identified the prints submitted as belonging to Petitioner. App. 346, l. 12 – 350, l. 7.

² The murder in this case took place on September 17, 2007, approximately four months after the listed booking date on the mugshot admitted as State’s Exhibit No. 41.

There was no further testimony related to Petitioner's mugshot entered as State's Exhibit No. 41.

PCR Hearing

Sarah Jayne Rogers, Petitioner's trial counsel, testified that about four months before trial she was asked by Petitioner's then counsel, John Witherspoon, to take over representation of Petitioner. This was her first murder case as she was mostly a Family Court attorney. App. 672, l. 18 – 673, l. 14. Rogers admitted she no longer practices law and the PCR court took judicial notice that she was disbarred by this Court in July 2015.³ App. 677, l. 7 – 678, l. 6.

The court asked Rogers “why the State was seeking its [the mugshot's] introduction” and whether the booking photograph was modified in any way “to minimize any suggestion that it was a mugshot.” Rogers explained, “The State was discussing the mugshot in its presentation of how they came to associate Mr. Gethers [Petitioner] with this crime and how they got him back to South Carolina, and I do not recall if it was altered.” She later clarified that the mugshot was one of the methods the police used to identify Petitioner after he was apprehended in New York.⁴ App. 689, l. 16 – 690, l. 12.

³ In re Rogers, 413 S.C. 187, 775 S.E.2d 387 (2015).

⁴ This testimony is incorrect and in direct conflict with the testimony at trial. Investigator John Garrison with the Dorchester County Sheriff's Office testified at trial that his office “submitted information, **photographs from the driver's license or Highway Department IDs** and we sent that to New York so that they [NYPD officers] could confirm that the person they had in custody was indeed Mr. Gethers [Petitioner].” App. 290, ll. 2-19 (emphasis added). Thus, it was the photograph from Petitioner's driver's license, **not his mugshot**, that was used by authorities in New York to identify him. Moreover, it was the “fingerprint card” collected from Petitioner during his **prior booking**, rather than his mugshot, that was used by law enforcement in South Carolina to identify him as a suspect in this murder.

Petitioner, who raised and briefed this issue in his PCR application, explained that the booking photograph introduced by the state was “the typical photo mugshot” with a picture from the front and a second picture from the side. App. 693, l. 18 – 693, l. 16.

Order of Dismissal

The PCR court found trial counsel was not ineffective for failing to object to the admission of Petitioner’s mugshot. The court found the booking photograph was introduced “to show how law enforcement identified [Petitioner] as a suspect in the murder.” Specifically, the court stated, “This Court finds the booking photo was offered in a relevant line of questioning. Testimony was elicited concerning prints lifted from the automobile where the victim was found murdered. [Petitioner] was identified based upon an earlier set of case prints (State’s Exhibit 40) taken from that earlier arrest. The booking photo tied those prints to [Petitioner].” App. 706-707.

Based on this finding, the court ruled trial counsel was not ineffective for failing to object to the introduction of the mugshot. Moreover, the court found Petitioner failed to prove that if counsel had objected that the objection would have been successful. App. 707.

Notably, the PCR court failed to analyze the allegation using the three part analysis found in State v. Traylor, 360 S.C. 74, 84, 600 S.E.2d 523, 528 (2004)⁵ nor did the court cite to any relevant case law in support of its ruling.

Discussion

Petitioner’s Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to object to the admission of Petitioner’s mugshot from his

⁵ “The introduction of a ‘mug-shot’ of a defendant is reversible error unless: (1) the state has a demonstrable need to introduce the photograph, (2) the photograph shown to the jury does not suggest the defendant has a criminal record, and (3) the photograph is not introduced in such a way as to draw attention to its origin or implication.” Traylor, 360 S.C. at 84, 600 S.E.2d at 528 (internal citations omitted).

prior arrest approximately four months before the murder where no demonstrable need of the mugshot was established, the mugshot plainly suggested to the jury that Petitioner had a prior record, and the origin of the mugshot was clear as it stated “Charleston County Sheriff’s Office Detention Center” at the top of the photograph and listed the “booking date.”

In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 686 (1984); See Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove “that counsel’s performance was deficient” and fell below reasonable professional norms, and there is a reasonable probability that, but for counsel’s unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 668).

“The introduction of a ‘mug-shot’ of a defendant is **reversible error** unless: (1) the state has a demonstrable need to introduce the photograph, (2) the photograph shown to the jury does not suggest the defendant has a criminal record, and (3) the photograph is not introduced in such a way as to draw attention to its origin or implication.” Traylor, 360 S.C. at 84, 600 S.E.2d at 528 (citing State v. Tate, 288 S.C. 104, 341 S.E.2d 380 (1986), State v. Robinson, 274 S.C. 198, 262 S.E.2d 729 (1980), and State v. Denson, 269 S.C. 407, 237 S.E.2d 761 (1977) (emphasis added)).

In Traylor, the defendant argued the trial court committed reversible error in admitting mugshots of him into evidence. Traylor, 360 S.C. at 83, 600 S.E.2d at 528. In the photographs, the defendant was not shown holding a “placard” with an arrest date and there was no indication of a law enforcement agency. However, the photographs “had numerical markings on the side, indicating a height in inches.” Id. at 77-78, 600 S.E.2d at 524-525. Our Supreme Court found the photograph of the defendant was “clearly a mug shot, revealed by the front and side poses, and the height indicators.” Id. at 80, 600 S.E.2d at 528.

Moreover, this Court held the trial judge erred by admitting the mugshot because the state did not have a demonstrable need to introduce it. Id. This Court “rejected the [s]tate’s argument that it could not prove the defendant was in the victim’s home without the mug shots because the defendant’s accomplice testified the defendant was at the scene of the crime, and the victims testified at trial, describing the attack and the identity of the assailants.” State v. Green, 412 S.C. 65, 80, 770 S.E.2d 424, 432 (Ct. App. 2015) (citing Traylor, 360 S.C. at 84, 600 S.E.2d at 528)). Yet, the Court held the defendant suffered no prejudice by the admission of the mugshots because a police officer testified the defendant’s photograph was taken after his arrest for his current charges. Traylor, 360 S.C. at 84-85, 600 S.E.2d at 528.

In Green, the defendant argued the trial court erred in allowing the state to introduce his mugshot because it was unnecessary, cumulative to the state’s case, and prejudicial because it suggested he had a prior criminal record. Green, 412 S.C. at 79, 770 S.E.2d at 431. The Court of Appeals held the state had a demonstrable need to introduce the booking photograph, which included a side view of the defendant’s face, so that the jury could compare the booking photograph to the still photographs from a surveillance video of the robbery, which also showed the side of the assailant’s face. Id. at 82, 770 S.E.2d at 433. The court also held the booking photograph did not

suggest the defendant had a criminal record. While noting the booking photograph included the side view profile picture of the defendant, which is a common feature of mugshots, the court held “this factor alone was insufficient to suggest the defendant had a prior record because the jury knew Green was arrested for the current armed robbery and likely assumed the picture was taken following his arrest.” Id. at 82-83, 770 S.E.2d at 433-434.

Lastly, the court held the mugshot was not “introduced in such a way as to draw attention to its origin or implication.” Id. at 83, 770 S.E.2d at 434 (internal citation omitted). The court noted that the trial judge “cut the ‘top and bottom off’ of the photo to remove any reference to the law enforcement agency” and that the photograph was admitted during a detective’s “testimony that the booking photo was a fair and accurate description of Green when he was arrested for the current armed robbery; therefore, the manner the photo was introduced implied that the booking photo was taken following Green’s current arrest.” Id.

Finally, in Denson, our Supreme Court held the state had a demonstrable need to introduce the defendant’s booking photographs because the defendant’s absence from trial made an in-court identification impossible. Denson, 269 S.C. at 410, 237 S.E.2d at 763. This Court further held that the photographs did not suggest the defendant had a prior criminal record because they “were not the juxtaposed full face and profile photographic display normally associated with ‘mug shots’” and because the jury likely assumed the picture was taken when the defendant was arrested for his current charge. Id. at 412-413, 237 S.E.2d at 764.

Here, trial counsel was ineffective for failing to object to State’s Exhibit No. 41 as the introduction of Petitioner’s mugshot was in clear violation of this Court’s holding in Traylor. First, it was obvious that this photograph was a mugshot, not only because of the front and side poses, but because the top of the photograph stated, “Charleston County Sheriff’s Office Detention Center”

and the body stated, “Booking Date: 05/11/07.” The photograph also included Petitioner’s background information, such as his height, date of birth, gender, and race. Moreover, Javon Wright, the detention center employee, unequivocally testified before the exhibit was admitted that it was “a **mugshot of Trevee Gethers** [Petitioner], **booking date 5-11-07.**” App. 323, l. 5 – 325, l. 6 (emphasis added). Therefore, the introduction of Petitioner’s mugshot clearly drew attention to “its origin and implication.”

Moreover, the mugshot plainly suggested that Petitioner had a prior record since the booking date was four months before the murder in this case. There is absolutely no way the jury could have thought this mugshot was from Petitioner’s current arrest for murder since the booking date was before this murder occurred on September 17, 2007. At an absolute minimum, the jury knew Petitioner had previously been arrested. This alone was highly prejudicial to Petitioner.

Lastly, the state did not have a demonstrable need to introduce the mugshot. Investigator Garrison testified that authorities in New York used Petitioner’s picture from his driver’s license, not his mugshot, to positively identify him before he was returned to South Carolina. Moreover, introduction of the mugshot was not necessary to establish that the “fingerprint card” entered as State’s Exhibit No. 40 belonged to Petitioner as the PCR court found. Petitioner never contested that this “fingerprint card” belonged to him nor did he dispute that his fingerprints were found on the outside of the decedent’s vehicle. Therefore, there was absolutely no need for the state to introduce Petitioner’s mugshot.

Petitioner was prejudiced by trial counsel’s deficient performance because if counsel would have properly objected to the admission of his mugshot and the trial court admitted the exhibit over objection, it would have been reversible error on appeal since the state did not have a demonstrable need to introduce the photograph, the photograph suggested Petitioner had a criminal record, and

the photograph was introduced in a way that drew attention to its origin. See Traylor, 360 S.C. at 84, 600 S.E.2d at 528. Moreover, since the three factors outlined by this Court in Traylor were met in this case, it is highly probable the trial court would have sustained an objection from trial counsel if an objection had been made. Therefore, the PCR court erred by ruling Petitioner “failed to prove that if counsel had objected that the objection would have been successful.” App. 707. There is no evidence to support the PCR court’s ruling.

Respectfully, this Court should hold trial counsel was ineffective, reverse the ruling of the PCR court, and remand for a new trial.

2.

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to object to the trial court's opening instruction to the jury that the trial was "a search for the truth in an effort to make sure that justice is done" since this instruction was fundamentally incorrect, was burden shifting, and misdirected the jury's inquiry from the beginning of the trial forward from the correct legal question of whether the state had proved Petitioner's guilt beyond a reasonable doubt.

Relevant Facts

In her opening instruction to the jury, the trial judge informed the jury:

[T]his trial is not for entertainment. It is a . . . **search for the truth in an effort to make sure that justice is done** between the State and Mr. Gethers [Petitioner]. **Searching for the truth and making sure that justice is done** is often slow, deliberate, and repetitive, the opposite no doubt of what you may have seen on television, read about in books, our perhaps in the movies.

...

The attorneys before you are advocates for the parties they represent, but first and foremost, they are officers of the court, sworn to uphold the integrity and fairness of our judicial system and to help you in **a search for the truth**. You should expect them to be professional, competent, and ethical in their representation of their clients.

App. 122, l. 10 – 123, l. 4 (emphasis added).

Trial counsel made no objection to this improper instruction.

Additionally, at the conclusion of the assistant solicitor's closing argument, he told the jury, "There's only one just verdict in this case . . . There's one verdict that **speaks the truth**, a verdict that holds the defendant accountable for his heinous and cowardly crimes, a verdict of guilty." App. 467, ll. 10-15 (emphasis added).

Moreover, at the very end of the trial court's instruction to the jury, the judge stated, "Now, ladies and gentlemen, I do want to leave you with one conclusion, one final thought . . . **The word**

‘verdict,’ the word ‘verdict’ comes from the Latin phrase ‘veredicto,’ which means to speak the truth, to speak the truth. *And that is now your task, to speak the truth.*” This was the very last instruction from the court before the judge excused the jury to begin its deliberations. App. 493, l. 19 – 494, l. 15 (emphasis added). This instruction further emphasized the court’s opening remark to the jury that a trial is a “search for the truth in an effort to make sure that justice is done.” See App. 122, l. 10 – 123, l. 4. Trial counsel made no objection to this incorrect instruction. Therefore, it was never corrected before the jury began its deliberations.

PCR Hearing

Petitioner, who raised and briefed this issue in this PCR application, testified at the PCR hearing that his trial counsel should have objected to the court’s opening instruction to the jury that a trial is “a search for the truth” “[b]ecause from my understanding of the law it isn’t for the jury to search for the truth. It’s for the State to prove beyond a reasonable doubt that I committed the crime.” App. 660, l. 16 – 661, l. 10.

Rogers merely testified that she did not think the court’s instruction that a trial is “a search for the truth” was “objectionable.” App. 683, ll. 18-21.

Order of Dismissal

The PCR court found trial counsel was not ineffective for failing to object to the trial judge’s opening instruction to the jury that a trial is a “search for the truth in an effort to make sure that justice is done.” App. 705. In reaching this conclusion, the court stated, “These remarks are part of the standard opening instructions for many judges, and Judge Goodstein’s opening remarks are not an instruction on the law. Additionally, because Judge Goodstein properly instructed the jury on the burden and standard of proof at the close of the case, any error was clearly harmless and did not affect the result.” App. 705.

Discussion

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to object to the trial court's opening instruction to the jury that the trial was a "search for the truth in an effort to make sure that justice is done" since this instruction was fundamentally incorrect, was burden shifting, and misdirected the jury's inquiry from the beginning of the trial forward from the correct legal question of whether the state had proved Petitioner's guilt beyond a reasonable doubt. The trial court erroneous opening instruction was further exacerbated during the judge's charge on the law at the conclusion of the case when she instructed the jury immediately before it was excused to begin its deliberations that its "task" was "to speak the truth." Petitioner was clearly prejudiced by trial counsel's failure to object to the court's incorrect, burden shifting instruction.

In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686; See Butler, 286 S.C. at 442, 334 S.E.2d at 814. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove "that counsel's performance was deficient" and fell below reasonable professional norms, and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry, 300 S.C. at 117-118, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 688). "A reasonable probability is a probability sufficient to undermine

confidence in the outcome of the trial.” Johnson, 325 S.C. at 186, 480 S.E.2d at 735 (citing Strickland, 466 U.S. at 668).

Eighteen years ago in State v. Needs, 333 S.C. 134, 155-156, 508 S.E.2d 857, 867-868 (1998), this Court “strongly urge[d] the trial courts to avoid using any ‘seek’ language.” The Court noted that such “seek the truth” language was “unnecessary,” and it ran “the risk of unconstitutionally shifting the burden of proof to a defendant.” Id.

This Court has also explained that the “seek the truth” language is troublesome when given in conjunction with other confusing or burden shifting language such as a reasonable doubt “is a doubt for which you can give a real reason.” State v. Manning, 305 S.C. 413, 416-417, 409 S.E.2d 372, 374-375 (1991); See State v. Raffalt, 318 S.C. 110, 456 S.E.2d 390 (1995).

Here, the fact that the court’s incorrect instruction occurred at the opening of Petitioner’s trial is problematic in that, throughout the trial, the jurors were concentrating on evaluating the quality of the evidence in a “search for the truth” rather than thinking in terms of their actual straightforward task of determining whether the state was proving its case beyond a reasonable doubt. Premature deliberations are prohibited, but certainly individual jurors are evaluating the evidence as it is presented, and *the context* in which they are evaluating that evidence based on the judge’s initial instructions is very important. In other words, it is critical whether the jurors are listening to the testimony trying to determine what really happened (a search for the truth) rather than listening in terms of whether the state is meeting its burden of proving Petitioner’s guilt beyond a reasonable doubt.

Moreover, the trial court’s incorrect instruction was even further exacerbated when the judge instructed the jury *immediately* before it began its deliberation that its “task” was “to speak the truth.” This reinforced in the jurors’ minds that its duty was to “search for the truth” as opposed

to determine whether the state had met its burden of proving Petitioner's guilt beyond a reasonable doubt. This erroneous instruction sent the jury into its deliberation with an incorrect understanding of its duty and the burden of proof in a criminal trial. During its deliberations, the jury was likely focusing on discovering "the truth" as opposed to determining whether the state had met its hefty burden of proving Petitioner's guilt beyond a reasonable doubt.

In State v. Daniels, 401 S.C. 251, 255-256, 737 S.E. 473, 475 (2012), this Court considered a similar jury instruction that "whatever verdict you reach will represent truth and justice for all parties that are involved in this case." Although the issue was not preserved, the Supreme Court instructed trial judges "[to] remove any suggestion from his general sessions charges that a criminal jury's duty is to return a verdict that is 'just' or 'fair' to all parties. Id. Such a charge could effectively alter the jury's perception of the burden of proof, substituting justice and fairness for the presumption of innocence and the State's burden to prove the defendant's guilt beyond a reasonable doubt." Id.

In this case, the judge also told the jury in her opening that at the conclusion of the case they would be in a position to "render a true and just verdict." App. 130, ll. 8-14; App. 126, l. 22 – 127, l. 1. This "true and just verdict" language reinforced in the jurors' minds that it was their duty to "seek the truth" and render a "true and just verdict," rather than do what the Constitution requires, which is to determine if the state met its burden beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307 (1979).

Sixteen years ago in State v. Aleksey, 343 S.C. 20, 26-29, 538 S.E.2d 248, 251-253 (2000), the Supreme Court repeated its warning that trial courts should avoid using any "seek the truth" language. However, the Court in Aleksey noted the "seek" language was used in that case as an instruction on witness credibility. Id. The "seek" language did not appear in either the reasonable

doubt or circumstantial evidence portion of the instruction. Id. The Court in Aleksey therefore found there was not a reasonable likelihood that the jury applied the challenged instruction in a manner inconsistent with the state's burden of proof beyond a reasonable doubt. Id.

Here, conversely, the instruction to the jury that a trial is a "search for the truth" was not only included, but became the centerpiece of the judge's opening instruction on what a criminal trial is all about. The court's incorrect instruction also became the focus of the jury's deliberation since the judge concluded her charge on the law by instructing the jury that its "task" was to "speak the truth." Therefore, unlike in Aleksey, there is a reasonable likelihood that the jury applied the challenged instruction in a manner inconsistent with the state's burden of proof beyond a reasonable doubt. A jury's function is not to "search for the truth" or "speak the truth." It is fundamentally different from truth and justice. The jury's function is to determine whether the state has proved the defendant's guilt *beyond a reasonable doubt*.

Additionally, the judge made clear in her opening instructions that it was the duty of the attorneys to be professional and act as officers of the court "to help you [the jurors] in a search for the truth." That was the antithesis of the jury's real function, which was to determine whether the state proved the defendant's guilt beyond a reasonable doubt.

Significantly, the trial judge never instructed the jury during her opening instruction that her remarks were not an instruction on the law as most judges do. Because the judge failed to inform the jury that her opening remarks were not an instruction on the law, the jury could only have assumed her opening instructions were the law. It is undisputable that the jury naturally looks up to the trial judge and expects guidance from her on how they should act and what their duties are throughout the trial. Sosebee v. Leeke, 293 S.C. 531, 362 S.E.2d 22 (1987). Thus, there is a

reasonable likelihood that the jury applied the challenged instruction in a manner inconsistent with the state's burden of proof beyond a reasonable doubt.

When examining the judge's opening instruction to the jury regarding the jury's function in conjunction with her charge immediately before the jury began deliberating that its "task" was to "speak the truth," it is remarkably clear that the incorrect instruction as a whole was burden shifting.

Given this fundamentally inaccurate instruction on the purpose of a criminal trial and the jury's function that occurred during both the court's opening remarks and the charge on the law at the conclusion of the trial, this Court should hold trial counsel rendered ineffective assistance of counsel by failing to object and that Petitioner was prejudiced by counsel's deficient performance since the incorrect instruction improperly shifted the burden of proof and tainted the jury's deliberations.

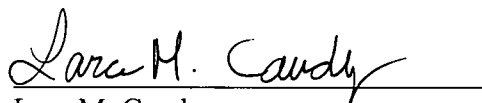
In Needs and Aleksey, eighteen and sixteen years ago respectively, this Court "strongly urged" trial judges to avoid using any "seek the truth" language. Almost two decades later, judges continue to ignore this Court's admonition and are still using this incorrect and burden shifting language. Moreover, the bar, as shown by trial counsel here, continues to fail to object to this inaccurate language despite the significant passage of time since Needs and Aleksey were decided. Both the bench and the bar need a reminder that this incorrect, burden shifting language should be removed from trial courts' remarks and instructions to the jury.

Respectfully, due to counsel's deficient performance and the resulting prejudice to Petitioner, this Court should reverse the ruling of the PCR court and grant Petitioner a new trial.

CONCLUSION

Based on the foregoing arguments, Petitioner respectfully requests this Court reverse the decision of the PCR court and remand for a new trial.

Respectfully submitted,

A handwritten signature in cursive script, reading "Lara M. Caudy", is written over a horizontal line.

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 9th day of June, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Dorchester County
Frank R. Addy, Circuit Court Judge

TREVEE GETHERS,

PETITIONER,

V.

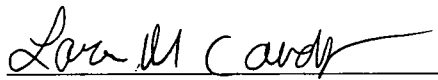
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-000284

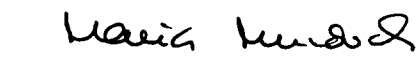
CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on J. Croom Hunter, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 9th day of June, 2016.


Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 9th day
of June, 2016.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

SEP 07 2016

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Frank R. Addy, Circuit Court Judge

Trevee Gethers, ... Petitioner,

v.

State of South Carolina, ... Respondent.

Appellate Case no. 2016-000284

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QUESTIONS PRESENTED

1. Whether trial counsel provided effective assistance of counsel when trial counsel did not object to the admission of Petitioner's booking photograph for identification purposes?
2. Whether trial counsel provided effective assistance of counsel when trial counsel did not object to trial court's opening instruction to the jury that the trial was a "search for the truth in an effort to make sure justice is done"?

STATEMENT OF THE CASE

A Dorchester County grand jury indicted Petitioner on December 3, 2007 for the offense of murder. He was represented by Sara Jayne Rogers, Esquire. On November 15, 2010, Petitioner proceeded to a trial by jury by which he was found guilty of murder. He was sentenced by the Honorable Diane Schafer Goodstein to confinement for a period of forty-five years.

Petitioner timely filed a notice of intent to appeal his conviction and sentence with the South Carolina Court of Appeals. Elizabeth Franklin-Best, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal. The Court of Appeals affirmed Petitioner's conviction and sentence. State v. Gethers, 2012-UP-576 (S.C. Ct. App. Filed October 25th, 2012.) His petition for writ of certiorari was denied by this Court and remittitur issued on May 7, 2014.

Petitioner filed an application for post-conviction relief (PCR) on July 3, 2014. Respondent made its Return on February 24, 2015, requesting an evidentiary hearing be convened. Rodney D. Davis, Esquire was appointed for the Petitioner by the Dorchester County Clerk of Court. With Applicant and Counsel present, a hearing was held on October 28, 2015, before the Honorable Frank R. Addy at the Dorchester County Courthouse. After questioning Applicant, counsel, and witnesses PCR Court denied and dismissed the application by order dated January 8, 2016. Petitioner timely filed a notice of intent to appeal and subsequently submitted a Petition for Writ of Certiorari. This Return to Petition for Writ of Certiorari follows.

STANDARD OF REVIEW

This Court must affirm the post-conviction relief ("PCR") court's factual findings if there is any evidence of probative value in the record to support them. Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005) (citing Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989)). This Court should reverse the PCR court only where there is no probative evidence to support the decision or the decision was controlled by an error of law. Kolle v. State, 386 S.C. 578, 589, 690 S.E.2d 73, 79 (2010). Furthermore, this Court "gives great deference to the [PCR] court's findings of fact and conclusions of law." Id. (quoting Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005)).

ARGUMENT

I. This Court should deny review because the booking photograph was correctly introduced for identification purposes and, even if this Court finds that trial counsel's lack of objection to the photograph was in error, Petitioner suffered no prejudice from the booking photograph.

Petitioner argues trial counsel should have objected to the use of defendant's mugshot for identification purposes. This argument is without merit.

The PCR Court found that the booking photograph was offered in a relevant line of questioning. App. p. 323-326. Testimony was elicited that fingerprints were lifted from the automobile where the victim was found murdered. App. p. 175. Petitioner was identified by a set of fingerprints taken from an arrest that produced the aforementioned booking photograph. App. p. 345, 350. The booking photograph conclusively tied the prints taken at that booking to the Petitioner. App. p. 324. Counsel testified credibly to this effect and agreed that the photograph was admitted to show how law enforcement identified Petitioner as a suspect in the murder.

Stephens's remaining argument, that his "mug shot" in the photo lineup implied he had a prior criminal record, is unpersuasive on its face. Our appellate courts have affirmed the admission of photo lineups that were more suggestive of a prior criminal record than the one in this case. *See, e.g., State v. Denson*, 269 S.C. 407, 412-13, 237 S.E.2d 761, 764 (1977) (finding no error in admitting photo lineup despite the fact photographs included placards that were taped over to conceal arrest information); *State v. Robinson*, 274 S.C. 198, 199-200, 262 S.E.2d 729, 730 (1980) (affirming admission of photo lineup comprised of full frontal, profile, and frontal head-and-shoulders images with written information blacked out); *State v. Davis*, 309 S.C. 326, 338-39, 422 S.E.2d 133, 141 (1992), *overruled on other grounds by Brightman v. State*, 336 S.C. 348, 352 n. 5, 520 S.E.2d 614, 616 n. 5 (1999) (affirming admission of photo lineup using mug shots with identifying information masked).

State v. Stephens, 398 S.C. 314, 321-22, 728 S.E.2d 68, 72 (Ct. App. 2012).

A. Traylor Test

Petitioner relies heavily upon the Traylor test, “The introduction of a “mug-shot” of a defendant is reversible error unless: (1) the state has a demonstrable need to introduce the photograph, (2) the photograph shown to the jury does not suggest the defendant has a criminal record, and (3) the photograph is not introduced in such a way as to draw attention to its origin or implication.” State v. Traylor, 360 S.C. 74, 84, 600 S.E.2d 523, 528 (2004.)) The facts of the instant case meet the requirements of the Traylor test.

1. Demonstrable Need

The State has shown a demonstrable need to introduce the photograph. The PCR Court found that the booking photograph of Petitioner was “offered in a relevant line of questioning” and “tied those prints to the Applicant.” App. p. 706. The photograph was introduced as a matter of establishing the validity of the fingerprints which were a key piece of circumstantial evidence. The booking photograph, taken by the witness at the same time as the fingerprints, was the way by which the witness recognized and correlated the fingerprints with the Petitioner. App. p. 324.

2. Criminal History

The photograph shown to the jury has not been proven to suggest the Petitioner had a criminal history. The photograph was discussed in a bench trial. App. p. 325. It is noted that there is a condition placed on the photograph, without which there would have been an objection. App. p. 326. That condition is never placed in the record. That condition could very well have been to remove any identifying marks that would infer a prior criminal. The picture was not made part of the record at the evidentiary hearing. “In a PCR action, the applicant bears the burden of proving the allegations in his application.” Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985.) There was also no mention during the trial of when the booking photograph took

place or for what charge he was being booked. The jury could easily have inferred the picture and fingerprints were from Petitioner's booking for the murder charge before them. The burden rests on the Petitioner to prove his case. The Petitioner has not proven that this booking photograph suggested a criminal history.

3. Origin and Implication

The photograph was not introduced in such a way as to draw attention to its origin or implication. The entire testimony of the witness was three pages long. App. p. 323 – 325. The booking photograph and the fact that the fingerprints were taken at a county detention center were not mentioned during the State's closing argument. A criminal history was never implied or alluded to by the State. The testimony surrounding the photograph never mentions the timing or the cause of the booking photograph. The photographs origin and implication were entirely avoided by the State after its introduction.

B. Probative Evidence to Support Lack of Prejudice

Even if this Court finds the State failed to meet the elements of the Traylor test, the Petitioner has failed to show that he suffered prejudice from the introduction of the booking photograph. In Traylor, this Court found that the defendant, despite the State failing the Traylor test, suffered no prejudice from the admission of his mug-shot and affirmed the trial court's decision. "Although we have held admission of a mug-shot to be reversible error if the three criteria of State v. Denson, 269 S.C. 407, 237 S.E.2d 761 (1977) are not met, the rationale for this holding is that such photographs are prejudicial because they imply a defendant's prior bad acts." State v. Traylor, 360 S.C. 74, 85, 600 S.E.2d 523, 528 (2004.) In Greene, the Court of Appeals found the mug-shot cumulative and of little prejudicial value. "Finally, we note that Green suffered little prejudice, if any, from the admission of the booking photograph because it

did not suggest he had committed prior bad acts.” State v. Green, 412 S.C. 65, 83, 770 S.E.2d 424, 434 (Ct. App. 2015.)

The Petitioner’s fingerprints matched the fingerprints found at the crime scene. The probative value of linking the fingerprint evidence to the Petitioner and, thus, the scene of the crime, far outweighs the prejudicial effect of an inference of a criminal history. The PCR Court agreed with this line of thought and found that trial “counsel testified credibly to this effect and agreed the photograph was admitted to show how law enforcement identified Applicant as a suspect in the murder.”

Even if trial counsel had objected to the mug-shot and successfully suppressed it, there is probative evidence to support the PCR court’s finding there was no reasonable probability the outcome of the trial would have been different. App. p. 707. “This Court should reverse the PCR court only where there is no probative evidence to support the decision or the decision was controlled by an error of law.” Kolle v. State, 386 S.C. “[C]ounsel's deficient performance must have prejudiced the petitioner such that “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Id. (citing Strickland, 466 U.S. at 690). The State introduced the photograph through Javon Wright, who worked for the Charleston County Detention Center. Javon Wright identified the Petitioner in court as the person whose fingerprints he took. This in-person identification by Javon Wright made the booking photograph cumulative and eliminated any possibility that the suppression of the photograph would change the outcome of the trial. The DNA, the fingerprint evidence at the scene of the crime, the Petitioner’s fleeing of the state, and the statement of Petitioner’s

codefendant were the key pieces of evidence by which the jury found the defendant guilty. Without the booking photograph those pieces remain intact. In fact, the photograph wasn't mentioned once in the Assistant Solicitor's opening or closing arguments. Therefore, there is no reasonable probability that, but for counsel's unprofessional errors, the outcome of the trial would have been different.

Petitioner failed to prove Counsel was ineffective in failing to object or that the objection would have been successful. Petitioner also failed to prove that if an objection had been successfully made there was a reasonable probability the result of the trial would have changed. Therefore, review should be denied on this allegation.

II. This Court should deny review because the 'seek the truth' language was harmless and the jury was properly instructed on the law.

Petitioner argues that his Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to object to the trial court's opening instruction to the jury that the trial was "a search for the truth in an effort to make sure that justice is done." This argument is without merit.

The central function of the trial process in both criminal and civil cases is to discover the truth. *See Portuondo v. Agard*, 529 U.S. 61, 73 (2000) (stating "the central function of [a] trial . . . is to discover the truth"); *see also State v. Wren*, 322 S.C. 103, 105, 470 S.E.2d 111, 112 (Ct. App. 1996) ("A trial is a search for the truth[.]"); *see, e.g., Carella v. California*, 491 U.S. 263, 265 (1989) (explaining that burden-relieving jury instructions "subvert the presumption of innocence accorded to accused persons and also invade the truth-finding task assigned solely to juries in criminal cases" (emphasis added)). As part of the truth-seeking process, the State carries the burden to prove a criminal defendant's guilt for every element of a criminal offense

beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970); see also *Burr v. Florida*, 474 U.S. 879, 880 (1985) (“[T]he beacon of the truth-seeking process in criminal cases is not absolute certainty, but the ‘reasonable doubt’ standard[.]” (emphasis added)).

Trial counsel’s failure to object to the Judge Goodstein’s comments was not erroneous. Counsel credibly testified that she did not find those statements objectionable. Judge Goodstein’s opening remarks were not an instruction on the law. The cases that Petitioner cites concerning ‘seek language’ are all concerned only with the court’s use of ‘seek language’ within the language of a circumstantial evidence jury instruction. *State v. Needs*, 333 S.C. 134, 155, 508 S.E.2d 857 (1998) [In this case, the trial judge’s *circumstantial evidence charge* was erroneous because it instructed jurors to seek a reasonable explanation other than the guilt of the accused.] *State v. Manning*, 305 S.C. 413, 409 S.E.2d 372 (1991) (overruled in *State v. Aleksey*, 343 S.C. 20, 28–29, 538 S.E.2d 248, 252–53 (2000)) [His charge deviates from the *circumstantial evidence charge* cited in *State v. Edwards*, 298 S.C. 272, 379 S.E.2d 888 (1989), that requires the evidence “point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis.”] *State v. Raffaldt*, 318 S.C. 110, 456 S.E.2d 390 (1995) [Here, although the *circumstantial evidence charge* was in error, the jury instructions, when read as a whole, do not convey that a lesser degree of proof is permissible. The trial court charged, quite extensively, that the State had the burden of proving the defendant guilty beyond a reasonable doubt.]) *State v. Aleksey*, 343 S.C. 20, 28–29, 538 S.E.2d 248, 252–53 (2000) [While we have urged trial courts to *avoid using any “seek” language when charging jurors on either reasonable doubt or circumstantial evidence* (see *State v. Needs*, 333 S.C. 134, 155, 508 S.E.2d 857, 867–68 (1998)), the “seek” language here did not appear in either the reasonable doubt or circumstantial evidence

charges, but in the instructions on juror credibility. *Both the reasonable doubt and circumstantial evidence charges were complete and proper.*]

In the instant case, the ‘seek’ language used by the court was part of Judge Goodstein’s opening remarks to the jury, not her instruction on reasonable doubt or circumstantial evidence. Furthermore, appellate courts have consistently found such ‘seek the truth’ language to be harmless when complimented by a full and correct charge on reasonable doubt and the burden of the state.

As an abstract concept, “seeking the truth” suggests determining whose version of events is more likely true, the government’s or the defendant’s, and thereby intimates a preponderance of evidence standard. Such an instruction would be error if used in the explanation of the concept of proof beyond a reasonable doubt. The district court, however, did not use it in this way. Rather, the trial court began its instructions with a clear definition of the government’s burden of proof in which it repeatedly stated that the defendant could not be convicted unless the jury found that the government had proven him guilty beyond a reasonable doubt. It correctly defined proof beyond a reasonable doubt as “proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs.” There is no reasonable likelihood that the jury inferred that the single reference at the end of the charge to “seeking the truth,” rendered as it was in the context of an admonition to “not give up your honest beliefs,” modified the reasonable doubt burden of proof. United States v. Gonzalez–Balderas, 11 F.3d 1218, 1223 (5th Cir.1994)

We find the reasoning of the *Gonzalez–Balderas* court very persuasive. There is not a reasonable likelihood the jury applied the challenged instruction in a manner inconsistent with the burden of proof beyond a reasonable doubt. The trial court’s instructions concerning seeking the truth were given in the context of the jury’s role in determining the credibility of witnesses. The remarks were prefaced by a full instruction on reasonable doubt and followed by an additional exhortation to bear in mind the State’s heavy burden of proof. Under the standards articulated in *Smith* and *Boyde*, the instruction as a whole properly conveyed the law to the jury and there is not a reasonable likelihood the jury applied the judge’s instructions to convict appellant on less than proof beyond a reasonable doubt.

Aleksey, 343 S.C. 20, 28–29, 538 S.E.2d 248, 252–53 (2000)

Respondent submits that Petitioner has failed to show entitlement to post-conviction relief on the basis of the language of the trial judge’s opening remarks. The jury charge should be

read as a whole when determining if there is error. See *State v. Smith*, 315 S.C. 547 (1994), citing *State v. Sims*, 304 S.C. 409, 405 S.E.2d 377 (1991) (Jury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error.). When the charge is read as a whole, it contains the correct definition and adequately covers the law. See *State v. Rabon*, 275 S.C. 459, 272 S.E.2d 634 (1980) (a jury charge which is substantially correct and covers the law does not require reversal). Respondent maintains that the trial judge's instruction, when viewed in its entirety, was not misleading or erroneous. The trial judge repeatedly instructed the jury that the State carried the burden of proving the Petitioner guilty beyond a reasonable doubt. App. p. 485-486.

Accordingly, Respondent asserts the PCR Court's rejection of this claim of ineffective assistance of counsel, is not contrary to, or an unreasonable application of, clearly established state law, nor did the adjudication result in an unreasonable determination of the facts. The instructions in the present case were clear, proper, and did not improperly shift the burden of proof to Petitioner. *State v. Peterson*, 287 S.C. 244, 335 S.E.2d 800 (1985); *State v. Franklin*, 310 S.C. 122, 425 S.E.2d 758 (Ct. App. 1992). The charge clearly informed the jury the burden was on the State to prove Petitioner's guilt beyond a reasonable doubt. Thus, trial counsel cannot be deficient for his failure to object to a lawful and proper jury instruction and Petitioner was not prejudiced from his failure to do so.

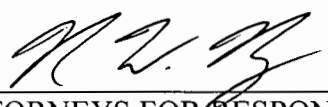
CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the petition be denied. If this Court sees fit to grant the petition for writ of certiorari, Respondent would request permission under the rules to fully brief the issues contained herein.

Respectfully submitted,

ALAN WILSON
Attorney General

RUSTON W. NEELY
Assistant Attorney General
S.C. Bar No. 100192

By: 

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September 7, 2016

STATE OF SOUTH CAROLINA
In The Supreme Court

Appeal from Dorchester County
Court of Common Pleas

The Honorable Frank R. Addy, Circuit Court Judge

TREVEE GETHERS,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of **Return to Petition for Writ of Certiorari** has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

**Lara M. Caudy, Esquire
SC Commission of Indigent Defense
Appellate Defense
Post Office Box 11589
Columbia, SC 29211**

This 7th day of September, 2016



ASHLEY HAWORTH
LEGAL ASSISTANT

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Dorchester County
Frank R. Addy, Circuit Court Judge

RECEIVED

SEP 16 2016

S.C. SUPREME COURT

TREVEE GETHERS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-000284

REPLY TO RETURN TO
PETITION FOR WRIT OF CERTIORARI

LARA M. CAUDY
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ARGUMENT IN REPLY

1.

The state's contention that Petitioner's mugshot was admitted into evidence with a condition in place and that the condition could have been to remove any identifying marks that would have inferred Petitioner had a criminal record confuses the record where the record clearly indicates that it was Petitioner's "fingerprint card" that was admitted with a condition and that this condition was to redact the booking offense. Further, the record refutes the state's claims that there was no mention during the trial of when Petitioner's mugshot was taken and that the jury could have inferred the photograph was from Petitioner's booking for the murder charge before them when the jury was distinctly informed that the mugshot was taken more than four months before the murder. The introduction of Petitioner's mugshot was reversible error and trial counsel was ineffective for failing to object.

There are numerous factual and legal inaccuracies in the state's return that merit a response from Petitioner. In its return, the state contended that State's Exhibit No. 41, which is Petitioner's mugshot, was admitted into evidence with a condition in place and that this "condition could very well have been to remove any identifying marks that would infer a prior criminal record." Ret. 5. However, the state's assertion is refuted by the record.

The record clearly reflects that the trial court admitted State's Exhibit **No. 40**, which was the copy of Petitioner's "fingerprint card," with a condition in place, **not** State's Exhibit **No. 41** as the state asserted. App. 325, l. 17 – 326, l. 10. It was later revealed that the "condition" was based on an agreement by the parties to redact the fingerprint card because the card "listed his [Petitioner's] charge that he was booked in on as distribution of Schedule 1, 2, or 3 controlled substance." Based

on this condition, the fingerprint card was later substituted for a copy with the listed charge redacted. App. 370, l. 6 – 371, l. 4.

While trial counsel requested the booking offense be redacted from the fingerprint card, **she did not request any redactions be made to State’s Exhibit No. 41** before it was admitted into evidence. Consequently, Petitioner’s mugshot was admitted with language that indisputably suggested he had a prior criminal record. See State v. Traylor, 360 S.C. 74, 84, 600 S.E.2d 523, 528 (2004) (“The introduction of a ‘mug-shot’ of a defendant is reversible error unless: (1) the state has a demonstrable need to introduce the photograph, (2) the photograph shown to the jury does not suggest the defendant has a criminal record, and (3) the photograph is not introduced in such a way as to draw attention to its origin or implication.”). Most notably, “Charleston County Sheriff’s Office Detention Center,” was listed at the top of the mugshot in large, bold writing. Additionally, the body of the mugshot included, “Booking Date: 05/11/07” and Petitioner’s basic background information, including his race, height, and gender. See App. 524.

The state also claimed in its return that “[t]here was also no mention during the trial of when the booking photograph took place.” Ret. 5-6. This is also incorrect. Not only does the mugshot list the booking date as “05/11/07,” which was approximately four months before the murder in this case, but state witness Javon Wright, who identified himself as an employee of the Charleston County Detention Center before the jury, also testified that State’s Exhibit No. 41 is “a **mugshot of Trevee Gethers** [Petitioner], **booking date 5-11-07.**” App. 323, l. 5 – 325, l. 6 (emphasis added). Accordingly, despite the state’s assertion, there was mention of *exactly* when the mugshot was taken, and significantly, as stated above, it was months before Petitioner’s arrest in this case.

Moreover, this evidence clearly refutes the state’s claim that the “jury could easily have inferred the picture and fingerprints were from Petitioner’s booking for the murder charge before

them.” Ret. 6. The murder in this case took place on September 17, 2007, approximately four months after the listed booking date on Petitioner’s mugshot. Consequently, it is impossible that the jury could have inferred the mugshot was from Petitioner’s arrest for the murder offense for which he was being tried.

In addition to “Charleston County Sheriff’s Office Detention Center,” the booking date, and Petitioner’s background information, State’s Exhibit No. 41 also contains both a front and side profile picture of Petitioner, which is normally associated with a mugshot. Therefore, it is undeniable that Petitioner’s mugshot admitted as State’s Exhibit No. 41 suggested he had a criminal record.

Furthermore, while the state contended in its return that Petitioner’s mugshot “was not introduced in such a way as to draw attention to its origin or implication,” it failed to make any argument in support of this assertion. Rather, the state simply maintained that the “booking photograph and the fact that the fingerprints were taken at a county detention center were not mentioned during the State’s closing argument” and the “photographs [sic] origin and implication were entirely avoided by the State after its introduction.” However, when Petitioner’s mugshot was admitted into evidence, as mentioned above, Javon Wright testified the exhibit was “a **mugshot of Trevee Gethers** [Petitioner], **booking date 5-11-07.**” Wright also testified that he took the picture of Petitioner when he booked Petitioner into the Charleston County Detention Center. The mugshot itself even states “Charleston County Sheriff’s Office Detention Center.” Therefore, it is obvious that the mugshot was admitted in a manner that drew significant attention to its origin and implication.

In support of its argument that the prosecution had shown a demonstrable need to introduce Petitioner’s mugshot, the state incorrectly asserted in its return that admitting the mugshot was

necessary to tie the fingerprint card to Petitioner. Ret. 5. Introduction of Petitioner's mugshot was not necessary to establish that the fingerprint card entered as State's Exhibit No. 40 belonged to Petitioner. Petitioner never contested that this fingerprint card belonged to him nor did he dispute that his fingerprints were found on the outside of the decedent's vehicle. Before Javon Wright testified and Petitioner's mugshot was admitted into evidence, Investigator John Garrison told the jury that latent prints were located on the outside passenger side of the decedent's vehicle and that the prints "came back to the defendant." Petitioner did not object to this testimony or dispute that his fingerprints were on the outside of the car. App. 287, ll. 15-17.

The state could have easily established the validity of the fingerprint card without introducing Petitioner's mugshot or suggesting to the jury that he had a prior criminal record. For example, Wright could have simply testified that he collected Petitioner's fingerprints on May 11, 2007 and that the prints were stored by the sheriff's office without any mention of Petitioner's prior arrest or why the prints were collected.

Therefore, trial counsel was ineffective for failing to object to State's Exhibit No. 41 as the introduction of Petitioner's mugshot was in clear violation of this Court's holding in Traylor.

If trial counsel would have objected to the admission of Petitioner's mugshot and the trial court admitted the exhibit over objection, it would have been reversible error on appeal since the state did not have a demonstrable need to introduce the photograph, the photograph suggested Petitioner had a criminal record, and the photograph was introduced in a way that drew attention to its origin and implication. See Traylor, 360 S.C. at 84, 600 S.E.2d at 528. Moreover, since the three factors outlined by this Court in Traylor were not met in this case, it is highly probable the trial court would have sustained an objection from trial counsel if an objection had been made.

Contrary to the state's argument in its return, if the mugshot had not been admitted, the outcome of Petitioner's trial would have been different. The state's case against Petitioner was based almost exclusively on circumstantial evidence. Specifically, the state presented evidence that Petitioner's fingerprints were found on the outside of the decedent's car, his DNA was found on a telephone headset found in the parking lot where the decedent was shot, and he allegedly fled to New York. The only direct evidence against Petitioner was a statement given by his codefendant, Veronica. However, Veronica disavowed most, if not all, of this statement during her testimony at trial. Consequently, the state's evidence against Petitioner was very weak. It is highly likely that the improper admission of his mugshot tipped the scales in favor of a conviction and led the jury to convict Petitioner on an improper basis, namely because they knew he had a criminal record and had committed prior bad acts. The danger in admitting such prejudicial evidence is that even if the jury found the state had failed to prove Petitioner's guilt beyond a reasonable doubt, it likely concluded he was a criminal and should be incarcerated.

Respectfully, this Court should hold trial counsel was ineffective, reverse the ruling of the PCR court, and remand for a new trial.

2.

The state oddly cites to the standard of review that is used by federal courts to determine if a writ of habeas corpus should be granted which was enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). This is an incorrect standard of review in post-conviction relief cases in South Carolina. Further, the state ignores the fact that the trial judge instructed the jury that its task was the “seek the truth” in *both* her opening remarks and her charge on the law. The court’s repeated use of the “seek the truth” language erroneously shifted the state’s heavy burden to Petitioner and likely caused the jury to apply the challenged instruction in a manner inconsistent with the state’s burden of proof beyond a reasonable doubt.

The state’s return ignores the fact that the trial judge instructed the jury that its task was to “seek the truth” in *both* her opening remarks and her charge on the law at the conclusion of the trial. In fact, the court’s last words to the jury before it began to deliberate was: “The word ‘verdict’ . . . comes from the Latin phrase ‘verdicto,’ which means to speak the truth, to speak the truth. And that is now your task, to speak the truth.” App. 494, ll. 6-9. The state makes no mention of this erroneous and burden shifting language in the court’s charge on the law and instead focuses on the trial judge’s opening instruction.

The state contended in its return that because the trial judge’s opening instructions were not a charge on the law, her erroneous use of “seek the truth” was not objectionable. However, the trial judge never instructed the jury during her opening that her remarks were not a charge on the law as most judges do. Because the judge failed to inform the jury that her opening remarks were not an instruction on the law, the jury could only have assumed her opening instructions were the law.

The trial court’s repeated use of the “seek the truth” language in its opening remarks to the jury and its instruction on the law at the conclusion of the trial erroneously shifted the state’s heavy

burden of proof to Petitioner. Throughout the trial, the jurors were concentrating on evaluating the quality of the evidence in a “search for the truth” rather than thinking in terms of their actual straightforward task of determining whether the state was proving its case beyond a reasonable doubt. Because of the repeated use of this erroneous language throughout Petitioner’s trial, even in the state’s closing argument, there is a reasonable likelihood that the jury applied the challenged instruction in a manner inconsistent with the state’s burden of proof beyond a reasonable doubt. During its deliberations, the jury was likely focusing on discovering “the truth” as opposed to determining whether the state had met its hefty burden of proving Petitioner’s guilt beyond a reasonable doubt.

Moreover, at the conclusion of its argument, the state oddly cited to an incorrect standard of review. Specifically, the state argued, “Respondent asserts the PCR Court’s rejection of this claim of ineffective assistance of counsel, is not contrary to, or an unreasonable application of, clearly established **state** law, nor did the adjudication result in an unreasonable determination of the facts.” Ret. 11 (emphasis added). This language appears in 28 U.S.C.A. § 2254(d), which was enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), and is the standard used by federal courts to determine if a writ of habeas corpus should be granted. Specifically, the statute reads,

An application for writ of habeas corpus on behalf of a person in custody pursuant to the judgement of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claims – (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established **Federal** law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

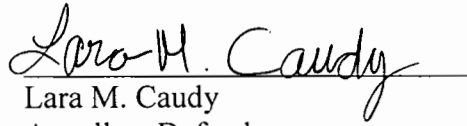
(emphasis added). This standard is not proper in post-conviction relief cases in South Carolina and was incorrectly and oddly cited by the state.

Given this fundamentally inaccurate instruction on the purpose of a criminal trial and the jury's function that occurred during both the court's opening remarks and the charge on the law at the conclusion of the trial, this Court should hold trial counsel rendered ineffective assistance of counsel by failing to object and that Petitioner was prejudiced by counsel's deficient performance since the incorrect instruction improperly shifted the burden of proof and tainted the jury's deliberations. Respectfully, due to counsel's deficient performance and the resulting prejudice to Petitioner, this Court should reverse the ruling of the PCR court and grant Petitioner a new trial.

CONCLUSION

For these additional reasons, Petitioner respectfully requests this Court grant the petition for writ of certiorari.

Respectfully submitted,


Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of September, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Dorchester County
Frank R. Addy, Circuit Court Judge

TREVEE GETHERS,

PETITIONER,

V.

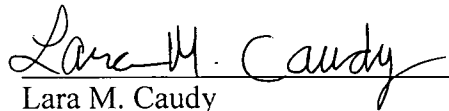
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-000284

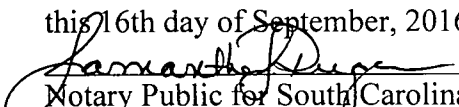
CERTIFICATE OF SERVICE

I certify that a true copy of the Reply to Return to Petition for Writ of Certiorari in the above referenced case has been served upon Ruston W. Neely, Esquire at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 2920, this 16th day of September, 2016.


Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 16th day of September, 2016.

 (L.S)

Notary Public for South Carolina

My Commission Expires: April 27, 2026.

The South Carolina Court of Appeals

Treveen Gethers, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2016-000284

ORDER

This matter is before the Court on a petition for a writ of certiorari following the denial of Petitioner's application for post-conviction relief. Based on the vote of the panel, the petition for a writ of certiorari is denied.

FOR THE COURT

BY


CLERK

Columbia, South Carolina

cc:

Lara Mary Caudy

Ruston Wesley Neely

Treven Gethers

The Honorable Frank R. Addy, Jr.

FILED

April 24, 2018

87



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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May 15, 2018

The Honorable Cheryl L. Graham
5200 E Jim Bilton Blvd
St George SC 29477-8020

REMITTITUR

Re: Trevee Gethers v. State
Lower Court Case No. 2014CP1801287
Appellate Case No. 2016-000284

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

V. Claire Allen, Deputy

CLERK

Enclosure

cc: Lara Mary Caudy, Esquire
Ruston Wesley Neely, Esquire
Trevee Gethers, #343706

COUNTY OF DorchesterTreyee Gether

Plaintiff(s)

CIVIL ACTION COVERSHEET

2021-CP-18-1217

-CP-

vs.

State of South Carolina

Defendant(s)

FILED-RECORDED

7-6-2021 RIBSubmitted By: Treyee GetherAddress: 136 Wilborn AveRidgeway, S.C. 29477SC Bar #: NATelephone #: NAFax #: NAOther: NAE-mail: NA

Cheryl Graham

Clerk of Court

Dorchester County

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 ☐ Constructions (100) ☐ Debt Collection (110) ☐ General (130) ☐ Breach of Contract (140) ☐ Fraud/Bad Faith (150) ☐ Failure to Deliver Warrant (160) ☐ Employment Discrim (170) ☐ Employment (180) ☐ Other (199)	Torts - Professional Malpractice ☐ Dental Malpractice (200) ☐ Legal Malpractice (210) ☐ Medical Malpractice (220) ☐ Previous Notice of Intent Case # 20____-NI_____ ☐ Notice/ File Med Mal (230) ☐ Other (299)	Torts - Personal Injury ☐ Conversion (310) ☐ Motor Vehicle Accident (320) ☐ Premises Liability (330) ☐ Products Liability (340) ☐ Personal Injury (350) ☐ Wrongful Death (360) ☐ Assault/Battery (370) ☐ Slander/Libel (380) ☐ Other (399)	Real Property ☐ Claim & Delivery (400) ☐ Condemnation (410) ☐ Foreclosure (420) ☐ Mechanic's Lien (430) ☐ Partition (440) ☐ Possession (450) ☐ Building Code Violation (460) ☐ Other (499)
Inmate Petitions ☒ PCR (500) ☐ Mandamus (520) ☐ Habeas Corpus (530) ☐ Other (599)	Administrative Law/Relief ☐ Reinstate Drv. License (800) ☐ Judicial Review (810) ☐ Relief (820) ☐ Permanent Injunction (830) ☐ Forfeiture-Petition (840) ☐ Forfeiture-Consent Order (850) ☐ Other (899)	Judgments/Settlements ☐ Death Settlement (700) ☐ Foreign Judgment (710) ☐ Magistrate's Judgment (720) ☐ Minor Settlement (730) ☐ Transcript Judgment (740) ☐ Lis Pendens (750) ☐ Transfer of Structured Settlement Payment Rights Application (760) ☐ Confession of Judgment (770) ☐ Petition for Workers Compensation Settlement Approval (780) ☐ Other (799)	Appeals ☐ Arbitration (900) ☐ Magistrate-Civil (910) ☐ Magistrate-Criminal (920) ☐ Municipal (930) ☐ Probate Court (940) ☐ SCDOT (950) ☐ Worker's Comp (960) ☐ Zoning Board (970) ☐ Public Service Comm. (990) ☐ Employment Security Comm (991) ☐ Other (999)
Special/Complex/Other ☐ Environmental (600) ☐ Automobile Arb. (610) ☐ Medical (620) ☐ Other (699) ☐ Sexual Predator (510) ☐ Permanent Restraining Order (680)	☐ Pharmaceuticals (630) ☐ Unfair Trade Practices (640) ☐ Out-of State Depositions (650) ☐ Motion to Quash Subpoena in an Out-of-County Action (660) ☐ Pre-Suit Discovery (670)		

Submitting Party Signature: Im LutzDate: 7-1-2021

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

FORM 5

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

County of Dorchester)2021-CP-18-1217Treyee Gether #343706)

FILED-RECORDED

Full name and prison number (if any) of Applicant)

7-6-2021 RIB

v.)

Cheryl Graham

Clerk of Court

APPLICATION FOR Dorchester County

State of South Carolina)

POST-CONVICTION RELIEF

Newly Discovered Evidence
S.C. Code 17-27-45(C)**INSTRUCTIONS - READ CAREFULLY**

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

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

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

1. Place of detention Lieber Court Inst 136 Wilborn Ave
Ridgelyville, SC 29472
2. Name and location of Court which imposed sentence Dorchester County
of General Sessions in St George
3. Name(s) of co-defendant(s) (if any) No
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2007-GS-18-1755
 - (b) _____

- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) Nov 19, 2010
- (b) _____
- (c) _____
6. 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 _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. S.C.C of Appeals
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. may 7, 2014 denied
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. may 7, 2014
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. 2012-48-576
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) _____

- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) See Memorandum of Law in Support
- (b) PCR Application S.C. Code of Law
- (c) Ann § 17-27-45(C)
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) Same Attachment
- (b) _____
- (c) _____
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? Yes
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? Yes
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? ██████ No
- (d) any other petitions, motions or applications in this or any other Court? No
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. NA
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. NA
- ii. _____
- iii. _____
- iv. _____

(c) the disposition thereof:

- i. NA
- ii. _____
- iii. _____
- iv. _____

(d) the date of each such disposition:

- i. NA
- ii. _____
- iii. _____
- iv. _____

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

- i. NA
- ii. _____
- iii. _____
- iv. _____

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

NA

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

(a) which grounds have been presented:

- i. NA
- ii. _____
- iii. _____

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

- i. NA
- ii. _____
- iii. _____

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

(a) NA

(b) _____

(c) _____

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

(a) your arraignment and plea? _____

(b) your trial, if any? Yes

(c) your sentencing? Yes

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

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?
NO

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

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

i. Sara J. Rogers Esq

ii. Elizabeth A. Franklin-Best

iii. _____

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

i. Trial

ii. Notice of Appeal

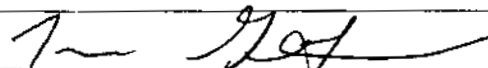
iii. _____

2021-CP-18-1217

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

I, Treva Gathers #343706, 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.


Applicant

SWORN or affirmed to and subscribed before me this

1st day of July, 2021.


Notary Public

My Commission Expires: 6-20-26

FILED-RECORDED

7-6-2021 ^{RIB}
Cheryl Graham
Clerk of Court
Dorchester County

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

Vacate Conviction And sentences

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

No

STATE OF SOUTH CAROLINA)

County of Ridgeville)

VERIFICATION

I, Treva Gether #343700, 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.

Treva Gether

SWORN to and subscribed before me this

1st

day of

July

2021.

Linda K. Butler (L.S.)

Notary Public

My Commission Expires:

6-20-26

State of South Carolina
County of Dorchester

In The Court of Common Pleas
C/A 2021-CP-18-1217

Trenee Getters
Applicant

AFFIDAVIT OF SERVICE

Vs

State of South Carolina,
Respondent's

FILED-RECORDED

7-6-2021 AIRB

Cheryl Graham
Clerk of Court
Dorchester County

To: Respondent's:

I Trenee Getters #343706; hereby served A True Copy of the original copy of Post-Conviction Relief Application by placing A true copy in the united states mail addressed below.

Cheryl Graham
(1) Dorchester County
Clerk of Court
5200 East Tim Biton Blvd.
St. George, S.C. 29472

Date 7-1 2021

s/ Trenee Getters
Trenee Getters
343706
136 Wilborn Ave
Ridgely, SC 29472

state of South Carolina) In the Court of Common Pleas
county of Dorchester) CA _____
2021-CP-18-1217

✓ Trevee Gether
Applicant

1 Memorandum of Law
1 Support Post-Conviction
1 Relief Application

VS
state of South Carolina
Respondent's

FILED-RECORDED
7-6-2021 RIB
Cheryl Graham
Clerk of Court
Dorchester County

To: Respondent's:

Now comes the applicant moves before
this Honorable Court pursuant to S.C. Code
of Law Ann § 17-27-45(C) Post-Conviction
Relief Application based on Newly Discovered
Evidence.

statement of the case

on september 17, 2007 Murder
occurred in Dorchester county
and applicant was sentenced to
45 years in prison. He appealed
his conviction and sentence which
was affirmed by the South Carolina

Court of Appeals on October 24, 2012, state v Trevee J. Gethers 202-up-576. He sought certiorari to the South Carolina Supreme Court and it denied certiorari by order dated May 7, 2014.

Petitioner then filed an application for post-conviction relief in the Dorchester County Court of Common Pleas on July 3, 2014. An evidentiary hearing was held on October 28, 2015. An order of dismissal was filed on February 15, 2016. Petitioner appealed that denial and after transfer from the South Carolina Supreme Court to the South Carolina Court of Appeals, the Court denied certiorari on April 24, 2018.

petitioner then timely filed a Petition for a writ of habeas corpus on April 15, 2019. Respondent filed a return and memorandum to habeas Petition and a motion for Summary Judgment on July 1, 2019,

Doc. Nos, 8, 9. It also filed a motion to strike Exhibits on that date. Doc. Nos. 10. Petitioner then filed a Response to the motion to strike Exhibits on July 11, 2019, Doc. 11 and a motion for an Evidentiary hearing on that date. Doc. No. 12. Respondent filed a Response in opposition to a motion for hearing on July 25, 2019. Doc. No. 13. Petitioner then filed a Reply to the Response on 9, 2019. Doc. No. 16. The Magistrate Judge issued her Report and Recommendation on October 17, 2019. Doc. No. 17. Petitioner filed objections to the RJR on October 29, 2019. Doc. No. 19. Respondent filed a Reply on November 8, 2019. Doc. No. 20. The opinion and order adopting the Report and Recommendation, Granting Respondent's motion for Summary Judgment. Denying Respondent's motion to strike, denying Petitioner's motion for an

Evidentiary hearing and dismissing the petition with prejudice and denying a certificate of Appealability was filed on June 5, 2020. Doc No. 23

Petitioner timely filed a Notice of Appeal on June 7, 2020 Doc. No. 25.

Argument I

Applicant contends that pursuant to S.C. Code of Law Arts 17-27-45(C) that he made a discovered whereby legal counsel Elizabeth A. Franklin Best prepared legal Brief on July 9, 2020, on behalf of the applicant, and legal counsel Elizabeth A. Franklin Best discovered that a witness by name of Dante Hubbard witness the commission of this crime, and this statement was gave to the police that Dante Hubbard observed the murder and the applicant was not the one who committed it and the state solicitor withheld Brady

material a statement that was found by legal counsel Elizabeth A Franklin-Best, and this statement never exist at the time of trial in the applicant motion discovery. "see at pg(6) of Brief No. 20-6850) in The united states court of Appeals for the fourth circuit.

The applicant contends that grounds for Newly Discovered Evidence is require to be filed pursuant to S.C. Code of Law Ann § 17-27-45(C) If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence.

The applicant contends Newly discovered Evidence when someone does not come forward to corroborate that claim. ... Here the applicant never

review Rule 586 Motion Discovery evidence which never exist to the applicant at his jury trial [and this evidence could be heard before the jury if only solicitor withheld this statement that was given to the police which is Brady material most favor to the applicant.

"see state v Spain 334 S.C. 618 513 SE2d 98 (1999); that is, the Newly Discovered Evidence (1) is such that it would probably change the result if a New trial were granted; (2) has been discovered since the trial; (3) could not in the exercise of due diligence have been discovered prior to trial; (4) is material; (5) is not merely cumulative or impeaching.

Applicant contends that this Evidence was most favor to the applicant if the solicitor

had not withheld statement that was given to the police and would have changed the outcome of the applicant jury trial which the applicant would have been granted Relief.

Conclusion

Wherefore the applicant should be granted A Newtrial Requesting Relief in this PCR Application.

Respectfully Submitted

s/ Trevee Gethers

\$1 - [Signature]

136 Wilborn Ave
Ridgeville S.C. 29472

C: C: T: G:
C C: A: W: A: G: O:

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF DORCHESTER	)	FOR THE FIRST JUDICIAL CIRCUIT
	)	
Treveen Gethers, SCDC #343706,	)	Case No.: 2021-CP-18-01217
	)	
Applicant,	)	
	)	RETURN TO THE APPLICATION
v.	)	FOR POST-CONVICTION RELIEF
	)	AND MOTION TO DISMISS
State of South Carolina,	)	(Appointment of Counsel NOT Requested)
	)	
Respondent,	)	

FILED-RECORDED
10-15-2021
 Cheryl Graham
 Clerk of Court
 Dorchester County

In response to the application for post-conviction relief filed by Applicant Treveen Gethers on July 6, 2021, and received by the South Carolina Attorney General's office on July 12, 2021, Respondent the State of South Carolina makes this return¹ and motion to dismiss the application as untimely and successive to Applicant's previous application pursuant to Section 17-27-45, Section 17-27-70, and Section 17-27-90 of the South Carolina Code and barred by the doctrine of *res judicata*. Respondent respectfully offers the following in support of its return and motion to dismiss:

I. Procedural History

Applicant is presently confined in the South Carolina Department of Corrections. During its December 2007 term, the Dorchester County Grand Jury indicted Applicant for murder (2007-GS-18-01755).

¹ Respondent's return was due to be filed within ninety days of receipt. *See* Rule 12(a), SCRCPC ("[T]he State of South Carolina shall answer or otherwise respond to an application for post-conviction relief within 60 days after service of the application, if it arises out of a guilty plea, and 90 days if it arises out of a trial.") Now, having completed the return required in this matter, and in light of no demonstrable prejudice to Applicant as a consequence of the delay, Respondent respectfully asks this Court to accept this return as timely filed. *See* S.C. Code Ann. § 17-27-70(a) (establishing that the Court may fix the time in which the State must respond and that "respondent shall file with its answer the record or portions thereof that are material to the questions raised in the application."); *Guinyard v. State*, 260 S.C. 220, 195 S.E.2d 392 (1973) (holding the trial court may extend the time for filing and that the time limit prescribed by the statute is not mandatory, but discretionary with the trial court.).

On November 15-16, 2010, Applicant proceeded to a jury trial before the Honorable Diane S. Goodstein. Sara Jayne Rogers, Esquire, represented Applicant on the charges. Russell D. Hilton and Harrison Bell, Jr., of the First Circuit Solicitor's Office, prosecuted the case. Applicant was found guilty as indicted. Judge Goodstein sentenced Applicant to imprisonment for a period of forty-five years.

A. Direct Appeal

Applicant filed a timely notice of appeal. Appellate Defender Susan Hackett perfected Applicant's appeal by filing a petition with the Court of Appeals on the following issue:

- I. Did the Court of Appeals err in affirming [Applicant's] conviction for murder and the trial judge's failure to direct a verdict of acquittal where the evidence adduced at trial did not rise above mere suspicion because the circumstantial evidence suggested only that [Applicant] was near the murder scene when the decedent was fatally shot?

Following briefing, the Court of Appeals affirmed Applicant's conviction and sentence. *State v. Gethers*, 2012-UP-576 (S.C. Ct. App. Filed October 25th, 2012). The case was remitted back to the circuit court on May 7, 2014.

B. Initial Post-Conviction Relief Action (2014-CP-18-01287) and Subsequent Appeal

Applicant filed his first application for post-conviction relief on July 3, 2014, alleging:

1. Ineffective assistance of trial counsel in:
 - a. Failing to object to Judge Goodstein's opening instruction;
 - b. Failing to object the solicitor's comments regarding robbery as a motive despite the fact that Applicant was not indicted for robbery;
 - c. Failing to object to the admission of Applicant's booking photo; and
 - d. Failing to request a voluntary manslaughter charge.

The State filed its Return on February 26, 2015. Applicant was represented by Rodney D. Davis. An evidentiary hearing was held on October 28, 2015, before the Honorable Frank R. Addy, at the Dorchester County Courthouse. On January 8, 2016, Judge Addy issued an order denying and dismissing Applicant's application for PCR with prejudice.

Subsequently, Applicant appealed the denial of post-conviction relief and was represented on appeal by Appellate Defender Lara M. Caudy of the South Carolina Commission on Indigent Defense-Division of Appellate Defense who filed a petition for writ of certiorari. Respondent filed its Return to the Petition on September 7, 2016. On March 2, 2016, the post-conviction relief appeal was transferred to the South Carolina Court of Appeals. The South Carolina Court of Appeals denied Applicant's petition by Order filed April 24, 2018. The Remittitur was issued on May 15, 2018.

C. Federal Habeas Corpus Action (1:19-cv-01088-SAL)

Applicant subsequently filed a *pro se* Petition for Habeas Corpus under 28 U.S.C. § 2254 on April 15, 2019. In his Petition, Applicant set forth the following grounds for relief:

1. The South Carolina Court of Appeals erred when it found the trial court did not err when she declined to grant petitioner's motion for a directed verdict when the evidence at trial was not sufficient to support his conviction for murder;
2. Trial Counsel rendered ineffective assistance of counsel when she did not secure the attendance of a witness who gave a statement to the Dorchester County Sheriff's Office shortly after the murder informing them that he witnessed someone else shoot the decedent;
3. The PCR court erred in finding that Petitioner was not denied his rights under the Sixth and Fourteenth Amendments to the effective assistance of counsel when counsel failed to object to the admission of Petitioner's mugshot from his prior arrest approximately four months before the murder where no demonstrable need of the mugshot was established, the mugshot plainly suggested to the jury that Petitioner had a prior record, and the origin of the mugshot was clear as it stated "Charleston County Sheriff's Office Detention Center" at the top of the photograph and listed the "booking date."; and
4. The PCR court erred in finding that Petitioner was not denied his rights under the Sixth and Fourteenth Amendments to the effective assistance of counsel when counsel failed to object to the trial court's opening statement to the jury that the trial was "a search for the truth in an effort to make sure that justice is done" since this instruction was fundamentally incorrect, was burden shifting, and misdirected the jury's inquiry from the beginning of the trial forward from the correct legal question of whether the State had proved Petitioner's guilt beyond a reasonable doubt.

Respondent filed its Return and Motion for Summary Judgment and Motion to Strike Exhibits Attached to Petition for Writ of Habeas Corpus on July 1, 2019. Applicant moved for an evidentiary hearing on July 11, 2019. The Honorable Shiva V. Hodges, United States Magistrate Judge, issued a Report and Recommendation on October 17, 2019, recommending that Respondent's motion for summary judgement be granted, Respondent's motion to strike be denied, Applicant's motion for an evidentiary hearing be denied, and the Petition be dismissed with prejudice. Applicant timely objected on October 29, 2019 and Respondent replied.

The Honorable Sherri A. Lydon, United States District Judge, denied Applicant's Petition on June 5, 2020, and accepted the Report and Recommendation for summary judgment. Applicant gave notice of his appeal to the Fourth Circuit Court of Appeals on June 7, 2020, and filed an informal opening brief on July 15, 2020. The Fourth Circuit Court of Appeals dismissed Applicant's appeal by unpublished *per curiam* opinion on March 22, 2021. Treveen Gethers v. Bryan Stirling, No. 20-6850 (4th Cir. March 22, 2021). The formal mandate of the Court was issued on April 13, 2021.

II. Allegations Raised and Relief Sought in Current Post-Conviction Relief Action

In his second and present application for post-conviction relief, Applicant alleges he is being held in custody unlawfully based on the following reasons:

1. Newly-discovered evidence

- a. "Counsel Elizabeth A. Franklin-Best prepared [a] legal brief on July 9, 2020, on behalf of the Applicant, and legal counsel Elizabeth A. Franklin-Best discovered that a witness by [the] name of Dante Hubbard witness[ed] the commission of this crime, and a statement was g[iven] to the police that Dante Hubbard observed the murder and the Applicant was not the one who committed it" and
- b. "The State Solicitor withheld *Brady* material. [A] statement that was found by legal counsel Elizabeth A. Franklin-Best, and this statement never exist[ed] at the time of trial in the Applicant['s] motion discovery".

Applicant requests relief as follows:

“vacate conviction and sentences”.

Attached to this return and incorporated by reference are the Dorchester County Clerk of Court records regarding the subject convictions; Applicant’s records from the South Carolina Department of Corrections; records from Applicant’s direct appeal, including the trial transcript; the final order from Applicant’s previous PCR action and subsequent appeal; records from Applicant’s habeas action; and the records of the current PCR action. The State reserves the right to amend this return upon receipt of any relevant materials.

III. Motion to Dismiss

The State moves for summary dismissal pursuant to Section 17-27-70 of the South Carolina Code on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing. *See Welch v. MacDougall*, 246 S.C. 258, 260, 143 S.E.2d 455, 456 (1965) (requiring a PCR applicant to make a *prima facie* showing he is entitled to relief before the court will hold an evidentiary hearing). Because there is no question of law or fact to necessitate a hearing, Respondent requests this Court issue a Conditional Order of Dismissal indicating the Court’s intent to dismiss the application and its reasons for so doing.² *See* S.C. Code Ann. § 17-27-70(b) (establishing procedure for summary disposition of PCR applications); *Leamon v. State*, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005) (summary disposition appropriate when there is no need to develop facts and the applicant is not entitled to relief); *Re: Appointment of Counsel in Post-Conviction Relief Cases before the Circuit Court*, S.C. Sup. Ct. Order filed October 6, 2008; Rule 71.1(d), SCRCPP (providing for appointment of counsel only where there is a question of law

² A proposed Conditional Order of Dismissal consistent with this Return and Motion to Dismiss is concurrently submitted for the Court’s consideration.

or fact which necessitates a hearing). Respondent moves for summary dismissal for the following reasons:

A. Summary Dismissal Based on the Statute of Limitations

Respondent submits this application should be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. § 17-27-10 to -160. Specifically, the Act requires as follows:

(A) An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

(B) When a court whose decisions are binding upon the Supreme Court of this State or the Supreme Court of this State holds that the Constitution of the United States or the Constitution of South Carolina, or both, impose upon state criminal proceedings a substantive standard not previously recognized or a right not in existence at the time of the state court trial, and if the standard or right is intended to be applied retroactively, an application under this chapter may be filed not later than one year after the date on which the standard or right was determined to exist.

(C) If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence.

S.C. Code Ann. § 17-27-45.

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. *Peloquin v. State*, 321 S.C. 468, 469 S.E.2d 606 (1996). A motion for summary judgment may properly be used to raise the defense of statute of limitations. *McDonnell v. Consolidated School District of Aiken*, 315 S.C. 487, 445 S.E.2d 638 (1994). Additionally, Section 17-27-70(c) authorizes this Court to “grant a motion by either party for

summary disposition of [an] application when it appears from the pleadings . . . there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.”

In the present case, Applicant was sentenced on November 16, 2010, and the remittitur from the subsequent direct appeal was issued May 7, 2014. Pursuant to Section 17-27-45(A), Applicant had until May 7, 2015, to timely file his application for post-conviction relief challenging his convictions. Applicant did not file the instant application until July 6, 2021, more than six years beyond the statute of limitations. Applicant failed to comply with the filing requirements under Section 17-27-45(A). Applicant has not alleged any claims based on a change of law or statute. Thus, Applicant has also failed to comply with the filing requirements under Section 17-27-45(B).

Moreover, Applicant’s allegation of newly-discovered evidence, is without merit. The Act states a person may institute a PCR action if “there exists evidence or material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice.” S.C. Code Ann. § 17-27-20(A)(4).

“If the applicant contends there is evidence of a material fact not previously presented, the PCR application must be filed *within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence.*” S.C. Code Ann. § 17-27-45(C) (emphasis added). An applicant requesting a new trial based on after-discovered evidence following a conviction must show that the evidence:

- (1) Is such as would probably change the result if a new trial was had;
- (2) Has been discovered since the trial;
- (3) Could not by the exercise of due diligence have been discovered before the trial;
- (4) Is material to the issue of guilt or innocence; and,
- (5) Is not merely cumulative or impeaching.

Hayden v. State, 278 S.C. 610, 611, 299 S.E.2d 854, 855 (1983) (citing *State v. Caskey*, 273 S.C. 325, 256 S.E.2d 737 (1979)).

In this case, Applicant alleges Dante Hubbard witnessed the crime Applicant was convicted of. Applicant states Mr. Hubbard gave a statement to police stating he observed the murder and Applicant was not the person who committed the crime. Applicant asserts this statement was withheld from trial counsel by the Solicitor's office and was not discoverable at the time of trial. Applicant contends this statement was recently discovered by habeas counsel, Elizabeth A. Franklin-Best. Applicant argues he is entitled to post-conviction relief based on this newly-discovered evidence.

In habeas counsel's Informal Brief of Petitioner-Appellant, habeas counsel states:

“While investigating Petitioner's case, habeas counsel contacted the Deputy Solicitor for Dorchester County, Don Sorenson, who provided Hubbard's contemporaneous statement, along with investigator notes memorializing the interview, to habeas counsel. It appears that the statement was therefore, in the file and that trial counsel simply did not use it.”

(Informal Brief of Petitioner-Appellant, Trevee Gethers, filed July 15, 2020, pp. 6-7).

This evidence was discoverable prior to trial. Applicant could have raised this claim of ineffective assistance of counsel in his prior PCR action. Applicant cannot raise this allegation now under the guise of “newly-discovered evidence”. Because these facts were clearly available prior to this action, they do not constitute newly-discovered evidence.

Before the Court will hold an evidentiary hearing, Applicant must make a *prima facie* showing he is entitled to relief. *Welch v. MacDougall*, 246 S.C. 258, 143 S.E.2d 455 (1965); *Blandshaw v. State*, 245 S.C. 385, 140 S.E.2d 784 (1965). Applicant has failed to make such showing he is entitled to relief based on the information set forth above. Additionally, Applicant's current allegations involve “facts” that were or could have been raised in the prior PCR action;

thus, Applicant is not entitled to an evidentiary hearing in the matter. Applicant has failed to meet his burden, and Respondent submits this matter should be summarily dismissed.

B. Summary Dismissal Based on Successiveness

The State moves to summarily dismiss the application because it is successive to Applicant's previous PCR application. Courts disfavor successive applications and place the burden on applicants to establish that any new ground raised in a subsequent application could not have been earlier raised in a previous application. *Foxworth v. State*, 275 S.C. 615, 274 S.E.2d 415 (1981); *Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992). Section 17-27-90 of the South Carolina Code states:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental, or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily, and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

Section 17-27-90 is clear—successive post-conviction relief applications are forbidden unless an applicant can indicate a “sufficient reason” why new grounds for relief were not raised or were not properly raised in previous applications or actions challenging these convictions. *See Aice v. State*, 305 S.C. 448, 452, 409 S.E.2d 392, 395 (1991) (“[Applicant] has filed an original PCR application, and has been allowed to seek review of the ruling against him. We refuse to grant his request for a second chance, and again we do so in order to effectuate the purposes of the Act and rules.”). Any new ground raised in a subsequent application is limited to those grounds that “could not have been raised . . . in the previous application.” *Id.* at 450, 409 S.E.2d at 394. If the applicant could have raised these allegations in a previous application, then the applicant may not raise those

grounds in successive applications. *Id.* Applicant bears the burden of showing the allegations could not have been previously raised. *Land v. State*, 274 S.C. 243, 262 S.E.2d 735 (1980).

Applicant's current allegations were or could have been raised in the proceedings based on Applicant's prior PCR application; thus, the current application is successive and barred under South Carolina Code Annotated Section 17-27-90. Applicant has failed to establish any sufficient reason why Applicant could not raise his current allegations in his previous state and federal collateral actions. Accordingly, Applicant has failed to meet the burden imposed upon him, and the Court should summarily dismiss the application as successive to Applicant's previous PCR actions.

C. Summary Dismissal Based on *Res Judicata*

Because the allegations in the current application were or could have been raised in Applicant's previous state and federal proceedings, this action is further barred by the doctrine of *res judicata*. *Res judicata* prohibits subsequent actions by the same parties on the same issues. *Bell v. Bennett*, 307 S.C. 286, 414 S.E.2d 786 (Ct. App. 1992). A final judgment on the merits in a prior action bars subsequent consideration of those issues in a new action. *Foran v. USAA Cas. Ins. Co.*, 311 S.C. 189, 427 S.E.2d 918 (Ct. App. 1993). *Res judicata* also bars any issues that could have been raised in the former action. *Id.*; *Foxworth*, 275 S.C. 615, 274 S.E.2d 415.

In *Foxworth*, the appellants—Myron Foxworth and Gary Wilson—were convicted of armed robbery and sentenced to twenty-two years imprisonment. Both men appealed their convictions, which were affirmed and their appeals dismissed. *Id.* at 616; 274 S.E.2d at 415. They then filed *pro se* petitions for writs of habeas corpus relief in the South Carolina Federal District Court, without exhausting their state PCR remedies. The District Court considered “the trial record and the numerous allegations raised in the petitions . . . and [it] dismissed [the petitions] on the

merits.” *Id.* Both men then filed *pro se* PCR applications, but the PCR judge found their applications were without merit. He further found that *res judicata* barred claims raised in the applications, as well as those that *could have* been raised. *Id.* at 616–17, 274 S.E.2d at 415–16 (emphasis added). Our Supreme Court agreed. Relying upon section 17-27-90 and its prior decisions construing that statute, the Court held:

The language of Section 17-27-90 is not restricted to State proceedings but rather refers to “any other proceeding” where relief might be sought prior to the submission of a subsequent application. We, therefore, extend the reasoning espoused in *Land v. State*, *supra*, to the situation where, as here, an application in the State court follows a federal habeas corpus adjudication. The burden is on the applicant to prove that the alleged grounds for relief could not have been raised in federal court.

Id. at 618, 274 S.E.2d at 416.

Applicant has pursued a petition for habeas corpus relief in federal court. He was denied habeas relief. He appealed that decision to the Fourth Circuit Court of Appeals who independently reviewed the record and concluded Applicant had not made the requisite showing entitling him to an appeal. *Gethers v. Stirling, Commissioner*, 1-19-cv-01088-SAL (dismissed June 5, 2020), *appeal dismissed* (4th. Cir. Mar. 22. 2021). Further, Applicant has litigated a previous PCR application in the circuit court, where he had a full opportunity to raise all his allegations of ineffective assistance of trial counsel. The finality of the previous courts’ rulings should be respected, and this Court should summarily dismiss this action as barred by the principles of *res judicata*.

IV. Any and All Other Allegations

Each and every allegation contained within the application not expressly admitted, qualified, or explained in this return is hereby denied.

V. Conclusion

WHEREFORE, having made its return, the State moves to summarily dismiss the application because it was filed after the statute of limitations had expired, it is successive to Applicant's prior PCR action, and it is barred by the doctrine of *res judicata*.

Respectfully submitted,

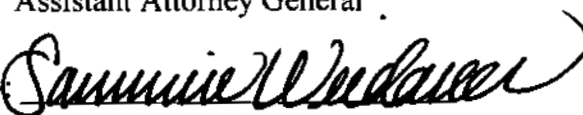
ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

SAMANTHA J. WEIDAUER
Assistant Attorney General

By



ATTORNEYS FOR THE STATE
Office of the Attorney General
Post Office Box 11549
Columbia, S.C. 29211

October 14, 2021

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER

IN THE COURT OF COMMON PLEAS

2021-CP-18-01217

TREVEE GETHERS, #343706

Applicant,

vs

CERTIFICATE OF SERVICE BY MAIL

STATE OF SOUTH CAROLINA,

Respondent,

FILED-RECORDED

10-15-2021

Christi Graham

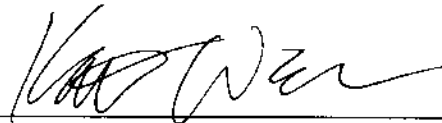
Clerk of Court

Dorchester County

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Return and Motion to Dismiss in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Treveen Gethers, #343706 (AB-0037-A)
Lieber Correctional Institution
Post Office Box 205
Ridgeville, SC 29472

DATED this 14th day of October, 2021.



Katie Wade, Legal Assistant
For Respondent

CAPTION 2177

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF DORCHESTER	)	FIRST JUDICIAL CIRCUIT
Tre'ee Gethers,	)	Case No. 2021-CP-18-01217
Applicant,	)	
v.	)	APPLICANT'S OBJECTION TO
State of South Carolina.	)	RESPONDENT'S MOTION TO DISMISS
Respondent.	)	AND REQUEST FOR HEARING
	)	

The above-named Applicant, by and through the undersigned Counsel, moves to deny the Respondent's motion to dismiss and respectfully requests an evidentiary hearing based on the following reasons:

(1) Respondent's motion to dismiss this application for Post-Conviction Relief (PCR) should be denied because there is a genuine issue of material fact for the Court's consideration, Respondent is not entitled to judgment as a matter of law, and the interests of justice require an evidentiary hearing on this matter. *See* S.C. Code § 17-27-70(b) and (c) (providing, in relevant part: "Disposition on the pleadings and record is not proper if there exists a material issue of fact."); *see generally Leamon v. State*, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005) (noting the standard of review to determine whether summary dismissal is appropriate is as follows: "Summary dismissal of a PCR application without a hearing is appropriate **only when (1)** it is apparent on the face of the application that there is **no need for a hearing to develop any facts and (2)** the applicant is not entitled to relief When considering the State's motion for summary dismissal of an application, **where no evidentiary hearing has been held, the circuit court must assume facts presented by an applicant are true and view those facts in the light most favorable to the applicant.** Similarly, when reviewing the propriety of a dismissal, this Court must view the facts

in the same fashion) (citations omitted) (emphasis added).

(2) The Court must assume the facts presented by the Applicant are true because no evidentiary hearing has been held to develop a record for the Court to weigh the credibility of the evidence and arguments presented in his *pro se* PCR application and Memorandum of Law/Support. *See generally Leamon*, 363 S.C. at 434, 611 S.E.2d at 495 (“[W]here no evidentiary hearing has been held, the circuit court must assume facts presented by an applicant are true[.]”); *see also* S.C. Code Ann. § 17-27-80 (2003) (PCR actions are governed by usual rules of civil procedure).

(3) “Extraordinary circumstances” exist in this matter because Applicant has alleged that the State **withheld** exculpatory evidence from his Trial Counsel, Sara Jayne Rogers. Specifically, Applicant alleged that the State did not disclose Dante Hubbard’s statement to his lawyer prior to trial. It appears Dante Hubbard provided a witness statement to police stating that he observed the murder, and Applicant was not the person who committed the crime. *See generally* S.C. Code § 17-27-20(A)(4) (providing “[a]ny person who has been convicted of, or sentenced for, a crime and who claims . . . that there *exists evidence of material facts, not previously presented and heard*, that requires vacation of the conviction or sentence in the interest of justice” is entitled to seek post-conviction relief) (emphasis added).

(a) Applicant has alleged that he and his Trial Counsel had no knowledge of Mr.

Hubbart’s statement, and he first became aware of that statement after his trial.

Specifically, Applicant alleged that Mr. Hubbard’s statement was discovered by his Federal Habeas counsel, Elizabeth Franklin-Best. It appears Mr. Hubbard provided an affidavit to his Federal Habeas counsel on December 11, 2018, confirming his exculpatory statement to law enforcement. (*See Attachments*).

(b) It also appears that on April 4, 2019, Don Sorenson of the First Circuit Solicitor’s

Office provided this witness statement to Applicant's Federal Habeas counsel at her request. *See* (Attachments). Notably, it appears Solicitor Sorenson was not involved in the prosecution of this case, and Mr. Hubbard's statement, along with the investigator's notes, were in law enforcement's possession and the Prosecutor's file at the time of Applicant's trial.

(c) Applicant has also alleged that he waited to file this PCR action until after the disposition of his Federal Habeas action.

(d) The undersigned Counsel seeks to present Trial Counsel's testimony at an evidentiary hearing on the issue because undersigned Counsel has communicated with Trial Counsel and was informed that she does not recall any exculpatory statements by Dante Hubbard. Trial Counsel also noted she felt that Applicant was not guilty of the charges and would have looked closely through the discovery for exculpatory evidence. It appears Applicant's Trial Counsel was disbarred from the practice of law in 2015. *See In re Sara Jayne Rogers*, Op. No. 27550 (Sup. Ct. filed July 23, 2015). (*See Attachments*).

(e) It also appears that Applicant's Federal Habeas counsel obtained an affidavit from Applicant's original PCR counsel, Rodney Davis, who admitted he did not request a copy of the Solicitor's file, had no strategic reason for failing to do so, and did not contact Trial Counsel prior to the evidentiary hearing. (*See Attachments*).

(4) Dante Hubbard's statement to law enforcement is of such a weight and quality that, under the facts and circumstances of this case, the "interests of justice" requires to vacate Applicant's convictions and sentences (if Applicant can satisfy his burden of proving the State withheld this critical evidence from Trial Counsel after an evidentiary hearing). *See* S.C. Code §

17-27-45(c) (providing “[i]f the applicant contends that there is *evidence of material facts not previously presented and heard* that requires vacation of the conviction or sentence, the application *must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant* or after the date when the facts could have been ascertained by the exercise of reasonable diligence.”) (emphasis added).

(5) A genuine issue of material fact exists because of this alleged newly discovered evidence that Applicant argues was unlawfully withheld from his Trial Counsel.

(6) In the light most favorable to Applicant, an evidentiary hearing is reasonable and necessary to develop facts and present evidence for the Court’s consideration in determining whether to toll the statute of limitations based on Applicant’s arguments of “**extraordinary circumstances**” and “**wrongdoing by the State.**” *See generally Leamon*, 363 S.C. at 434, 611 S.E.2d at 495 (“[W]here no evidentiary hearing has been held, the circuit court must . . . view those facts in the light most favorable to the applicant.”); *see* S.C. Code Ann. § 17-27-80 (citations omitted); *see generally Pelzer*, 378 S.C. at 521, 662 S.E.2d at 620-621 (summarizing the doctrine of equitable tolling: “The time requirements in lawsuits between private litigants are customarily subject to equitable tolling if such tolling is necessary to prevent unfairness to a diligent plaintiff. However, equitable tolling, which allows a plaintiff to initiate an action beyond the statute of limitations deadline, is typically available only if the claimant was prevented in some extraordinary way from exercising his or her rights, or, in other words, if the relevant facts present sufficiently rare and exceptional circumstances that would warrant application of the doctrine.”) (citations omitted) (emphasis added).

(7) Notably, Respondent did not timely file a Return within ninety (90) days as required by Rule 12(a) of the South Carolina Rules of Civil Procedure. Rule 12, SCRPC; *see also* S.C.

Code § 17-27-70(b) (providing, in relevant part: “(Within thirty days after the docketing of the application, or within any further time the court may fix, the State shall respond by answer or by motion which may be supported by affidavits.”). Applicant filed this application for PCR on July 6, 2021, and his Memorandum in Support of the PCR Application with attachments on July 8, 2021. Respondent subsequently filed the Return and Motion to Dismiss on October 15, 2021, which is outside of the required filing deadline by the South Carolina Rules of Civil Procedure.

CONCLUSION

Based on the foregoing reasons, Applicant respectfully moves to deny the Respondent’s motion to dismiss and requests an evidentiary hearing to present evidence and arguments in support of this PCR action.

Sincerely,

s/ Dayne Phillips


Dayne C. Phillips, Esq.

PRICE BENOWITZ LLP
1614 Taylor Street, Suite D.
Columbia, SC 29201
O: 803-272-4503
C: 803-807-0234
F: 803-380-8035
dayne@pricebenowitz.com

October 25, 2021

CERTIFIED COPY
OCT 27 21 03 50

U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
WASHINGTON, D.C.

ATTACHMENTS

STATE OF SOUTH CAROLINA)

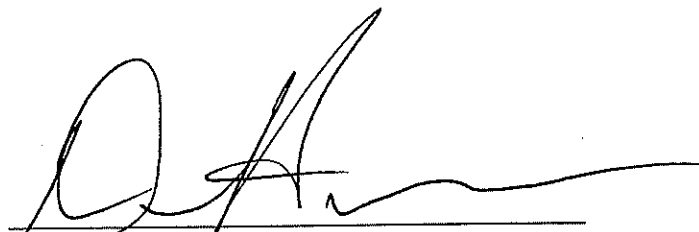
AFFIDAVIT of DANTE HUBBART

COUNTY OF RICHLAND)
_____)

My name is Dante Hubbard, 522-79-2803, and I swear and affirm the following under penalties of perjury:

- 1) I am 31 years old, and I am giving this affidavit of my free will.
- 2) I was with Trevee Gethers on September 17, 2007 and saw the shooting of the decedent.
- 3) Trevee Gethers and I were selling drugs at the time.
- 4) I saw the decedent pull into the area. He frequently bought drugs in the area. I had seen him before.
- 5) After he pulled in, Trevee Gethers went up to the driver's side to sell him drugs. Don Chisolm came from the other side of the car and started yelling, "where's my money, where's my money" at the guy. Don Chisolm is currently in prison for murder.
- 6) The man was bickering with Don.
- 7) Then I saw Don Chisolm open the door, got in the car, and that's when Trevee walked to the back of the car. Trevee Gethers never went into the car.
- 8) Then I saw the flash inside the car.
- 9) After I saw the flash, I took off running.
- 10) I was scared because I didn't know what happened to Trevee Gethers.
- 11) About one or two months later I told someone with the Dorchester County Sheriff's Department about what I saw. I went there voluntarily. They took notes and took an affidavit, and I signed it. I told them what is contained in this affidavit. Upon information and belief, this affidavit was not turned over to Trevee Gether's defense counsel.
- 12) No one called me, or subpoenaed me to testify.
- 13) At the time of Trevee Gether's trial, I was in Jacksonville, North Carolina. I didn't know that his trial was starting. It was three years later.

FURTHER AFFIANT SAYETH NAUGHT.


Dante Hubbard

Sworn before me
this 11th day of December
2018.
Jill B. Avery
expires 3/09/26

DORCHESTER COUNTY SHERIFF'S OFFICE

STATEMENT

STATEMENT OF DANIEL M. HUBBARDHOME ADDRESS [REDACTED] HOME PHONE [REDACTED]EMPLOYER BALDWIN SCHOOLINGBUSINESS ADDRESS Hwy 78BUS. PHONE 574-9179OCCUPATION BAILOUTDATE OF BIRTH [REDACTED]SOCIAL SECURITY NUMBER [REDACTED]THIS STATEMENT IS GIVEN 11-28-07 (DATE) AT 1050 (TIME)DCSO DET OFFICE

(LOCATION)

ON A MONDAY MORNING IN SEPTEMBER I WAS AT HOME WHEN THREE GUYS CALLED ME ON THE CELL. HE WANTED TO KNOW IF I WAS GOING TO COME OUT WITH HIM. I WALKED OVER TO HAVEN OAKS AND WENT TO "PSYCHO" APARTMENT. I WAS OUTSIDE THE APARTMENT WHEN THREE GOT THERE AND WE ALL JUST CHILL IN THE FRONT. "PSYCHO" WENT BACK IN AND IT WAS JUST "T" (THREE) AND ME BUT THERE WE SAW THIS WHITE TRUCK COME IN AND DRIVING AROUND ONE AND THEN COME BACK AND PARK AT THE BACK OF THE APARTMENTS. "T" FIGURED THAT MIGHT BE A SUSPECT AND I WENT UP TO THE PASSENGER SIDE, OPENED THE DOOR AND GOT IN. NOT LONG AFTER THIS "DON" CAME UP TO THE DRIVER'S DOOR AND LOOKED LIKE HE WAS ARGUING. HIS HANDS WERE MOVING BACK AND FORTH. "T" GOT OUT AND WAS BY THE PASSENGER DOOR. DON WAS STILL AT THE DRIVER'S DOOR AND LOOKED LIKE HE SHOT THE GUY IN THE TRUCK. WHEN I HEARD THE SHOT, I RAN BACK TO MY HOUSE AND I DIDN'T SEE ANYONE. "T" OR DON WENT WITH I GOT HOME, "T" CALLED ME TO SEE IF I WAS OK. WE DIDN'T TALK LONG BECAUSE I HAD TO PICK UP MY BROTHER AT SONIC AND HE GOT OFF AT 11:30 PM. I WENT HOME TALKING TO "T" IT SEEMS LIKE

I HAVE READ THE FOREGOING STATEMENT OR HAVE HAD IT READ TO ME AND IT IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE. I HAVE GIVEN THIS STATEMENT FREELY AND VOLUNTARILY AND HAVE BEEN PROVIDED A COPY OF MY STATEMENT.

WITNESS:

Det. J. B. Banno

WITNESS:

Det. D. L. Mully

SIGNATURE:

Det. J. B. Banno

AFTER THAT NIGHT, I'M NOT SURE WHAT TIME THE
WAS BUT MY BROTHER GOT OFF BETWEEN 11:30^P AND 12:00
AND IT WAS BEFORE THAT. I AM NOT PICK HIM UP ON
TIME. I WOULD GO TO SEE OFF IN THE DISTANCE BUT
DIDN'T HAVE THEM ON THAT NIGHT. I DON'T KNOW DONS
FULL NAME BUT DET. GARRISON AM MORELLI SHOWED
ME (6) SIX PICTURES AND I PICKED OUT WHO DOW IS

I HAVE READ THE FOREGOING STATEMENT OR HAVE HAD IT READ TO ME AND IT IS TRUE AND CORRECT TO THE BEST OF
MY KNOWLEDGE. I HAVE GIVEN THIS STATEMENT FREELY AND VOLUNTARILY AND HAVE BEEN PROVIDED A COPY OF MY
STATEMENT.

WITNESS:

Det. J.B. Barnes

WITNESS:

Det. S. S. Mully

SIGNATURE:

Det. H. H. H. H.

11-28-07 1020 DESO

32° 15'0"

DANTE HUBBARD

Sun

Bldg. GOT 014
@ 1130

WAS at Terry CHILLER in that place with
 while selected driving up. Down around once
 & PARKED. Terry let to pass. SIDE OPEN
 DOWN & GOT IN PASS. SEAT RIGHT
 P DOWN CAME up TO. D. DILLONS & LAMING
 then later he was upset w/ SENSATION.
 Terry GOT OUT & DOWN SPOT ONE TIME
 Terry HAD with him. BACK FROM CAR TO
 HIS HOUSE. DIDNT see him DOWN LET
 Terry CAME up. on cell, ph. TO see if
 WAS OK.

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

AFFIDAVIT OF RODNEY DAVIS

I hereby affirm and swear under penalty of perjury:

- 1) I am an attorney in good-standing with the South Carolina Bar, and I am currently employed with the Charleston County Public Defender's Office.
- 2) I represented Trevee Gethers during the evidentiary hearing portion of his state post-conviction relief proceeding before Judge Frank Addy on October 28, 2015.
- 3) During the course of my representation of Mr. Gethers, I did not request a copy of the Solicitor's file.
- 4) I did not have any strategic reason for not requesting the file.
- 5) Prior to the hearing, I did not have contact information for Sarah Jayne Rogers (now Sarah McClellan). I met her for the first time at the evidentiary hearing. She appeared in court without any documentation on this case.

FURTHER AFFIANT SAYETH NAUGHT.


Rodney Davis
Bar #: 12396

SWORN to and subscribed to me
this 10 day of July, 2019.


 Notary Public for South Carolina
 My Commission expires August 29, 2028

Affidavit of Veronica M.

Name - Veronica J M

Occupation - Warehouse

I Veronica M. Swears or affirm

1. I am Veronica M. of Summerville, S.C.
2. That on or about January 2008 I gave a coerced statement to the authorities of Dorchester County to detectives Morrell, about my co-defendant Trevee Gathers.
3. The things that are in this statement was none of my account, all of what the detectives wanted to put their case together. I actually didn't written any of it, it was all written by the detectives, I just signed off on it, the reasons I signed off on it at the time because I was 14 years old and I was afraid because I was told I could go away for a long time. For two I was promised that if I signed the statement and testified at trial my case would be kept in Juvenile and eventually drop.
5. After court they were mad because I didn't agree to what they were saying, because I knew that it wasn't the truth at all.

7-5-2018

DATE

Veronica M
Name

S B Hampmeyer
S B HAMPMEYER
Notary Public, State of South Carolina
My Commission Expires 7/17/2025

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

TREEVE GETHERS,

Petitioner,

v.

BRYAN STIRLING, *Commissioner*,
South Carolina Department of Corrections,
and **Randall Williams *Warden*** of
Lieber Correctional Institution,

Respondent.

C/A No. 1:19-cv-01088 - TMC-SVH

**PETITION FOR WRIT OF HABEAS CORPUS
BY A PERSON IN STATE CUSTODY
AND MEMORANDUM IN SUPPORT OF HABEAS PETITION**

1.(a) Trevee Gethers was convicted of murder and sentenced in the Dorchester County Court of General Sessions in St. George, South Carolina.

(b) State of South Carolina v. Trevee Gethers, 2007-GS-18-1755.

2. Petitioner was convicted and sentenced on November 19, 2010.

3. Petitioner was sentenced to 45 years in prison.

4. Petitioner was convicted of one crime.

5. ~~Petitioner was convicted of murder.~~

6. Petitioner was found guilty after trial.

7. N/A

8. Petitioner appealed his conviction and sentence.

9. (a) Petitioner appealed to the South Carolina Court of Appeals.

(b) Appellate Case No. 2010-178687

- (c) The South Carolina Court of Appeals affirmed the convictions and sentence.
 - (d) The South Carolina Court of Appeals denied the appeal on October 24, 2012.
 - (e) *State v. Trevee J. Gethers*, 2012-UP-576 (filed October 24, 2012).
 - (f) Petitioner raised the following ground: Whether the trial court judge erred when she did not grant appellant's motion for a directed verdict when the evidence adduced at trial did not rise above mere suspicion that he was guilty of murder because the circumstantial evidence merely suggested that he was near the murder scene when the decedent was fatally shot?
 - (g) Petitioner sought review by a higher state court. The South Carolina Supreme Court denied certiorari by order dated May 7, 2014.
 - (h) Petitioner did not file a petition for certiorari in the United States Supreme Court.
10. Other than the direct appeal, Petitioner sought relief by filing an application for post-conviction relief in the state court of South Carolina.
11. (a) (1) Petitioner filed an application for post-conviction relief in the Dorchester County Court of Common Pleas.
- (2) Case No. 2014-CP-18-1287
 - (3) Petitioner filed his petition on July 3, 2014.
 - (4) Petitioner had a post-conviction relief proceeding with an evidentiary hearing.
 - (5) Petitioner raised the following grounds:
 - a) Was counsel ineffective for failing to object when the trial court shifted the burden of proof by telling the jury they, the jury were to "search for the truth", thus relieving the state of their burden of proving applicant guilty beyond a reasonable doubt?

- b) Was counsel ineffective for failing to object to the trial court's jury instructions on malice that resulted in a mandatory presumption in violation of due process when the trial court failed to instruct the jury that they were free to "accept or reject" the inference of malice from the use of a deadly weapon based on their consideration of the evidence and they could give it such weight as they determined?
- c) Was counsel ineffective for failing to object to the trial court impermissibly commented on the facts of the case during the court's charge on express malice, that was to be determined by the jury?¹

(6) An evidentiary hearing was held on October 28, 2015.

(7) The court entered an order of dismissal.

(8) The order was filed on January 15, 2016.

(b) N/A.

(c) N/A.

(d) Petitioner appealed to the highest state court having jurisdiction.

12. GROUND FOR HABEAS RELIEF

Relevant Facts

Trevee Gethers, the Petitioner, was convicted of the murder of Earl Robinson which occurred on September 17, 2007. On that date, the decedent had earlier borrowed \$200 from his son. App. 220. The decedent was later found outside of an

¹ The Order of Dismissal characterized the claims as: I. Ineffective assistance of trial counsel in: a. Failing to object to Judge Goodstein's opening instruction; b. Failing to object the solicitor's comments regarding robbery as a motive despite the fact that Applicant was not indicted for robbery; c. Failing to object to the admission of Applicant's booking photo; and d. Failing to request a voluntary manslaughter charge.

apartment complex, seated in the driver's seat of a white Toyota Sequoia. App. 157-58. He had been shot once in the arm, with the bullet entering his chest and fatally injuring him. App. 312.

Neighbors in the apartment complex heard arguing in the parking lot just prior to the gunshots, although no one identified Petitioner as the one arguing with the decedent. *See generally* testimonies of Kimberly Ritchey, Michael Ritchey, and Shanika Moon. The apartment complex was known as a very high crime area and gunshots were "fairly common." App. 149, l. 7; App. 152. An officer with the Dorchester County sheriff's office confirmed this was a violent area, and there were "a lot of fights, a lot of drug-related calls." App. 163, 159, l. 4.

As law enforcement conducted their investigation, they took into their custody a number of cigarette butts, a .40 caliber gunshot shell, and a Bluetooth telephone headset. App. 170. Law enforcement did not have these cigarette butts, that were located in the immediate area of the car, analyzed for DNA. App. 170. The .40 caliber bullet was determined not to be relevant to the crime scene. App. 174.

Law enforcement extracted 34 latent fingerprints from the decedent's car. App. 175. Three people were identified based on the presence of the fingerprints found on the car, but they were never pursued in connection with this investigation. App. 182-84, 210 Later in the investigation, law enforcement obtained a buccal swab from Petitioner and obtained his DNA profile. App. 187.

Petitioner's DNA was found on the Bluetooth telephone headset that was found in the apartment complex. Significantly, the headset was not found close to where the decedent's body was located. As a detective testified:

A: That was just inside the first crime scene tape that was stretched across the road. It was actually in front of Apartment [redacted]. It was not located anywhere around the vehicle. It was between Apartment [redacted] and [redacted], the apartment complex to the right. It was in that area on the road as you came in.

App. 214, ll. 4-9.

Brandee Kieffer was Petitioner's girlfriend at the time of these events and recalled that, around the time of this crime, she and Petitioner switched cars. App. 238. Veronica M (name redacted because of her status as a minor), was another friend of Petitioner's. App. 246-47. She testified that on the date the decedent was killed, she was supposed to meet with the decedent. He was expected to bring her money that evening, App. 247, because he intended to have sex with Ms. M who was 14 years old at the time. That evening, she was using her friend, Maggie Reid's, telephone. App. 248. At some point after the decedent was killed, Ms. M and the Petitioner drove to Virginia, and then eventually travelled together to New York. App. App. 255

During their investigation, law enforcement obtained the telephone that belonged to the decedent, and which was located in his car, and noticed a number of telephone calls that he made to his son and to the telephone that was registered to Reid, Ms. M's friend. App. 279-80. Their investigation led them to identify Petitioner's telephone number. App. 283. Law enforcement obtained search warrants based on telephone calls between Ms. M and Petitioner, but those searches did not

uncover anything of evidentiary value. App. 286. Law enforcement also had identified Petitioner's fingerprints located on the passenger side of the decedent's car. Other fingerprints were also located on the car, but they were not identified by law enforcement. App. 287. Law enforcement never located the murder weapon, even after extensively searching the area. App. 284. Ultimately, Ms. M and Petitioner were located in New York City. App. 290.

Ms. M gave a statement to law enforcement that suggested that she had Petitioner meet with the decedent in order to get money from him. She testified that she did not want to have sex with the decedent, so she sent Petitioner in her place. App. 251. According to her trial testimony, Ms. M claimed that Petitioner told her he was busy, and "so I just left it like that." App. 252, ll. 1-2. At trial, she did not testify to the facts she first recounted to law enforcement, but her earlier statement was found admissible as a prior inconsistent statement. App. 295. In exchange for her cooperation, Ms. M's charge of murder remained in the jurisdiction of Family Court. App. 374. In a statement Ms. M has since provided to counsel, she attests that she did not willingly give her statement to law enforcement, but felt pressured to do so because she was 14 years old and threatened with prison. **Exhibit A.**

Petitioner's DNA was located on the Bluetooth headset that was found in the apartment complex. App. 425 Petitioner did not testify at trial.

At the close of the State's case, trial counsel motioned for a directed verdict that the court denied. App. 441. He was subsequently convicted and sentenced to 45 years in prison.

ARGUMENTS IN SUPPORT OF HABEAS RELIEF

1. The South Carolina Court of Appeals erred when it found the trial court did not err when she declined to grant Petitioner's motion for a directed verdict when the evidence at trial was not sufficient to support his conviction for murder.

The South Carolina Court of Appeals resolved Petitioner's claim by merely providing a string of citations that articulate the standard of review in the South Carolina state courts. In denying his claim, the Court affirmed pursuant to Rule 220(b), SCACR,² and the following authority: *State v. Weston*, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006) ("When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight."); *id.* ("When reviewing a denial of a directed verdict, [an appellate court] views the evidence and all reasonable inferences in the light most favorable to the state."); *id.* at 292-93, 625 S.E.2d at 648 ("If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the [c]ourt must find the case was properly submitted to the jury.").

The South Carolina Court of Appeals' opinion is contrary to, or involves an unreasonable application of clearly established federal law as determined by the United States Supreme Court. Its decision is also based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. 28 U.S.C. §2254(d) (1), (2).

² *Decision by the Court.* In every decision rendered by an appellate court, every point distinctly stated in the case which is necessary to the decision of the appeal and fairly arising upon the record of the court must be stated in writing and must, with the reason for the court's decision, be preserved in the record of the case.

Petitioner's conviction is unconstitutional under the United States Supreme Court's decision in *Jackson v. Virginia*, 443 U.S. 307 (1979). The relevant question for this Court is whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.* at 319. As the Court makes clear, this is a higher standard of proof than the "any evidence" standard of *Thompson v. Louisville*, 362 U.S. 199 (1960):

In short, *Winship* presupposes as an essential of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense.

Id. at 316.

The evidence offered by the State against Petitioner was completely circumstantial and weak. The State showed that Petitioner's young female friend had a relationship with the victim that involved the victim's wanting to have sex with a minor. The State also showed that Petitioner's Bluetooth was in the area, and that Petitioner and his this young female left the state. The State also found Petitioner's fingerprints on the car. But the State never showed that Petitioner had received money from the victim (which was its theory of why Petitioner shot the victim), nor did it show that Petitioner had a weapon that night. Indeed, as further discussed in Claim 2, the State had, in its possession, a statement from a witness to these events that someone else shot the victim.

This case is wholly dissimilar from other cases in which the Fourth Circuit has found evidence sufficient to support convictions. *See United States v. Fields*, 571 Fed. App'x. 238 (2014) (noting evidence sufficient where “several witnesses” testified, appellant threw “black object” over fence and officers retrieved packages in “black covering” containing 1.6 kilograms of cocaine); *United States v. Farmer*, 482 Fed. App'x. 805 (2012) (noting “multiple witnesses” who testified to defendant’s direct involvement in drug distribution conspiracy). *See also Fiore v. White*, 531 U.S. 225 (2001) (*per curiam*) (granting federal habeas corpus relief because the prosecution failed to present sufficient evidence to prove element of crime and therefore petitioner’s “conviction is not consistent with the demands of the Federal Due Process Clause”). Respectfully, Petitioner asks this Court to grant his petition for a writ of habeas corpus.

- (b) This claim is exhausted.
- (c) This claim was raised on direct appeal.
- (d) This claim was not raised in post-conviction.
- (e) This claim has not been raised by way of any other procedures.

2. Trial counsel rendered ineffective assistance of counsel when she did not secure the attendance of a witness who gave a statement to the

Dorchester County Sheriff’s Office shortly after the murder informing them that he witnessed someone else shoot the decedent.

On April 4, 2019, Don Sorenson of the First Circuit Solicitor’s Office provided undersigned counsel, upon request, a statement given to law enforcement in connection with this murder investigation by Dante Hubbart. This statement, along with detective notes, were located in the Solicitor’s file. Mr. Sorenson was not

involved in the prosecution of this case. Both the statement and notes were provided to counsel. **Exhibit B.** The detective notes and statement confirm what Mr. Hubbard attested to by way of an affidavit executed on December 11, 2018 in counsel's office—that Don Chisolm, and not Trevee Gethers, shot the victim in this case. **Exhibit C.** Trial counsel has since been disbarred, *see In re Rogers*, 413 S.C. 187, 775 S.E.2d 387 (2015), for egregious misconduct, including making false statements to clients and non-cooperation with Disciplinary Counsel. Failing to interview Dante Hubbard, especially when she had his witness statement given to law enforcement that exonerated her client, is shockingly unreasonable and falls well below professional norms.

The statement given by Hubbard, indeed, accounted for at least some of the forensic evidence the state used in its case against Petitioner. In closing, the state argued it was probative of Petitioner's guilt that Petitioner's fingerprints were on the victim's car. App. 452-53, 459, 462. Hubbard's statement indicates that Petitioner was dealing drugs that night and that he got into the passenger side of the victim's car. As he was sitting there, Don came to the driver's side and looked angry because his arms were moving back and forth. Petitioner then exited the car, but Don was still at the driver's door. Then, Don shot the victim. Hubbard then ran away from the scene. Donsurvi Chisolm is currently serving two life sentences in prison for two separate counts of murder. *See* <https://public.doc.state.sc.us/scdc-public/inmateDetails.do?id=%2000347831> (*last visited* April 15, 2019).

To bring a successful ineffective assistance of counsel claim, Petitioner must demonstrate that his trial counsel's performance was deficient and resulted in prejudice. *See Strickland v. Washington*, 466 U.S. 558 (1984). There is a "a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." *Richter*, 562 U.S. at 104 (quoting *Strickland*, 466 U.S. at 689). To establish prejudice, Petitioner must show a reasonable probability that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 703. "Counsel's errors must be 'so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" *Harrington v. Richter*, 562 U.S. 86 (2011) (quoting *Strickland*, 466 U.S. at 687). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 466 U.S. at 690. However, even when making strategic decisions, counsel's conduct must be reasonable. *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000). "[S]trategic choices made after less than complete investigations are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 690-91.

See Stanley v. Bartley, 465 F.3d 810 (7th Cir. 2006) (finding counsel's failure to interview witnesses are deficient and that the failure prejudiced defendant); *Riley v. Payne*, 352 F. 3d 1313 (9th Cir. 2003) (granting habeas relief when defense counsel failed to interview petitioner's associate who was with him during the confrontation

with the victims); *Allen v. LaMarque*, 50 Fed. Appx. 346 (9th Cir. 2002) (grant of habeas relief for counsel's failure to interview potentially exculpatory witness); *Black v. Larson*, 45 Fed. Appx. 653 (9th Cir. 2002) (same).

- (b) This claim is not exhausted.
- (c) This claim was not raised on direct appeal because trial counsel rendered ineffective assistance of counsel.
- (d) This claim was not raised in post-conviction proceeding.
- (e) This claim was not raised because PCR counsel rendered ineffective assistance of counsel. *See Martinez v. Ryan*, 566 U.S. 1 (2012).

3. The PCR court erred in finding that Petitioner was not denied his rights under the Sixth and Fourteenth Amendments to the effective assistance of counsel when counsel failed to object to the admission of Petitioner's mugshot from his prior arrest approximately four months before the murder where no demonstrable need of the mugshot was established, the mugshot plainly suggested to the jury that Petitioner had a prior record, and the origin of the mugshot was clear as it stated "Charleston County Sheriff's Office Detention Center" at the top of the photograph and listed the "booking date."

During its case in chief, the State called Javon Wright, an employee with the Charleston County Detention Center to testify. App. 323. The State then admitted, without objection, State's Exhibit #40, which consisted of Petitioner's major case prints taken during an earlier arrest. App. 324. It then entered a mugshot photograph of Petitioner with a booking date of May 11, 2007, App. 325, again without objection. Trial counsel then, inexplicably, cross-examined Wright to ensure that the earlier date was, in fact, May 11, 2007 thereby ensuring that the jury's attention was drawn to his prior arrest and mugshot. App. 326.

The PCR court found trial counsel was not ineffective for failing to object to the admission of Petitioner's mugshot. The court found the photograph was introduced "to show how law enforcement identified [Petitioner] as a suspect in the murder." It also found, "This Court finds the booking photo was offered in a relevant line of questioning. Testimony was elicited concerning prints lifted from the automobile where the victim was found murdered. [Petitioner] was identified based upon an earlier set of case prints (State's Exhibit 40) taken from that arrest. The booking photo tied those prints to [Petitioner]." App. 706-707.

Under *Strickland v. Washington*, 466 U.S. 668 (1984), a defendant has a Sixth Amendment right to effective assistance of counsel and a remedy for constitutionally deficient assistance. Counsel renders ineffective assistance of counsel, warranting a new trial, when his performance falls "below an objective standard of reasonableness," taking into account prevailing professional norms, and when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 688. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

Trial counsel's failure to object to the mugshot was reversible error under South Carolina law. According to the seminal case on this issue in South Carolina, *State v. Traylor*, 360 S.C. 74, 84, 600 S.E.2d 523, 528 (2004), "[t]he introduction of a 'mug-shot' of a defendant is reversible error unless: (1) the state has a demonstrable need to introduce the photograph, (2) the photograph shown to the jury does not suggest the defendant has a criminal record, and (3) the photograph is not introduced

in such a way as to draw attention to its origin or implication.” *Id.* (citing *State v. Tate*, 288 S.C. 104, 341 S.E.2d 380 (1986); *State v. Robinson*, 274 S.C. 198, 262 S.E.2d 729 (1980); *State v. Denson*, 269 S.C. 407, 237 S.E.2d 761 (1977)). Here, trial counsel failed to hold both the State to its burden of showing it had a demonstrable need to introduce the photograph. But additionally, a view of the photograph illustrates how clearly it indicates the presence of a prior criminal record, and further, the actual booking date which draws attention to its origin and implication. Petitioner was clearly prejudiced by his attorney’s substandard performance.

The PCR judge’s order of dismissal is contrary to, or involves an unreasonable application of clearly established federal law as determined by the United States Supreme Court regarding ineffective assistance of counsel as propounded in *Strickland v. Washington*, 466 U.S. 668 (1984). Its decision is also based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. 28 U.S.C. §2254(d) (1), (2). Petitioner was substantially and injuriously prejudiced by his attorneys’ substandard performance. *Brecht v. Abrahamson*, 507 U.S. 619 (1993). Petitioner respectfully asks this Court to grant his petition for writ of habeas corpus, and release him from custody.

-
- (b) This claim is exhausted.
 - (c) This claim was not raised on direct appeal because trial counsel rendered ineffective assistance of counsel.
 - (d) This claim was raised in post-conviction.

(e) Petitioner raised this claim to the South Carolina Supreme Court by way of a petition for writ of certiorari (that was denied).

4. The PCR court erred in finding that Petitioner was not denied his rights under the Sixth and Fourteenth Amendments to the effective assistance of counsel when counsel failed to object to the trial court's opening statement to the jury that the trial was "a search for the truth in an effort to make sure that justice is done" since this instruction was fundamentally incorrect, was burden shifting, and misdirected the jury's inquiry from the beginning of the trial forward from the correct legal question of whether the State had proved Petitioner's guilt beyond a reasonable doubt.

In her opening instruction to the jury, the trial court informed the jury:

[T]his trial is not for entertainment. It is a ... **search for the truth** in an effort to make sure that justice is done between the State and Mr. Gethers [Petitioner]. **Searching for the truth and making sure that justice is done** is often slow, deliberate, and repetitive, the opposite no doubt of what you may have seen on television, read about in books, or perhaps in the movies.

The attorneys before you are advocates for the parties they represent, but first and foremost, they are officers of the court, sworn to uphold the integrity and fairness of our judicial system and to help **you in a search for the truth**. You should expect them to be professional, competent, and ethical in their representation of their clients.

App. 122, l. 10- 123, l. 4 (emphasis added).

The order of dismissal found trial counsel was not ineffective for failing to object to these remarks:

These remarks are part of the standard opening instructions for many judges, and Judge Goodstein's opening remarks are not an instruction on the law. Additionally, because Judge Goodstein properly instructed the jury on the burden and standard of proof at the close of the case, any error was clearly harmless and did not affect the result.

App. 705.

Under *Strickland v. Washington*, 466 U.S. 668 (1984), a defendant has a Sixth Amendment right to effective assistance of counsel and a remedy for constitutionally deficient assistance. Counsel renders ineffective assistance of counsel, warranting a new trial, when his performance falls "below an objective standard of reasonableness," taking into account prevailing professional norms, and when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 688. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

The language used by the trial court has long been disfavored in South Carolina, and trial counsel should have objected. For example, the jury instruction in *State v. Daniels*, 401 S.C. 251, 737 S.E.2d 473 (2012), stated "whatever verdict you reach will represent truth and justice for all parties that are involved in this case." There, the Court admonished trial judges to remove any language that suggests a criminal jury's duty is to return a verdict that is "just" or fair" since that could effectively alter the jury's understanding of the burden of proof. The South Carolina Supreme Court reversed the post-conviction relief court's finding of trial counsel ineffectiveness, and upheld Petitioner's convictions.

Daniels, however, was not the first South Carolina state case to address burden-diluting jury instructions. Before *Daniels*, the South Carolina Supreme Court explicitly disfavored the following instruction:

Beyond a reasonable doubt, in telling you that that is the degree of proof by which the State must prove, that phrase means exactly what it states in the English language, and *that is a doubt for which you can give a real reason*. That excludes a whimsical doubt, fanciful doubt. You could

doubt any proposition if you wanted to. *A reasonable doubt is a substantial doubt for which honest people, such as you, when searching for the truth can give a real reason.* So it's to that degree of proof that the State is required to establish the elements of a charge.

State v. Manning, 305 S.C. 413, 415, 409 S.E.2d 372, 374 (1991) (emphasis in original). The South Carolina Supreme Court, accordingly, prohibited trial judges from telling jurors “to seek some reasonable explanation of the circumstances proven other than the guilt of the Defendant.” *Id.*, 305 S.C. at 416, 409 S.E.2d at 374. The South Carolina Supreme Court then reaffirmed this principle in *State v. Cherry*, 361 S.C. 588, 596, 606 S.E.2d 475, 479 (2004) (In *Manning*, “we held that a circumstantial evidence charge which requires the jury to seek some reasonable explanation other than the defendant’s guilt ‘turns the State’s burden of proof on its head by requiring the jury to find a ‘reasonable explanation’ of the evidence inconsistent with appellant’s guilt before it can find him not guilty.”).

In *State v. Aleksey*, 343 S.C. 20, 26-27, 538 S.E.2d 248, 251 (2000), the South Carolina Supreme Court again reminded the bench that, “Jury instructions on reasonable doubt which charge the jury to ‘seek the truth’ are disfavored because they [run] the risk of unconstitutionally shifting the burden of proof to a defendant” (quoting *State v. Needs*, 333 S.C. 134, 155, 508 S.E.2d 857, 867-68 (1998)).

The PCR court’s order commits an unreasonable legal error. Long before Petitioner’s trial, this Court addressed precisely the issue of burden-diluting jury instructions in *Cage v. Louisiana*, 498 U.S. 39 (1990). Trial counsel should have known that United States Supreme Court law disallowed the jury charge that was given in this case. She was ineffective for failing to object to it. *Strickland v.*

Washington, 466 U.S. 668 (1984). Petitioner is entitled to relief because the jury charge given in this case impermissibly diluted the burden of proof constitutionally required to convict Petitioner of these crimes.

The jury instruction delivered to the jury in this case violated well established United States Supreme Court law. In *Cage*, the Louisiana state court gave the following instruction:

If you entertain a reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your duty to give him the benefit of that doubt and return a verdict of not guilty. Even where the evidence demonstrates a probability of guilt, if it does not establish such guilt beyond a reasonable doubt, you must acquit the accused. This doubt, however, must be a reasonable one; that is one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. *It must be such doubt as would give rise to a grave uncertainty*, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. *It is an actual substantial doubt*. It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a *moral certainty*. *Cage*, 498 U.S. at 40, 111 S. Ct. 328 (citation omitted) (emphases in the original).

Concluding that the instruction was unconstitutional, the Court explained:

The charge did at one point instruct that to convict, guilt must be found beyond a reasonable doubt; but it then equated a reasonable doubt with a "grave uncertainty" and an "actual substantial doubt," and stated that what was required was a "moral certainty" that the defendant was guilty. ~~It is plain to us that the words "substantial" and "grave," as they~~ are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable-doubt standard. When those statements are then considered with the reference to "moral certainty," rather than evidentiary certainty, it becomes clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause.

Id. at 41, 111 S. Ct. 328 (footnote reference omitted).

The same constitutional infirmity is present in Petitioner's case. By charging the jury that its duty was to search for the truth, the judge improperly minimized the awesome role of the jury in applying the rigorous standards of proof to the state's conduct, thus obviating the State's burden of proof in this case. And see *Yates v. Evatt*, 500 U.S. 391 (1991) (jury instructions on malice violated due process by relieving state of burden of proving every element of crime beyond a reasonable doubt); *Francis v. Franklin*, 471 U.S. 307 (1985) (instruction that person "is presumed to intend the natural and probable consequences of his acts" unconstitutionally gave defendant burden of proof on element of intent to kill).

The jury instruction given in this case was contrary to the Fifth Amendment's guarantee that no one will be deprived of liberty without due process of law and the Sixth Amendment right to a trial by jury, which together require a jury to determine a defendant's guilt on every element of the charged crimes beyond a reasonable doubt. See *United States v. Gaudin*, 515 U.S. 506, 509-10 (1995); *Sullivan v. Louisiana*, 508 U.S. 277, 78; *In Re Winship*, 397 U.S. 358, 364 (1970) ("...the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."); *Patterson v. New York*, 432 U.S. 197, 215 (1977) (a State must prove every ingredient of an offense beyond a reasonable doubt and it may not shift the burden of proof to the defendant); and *Sandstrom v. Montana*, 442 U.S. 510 (1979) (a presumption which, although not conclusive, had the effect of shifting the burden of persuasion to the defendant is constitutionally infirm).

The South Carolina Supreme Court has recently acknowledged similar problems with opening remarks given to the jury in *State v. Michael Vernon Beaty*, 813 S.E.2d 502 (2018)³.

[W]e agree with appellant that a trial court should refrain from informing the jury, whether through comments or through its charge, that its role is to search for the truth, or to find the true facts, or to render a just verdict. These phrases may be understood to place an obligation on the jury, independent of the burden of proof, to determine the circumstances surrounding the alleged crime and from those facts alone render the verdict it believes best serves the jury's perception of justice. We instruct trial judges to avoid these terms and any other that may divert the jury from its obligation in a criminal case to determine, whether the State has proven the defendant's guilt beyond a reasonable doubt.

Petitioner was substantially injured by his counsel's failure to object to the improper remarks to the jury. *Brecht v. Abrahamson*, 507 U.S. 619 (1993). Trial counsel's failure to object to the burden-diluting opening remarks rendered her performance ineffective. Petitioner was prejudiced by her performance. Respectfully, this Court should grant habeas relief.

(b) This claim is exhausted.

(c) This claim was not raised on direct appeal because trial counsel rendered ineffective assistance of counsel.

³ In *Beaty*, appellant objected to the following statements: "This...trial...is a search for the truth in an effort to make sure justice is done. Searching for the truth and ensuring that justice is done is often slow, deliberate, and repetitive." "You also just took an oath to listen to the evidence in this case and reach a fair and just verdict and you are expected to be professional, reasonable and ethical." And, "[i]n determining what the true facts are in this case you must decide whether or not the testimony of a witness is believable. After argument of counsel and the charge on the law by me, you will then be in a position to determine what the true facts are and apply those facts to the law and thus render a true and just verdict."

(d) This claim was raised in post-conviction.

(e) Petitioner raised this claim to the South Carolina Supreme Court by way of a petition for writ of certiorari (that was denied).

13. (a) All grounds for relief that are raised in this petition have been presented to the highest state court having jurisdiction except for Claim 2.

(b) There is not any ground in this petition that has not been presented in some state or federal court.

14. Petitioner has not previously filed any type of petition, application, or motion in a federal court regarding the conviction that is challenged in this petition.

15. Petitioner does not have any petition or appeal now pending in any court.

16. Petitioner was represented by Sara Jane Rogers at trial. Ms. Rogers is disbarred.

Petitioner was represented by undersigned counsel, Elizabeth Franklin-Best for direct appeal. At that time, undersigned counsel worked for the Commission on Indigent Defense, Appellate Division, 1330 Lady Street, Suite 401, Columbia, South Carolina 29201.

Petitioner was represented by Rodney D. Davis for PCR. Lowcountry Law Office, 4000 Faber Place Drive, Suite 300, Charleston, South Carolina 29405. Petitioner was represented by Lara M. Caudy of the South Carolina Commission on Indigent Defense, Appellate Division, 1330 Lady Street, Suite 401, Columbia, South Carolina 29201 for the appeal of the denial of PCR.

17. Petitioner does not have any future sentence to serve after he completes the sentence for the judgment that he is challenging.

18. This petition is timely filed if it is filed before or on **May 28, 2019**.

Therefore, Petitioner asks that this Court release him from custody, or any other relief to which Petitioner may be entitled.

Respectfully submitted,

/s/ Elizabeth A. Franklin-Best

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April 15, 2019.

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DORCHESTER COUNTY SHERIFF'S OFFICE **STATEMENT**

STATEMENT OF DANIEL M. HUBBARD
 HOME ADDRESS [REDACTED]
 EMPLOYER BAIRD CHASELINE BUSINESS ADDRESS Hwy 78
 BUS. PHONE 574-9179 OCCUPATION BUILDER
 DATE OF BIRTH [REDACTED] SOCIAL SECURITY NUMBER [REDACTED]
 THIS STATEMENT IS GIVEN 11-28-07 (DATE) AT 1050 (TIME)
DCSO DET OFFICE (LOCATION)

ON A MONDAY EVENING IN SEPTEMBER I WAS AT HOME WITH THREE
 GOTTEN CITIZEN ME ON THE CELL. HE WANTED TO KNOW IF I
 WAS GOING TO COME CITIZEN WITH HIM. I WALKED OVER TO HAVEN
 OAKS AND WENT TO "PSYCH" APARTMENT. I WAS OUTSIDE THE APARTMENT
 WHEN THREE GOT THERE AND WE ALL JUST CHILL ^{IN FRONT OF PSYCH} TO THE COURT
 9235 "HOW SO" "PSYCH" WENT BACK IN AND IT WAS JUST "T" (THREE) AND
 ME OUT THERE. WE SAW THIS WHITE TRUCK COME IN AND
 DRIVING BUILDING ONE AND THEN COME BACK AND PARK AT
 THE BACK OF THE APARTMENTS. "T" FIGURED THAT MIGHT
 BE A SALE AND I CAN GO TO THE PASSENGER SIDE, OPENED
 THE DOOR AND GOT IN. NOT LONG AFTER THIS "DON" CAME
 UP TO THE DRIVERS DOOR AND LOOKED LIKE HE WAS TALKING.
 HIS ARMS WERE MOVING BACK AND FORTH. "T" GOT OUT AND
 WAS BY THE PASSENGER DOOR. DON WAS STILL AT THE DRIVERS DOOR
 AND LOOKED LIKE HE SHOT THE GUY IN THE TRUCK. WHEN I
 HEARD THE SHOT, I RAN BACK TO MY HOUSE AND I DIDN'T
 SEE WHEN "T" OR DON LEFT. WHEN I GOT HOME, "T" CALLED
 ME TO SEE IF I WAS OK. WE DIDN'T TALK LONG BECAUSE I
 HAD TO PICK UP MY BROTHER AT SONIC AND HE GOT OFF
 AT 11:30 PM I NEVER HEARD FROM "T" IT SEEMED

I HAVE READ THE FOREGOING STATEMENT OR HAVE HAD IT READ TO ME AND IT IS TRUE AND CORRECT TO THE BEST OF
 MY KNOWLEDGE. I HAVE GIVEN THIS STATEMENT FREELY AND VOLUNTARILY AND HAVE BEEN PROVIDED A COPY OF MY
 STATEMENT.

WITNESS:

Det. J. B. Bama

WITNESS:

Det. S. L. Mully

SIGNATURE:

Sgt. J. H. Hest

PAGE 2 OF 2

— STATEMENT CONTINUATION —

CASE # 07009049

AFRICA THAT NIGHT. I'M NOT SURE WHAT TIME ALL THIS WAS BUT MY BROTHER GOT OFF BETWEEN 11:30^{PM} AND 12:00 AND IT WAS BEFORE THAT. I AM NOT SURE PICK HIM UP ON TIME. I WENT GLASSES TO SEE OFF IN THE DISTANCE BUT DIDN'T HAVE THEM ON THAT NIGHT. I DON'T KNOW DAVIS FULL NAME BUT DET. GARRISON AND MARCELLI SHOWN ME (6) SIX PICTURES AND I PICKED OUT WHO DAVIS IS.

I HAVE READ THE FOREGOING STATEMENT OR HAVE HAD IT READ TO ME AND IT IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE. I HAVE GIVEN THIS STATEMENT FREELY AND VOLUNTARILY AND HAVE BEEN PROVIDED A COPY OF MY STATEMENT.

WITNESS:

Det. J.B. Barnes

WITNESS:

Det. J.L. Mally

SIGNATURE:

Santi Hubbert

11-28-07 1020 DCSO

32-0150

DANTE HUBBARD

Summ

BRO. GOT OUT
@ 1130

WAS A TRUCK CHASE IN THE PARKING LOT
WHILE SECURED DRIVING. Drove Around Once
& PARKED. TRUCK WENT TO PASS. SIDE OPENED
DOWN & ~~WENT~~ GOT IN PASS. SEAT. RIGHT
P. DON CAME UP TO "DILLIGONS" & WAVING
HIS HAND HE WAS WAVING UP SENATOR.
TRUCK GOT OUT & DON SHOT ONE TIME
TRUCK ~~WENT~~ WENT. HE BROKE THEM CAR TO
HIS HOUSE. DIDNT SEE WHEN DON WENT.
TRUCK CAME OUT. ON CELL, PH. TO SEE IF
WAS OK.

Affidavit of Veronica M.

Name - Veronica J M

Occupation - Warehouse

I Veronica M. Swears or affirm

1. I am Veronica M. of Summerville, S.C.

2. That on or about January 2008 I gave a coerced statement to the authorities of Dorchester County to detectives Morrelli, about my co-defendant Trevee J. Gathers.

3. The things that are in this statement was none of my account, all of what the detectives wanted to put their case together. I actually didn't written any of it, it was all written by the detectives, I just signed off on it, the reasons I signed off on it at the time because I was 14 years old and I was afraid because I was told I could go away for a long time. For two I was promised that if I signed the statement and testified at trial my case would be kept in Juvenile and eventually drop.

5. After court they were mad because I didn't agree to what they were saying, because I knew that it wasn't the truth at all. oo

7-5-2018

DATE

Veronica M.
Name

 S B KAMPMEYER
 Notary Public, State of South Carolina
 My Commission Expires 7/17/2025

STATE OF SOUTH CAROLINA)

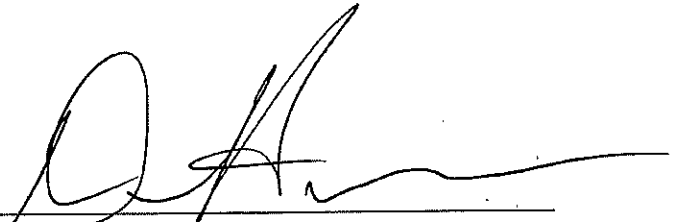
COUNTY OF RICHLAND)

AFFIDAVIT of DANTE HUBBART

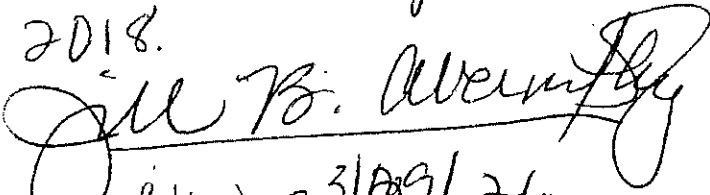
My name is Dante Hubbard, 522-79-2803, and I swear and affirm the following under penalties of perjury:

- 1) I am 31 years old, and I am giving this affidavit of my free will.
 - 2) I was with Trevee Gethers on September 17, 2007 and saw the shooting of the decedent.
 - 3) Trevee Gethers and I were selling drugs at the time.
 - 4) I saw the decedent pull into the area. He frequently bought drugs in the area. I had seen him before.
 - 5) After he pulled in, Trevee Gethers went up to the driver's side to sell him drugs. Don Chisolm came from the other side of the car and started yelling, "where's my money, where's my money" at the guy. Don Chisolm is currently in prison for murder.
 - 6) The man was bickering with Don.
 - 7) Then I saw Don Chisolm open the door, got in the car, and that's when Trevee walked to the back of the car. Trevee Gethers never went into the car.
 - 8) Then I saw the flash inside the car.
 - 9) After I saw the flash, I took off running.
 - 10) I was scared because I didn't know what happened to Trevee Gethers.
-
- 11) About one or two months later I told someone with the Dorchester County Sheriff's Department about what I saw. I went there voluntarily. They took notes and took an affidavit, and I signed it. I told them what is contained in this affidavit. Upon information and belief, this affidavit was not turned over to Trevee Gether's defense counsel.
 - 12) No one called me, or subpoenaed me to testify.
 - 13) At the time of Trevee Gether's trial, I was in Jacksonville, North Carolina. I didn't know that his trial was starting. It was three years later.

FURTHER AFFIANT SAYETH NAUGHT.


Dante Hubbard

Sworn before me
this 11th day of December
2018.


Jill B. Avery
expires 3/29/26

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
AIKEN DIVISION

Treveen Gethers,

Petitioner,

v.

Bryan Stirling, Commissioner, South Carolina
Department of Corrections, and Randall
Williams, Warden of Lieber Correctional
Institution,

Respondents.

Case No.: 1:19-cv-01088-SAL

OPINION AND ORDER

Petitioner filed this action seeking a writ of habeas corpus on April 15, 2019. ECF No. 1. On July 1, 2019, Respondents filed a Return, a Motion for Summary Judgment, and a Motion to Strike Exhibits Attached to Petition for Writ of Habeas Corpus. ECF Nos. 8, 9, 10. Petitioner moved for an evidentiary hearing on July 11, 2019. ECF No. 12. On October 17, 2019, in accordance with 28 U.S.C. § 636(b) and Local Civ. Rule. 73.02(B)(2)(c), United States Magistrate Judge Shiva V. Hodges issued a Report and Recommendation ("Report"), ECF No. 17, recommending that the Court grant Respondents' Motion for Summary Judgment, deny Respondents' Motion to Strike, deny Petitioner's Motion for an Evidentiary Hearing, and dismiss the Petition with prejudice. Petitioner timely objected to the Report on October 29, 2019, ECF No. 19, and Respondents replied. ECF No. 20.

I. Background

Petitioner Treveen Gethers, an inmate at Lieber Correctional Facility, is currently serving a forty-five-year sentence for the murder of Robert Earl Robertson, which occurred on September 17, 2007. Petitioner was convicted on November 19, 2010, after a three-day jury trial in the

Dorchester County Court of General Sessions. In the interest of brevity, the Report's recitation of the evidence adduced at trial is incorporated herein by reference. ECF No. 17 at 19-23. As detailed in the Report, Petitioner unsuccessfully challenged his conviction on direct appeal and through collateral review in post-conviction relief ("PCR") proceedings. After the South Carolina Court of Appeals denied certiorari on Petitioner's PCR challenges, he timely sought a writ of habeas corpus in this Court pursuant to 28 U.S.C. § 2254, alleging the following grounds for relief:

1. The South Carolina Court of Appeals erred when it found the trial court did not err when she declined to grant petitioner's motion for a directed verdict when the evidence at trial was not sufficient to support his conviction for murder;
2. Trial Counsel rendered ineffective assistance of counsel when she did not secure the attendance of a witness who gave a statement to the Dorchester County Sheriff's Office shortly after the murder informing them that he witnessed someone else shoot the decedent;
3. The PCR court erred in finding that Petitioner was not denied his rights under the Sixth and Fourteenth Amendments to the effective assistance of counsel when counsel failed to object to the admission of Petitioner's mugshot from his prior arrest approximately four months before the murder where no demonstrable need of the mugshot was established, the mugshot plainly suggested to the jury that Petitioner had a prior record, and the origin of the mugshot was clear as it stated "Charleston County Sheriff's Office Detention Center" at the top of the photograph and listed the "booking date."
4. The PCR court erred in finding that Petitioner was not denied his rights under the Sixth and Fourteenth Amendments to the effective assistance of counsel when counsel failed to object to the trial court's opening statement to the jury that the trial was "a search for the truth in an effort to make sure that justice is done" since this instruction was fundamentally incorrect, was burden shifting, and misdirected the jury's inquiry from the beginning of the trial forward from the correct legal question of whether the State had proved Petitioner's guilt beyond a reasonable doubt.

The parties agree that Petitioner's first and third grounds for relief are preserved and subject to review under 28 U.S.C. § 2254(d). *See* ECF No. 1 at 9, 14; ECF No 8 at

13; 49. The parties agree that Petitioner's second ground for relief is procedurally defaulted, ECF No. 1 at 12; ECF No. 8 at 35; however, Petitioner asserts this ground is subject to review pursuant to *Martinez v. Ryan*, 566 U.S. 1 (2012). The Magistrate Judge found that Petitioner had abandoned his fourth ground for relief. *See* ECF No. 17 at 36. In objecting to the Report, Petitioner does not address this finding or otherwise discuss this ground for relief. Because the Report's finding is not clearly erroneous, the Court adopts the Magistrate Judge's finding that Petitioner's fourth ground for relief is abandoned.

II. Legal Standard

A. Review of a Report and Recommendation

The Magistrate Judge makes only a recommendation to this Court. The recommendation has no presumptive weight, and the responsibility to make a final determination remains with this Court. *See Mathews v. Weber*, 423 U.S. 261, 270–71 (1976). The Court is charged with making a de novo determination of only those portions of the Report that have been specifically objected to, and the Court may accept, reject, or modify the Report, in whole or in part. 28 U.S.C. § 636(b)(1). In the absence of objections, the Court is not required to provide an explanation for adopting the Report and must “only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.” *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310, 315 (4th Cir. 2005) (citing Fed. R. Civ. P. 72 advisory committee's note).

B. Summary Judgment Standard

Rule 56 of the Federal Rules of Civil Procedure provides that “[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). A fact is “material” if proof of its existence or non-existence would affect disposition of the case under

applicable law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue of material fact is “genuine” if the evidence offered is such that a reasonable jury might return a verdict for the non-movant. *Id.* at 257. When determining whether a genuine issue has been raised, the court must construe all inferences and ambiguities against the movant and in favor of the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

The party seeking summary judgment shoulders the initial burden of demonstrating to the court that there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the movant has made this threshold demonstration, the non-moving party, to survive the motion for summary judgment, may not rest on the allegations averred in his pleadings. *Id.* at 324. Rather, the non-moving party must demonstrate specific, material facts exist that give rise to a genuine issue. *Id.* Under this standard, the existence of a mere scintilla of evidence in support of the non-movant’s position is insufficient to withstand the summary judgment motion. *Anderson*, 477 U.S. at 252. Likewise, conclusory allegations or denials, without more, are insufficient to preclude granting the summary judgment motion. *Ross v. Commc’ns Satellite Corp.*, 759 F.2d 355, 365 (4th Cir. 1985), *overruled on other grounds*, 490 U.S. 228 (1989). “Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.” *Anderson*, 477 U.S. at 248.

C. Habeas Corpus

Because Petitioner filed this action after the effective date of the Antiterrorism and Effective Death Penalty Act (“AEDPA”), review of his asserted grounds for habeas relief is governed by 28 U.S.C. § 2254(d), as amended. *Lindh v. Murphy*, 521 U.S. 320 (1997). Under 28 U.S.C. § 2254(d), no petition for a writ of habeas corpus may be granted with respect to any

claim adjudicated on the merits in state court unless the state court's adjudication (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"; or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." A federal court's independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly is insufficient for the court to issue a writ of habeas corpus. *See Williams v. Taylor*, 529 U.S. 362, 410 (2000). "Rather, that application must also be unreasonable." *Id.* A state courts factual findings are presumed to be correct, and a petitioner may overcome this presumption only with clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

III. Discussion

A. Ground One: The Report Properly Declined to Analyze Extra-record Evidence in Evaluating Petitioner's *Jackson* Claim.

Petitioner lodges a general objection to the Magistrate Judge's conclusion that Petitioner failed to show no rational trier of fact could have found Petitioner guilty of murder beyond a reasonable doubt and that the South Carolina Court of Appeals reasonably denied this challenge on direct appeal. *See* ECF No. 19 at 1-2. Petitioner cites his petition and the brief he submitted to the Magistrate Judge in support of the conclusory statement, "the evidence adduced at trial was insufficient in support of his conviction for murder." *Id.* at 2. This objection fails to specifically identify any particular portion of the Magistrate Judge's findings or reasoning as required by 28 U.S.C. § 636(b)(1) and Rule 72(b)(2) of the Federal Rules of Civil Procedure. *See, e.g., United States v. Midgette*, 478 U.S. 616, 621 (4th Cir. 2007). Further, a party is not entitled to de novo review by relying on papers submitted to a magistrate judge. *E.g., Veney v. Astrue*, 539 F. Supp. 2d 841, 845-46 (W.D. Va. 2008) (declining to engage in de novo review where party's general

objection relied on matters raised in summary judgment brief).

Petitioner objects further, however, arguing that the Report fails to consider the “impact of the additional evidence that someone other than Petitioner murdered the victim” in its analysis of this claim. ECF No. 19 at 2. Petitioner refers the Court to documents submitted as attachments to his petition, which he contends tend to show that Donsurvi Chisholm, not Petitioner, shot and killed Robert Earl Robertson. *See* ECF Nos. 1-1, 1-3. Petitioner notably omits in this objection any reference to the Magistrate Judge’s conclusion that these extra-record documents should only be considered on the question of whether petitioner has shown cause and prejudice to excuse the procedural default associated with his second ground for relief. *See* ECF No. 17 at 39-40; *see also Schriro v. Landrigan*, 550 U.S. 463, 473 n.1 (2007); *Fielder v. Stevenson*, No. 2:12-CV-00412-JMC, 2013 WL 593657, at *3 (D.S.C. Feb. 14, 2013).

In the documents to which Petitioner refers, Dante Hubbard recounts what he saw at the scene of the crime on September 17, 2007. *See* ECF Nos. 1-1, 1-3. On November 28, 2007, Dante Hubbard signed a written statement with the Dorchester County Sheriff’s Office that “Don” shot the victim—who was sitting in the driver’s seat of a truck—through the driver’s side door shortly after Petitioner exited the passenger’s seat of the vehicle. *See* ECF No. 1-1 at 1. On December 11, 2018, Dante Hubbard swore that, at the time of the shooting, Petitioner had just travelled from the driver’s side door to the back of the car. *See* ECF No. 1-3 at ¶¶ 5-8. In contrast to his 2007 statement, he now claims in 2018 that it was “Don Chisolm,” not Petitioner, who was in the car just prior to the shooting. The probative value of this evidence, whatever it may be, is not relevant to Petitioner’s claim that the Court of Appeals unreasonably affirmed the trial court’s denial of his motion for a directed verdict of acquittal.

Generally, a state prisoner alleging that the evidence in support of his conviction “cannot

be fairly characterized as sufficient to have led a rational trier of fact to find guilt beyond a reasonable doubt” has a cognizable claim for habeas relief under 28 U.S.C. § 2254. *Jackson v. Virginia*, 443 U.S. 307, 321 (1979) (citations omitted). A *Jackson* “sufficiency of the evidence” review is limited, though, to “record evidence.” *Herrera v. Collins*, 506 U.S. 390, 402 (1993) (citing *Jackson*, 443 U.S. at 318). It does not extend to extra-record evidence, including newly discovered evidence. *Id.* Accordingly, Petitioner’s *Jackson* claim succeeds or fails based only “upon the record evidence *adduced at the trial.*” *Jackson*, 443 U.S. at 324 (emphasis added).

As Petitioner acknowledges, the evidence he claims tends to prove someone else shot and killed the victim was not adduced at trial. His objection that the Report errs in failing to consider this evidence in connection with his *Jackson* claim is accordingly overruled.

B. Ground Two: Petitioner’s Ineffective Assistance of Trial Counsel Claim is Not Substantial. Its Procedural Default is Therefore not Excused Under *Martinez v. Ryan*.

Petitioner’s second ground for habeas relief asserts he received ineffective assistance of counsel in violation of the Sixth Amendment, where trial counsel did not call Dante Hubbard as a witness. The Magistrate Judge found this claim to be procedurally defaulted and not properly before the Court under *Martinez v. Ryan*, 566 U.S. 1 (2012). Petitioner objects on the ground that the Report (1) did not consider certain extra-record affidavit evidence; (2) improperly resolved factual disputes in the state’s favor at the summary judgment stage; and (3) recommends denying an evidentiary hearing.

Because this ground is procedurally defaulted, Petitioner must establish cause and prejudice to excuse the default under *Martinez*. To meet this standard, a prisoner must establish the existence of a “substantial” claim of ineffective assistance of trial counsel. *Martinez*, 566 U.S. at 14. In addition, the prisoner must show that PCR counsel was ineffective in failing to

raise the claim in PCR proceedings. *See id.* The Court does not reach the second issue, where Petitioner has not made out a “substantial” claim for ineffective assistance of counsel at trial, *i.e.*, one with at least “some merit.” *See id.* (citing *Miller-El v. Cockrell*, 537 U.S. 322 (2003)).

The Sixth Amendment right to counsel includes the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To establish a violation of the Sixth Amendment’s guarantees based upon the ineffective assistance of counsel, a party must show (1) that counsel’s performance fell below an objective standard of reasonableness, and (2) that a reasonable probability exists that but for counsel’s error, the result of the proceeding would have been different. *Id.* at 694. A “strong presumption” exists that counsel’s performance fell within a “wide range of reasonable professional assistance.” *Id.* at 689. In addition, the “reasonable probability” contemplated by the second prong of this analysis is “a probability sufficient to undermine confidence in the outcome” of the trial. *Id.* at 694. When a court evaluates an attorney’s performance under the *Strickland* standard, it must “eliminate the distorting effects of hindsight, . . . reconstruct the circumstances of counsel’s challenged conduct, and . . . evaluate the conduct from counsel’s perspective *at the time.*” *Id.* at 690 (emphasis added).

Petitioner’s first objection—that the Report failed to consider extra-record affidavit evidence—is incompatible with the requirement that trial counsel’s decisions are to be evaluated in light of circumstances viewed from counsel’s perspective at the time of the challenged conduct.

The affidavits at issue include the December 11, 2018 affidavit of Dante Hubbard, which, in contrast to his 2007 statement to police, places Don Chisolm rather than Petitioner on the passenger’s side of the victim’s car in the immediate timeframe of the shooting. The second

affidavit Petitioner wants considered is that of Veronica [REDACTED] dated July 5, 2018, in which she submits her 2008 statement to police, which tended to incriminate Petitioner, was coerced.

While a court may evaluate facts outside the record to permit a petitioner to show grounds for excusing a procedural default, *see Fielder*, 2013 WL 593657, at *3,¹ Petitioner here fails to show how the affidavits are relevant to the substantiality of his underlying Sixth Amendment claim. Both records that the Magistrate Judge concluded are not properly considered on the question of the underlying Sixth Amendment claim were created more than seven years *after* Petitioner was convicted, and they differ materially from the facts trial counsel faced. The Magistrate Judge did consider the extra-record written statement of Dante Hubbard dated November 28, 2007, and concluded trial counsel could have had a number of valid strategic reasons not to call Dante Hubbard as a witness.²

Petitioner's second objection argues that the Report improperly resolves a factual issue in favor of the state by opining on what trial counsel's strategy actually was. Specifically, he objects to the Report's conclusions that (1) "trial counsel was aware of Hubbard's statement and the evidence the State planned to present and she decided against further investigating the crime[.]" and (2) "the record suggests trial counsel chose to support her defense theory by focusing the jury on the reputation of the apartment complex as a high-crime area." ECF No. 19 at 5.

¹ No party filed a specific written objection to the Magistrate Judge's recommendation that the Court deny Respondents' Motion to Strike, but only sought consideration of the extra-record attachments to which the motion is directed on the question of cause and prejudice to excuse procedural default. Finding no clear error in the recommendation, it is adopted and the motion is denied.

² For example, Dante Hubbard's pretrial statement places Petitioner in the passenger's seat of the truck in which Robert Earl Robertson was shot immediately prior to the shooting. Dante Hubbard stated "Don" shot the victim from the driver's side; however, as noted by the Magistrate Judge, the state's evidence showed the victim was killed from close range and that the shooter would have been on the passenger side of the truck. The Report also notes Dante Hubbard's potential credibility issues, where Petitioner was ultimately apprehended in New York City carrying Dante Hubbard's identification.

First, whether counsel's performance is constitutionally adequate is a mixed question of law and fact. *Smith v. Angelone*, 111 F.3d 1126, 1131 (4th Cir. 1997). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at 248. The law governing Petitioner's underlying Sixth Amendment challenge requires him to overcome the strong presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." *Strickland*, 466 U.S. at 689 (quoting *Michel v. Louisiana*, supra, 350 U.S. 91, 101 (1955)). Respondents have carried their burden at this stage by positing a number of reasons why trial counsel would not have wanted to present Dante Hubbard as a witness, and Petitioner fails to demonstrate a genuine issue in response.

The Court is simply unable to conclude that Petitioner has raised a substantial Sixth Amendment claim based on trial counsel's decision not to call Dante Hubbard as a witness. His statement to police in 2007 placed Petitioner on the side of the vehicle where the shooter would have been according to the state's witness. This is corroborated by Petitioner's fingerprints, which were lifted from the front passenger side of the vehicle in which the victim was shot. Nevertheless, in 2007, Dante Hubbard stated "Don" shot the victim from outside the driver's side of the vehicle. Counsel could easily arrive at the reasonable conclusion that the jury would not find Dante Hubbard credible.

Finally, Petitioner has failed to demonstrate his entitlement to an evidentiary hearing on the issue of cause and prejudice to excuse the procedural default on this claim. In deciding whether to grant an evidentiary hearing, "a federal court must consider whether the hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief." *Schriro*, 550 U.S. at 474. To the contrary, "if the record

refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing." *Id.* The facts are not genuinely disputed at this stage. Dante Hubbard's 2007 signed statement to police, which opposes his 2018 affidavit, placed Petitioner where the shooter would have been at the time of the shooting. Petitioner does not address this rather obvious issue attendant to Dante Hubbard's 2007 statement in the context of why trial counsel was required to call him as a witness at trial anyway. Instead, in his objection, Petitioner appears to rebut the Report's conclusion that the 2018 affidavit is materially different than the 2007 affidavit. *See* ECF No. 19 at 4. Because the record-enlarged for the limited purpose of determining whether Petitioner is able to show cause and prejudice—precludes habeas relief, the Court declines to hold an evidentiary hearing.

C. Ground Three: Petitioner Cannot Establish Prejudice Resulting from the Admission of a Mugshot into Evidence at Trial.

In the Report, the Magistrate Judge concluded that, although Petitioner's mugshot from a prior arrest should not have been admitted into evidence at trial under *State v. Traylor*, 600 S.E.2d 528 (S.C. 2004), Petitioner has failed to show that he was prejudiced by counsel's failure to object under *Strickland v. Washington*, 466 U.S. 668 (1984). Petitioner, in objecting to this conclusion, makes the factual argument that the admission of his mugshot had an "overwhelming prejudicial effect" where the state's evidence against him was circumstantial and weak.

Respondents submit in their reply that trial counsel's performance was not deficient, and even if it was, Petitioner suffered no prejudice where the state presented "overwhelming proof" of Petitioner's guilt.

Under *Traylor*, the introduction of a mugshot into evidence constitutes reversible error unless "(1) the state has a demonstrable need to introduce the photograph, (2) the photograph shown to the jury does not suggest the defendant has a criminal record, and (3) the photograph is

not introduced in such a way as to draw attention to its origin or implication.” *Traylor*, 600 S.E.2d at 527. The Court agrees that the photograph was objectionable as admitted and that counsel’s performance was deficient for purposes of *Strickland*. The mugshot states “Charleston County Sheriff’s Office Detention Center” in large letters across the top of the page and displays a booking date of May 11, 2007, which was prior to the murder and, therefore, necessarily unrelated to it. *See* ECF No. 8-2 at 26. Under the first prong in *Traylor*, as noted by the PCR court, the state demonstrated that the photograph was necessary to link Petitioner to a set of known fingerprints. *See id.* at 25. The PCR court’s conclusion to this effect is not an unreasonable application of clearly established federal law, and Petitioner makes no specific objection to the Report on this point.³ Under the second prong, however, the mugshot indicated that it was taken in a different county and on a different date than Petitioner’s arrest for the murder of Robert Earl Robertson, thereby suggesting that Petitioner had a criminal record. Finally, under the third prong, it appears the mugshot was introduced in such a way as to draw attention to its origin and the implication that Petitioner may have a record. Specifically, trial counsel elicited testimony highlighting that the date of the booking photograph was May 11, 2007, prior to Robert Earl Robertson’s murder. The Court agrees with the Report’s conclusion that the mugshot was objectionable under *Traylor*, and Respondents’ objections to this conclusion merely mirror the arguments in its Motion for Summary Judgment without adding any legal authority.

Petitioner has failed to show, however, that trial counsel’s failure to object to the mugshot under *Traylor* “undermine[s] confidence in the outcome” of the trial or that the PCR court

³ Petitioner does lodge an objection to the Magistrate Judge’s conclusion that Petitioner–like Respondent–did not cite any legal authority in support of his position. After a thorough review of Petitioner’s response, ECF No. 11 at 11-13, the Court agrees Petitioner engages in no legal analysis beyond stating the rule in *Traylor*.

unreasonably rejected Petitioner's argument to the contrary. *See Strickland*, 466 U.S. at 694. Petitioner's objection on the question of prejudice merely characterizes the state's case at trial as weak, with a "dearth of evidence," such that admission of the mugshot had an outsized impact on the jury's verdict. *See, e.g., id.* at 696 (acknowledging that "a verdict . . . only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support."). Respondents counter that the state presented "overwhelming proof," detailing certain of the evidence adduced at trial. The parties do not direct the Court to any case concerning their position or from which to determine the issue of prejudice in the context of what is a "weak" or a "strong" case. After a thorough review of the record evidence in this case, however, it is not "reasonably likely" that Petitioner would have been acquitted but for the admission of his May 11, 2007 mugshot. The state introduced fingerprint evidence showing that Petitioner had been in contact with the front passenger side door of the victim's car—the side from which the victim was shot. Petitioner's DNA was also collected from a still-powered-on headset found near the crime scene shortly after the killing. Petitioner's phone records provided a further link between himself and the victim, and on the day of the shooting, a string of calls to and from Veronica [REDACTED], who was herself connected to the victim, ended just one minute after the shooting. After the shooting, Petitioner fled to New York with Veronica [REDACTED] who later stated she "knew [they] were running from something." *See* ECF No. 17 at 19-23 (summarizing evidence adduced at trial). In

light of the foregoing evidence, the verdict is not "weakly supported" such that error in admitting the mugshot undermines confidence in the result of the trial. Further, even if Petitioner could satisfy both prongs of the *Strickland* analysis on direct review, he has not shown that the state court's determination was not only incorrect, but also unreasonable. *See Williams*, 529 U.S. at 410 (2000) ("[A] federal habeas court may not issue the writ simply because that court concludes

in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.”).

IV. Conclusion

After a thorough review of the Petition, the record, the Report, the applicable law, and the arguments submitted by the parties, the Court adopts the Report, ECF No. 17, GRANTS Respondents’ Motion for Summary Judgment, ECF No. 9, DENIES Respondents’ Motion to Strike, ECF No. 10, DENIES Petitioner’s Motion for an Evidentiary Hearing, ECF No. 12, and DISMISSES the Petition, ECF No. 1, with prejudice.

It is further ordered that a certificate of appealability is denied because Petitioner has failed to make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

IT IS SO ORDERED.

/s/Sherri A. Lydon
Sherri A. Lydon
United States District Judge

June 5, 2020

Florence, South Carolina

UNPUBLISHED

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 20-6850

TREVEE GETHERS,

Petitioner - Appellant,

v.

**BRYAN STIRLING, Commissioner, South Carolina Department of Corrections;
RANDALL WILLIAMS, Warden of Lieber Correctional Institution,**

Respondents - Appellees.

Appeal from the United States District Court for the District of South Carolina, at Aiken.
Sherri A. Lydon, District Judge. (1:19-cv-01088-SAL)

Submitted: March 18, 2021

Decided: March 22, 2021

Before WILKINSON and RICHARDSON, Circuit Judges, and SHEDD, Senior Circuit
Judge.

Dismissed by unpublished per curiam opinion.

Elizabeth Anne Franklin-Best, ELIZABETH FRANKLIN-BEST, P.C., Columbia, South
Carolina, for Appellant.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Treveen Gethers, a South Carolina inmate, seeks to appeal the district court's order accepting the recommendation of the magistrate judge and denying relief on Gethers' counseled 28 U.S.C. § 2254 petition. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1)(A). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. *See Buck v. Davis*, 137 S. Ct. 759, 773-74 (2017). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable and that the petition states a debatable claim of the denial of a constitutional right. *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

We have independently reviewed the record and conclude that Gethers has not made the requisite showing. Accordingly, we deny a certificate of appealability and dismiss the appeal. ~~We dispense with oral argument because the facts and legal contentions are~~ adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

AO 450 (SCD 04/2010) Judgment in a Civil Action

UNITED STATES DISTRICT COURT
for the
District of South Carolina

Trevee Gethers,

Petitioner

v.

Bryan Stirling *Commissioner, South Carolina*
Department of Corrections; Randall Williams
Warden of Lieber Correctional Institution.

Respondent

Civil Action No. 1:19-cv-01088-SAL

JUDGMENT IN A CIVIL ACTION

The court has ordered that (*check one*):

☐ the petitioner (*name*) _____ recover from the respondent (*name*) _____ the amount of _____ dollars (\$___), which includes prejudgment interest at the rate of ___ %, plus postjudgment interest at the rate of ___ %, along with costs.

☐ the petitioner recover nothing, the action be dismissed on the merits, and the respondent (*name*) _____ recover costs from the petitioner (*name*) _____.

☒ other: Summary judgment is hereby entered for the respondents, Bryan Stirling *Commissioner, South Carolina Department of Corrections* and Randall Williams *Warden of Lieber Correctional Institution*. The petitioner, Trevee Gethers, shall take nothing of the respondents and this action is dismissed with prejudice.

This action was (*check one*):

☐ tried by a jury, the Honorable _____ presiding, and the jury has rendered a verdict.

☐ tried by the Honorable _____ presiding, without a jury and the above decision was reached.

☒ decided by the Honorable Sherri A. Lydon, United States District Judge, presiding, adopting the Report and Recommendation of the Honorable Shiva V. Hodges, United States Magistrate Judge, which recommended granting the respondents' motion for summary judgment.

Date: June 5, 2020

ROBIN L. BLUME, CLERK OF COURT

s/L. Baker

Signature of Clerk or Deputy Clerk

CERTIFICATE OF SERVICE

I hereby certify that I have this date served the within and foregoing Applicant's Objection to Respondent's Motion to Dismiss and Request for Hearing and Attachments, by depositing a true and correct copy of the same via first-class mail, postage prepaid, upon all parties as follows:

Samantha Weidauer, Esq.
Office of Attorney General
PO Box 11549
Columbia, SC 29211

The Honorable Edgar W. Dickson
P.O. Box 1949
Orangeburg, SC 29116-1949

The Honorable Cheryl L. Graham
Dorchester County Clerk of Court
5200 E Jim Bilton Blvd
St George, SC 29477-8020

By: Courtney Powers
Courtney Powers
Paralegal for Dayne C. Phillips, Esq.

1614 Taylor Street, Suite D.
Columbia, SC 29201
C: (803) 216-5561
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courtney@pricebenowitz.com

October 25, 2021

FILED-RECORDED

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF DORCHESTER 2022 JUL 1 } PM 1:26
FIRST JUDICIAL CIRCUIT

Trenee Gethers,

Applicant,

v.

State of South Carolina,

Respondent.

Case No. 2021-CP-18-01217

**ORDER FOR EVIDENTIARY
HEARING**

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on July 6, 2021. The Court has reviewed the Application, the State's Return and Motion to Dismiss, the State's Conditional Order of Dismissal, and Applicant's Reply Brief and Request for Hearing. After reviewing the documents, the court finds it appropriate to convene an evidentiary hearing in this case.

IT IS THEREFORE ORDERED that an evidentiary hearing be scheduled during the next appropriate term of court.

AND IT IS SO ORDERED.



EDGAR W. DICKSON
Presiding Judge
First Judicial Circuit

June 29, 2022
Orangeburg, South Carolina

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER
IN THE COURT OF COMMON PLEAS

Filed - Recorded

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2021CP1801217

Trevee Gethers

7/11 JUL 11 PM 3:56

South Carolina State Of

PLAINTIFF(S)

Charles H. Gethers

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit);
☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.

Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Edgar W. Dickson

2153

7/11/2022

Circuit Court Judge

Judge Code

Date

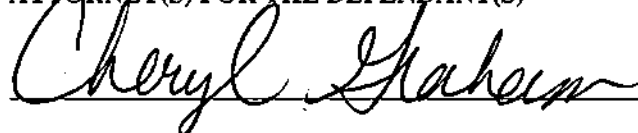
For Clerk of Court Office Use Only

This judgment was entered on **07/11/2022**, and a copy mailed first class or placed in the appropriate attorney's box on **07/11/2022**, to attorneys of record or to parties (when appearing pro se) as follows:

Trenee Gethers Lieber Corr. Inst., Scdc#343706 136
Wilborn Ave. Ridgeville, SC 29472
Dayne C Phillips Price Benowitz Llp 1614 Taylor Street, Ste.
D Columbia, SC 29201

Megan Harrigan Jameson PO Box 11549 Columbia, SC
29211
Samantha Jo Weidauer PO Box 11549 Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

Cheryl Graham - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA	)	COMMON PLEAS COURT
	)	
DORCHESTER COUNTY	)	FIRST JUDICIAL CIRCUIT
TREVEE GETHERS	)	2021-CP-18-1217
	)	
VS.	)	<u>TRANSCRIPT OF RECORD</u>
	)	
STATE OF SOUTH CAROLINA	)	PCR Hearing

B E F O R E:

The Honorable Heath P. Taylor, Judge

DATE: Tuesday, January 24, 2023

11:41 a.m.

Orangeburg, South Carolina

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

Dayne C. Phillips, Esquire

Price Benowitz LLP
 1614 Taylor Street, Suite D
 Columbia, South Carolina 29201
 dayne@pricebenowitz.com

Attorney for the Applicant

Chelsey F. Marto, Esquire

South Carolina Attorney General's Office
 Post Office Box 11549
 Columbia, South Carolina 29211

Attorney for the State

Reported by: Cathy J. Provost, RMR, Official Court Reporter

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JAMAAL A. GETHERS

By Attorney Phillips	19	--	--	--
By Attorney Marto	--	21	--	--

SARA J. ROGERS McCLELLAN

By Attorney Phillips	22	--	--	--
By Attorney Marto	--	26	--	--

TREVEE GETHERS

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RUSSELL D. HILTON

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IDENTIFIED: ADMITTED:

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2	- Dontae Hubbard's statement	6	11
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4	- Affidavit (Dante Hubbard)	6	12
5	- Affidavit ("M")	6	14
6	- Affidavit (Rodney Davis)	6	15

(No exhibits marked.)

dash -- intentional/purposeful interruption; change in thought
 ellipses ... trailing off
 [ph] phonetically written
 [sic] written as said
 [indiscernible] unable to be understood due to low volume or
 quality of audio

1 -- P R O C E E D I N G S --

2 ATTORNEY MARTO: May it please the Court. We are here today
3 on the case of Trevee Gethers v. State of South Carolina, Docket
4 No. 2021-CP-18-1217. My name is Chelsey Marto, and I'm here on
5 behalf of respondent. Mr. Dayne Phillips represents the
6 applicant in this matter. He's presently confined in the
7 Department of Corrections, and was indicted in December 2007 for
8 murder. Proceeded to a jury trial November 15th through the
9 16th, 2010, before Judge Goodstein. Sara Rogers represented
10 applicant, and Russell Hilton and Harrison Bell prosecuted the
11 case. He was found guilty as indicted and sentenced to 45 years'
12 imprisonment.

13 There was a notice of appeal filed and a direct appeal
14 ensued. The case was remitted back to the Circuit Court May 7,
15 2014, and he filed his first application July 3rd, 2014. He was
16 represented by Rodney Davis. A hearing was held October 28th,
17 2015, before Judge Addy, and relief was denied. A PCR appeal has
18 also been pursued, and that was denied, and the remittitur issued
19 May 15th, 2018. He also pursued a habeas matter in this case,
20 and filed the petition April 15th, 2019.

21 And one of the issues was similar to the issue we have here
22 today; namely, that trial counsel rendered ineffective assistance
23 of counsel when she did not secure the attendance of witness
24 Dante who gave a statement to the Dorchester County Sheriff's
25 Office shortly after the murder stating that he witnessed someone

1 else shoot the decedent. This habeas petition was dismissed on
2 the recommendation of the magistrate's court. An appeal was
3 filed, and the Fourth Circuit Court of Appeals dismissed it by
4 unpublished pro curium opinion. Mandate was issued April 13th,
5 2021. This application was filed July 6, 2021. The State moved
6 to dismiss October 14th, 2021, and a full evidentiary hearing was
7 ordered by Judge Dickson on June 29th, 2022.

8 And with that, I'll turn it over to Mr. Phillips.

9 ATTORNEY PHILLIPS: Thank you, Your Honor.

10 THE COURT: Yes, sir.

11 ATTORNEY PHILLIPS: The issue before the Court on this
12 excessive PCR is very limited in scope. Ultimately that's one of
13 the reasons why, based on the attachments presented, that I
14 believe Judge Dickson ordered this evidentiary hearing, because
15 it's compelling. Specifically, the limited issue is whether the
16 State disclosed the specific statement that was provided to law
17 enforcement, the Dorchester County Sheriff's Office, from Dante
18 Hubbard ultimately obtained by his federal habeas counsel who's
19 present and will be called to testify, so it is very limited in
20 scope issue. It's not a successive PCR once we're trying to
21 relitigate issues that had already been addressed in a prior PCR
22 matter.

23 This issue was raised in the federal habeas matter that
24 ultimately came to light to the federal habeas counsel. And with
25 that, we'll certainly, I think, save the rest for argument and go

1 ahead and present testimony, Your Honor.

2 THE COURT: So this issue, the disclosure of this witness
3 statement, was not raised in the initial PCR?

4 ATTORNEY MARTO: That's correct.

5 THE COURT: Okay.

6 (Whereupon, Applicant's Exhibits 1 through 6 were
7 premarked.)

8 ATTORNEY PHILLIPS: And I believe as far as the scope of
9 everything, the State and I are on the same page with Your
10 Honor's decision.

11 ATTORNEY MARTO: Yes, Your Honor.

12 THE COURT: All right. Mr. Gethers, will you please raise
13 your right hand for me.

14 TREVEE GETHERS, THE DEFENDANT, SWORN IN

15 THE COURT: All right. A few things. And I'm sure
16 Mr. Phillips has been over this with you, but I've got to advise
17 you, when you ask for a post-conviction relief, there are two
18 things that can happen, essentially. If I find you're not
19 entitled to relief you'll have to serve the remainder of your
20 sentence. If I find that you are entitled to relief, you will
21 then go back and potentially start from the beginning where you
22 will be subject to trial, or working it out, however it may
23 happen, the charge of murder, so if you win today you certainly
24 could be subjected to life in prison again. And you understand
25 that, correct?

1 MR. GETHERS: Yes, sir.

2 THE COURT: And you're willing to move forward?

3 MR. GETHERS: Yes, sir.

4 DEFENSE ATTORNEY1: All Right. You've got a good lawyer,
5 and I'm sure Mr. Phillips has advised you all that, but I just
6 like to have that on the record.

7 MR. GETHERS: Yes, sir.

8 ATTORNEY PHILLIPS: And, Your Honor, just for the record, I
9 always explain it as like hitting a reset button. If you win,
10 the remedy is starting from day one.

11 THE COURT: Yes. All right. You can be seated.

12 ATTORNEY PHILLIPS: Thank you, Your Honor.

13 THE COURT: Yes, sir.

14 ATTORNEY PHILLIPS: The applicant would call Elizabeth
15 Franklin Best.

16 ELIZABETH FRANKLIN BEST,
17 having first been duly sworn, was examined and testified as
18 follows:

19 **DIRECT EXAMINATION**

20 BY ATTORNEY PHILLIPS:

21 Q Good morning, Ms. Best.

22 A Good morning.

23 Q Could you say your full name.

24 A Sure. It's Elizabeth Franklin Best.

25 Q And if you could, give the background as far as your legal

1 training and experience.

2 A Okay. So I graduated from law school back in 2001. Sat for
3 the New York Bar in 2001, got licensed there. Moved back to
4 South Carolina in 2003, sat for the South Carolina Bar, and have
5 been licensed since 2004.

6 I have practiced criminal defense for that entire time,
7 mostly appellate work, and much of it in the death-penalty area,
8 but these days just representing regular criminal defendants in
9 appellate matters.

10 Q And, I guess, could you explain or kind of expound upon what
11 your primary practice areas are now?

12 A Sure. As we kind of focus on appeals, state appeals and
13 federal appeals, and we do a lot of federal post-conviction work,
14 §2255 motions. We handle federal habeas cases like this one,
15 compassionate release petitions, things like that.

16 Q And could you explain how you got involved in this case.

17 A It's been a while. I can't believe it's already been like
18 this long, since 2019, but either Mr. Gethers or his family
19 reached out to me. They wanted somebody to represent him in
20 federal habeas, and I agreed to do so.

21 Q And during the course of your representation in the federal
22 habeas what information did you receive that ultimately, really,
23 the matter we're at here today, the statement of Dante Hubbard,
24 how did that come about?

25 A Sure. So I can't remember whether it was Trevee or

1 Mr. Hubbard who indicated that there was a statement, a
2 law-enforcement statement. I know that Mr. Gethers had not seen
3 it. And so I just reached out to the solicitor's office and
4 requested that they go through their files just to see if there
5 was a statement by Dante Hubbard. Don Sorenson, who was not the
6 prosecutor on this case but he was the person I was corresponding
7 with, sent me a copy of the statement and also some investigation
8 notes.

9 Q And so I guess to kind of clear up and clarify, you were
10 notified that Dante Hubbard had provided a statement during the
11 course of the representation, or during the course of the
12 investigation?

13 A During the course of the investigation. I mean, at some
14 point I became aware that there may have been this statement that
15 my client had not seen, and so wanted to track it down if I
16 could.

17 Q So you discussed that with Mr. Gethers?

18 A Yes. As I recall, yes.

19 Q And you confirmed that he had no knowledge of that
20 statement?

21 A Yes.

22 Q And that caused you to investigate further?

23 A And that's the only reason I moved -- or, reached out to
24 Mr. Sorenson.

25 Q And so once you reached out to Mr. Sorenson he provided that

1 statement to you?

2 A Yes. He pulled the file, went through it, and identified
3 and provided to me what I specifically asked for. I mean, I
4 didn't just ask for a copy of the file, I asked for this
5 particular statement, and he identified and provided it.

6 Q All right. And so just to -- as a matter of housekeeping, I
7 had given you copies of what's been marked as Applicant's Exhibit
8 No. 1. That's that petition for writ of habeas corpus, the
9 habeas petition, that you ultimately filed. Does that look like
10 an accurate copy of what you filed?

11 A Yes, it is.

12 ATTORNEY PHILLIPS: Your Honor, the applicant would move to
13 admit Applicant's Exhibit No. 1 into evidence.

14 THE COURT: Any objection, Ms. Marto?

15 ATTORNEY MARTO: No objection.

16 THE COURT: All right. That will be Applicant's 1.

17 (Applicant's Exhibit No. 1 is admitted into the record.)

18 Q I also provided you a copy of what's been marked as
19 Applicant's Exhibit No. 2, and that was the statement that was
20 provided -- Dante Hubbard's statement, that was provided -- to
21 the Dorchester County Sheriff's Office on November 28th of 2007.
22 Does that look accurate as far as what you received?

23 A Yes. This is what I received.

24 ATTORNEY PHILLIPS: Your Honor, I would like to admit
25 Applicant's Exhibit No. 2 into evidence.

1 THE COURT: Ms. Marto?

2 ATTORNEY MARTO: No objection.

3 THE COURT: That will be Applicant's 2.

4 (Applicant's Exhibit No. 2 is admitted into the record.)

5 Q Now, Ms. Best, what's been marked as Applicant's Exhibit
6 No. 3, the investigator's notes that were attached to that to
7 statement, do those look accurate as what was provided by Don
8 Sorenson?

9 A Yes, they do.

10 ATTORNEY PHILLIPS: Your Honor, I'd like to admit
11 Applicant's Exhibit No. 3 into evidence.

12 ATTORNEY MARTO: No objection.

13 THE COURT: That will be Applicant's 3.

14 (Applicant's Exhibit No. 3 is admitted into the record.)

15 Q Now, there's also an affidavit that you had filed dated
16 December 11th of 2018, an affidavit from Dante Hubbard, a
17 subsequent, kind of in time. Could you explain the background of
18 how you obtained that statement?

19 A Sure. I remember speaking with Mr. Hubbard, and it seems to
20 me that I was made aware that at the time of Mr. Gethers' trial
21 he was not in the state, and I didn't know -- I knew he was
22 available, and so I asked -- I didn't know whether or not he was
23 somebody that went to other areas or anything like that, but he
24 traveled a bit, so I asked him to come in and spoke with him, and
25 we developed this affidavit together.

1 Q And so you were present whenever he provided that?

2 A Yes, I was present. So we spoke about what had happened.
3 And as we were speaking, I started kind of writing this down and
4 just confirmed that this is, you know, his statement, what
5 happened that night, he signed it, and then we had it notarized.

6 ATTORNEY PHILLIPS: Your Honor, at this time I would move to
7 admit Applicant's Exhibit No. 4, the affidavit of Dante Hubbard.

8 THE COURT: Any objection?

9 ATTORNEY MARTO: No objection.

10 THE COURT: Thank you. That will be Applicant's 4.

11 (Applicant's No. Exhibit 4 is admitted into the record.)

12 Q Again, during the uncovering of the receipt of the statement
13 from Don Sorenson and then obtaining this subsequent affidavit,
14 what was the importance of that statement in relation to
15 Mr. Gethers' case?

16 A I mean, I thought it was exculpatory. I mean, it was
17 impeaching as any witnesses who may have claimed that Trevee is
18 the one who pulled the trigger, but it was also exculpatory in
19 that it identified somebody else as having been the trigger
20 person.

21 Q And you raised that in your federal habeas petition?

22 A Yes.

23 Q And ultimately that was denied, correct?

24 A Yes.

25 Q You appealed to the Fourth Circuit Court of Appeals?

1 A Well, so you don't get a full appeal to the Fourth Circuit
2 Court of Appeals. All you get is a certificate of appealability.
3 So I requested a certificate of appealability from the Fourth
4 Circuit. They denied.

5 Q And just again, as far as background, what was provided
6 ultimately in the federal habeas petition? What's been marked as
7 Applicant's Exhibit No. 5, there was an affidavit from a Veronica
8 -- we'll just say "M" -- I believe she was a minor at the time so
9 we'll keep the record clean even though she's an adult now --
10 dated -- it's July 5th of 2018. How did you come to obtain that
11 statement?

12 A I believe that she reached out and may have sent that to us.
13 I don't have as firm a recollection of that. I don't recall
14 meeting with her, but I received this.

15 Q But you did obtain that statement?

16 A Yes.

17 Q I mean, it was given to you?

18 A Yes.

19 Q And what was the importance of that statement?

20 A I believe -- yeah. So it was recanting. It seemed that she
21 was sort of disavowing some statements that she had made at the
22 time of trial.

23 ATTORNEY PHILLIPS: Your Honor, at this time the applicant
24 would move to admit Applicant's Exhibit No. 5 into evidence.

25 ATTORNEY MARTO: No objection.

1 THE COURT: That will be Applicant's 5.

2 (Applicant's Exhibit No. 5 is admitted into the record.)

3 ATTORNEY PHILLIPS: Thank you, Your Honor.

4 Q Now, you also have been handed an affidavit from Rodney
5 Davis, the original PCR lawyer who represented Mr. Gethers.
6 Again, with that affidavit, what was the importance of that
7 affidavit?

8 A So, okay. So back when I was filing the federal habeas
9 petition, there was a fairly recent, from 2012, United States
10 Supreme Court case called *Martinez v. Ryan* that provided sort of
11 an equitable remedy for inmates who could show an ineffective
12 assistance of trial counsel claim if they could also show an
13 ineffective assistance of PCR counsel claim.

14 And so because this was a claim, the existence of this
15 Dante's statement, is one that had not been raised before and I
16 was raising for the first time in federal habeas, I was asking
17 the federal court to excuse the procedural default. And in order
18 to even have a chance at meet making that claim, I had to show
19 that PCR counsel was ineffective. And so what I was attempting
20 to do was to get Mr. Davis. I spoke to him. He admitted that he
21 had not tried to obtain a copy of the solicitor's file.

22 And so that was going to sort of -- my allegation was that
23 that was certainly ineffective; that he should have conducted the
24 same investigation that I conducted; and had he done so, this
25 could have been raised at the initial PCR hearing.

1 ATTORNEY PHILLIPS: Your Honor, at this time we would move
2 to admit Applicant's Exhibit No. 6, the affidavit of Rodney
3 Davis.

4 ATTORNEY MARTO: No objection.

5 THE COURT: That will be admitted as Applicant's 6.

6 (Applicant's Exhibit No. 6 is admitted into the record.)

7 ATTORNEY PHILLIPS: Thank you, Your Honor.

8 Q Now, taking it a step back with the Dante Hubbard's
9 affidavit and the information he's provided, he specifically --
10 again, you said it was exculpatory -- I guess being more
11 specific, he identified someone other than Mr. Gethers as the
12 shooter?

13 A He did, and it's somebody who is also currently serving a
14 life sentence for murder.

15 Q Two life sentences?

16 A Two life sentences. So I guess this would have been no. 3.

17 Q And his name for the Court?

18 A Don Chisolm.

19 Q And so ultimately he's in the South Carolina Department of
20 Corrections on two separate murder convictions, serving life in
21 prison, and that was provided in the statement?

22 A Yes.

23 Q Now, with that being said, as far as your review, again as
24 somebody who does PCRs, and obviously you put this in your
25 federal habeas for that reason that we always have to deal with

1 the prejudice issue, you noticed some things that show that it's
2 not a strong case against Mr. Gethers. Again, certainly I don't
3 want to, you know, [simultaneous talking] for that, certainly.
4 With that, what were some of the things you identified in your
5 habeas petition as far as weaknesses to the State's case or lack
6 of evidence pointing to Mr. Gethers' guilt?

7 A Sure. And if I can go back, and I was just reviewing the
8 traverse that I filed, which I think I argued a little bit more
9 about this, but I just remember it was a particularly sort of
10 weak case. I mean, his Bluetooth was found in the area, and they
11 were able to show that Trevee and this young female left the
12 state, and they found fingerprints in the car. But the State
13 never showed that he had received any money from the victim,
14 which was the State's theory about why Trevee would have shot the
15 victim, there was no evidence that he had a weapon that night,
16 and it appears that, you know, the State had a statement in its
17 possession that somebody else had shot the victim.

18 Q And so as you pointed out in your habeas petition, there
19 were witnesses but none of them identified Mr. Gethers?

20 A That's correct.

21 Q That there were numerous fingerprints taken by the State
22 that identified at least three different people other than
23 Mr. Gethers?

24 A That's accurate.

25 Q There was no additional investigation done into those three

1 individuals?

2 A I mean, that was my -- my understanding is that, you know,
3 they were able to show that Mr. Trevee was there in that area,
4 and then he was just sort of immediately identified as a suspect
5 and prosecuted.

6 Q And as you noted in the habeas petition, the Bluetooth
7 headset wasn't even found that close to the actual crime scene?

8 A No, it was not particularly close.

9 Q And there was no murder weapon found in this case?

10 A No.

11 Q And there were ultimately search warrants done for telephone
12 records, and none of those provided any inculpatory --

13 A I am sure that's accurate.

14 Q Ultimately, with that, there was no other smoking gun, so to
15 speak, overwhelming evidence of guilt, in your mind?

16 A No, not at all.

17 Q And so with that you obviously felt that Dante Hubbard's
18 statement was a critical piece to this case?

19 A I mean, absolutely. I mean, I can't imagine not having used
20 that statement if you had it at the trial.

21 ATTORNEY PHILLIPS: No further question, Your Honor.

22 THE COURT: Ms. Marto.

23 ATTORNEY MARTO: Yes, Your Honor.

24

25

CROSS-EXAMINATION

BY ATTORNEY MARTO:

Q Good afternoon.

A Hey.

Q So you were involved in the habeas, correct?

A Yes.

Q And you weren't involved before taking on the habeas, correct?

A No.

Q And you have no personal knowledge whether or not a statement was handed over to a defense counsel?

A No. No. I mean, that's why I think I couched it in the habeas petition that it was either going to be sort of a prosecutorial misconduct for failing to hand it over or an ineffective assistance of trial counsel for not using it.

Q And Mr. Gethers had multiple trial counsel, correct?

A I don't recall. Sorry.

Q And again, how did you find out about the statement?

A I can't remember. Somebody told me that it existed, and I decided to ask some questions and see if it really did.

Q Do you recall if it was a family member?

A It was either Mr. Gethers or Dante. I mean, I just -- it goes back in 2008. I just can't remember. But somebody told, brought to my attention that the statement was out there, and so, I mean, I didn't know if it really did or not, and so I just

1 reached out to Don Sorenson, and he provided it.

2 Q Do you have personal knowledge over whether or not
3 Mr. Gethers had seen that statement before the habeas?

4 A I mean, he told me he had not.

5 Q And again, you think that he could have been the one that
6 told you about the statement in the first place, correct?

7 A Perhaps.

8 Q And again, the habeas petition was denied, correct?

9 A It was.

10 ATTORNEY MARTO: No further questions.

11 ATTORNEY PHILLIPS: Thank you, Your Honor.

12 THE COURT: Any redirect?

13 ATTORNEY PHILLIPS: No redirect.

14 THE COURT: All right, Ms. Best. You may step down.

15 ATTORNEY PHILLIPS: Your Honor, the applicant would call
16 Jamaal Gethers. This is the applicant's brother.

17 JAMAAL GETHERS,
18 having first been duly sworn, was examined and testified as
19 follows:

20 **DIRECT EXAMINATION**

21 BY ATTORNEY PHILLIPS:

22 Q Good morning, Jamaal.

23 A Good morning.

24 Q If you could, say your full name for the Court.

25 A Jamaal Ajile Gethers.

1 Q And what's your relationship with Trevee?

2 A That's my little brother.

3 Q Now, if you could, trying to piece this together, were you
4 the person who provided the information to Ms. Best?

5 A No, I wasn't.

6 Q Regarding Dante Hubbard?

7 A No, I wasn't. I informed Trevee about -- I bumped into
8 Dante, I think it was, at a grocery store or gas station, or
9 something. It was like '19, '20, maybe somewhere a couple years
10 ago, and when we were talking about the trial he was, Well, what
11 did they do with the information that they received, his
12 statement? I said I don't know, I have to get back with my
13 little brother and let him know.

14 So once informed Trevee about the statement, he seemed lost
15 like, why didn't they bring up at trial or whatever, so I guess
16 he did his background and got in touch with whoever he needed to
17 to pass that information on.

18 Q So just to clarify this, you said you ran into Mr. Hubbard?

19 A Yes, sir, in the street somewhere. I can't remember exactly
20 where it was.

21 Q And Mr. Hubbard asked about what they did with his
22 statement?

23 A Yeah. We had another conversation going on, and then when
24 he brought the trial up, that's when he said, Well, how could
25 they do that if they had his statement.

1 Q And so you said this was a few years ago?

2 A Yes, sir.

3 Q And then you brought that to your brother, Trevee's,
4 attention?

5 A Yes, sir.

6 Q And then he indicated that he didn't understand what you're
7 talking about?

8 A Yes, sir.

9 Q Okay. You had no further involvement in this matter?

10 A No, sir.

11 ATTORNEY PHILLIPS: No further questions, Your Honor.

12 **CROSS-EXAMINATION**

13 BY ATTORNEY MARTO:

14 Q Good afternoon.

15 A Good afternoon.

16 Q So were you involved in any discussions with counsel leading
17 up to trial?

18 A No, sir -- no, ma'am.

19 Q So you have no knowledge as to whether or not the discovery
20 was shown, personally?

21 A Well, I attended the trial, and they never brought that out.
22 I didn't know nothing about it until I spoke to Mr. Hubbard, and
23 at the trial they didn't bring any defenses up at all.

24 Q But you weren't party to any conversations with counsel,
25 though, right?

1 A No. No, ma'am.

2 Q So you don't know if counsel brought it up prior to trial?

3 A Prior to trial, I wouldn't know.

4 ATTORNEY MARTO: No further questions.

5 ATTORNEY PHILLIPS: No redirect --

6 THE COURT: Any redirect? All right, Mr. Gethers, you can
7 step down. Thank you for being here.

8 ATTORNEY PHILLIPS: Your Honor, the applicant would call
9 Ms. Sara Rogers, or Ms. McClellan, I think, is her name, married
10 name, now.

11 SARA J. ROGERS McCLELLAN,
12 having first been duly sworn, was examined and testified as
13 follows:

14 CLERK OF COURT: Please state your name for the record.

15 THE WITNESS: Sara Rogers, now Sara McClellan.

16 **DIRECT EXAMINATION**

17 BY ATTORNEY PHILLIPS:

18 Q Good morning.

19 A Good morning.

20 Q If you could, explain essentially your -- how you became the
21 lawyer for Mr. Gethers.

22 A I believe I was ultimately the fifth attorney that he had.
23 And I was friends with Susan Williams who was, as I understood
24 it, going to be his fifth and something arose and she could not,
25 so she reached out to me, along with his fourth attorney, and

1 essentially asked if I would be willing to meet with him and take
2 the case, and I did.

3 Q And if you could -- sorry, kind of jumping around here -- if
4 you could give some of your background as far as your lawyer and
5 your current status as far as with the bar?

6 A Uh-huh. So I went to law school. Graduated in 2007. Sat
7 for the bar. Practiced until about 2011. And currently I am
8 disbarred/unbarred/suspended, and that was in 2014, I believe.

9 Q With that, does that have any affect on your testimony here
10 today?

11 A No.

12 Q Now, as far as your memory's concerned, if you don't mind --

13 ATTORNEY PHILLIPS: Your Honor, may I approach?

14 THE COURT: Yes, sir.

15 Q -- if you'll just take a look at these documents that I'm
16 handing you. And how long did you represent Mr. Gethers? Like
17 as far as from when you came in, do you have any kind of memory
18 of that?

19 A It was when I came in to trial, and that was very fast.

20 Q You tell me if this is a wrong way to clarify this. You had
21 a short period of time to prepare?

22 A Yes.

23 Q And when you came in there were prior attorneys who had
24 represented Mr. Gethers?

25 A Yes. And when I came in it was under the impression that

1 the last attorney was still going to aid in the defense because I
2 was a new attorney at the time.

3 Q Now, with that, you had a chance to obviously to review the
4 discovery and prepare for trial?

5 A Yes.

6 Q And so the statement that you just reviewed, and the notes,
7 that's, again, what's been marked -- I want to make sure I
8 properly identify it -- as Applicant's Exhibit No. 2 and 3,
9 that's the statement from Dante Hubbard that was provided to the
10 Dorchester County Sheriff's Office on November 28th of 2007, and
11 their investigator notes, which is Applicant's Exhibit No. 3,
12 having a chance to review those, do you have any memory of those
13 two documents being provided to you in discovery?

14 A No.

15 Q And again, when you say no, in your review of those
16 documents, do you feel that that's critical evidence to the case?

17 A Yes.

18 Q And so why do you feel it's critical to the case?

19 A Because I would have -- let me back up a second.

20 Q Take your time.

21 A Just to be clear, in terms of my disbarment, it was not
22 related to my ability or my capability to practice law. It had
23 something -- it was something else entirely.

24 Q Understood.

25 A So I was a good attorney, and I would have, even as a baby

1 attorney, because I believed him, I did, I would have tracked it
2 down.

3 Q And so if you had that statement your investigation would
4 have been different?

5 A Yes.

6 Q Your cross-examination would have been different?

7 A Yes.

8 Q And as far as the evidence that was presented against him,
9 you were here in the courtroom, you heard Ms. Best's testimony,
10 do you agree that the State's case, as far as the value of the
11 evidence against him, was weak?

12 A Yes, with the exception of Veronica's testimony.

13 Q And obviously now -- what I've handed you has been marked
14 as, or admitted as, Applicant's Exhibit No. 5. That's an
15 affidavit from Veronica [REDACTED]. Obviously this is not related to
16 your representation. It's subsequent in time. But that
17 statement, have you had a chance to review it?

18 A I have.

19 Q And is that essentially a recantation inconsistent with her
20 testimony at trial?

21 A It is.

22 Q And that would have obviously also been something that would
23 have been critical?

24 A Yes.

25 Q And so with that being said -- and again, because this is as

1 far as your review of the case -- again, you have no memory as to
2 Dante Hubbard's statement that was provided to the sheriff's
3 department and those notes?

4 A No.

5 ATTORNEY PHILLIPS: No further questions, Your Honor.

6 THE COURT: Ms. Marto.

7 ATTORNEY MARTO: Yes, Your Honor.

8 **CROSS-EXAMINATION**

9 BY ATTORNEY MARTO:

10 Q Good afternoon. So you took on this case roughly a few
11 months before trial, correct?

12 A I don't even think it was a few months, but yeah.

13 Q So last minute?

14 A Yeah.

15 Q Yeah. And so discovery, for the most part, had concluded by
16 the time you took on representation, correct?

17 A Yes.

18 Q So discovery had already been turned over?

19 A That was my understanding. Yes.

20 Q Did you do any follow-up with the solicitor to ensure it was
21 complete?

22 A Yes, I did. I don't remember if -- I think I reached out to
23 him, but Russell Hilton was the solicitor on the case, and we got
24 in touch with each other and met with him and filled in holes
25 that I knew were there.

1 Q So did you essentially just go through an open-file review
2 of the solicitor's file?

3 A I don't believe so. I believe what we did is I went through
4 what I had and we kind of compared it, something along those
5 lines. And then there was a list of things were -- from the
6 attorney I had gotten the case from -- and things were marked off
7 and some things weren't. So if something wasn't marked off, then
8 I presumed not to have it, and Mr. Hilton gave me those things.

9 Q Are you stating that you affirmatively did not see this
10 document or that you do not recall seeing the document?

11 A I did not see this document.

12 Q And you can say that with certainty?

13 A Yes.

14 Q Do you recall all of the discovery you reviewed during the
15 case?

16 A No.

17 Q But this one document stands out to you?

18 A It does, just like Veronica's statement at the time did. I
19 mean, there are certain things -- the autopsy -- there are
20 certain things that I recall, and I just -- had I seen this
21 statement, I would have had a conversation about it.

22 Q And when did you find out about the statement?

23 A Within the past two years, maybe.

24 Q Did you find out from Mr. Phillips?

25 A Yes.

1 Q And again, they found, I believe, his DNA on the Bluetooth
2 nearby, correct?

3 A Yes.

4 Q And they also found his DNA evidence on the vehicle?

5 A Yes.

6 Q So was there ever any dispute as to whether or not he was on
7 the scene?

8 A No.

9 ATTORNEY MARTO: No further questions, Your Honor.

10 THE COURT: Anything on redirect?

11 ATTORNEY PHILLIPS: No, Your Honor.

12 THE COURT: All right, ma'am. You can step down. Thank you
13 for being here.

14 THE WITNESS: Thank you.

15 ATTORNEY PHILLIPS: Just a moment, Your Honor.

16 THE COURT: Yes, sir.

17 ATTORNEY PHILLIPS: Your Honor, let me just make sure one
18 thing. Your Honor, the applicant calls Trevee Gethers himself.

19 THE COURT: Okay.

20 TREVEE GETHERS,

21 having first been duly sworn, was examined and testified as
22 follows:

23 CLERK OF COURT: Please state your name for the record.

24 THE WITNESS: Trevee Gethers.
25

DIRECT EXAMINATION

BY ATTORNEY PHILLIPS:

Q Good morning.

A Good morning.

Q It's probably afternoon by now. So, Mr. Gethers, if you could, I'd like to hand you some documents for you to review real quick. Take a moment and look over them. All right. What I've handed you has been admitted as Applicant's Exhibits Nos. 2 and 3, Dante Hubbard's statement to the Dorchester County Sheriff's Department, as well as the investigator notes.

Just be very straightforward. You're under oath. Have you, at the time of your trial, or before that in preparation for your trial, had you seen that statement?

A No, sir.

Q Okay. Had any of your attorneys discussed that statement with you?

A No, sir.

Q And just to be clear, how many attorneys did you have?

A Five.

Q Five attorneys?

A Yes, sir.

ATTORNEY PHILLIPS: No further questions, Your Honor.

THE COURT: Ms. Marto.

ATTORNEY MARTO: Yes, Your Honor.

CROSS-EXAMINATION

BY ATTORNEY MARTO:

Q So you had five attorneys, correct?

A Yes, ma'am.

Q Did you review discovery with all of them?

A Yes, ma'am.

Q Was there any discovery that maybe one attorney showed that another one didn't?

A No, ma'am. All of them basically had the same thing.

Q So they all basically reviewed the same thing with you over and over and over again?

A Yes, ma'am.

Q And you are testifying today that you never saw that statement?

A Yes, ma'am.

Q Did you know Dante was a witness in this case?

A A witness?

Q That he was nearby and wrote a statement?

A I didn't know about a statement.

Q Did you know he was nearby?

A Yes.

Q Did you know the police talked to him?

A No.

Q Were you there when the police arrived?

A No, ma'am.

1 Q So you took off before then?

2 A Yes, ma'am.

3 Q So you knew he was nearby. Did you have any discussions
4 with Dante prior to trial?

5 A No, ma'am.

6 Q Did you think he would have been helpful to you?

7 A Yes, ma'am.

8 Q Then why didn't you try to reach out to him?

9 A Because none of my attorneys advised me to.

10 Q Didn't you tell your attorneys about Dante?

11 A My first attorney, I did.

12 Q Do you recall what the response was?

13 A Well, she asked me did I knew -- was there anybody out there
14 who could speak on my behalf, and I gave her a few names, and
15 Dante was one of the names. And that she knew him. I think she
16 represented him before. And she said she would contact him.
17 Well, shortly after, she quit with the public defender, so
18 nothing arised from it.

19 Q Did you ask your other attorneys to contact him?

20 A No, ma'am.

21 Q Is there any particular reason why?

22 A No, ma'am.

23 Q Did your first attorney let you know whether or not he felt
24 that that witness would be helpful?

25 A She said she would investigate it, but shortly after she

1 quit the public defender's office so I never heard anything else
2 about it.

3 Q And she never showed you the statement?

4 A No, ma'am.

5 ATTORNEY PHILLIPS: No further questions.

6 THE COURT: Anything on redirect?

7 **REDIRECT EXAMINATION**

8 BY ATTORNEY PHILLIPS:

9 Q Who was your first attorney?

10 A Marva Thomas.

11 Q And just to be clear, you had provided a list of names. One
12 of those was Dante?

13 A Yes, sir.

14 Q But again, the specific question is had ever you seen that
15 statement, those documents, or did your lawyers ever discuss that
16 with you, that he had provided a statement and that's essentially
17 the statement itself?

18 A No, sir.

19 ATTORNEY PHILLIPS: No further questions.

20 ATTORNEY MARTO: Nothing further, Your Honor.

21 THE COURT: All right. Mr. Gethers, you can step down.

22 ATTORNEY PHILLIPS: That's the applicant's case, Your Honor.

23 THE COURT: Okay.

24 ATTORNEY MARTO: Judge, we would call Mr. Russell Hilton to
25 the stand.

1 THE COURT: Okay.

2 RUSSELL HILTON,

3 having first been duly sworn, was examined and testified as
4 follows:

5 CLERK OF COURT: Please state your name for the record.

6 THE WITNESS: Russell Hilton.

7 **DIRECT EXAMINATION**

8 BY ATTORNEY MARTO:

9 Q Good afternoon. So you were the prosecutor on this case,
10 correct?

11 A I was. I was actually the second prosecutor. Blair
12 Jennings was a prosecutor in our office. He had the case first.
13 When he ended up leaving the office I took over and actually did
14 the trial of the case.

15 Q Do you recall how long you had to prepare the case?

16 A I mean, it was months. If you look back in the notes, and I
17 was, in preparation for this, looking back, I know Sara Jane
18 Rogers took over around June, July, somewhere in there, and I
19 think we tried the case in November.

20 Q And do you recall when you got discovery in this matter?

21 A Well, the solicitor's office would have gotten it early on.
22 I think the case was a 2007 case from the date of incident. So
23 we got discovery early on.

24 And the way most of us did, I certainly did it this way and
25 Mr. Jennings did it this way, as well, we had, essentially, a

1 Rubbermaid container, and it would be full of VHS tapes at this
2 time, or CDs, or statements, and so forth, and then from there
3 you would take and make a binder, your trial binder,
4 essentiality.

5 So we would have gotten the bulk of the discovery early on
6 even when Mr. Jennings would have had the case, and then as I
7 prepared it for trial I would have gone through, if anything
8 would have been missing, would have gotten that together, and
9 gone forward with the trial based on that. So it would have been
10 a continuum of gathering discovery.

11 Q And how long were you a prosecutor for?

12 A Eight years.

13 Q And what was your typical practice when it came to handing
14 discovery over to defense counsel?

15 A So I tried a lot of the murder cases in the Dorchester
16 County portion of the First Circuit, and we always had an
17 open-file policy, and I always had the defense attorney come and
18 go through the file. And I would have that Rubbermaid container,
19 I would have my trial notebook, had a big table set out in front
20 of my desk, and they could literally flip through, page by page,
21 they could look at my notes. Whatever they wanted to look at, it
22 didn't matter to me. We always had this open-file policy.
23 Solicitor Pascoe did, and I certainly did have any problems with
24 honoring that.

25 And so she would have been able, she being Ms. Rogers, would

1 have been able to go through my entire file, including any disks,
2 videos, we could have played anything she wanted to play, that
3 would have been the opportunity, and that's reflected in our
4 notes.

5 Q And did Ms. Rogers take advantage of that open-file policy
6 to review discovery with you?

7 A She did.

8 Q And do you recall if Dante's statement was there then?

9 A I don't specifically recall. What I do recall is a letter
10 from Mr. Jennings turning that information over, specifically
11 stating statement of Dante Hubbart.

12 Q So your files indicate that that was attached to a letter
13 sent to defense counsel?

14 A That's correct.

15 Q Do you have any reason to doubt that that was attached?

16 A No reason to doubt that.

17 Q Do you have any reason to doubt that that letter was
18 actually sent?

19 A No reason to doubt that. In fact, there's a note in PCMS
20 where Mr. Jennings and Mr. Witherspoon met, and the letter is a
21 couple days later saying, Thank you for meeting with me last
22 week. So, I mean, everything went together. There would be no
23 reason not to suspect it.

24 And the other reason I suspect that it was all attached and
25 the letter actually went is because they had his statement, and

1 the letter also included his statement and his video and so
2 forth. So all of that was received by the defense, and that
3 would have been coupled with all of the other information that
4 was on that letter.

5 Q Again, Ms. Rogers had the liberty to basically go through
6 your entire file, including the notes, correct?

7 A That's correct.

8 Q And do you have any independent recollection of taking
9 certain pieces of evidence out of that open file?

10 A I wouldn't have done that. I would have lost it, so I
11 always kept everything together. Between the trial notebook and
12 the Rubbermaid container, it all stayed together.

13 Q So you can say with at least relative certainty that that
14 statement was disclosed to defense counsel?

15 A Yes. And not only was it disclosed, but Mr. Gethers would
16 have known about it, and --

17 ATTORNEY PHILLIPS: Objection, Your Honor.

18 A -- Well.

19 ATTORNEY PHILLIPS: Speculative.

20 THE COURT: Yeah. I'll let him testify. We don't have a
21 jury.

22 ATTORNEY PHILLIPS: I understand.

23 THE COURT: Go ahead.

24 A He knew about it because it's in his statement. He said in
25 his statement, Dante saw this; Dante can verify; Dante's a

1 witness. And throughout his interview with law enforcement, he
2 gave the name Dante Hubbard. He knew all about Dante Hubbard and
3 what Dante saw and didn't see.

4 It's not clear from the transcript, and it wouldn't have
5 been clear to Ms. Franklin Best just receiving a transcript and
6 so forth, because in the transcript it just says that the
7 defendant's statement was played during the *Jackson v Denno*
8 hearing, and the statement was entered into evidence as Court's
9 Exhibit 3, I believe it was.

10 So it's actually in evidence where he says, he's the one
11 that's saying, you know, Dante saw all this. He knew about Dante
12 from the git-go, so I find it a little bit hard to believe that
13 they don't know about Dante at this point.

14 Q Was Mr. Hubbard mentioned at trial at all? Do you recall?

15 A He was not mentioned by the prosecution intentionally, and I
16 suspect he was not mentioned intentionally by the defense
17 attorney.

18 ATTORNEY PHILLIPS: Objection.

19 THE COURT: Note your objection.

20 Q Do you recall ever having discussions with counsel about him
21 potentially calling him as a defense witness?

22 A I do not recall any discussions. I'm not saying it didn't
23 happen. It's just been over a decade ago, and I don't recall.

24 Q And you weren't going to call him in the State's case in
25 chief, correct?

1 A No.

2 THE COURT: No further questions.

3 ATTORNEY PHILLIPS: Thank you, Your Honor.

4 **CROSS-EXAMINATION**

5 BY ATTORNEY PHILLIPS:

6 Q Mr. Hilton, did you specifically give those documents to
7 Ms. Rogers?

8 A No.

9 Q Do you have personal knowledge that Ms. Rogers had those
10 documents?

11 A I do from the letters and so forth in the file.

12 Q To Ms. Rogers?

13 A To Mr. Witherspoon.

14 Q Say that again?

15 A To Mr. Witherspoon.

16 Q Not Ms. Rogers?

17 A That's correct.

18 Q So just to be clear, you said there was a letter sent to
19 Mr. Witherspoon?

20 A That's correct.

21 Q One of the five former lawyers that he had?

22 A The lawyer previous to Ms. Rogers.

23 Q Do you have any knowledge that Mr. Witherspoon provided that
24 statement to Ms. Rogers?

25 A I do not.

1 Q Do you have any personal knowledge that Ms. Rogers had that
2 statement?

3 A I do not.

4 Q In fact, all the information that you have, your PCMS notes,
5 the letter, all goes to Mr. Witherspoon, a former lawyer?

6 A That's correct.

7 Q And you had no knowledge that she had that document?

8 A That's correct.

9 Q And you testified a minute ago that you didn't recall
10 whether she could see that that statement was in your file? You
11 said it should be there but you can't say personally that she sat
12 there and looked at it.

13 A Well, it would have been there because Mr. Sorenson later
14 got the file and gave it to Ms. Franklin Best. So it was
15 certainly in the file.

16 Q It was somewhere in the file?

17 A Yeah. I mean, it was in that Rubbermaid container.

18 Q But you don't have any memory that it was reviewed or
19 disclosed to Ms. Rogers?

20 A I don't have any distinct recollection of that.

21 ATTORNEY PHILLIPS: Just a minute, Your Honor.

22 THE COURT: Sure.

23 ATTORNEY PHILLIPS: No further question, Your Honor.

24 THE COURT: Anything on redirect?

25 ATTORNEY MARTO: No redirect, Your Honor.

1 THE COURT: Anything else from the State?

2 ATTORNEY MARTO: No further witnesses, Your Honor.

3 THE COURT: All right. I will hear from counsel.

4 ATTORNEY PHILLIPS: Thank you, Your Honor. There's -- I
5 kind of proposed, Your Honor, kind of a couple different ways in
6 these PCR cases. If Your Honor wants us to give kind of a
7 closing summation, we certainly can do that. Other ways, I know
8 some judges have had everybody submit a proposed order, it's all
9 clean, and you'll probably ultimately go in that direction where
10 Your Honor's got to decide either way. I leave it in Your
11 Honor's discretion.

12 THE COURT: Yeah. Why don't you all both prepare me a
13 proposed order.

14 ATTORNEY PHILLIPS: I just know it's clean and, you know,
15 Your Honor gets as much time as you need to review everything.

16 THE COURT: Yeah. I would like -- the letter that he
17 discussed where it was, the statement was, allegedly transmitted
18 to Mr. Witherspoon, do we have that anywhere?

19 ATTORNEY MARTO: I have a copy of it. I don't have it
20 printed. I can disseminate it and have you take judicial notice
21 of it if Your Honor would like.

22 THE COURT: Okay. Yes.

23 ATTORNEY PHILLIPS: And as an advocate, we had the
24 prosecutor on the stand. Blair Jennings didn't testify. He was
25 here earlier this morning. A difficult position as far as taking

1 judicial notice of a statement. I will say that, without a
2 doubt, I don't discredit anything. I believe, as far as the
3 testimony, that there was a letter in the file, I'm not saying
4 that that's not true.

5 THE COURT: Then give me a little bit. I guess I do want
6 orders from both you, or proposed orders. But give me a little
7 bit of, I guess, for my edification, is this an ineffective
8 assistance of counsel, a prosecutorial misconduct, or both --

9 ATTORNEY PHILLIPS: So --

10 THE COURT: -- because I have serious concerns --

11 ATTORNEY PHILLIPS: Both?

12 THE COURT: -- with Ms. Rogers not presenting that at trial,
13 and also some serious concerns as to why it was taken to trial
14 with someone -- with a witness saying somebody else shot him. I
15 guess maybe both. Yes.

16 ATTORNEY PHILLIPS: Yes, Your Honor. I understand. So give
17 me a second and let me get my notes out here, and I'll start
18 rattling off. Okay.

19 THE COURT: I don't know what my ultimate decision is, but I
20 certainly have --

21 ATTORNEY PHILLIPS: The true scope of what's before the
22 Court is whether -- because he's already had a PCR.

23 THE COURT: Right.

24 ATTORNEY PHILLIPS: And you understand how the procedural
25 history works.

1 THE COURT: Right.

2 ATTORNEY PHILLIPS: We're barred, unfortunately, in many
3 ways. But the limited scope that's truly before the Court is
4 whether this statement had been disclosed to defense counsel.
5 You know, certainly I don't have any reason to discredit the fact
6 that it may have been provided to a former defense counsel.
7 However, Blair Jennings didn't testify, former defense counsel
8 didn't testify, so it's a lot of speculation there on behalf of
9 the testimony we did receive.

10 And so when we look at this case we have, again, walking you
11 through -- again, I know Your Honor's main focus is the scope,
12 and scope is whether it was disclosed, because with the success
13 of PCR we would have been denied if I just tried to litigate
14 ineffective assistance of counsel by itself.

15 However, you cannot look past the fact that it's one or the
16 other. It's either truly a *Brady* violation issue, everything
17 that comes with that -- and certainly we'll outline that part of
18 it -- or ineffective assistance of counsel. It's got to be one
19 or the other.

20 In terms of procedural standpoint, how the mechanism that
21 gets us into court is the argument that it was not disclosed, and
22 based on the testimony certainly that there's a good-faith basis
23 to make that argument. Ms. Rogers doesn't have any recollection
24 of that statement. Obviously we have conflicting information
25 that's been presented by the State. So at the heart of the issue

1 is whether the State disclosed that statement to defense counsel.

2 Now, does it somehow parallel, as kind of a sub issue under
3 the umbrella, if you give it to defense counsel no. 3, or number
4 4, does defense counsel no. 5 automatically know that statement
5 was there and does that impute some type of knowledge? And I
6 think that's really where we're at, is if -- and again, we didn't
7 have Witherspoon testify, we didn't have Blair Jennings testify,
8 but if we go on the face of what was presented -- if discovery
9 was -- or, this statement was presented to former counsel, is
10 that imputed to subsequent counsel? I think that's kind of
11 where -- that's the issue that's before the Court.

12 In some respects, of course, our argument would be that we
13 can't get that far because we didn't even have the testimony to
14 truly lay the framework for that, and we would argue against
15 that.

16 But if we're taking it to that next step, if we're taking it
17 in a light looking favorable to the State which, again, it's
18 always our burden in a PCR, the applicant's burden is on us, I
19 think that's really where we're at.

20 But again, ultimately based on the testimony that's
21 presented, it was either not disclosed or we have ineffective
22 assistance of counsel. That's certainly our position as far as
23 the mechanisms before the Court. I know it's difficult from a
24 procedural standpoint.

25 THE COURT: All right. How about prior PCR counsel? Did

1 they not know about this?

2 ATTORNEY PHILLIPS: So that is -- Applicant's Exhibit No. 6,
3 Rodney Davis, provided an affidavit --

4 THE COURT: All, yeah.

5 ATTORNEY PHILLIPS: -- saying he did not request the State's
6 case file. And that's -- I know. So we ultimately end up in
7 this position, which is why Ms. Best had to couch it as the
8 *Martinez v. Ryan* to try to get the district court to hear it
9 because if it's not exhausted at the state level it can't be
10 raised at the federal level.

11 Again, we're always playing the shell game, as Your Honor's
12 aware, on the appellate side of the defense, and so if things
13 aren't done perfectly, it falls over. And so that's why she had
14 to raise the *Martinez v. Ryan* issue, to try to get that, to
15 crowbar it in as ineffective assistance of counsel, PCR counsel,
16 to try to get that in, which is why she had the affidavit from
17 Rodney Davis.

18 THE COURT: Okay.

19 ATTORNEY PHILLIPS: Does that make sense, Your Honor? I
20 hope I'm not muddying the water.

21 THE COURT: No. It does. It does. I mean, it would just
22 seem to me there's a failure somewhere, assuming nobody disputes
23 the authenticity of this statement from someone saying that
24 somebody else shot the man.

25 ATTORNEY PHILLIPS: No. That is undisputed. That was in

1 the solicitor's file. As was testified to by Mr. Hilton, that
2 that issue never came out at trial. Certainly it's not favorable
3 to the State, so they didn't present it.

4 Now, again, when you look at this case as a whole in a PCR
5 context, we're always having to defeat also that second prong of
6 prejudice where the outcome would have been different. In
7 looking at the case, we certainly argue that it's not
8 overwhelming evidence of guilt. We have no identification from
9 the witnesses that were in the case. Out of the fingerprints,
10 there were three additional individuals on the car that were
11 identified with no further investigation, no murder weapon. The
12 Bluetooth headset that ultimately had Mr. Gethers' DNA was not
13 found directly at the crime scene but farther away. There was a
14 fingerprint. In due candor to the Court, Your Honor can review
15 everything of Mr. Gethers that's there. There were search
16 warrants for telephone records. None of them were inculpatory.

17 The statement -- what ultimately gets Mr. Gethers is
18 Veronica -- and I'll just say "M" because I think she was a
19 minor, 14, back then, and I think the deceased was planning to
20 have sex with her when she was 14 at the time -- ultimately she
21 has recanted. There is an affidavit, Applicant's Exhibit No. 5.
22 That's unfortunately not -- that's something that's not
23 technically a true PCR issue because it's a recantation. I think
24 it would have a very difficult time probably surviving that newly
25 discovered evidence standard, which is so difficult. But

1 ultimately we have a recantation from the State's key witness in
2 a weak murder case who says, I was pressured; I was a teenager.
3 Her case stayed in family court. It was not waived up in
4 exchange for her testimony as outlined in the habeas petition.

5 With that being said, we have a very difficult matter where,
6 without a doubt, there's no way you could have a murder trial
7 with these set of facts and there not be investigation and
8 cross-examination as to a fact that an individual said someone
9 else shot and killed the decedent when the person they even
10 identified is currently serving two life sentences for two
11 separate murders. And so that's pretty compelling evidence that
12 obviously would potentially make the outcome different. And so
13 that would be our argument.

14 THE COURT: Well, I mean, you know what I did for 24 years.
15 I can't imagine a competent defense attorney not bringing that up
16 at the trial of the case if they knew about it.

17 ATTORNEY PHILLIPS: It wouldn't make sense. There's no
18 rational explanation. What we always have to deal with in
19 PCRs -- and I know Your Honor's familiar with it -- is we're
20 always having to fight the State. From a strategic standpoint
21 the lawyer gets up there and explains kind of their strategy for
22 why they didn't do something or did do something, and the law
23 says that strategy is only based on reasonableness. If the
24 strategy is unreasonable -- I mean, this isn't the facts we have
25 here, but ultimately even if she knew the statement existed and

1 never cross-examined, never investigated, that's an unreasonable
2 trial strategy, clearly, and would be ineffective assistance
3 counsel.

4 Again, that's not the scope from which we're before the
5 Court. That's a very difficult situation.

6 THE COURT: Right. Okay. All right. Anything else?
7 Ms. Marto?

8 ATTORNEY MARTO: Yes, Your Honor. We just have a brief
9 argument. It's the State's position that this Court, in
10 determining whether or not applicant is entitled to relief, it's
11 not a State or a *Brady* violation that needs to be determined but,
12 rather, newly discovered evidence, and that is a five-prong
13 analysis, and I believe that's what was alleged by Mr. Phillips
14 in his application.

15 And that analysis is; is such that it probably would have
16 resulted in a new trial, has been discovered since the trial,
17 could not have been discovered in the exercise of due diligence,
18 is material, and is not merely cumulative or impeaching.

19 Now, it's the State's position that Mr. Hilton should be
20 found credible in stating that he handed and did an open-file
21 review with Ms. Rogers with the case. There was no indication
22 whatsoever that he pulled out documents or he somehow took it
23 apart. And I think, as Mr. Phillips stated in his closing
24 argument, that it was, in fact, in the solicitor's file because
25 then that was what was given to Ms. Franklin Best.

1 But I think that the strongest prong for the State is could
2 it have been discovered in the exercise of due diligence. And
3 it's the State's position that, yes, it could have. For
4 starters, Mr. Gethers admitted on the stand that he knew Dante
5 was nearby and he knew he would be a favorable witness. The
6 statement is just an extrapolation of that knowledge, that he
7 brought that to counsel's attention, but did not bring that up
8 going forward to his other counsel even though first counsel
9 indicated to him he would be a favorable witness.

10 Additionally, this statement could have been exercised
11 through Ms. Rogers issuing a Rule 5 or otherwise requesting
12 discovery in this case. And, in fact, that seemingly was done
13 and a review was made with Mr. Hilton.

14 Further, there is a letter that states, as Mr. Hilton
15 testified to and Mr. Phillips stated he did not dispute the
16 veracity of that statement to another counsel, explicitly stating
17 that that statement was being handed over. And so could counsel
18 or Mr. Gethers reasonably, in the exercise of due diligence,
19 gotten that document from another person? And the answer to that
20 is also yes.

21 And so it's our stance that relief should be denied because
22 it was discovered prior to trial. But even if the Court would
23 conclude it wasn't, it certainly could have been discovered in
24 the exercise of due diligence. And with that, we'll just request
25 you deny relief. Thank you.

1 THE COURT: Okay.

2 ATTORNEY PHILLIPS: And just in closing, certainly newly
3 discovered evidence is a five-part test, and the State outlined
4 those factors that Your Honor has to review. But, again, our
5 position is there's a gross miscarriage of justice somewhere in
6 here, and we certainly, I think, based on the testimony presented
7 outlined the reasons why post-conviction relief should be
8 granted.

9 THE COURT: Okay. All right. Well, you all submit me some
10 orders, and we'll see where it goes.

11 ATTORNEY MARTO: Thank you, Judge.

12 THE COURT: Thank you.

13 (End of Transcript of Record.)
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CERTIFICATE OF REPORTER

I, Cathy J. Provost, Official Court Reporter for the Fourteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial/proceedings of the captioned case in the Court of Common Pleas for Dorchester County, South Carolina, on the 24th day of January, 2023.

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

Date: September 19, 2023

\s\ Cathy J. Provost
Cathy J. Provost, RMR
Official Circuit Reporter

- (c) The South Carolina Court of Appeals affirmed the convictions and sentence.
 - (d) The South Carolina Court of Appeals denied the appeal on October 24, 2012.
 - (e) *State v. Trevee J. Gethers*, 2012-UP-576 (*filed* October 24, 2012).
 - (f) Petitioner raised the following ground: Whether the trial court judge erred when she did not grant appellant's motion for a directed verdict when the evidence adduced at trial did not rise above mere suspicion that he was guilty of murder because the circumstantial evidence merely suggested that he was near the murder scene when the decedent was fatally shot?
 - (g) Petitioner sought review by a higher state court. The South Carolina Supreme Court denied certiorari by order dated May 7, 2014.
 - (h) Petitioner did not file a petition for certiorari in the United States Supreme Court.
10. Other than the direct appeal, Petitioner sought relief by filing an application for post-conviction relief in the state court of South Carolina.
11. (a) (1) Petitioner filed an application for post-conviction relief in the Dorchester County Court of Common Pleas.
- (2) Case No. 2014-CP-18-1287
 - (3) Petitioner filed his petition on July 3, 2014.
 - (4) Petitioner had a post-conviction relief proceeding with an evidentiary hearing.
 - (5) Petitioner raised the following grounds:
 - a) Was counsel ineffective for failing to object when the trial court shifted the burden of proof by telling the jury they, the jury were to "search for the truth", thus relieving the state of their burden of proving applicant guilty beyond a reasonable doubt?

- b) Was counsel ineffective for failing to object to the trial court's jury instructions on malice that resulted in a mandatory presumption in violation of due process when the trial court failed to instruct the jury that they were free to "accept or reject" the inference of malice from the use of a deadly weapon based on their consideration of the evidence and they could give it such weight as they determined?
- c) Was counsel ineffective for failing to object to the trial court impermissibly commented on the facts of the case during the court's charge on express malice, that was to be determined by the jury?¹
- (6) An evidentiary hearing was held on October 28, 2015.
- (7) The court entered an order of dismissal.
- (8) The order was filed on January 15, 2016.
- (b) N/A.
- (c) N/A.
- (d) Petitioner appealed to the highest state court having jurisdiction.

12. GROUNDS FOR HABEAS RELIEF

Relevant Facts

Treveen Gethers, the Petitioner, was convicted of the murder of Earl Robinson which occurred on September 17, 2007. On that date, the decedent had earlier borrowed \$200 from his son. App. 220. The decedent was later found outside of an

¹ The Order of Dismissal characterized the claims as: I. Ineffective assistance of trial counsel in: a. Failing to object to Judge Goodstein's opening instruction; b. Failing to object the solicitor's comments regarding robbery as a motive despite the fact that Applicant was not indicted for robbery; c. Failing to object to the admission of Applicant's booking photo; and d. Failing to request a voluntary manslaughter charge.

apartment complex, seated in the driver's seat of a white Toyota Sequoia. App. 157-58. He had been shot once in the arm, with the bullet entering his chest and fatally injuring him. App. 312.

Neighbors in the apartment complex heard arguing in the parking lot just prior to the gunshots, although no one identified Petitioner as the one arguing with the decedent. *See generally* testimonies of Kimberly Ritchey, Michael Ritchey, and Shanika Moon. The apartment complex was known as a very high crime area and gunshots were "fairly common." App. 149, l. 7; App. 152. An officer with the Dorchester County sheriff's office confirmed this was a violent area, and there were "a lot of fights, a lot of drug-related calls." App. 163, 159, l. 4.

As law enforcement conducted their investigation, they took into their custody a number of cigarette butts, a .40 caliber gunshot shell, and a Bluetooth telephone headset. App. 170. Law enforcement did not have these cigarette butts, that were located in the immediate area of the car, analyzed for DNA. App. 170. The .40 caliber bullet was determined not to be relevant to the crime scene. App. 174.

Law enforcement extracted 34 latent fingerprints from the decedent's car. App. 175. Three people were identified based on the presence of the fingerprints found on the car, but they were never pursued in connection with this investigation. App. 182-84, 210 Later in the investigation, law enforcement obtained a buccal swab from Petitioner and obtained his DNA profile. App. 187.

Petitioner's DNA was found on the Bluetooth telephone headset that was found in the apartment complex. Significantly, the headset was not found close to where the decedent's body was located. As a detective testified:

A: That was just inside the first crime scene tape that was stretched across the road. It was actually in front of Apartment [redacted]. It was not located anywhere around the vehicle. It was between Apartment [redacted] and [redacted], the apartment complex to the right. It was in that area on the road as you came in.

App. 214, ll. 4-9.

Brandee Kieffer was Petitioner's girlfriend at the time of these events and recalled that, around the time of this crime, she and Petitioner switched cars. App. 238. Veronica M (name redacted because of her status as a minor), was another friend of Petitioner's. App. 246-47. She testified that on the date the decedent was killed, she was supposed to meet with the decedent. He was expected to bring her money that evening, App. 247, because he intended to have sex with Ms. M who was 14 years old at the time. That evening, she was using her friend, Maggie Reid's, telephone. App. 248. At some point after the decedent was killed, Ms. M and the Petitioner drove to Virginia, and then eventually travelled together to New York. App. App. 255

During their investigation, law enforcement obtained the telephone that belonged to the decedent, and which was located in his car, and noticed a number of telephone calls that he made to his son and to the telephone that was registered to Reid, Ms. M's friend. App. 279-80. Their investigation led them to identify Petitioner's telephone number. App. 283. Law enforcement obtained search warrants based on telephone calls between Ms. M and Petitioner, but those searches did not

uncover anything of evidentiary value. App. 286. Law enforcement also had identified Petitioner's fingerprints located on the passenger side of the decedent's car. Other fingerprints were also located on the car, but they were not identified by law enforcement. App. 287. Law enforcement never located the murder weapon, even after extensively searching the area. App. 284. Ultimately, Ms. M and Petitioner were located in New York City. App. 290.

Ms. M gave a statement to law enforcement that suggested that she had Petitioner meet with the decedent in order to get money from him. She testified that she did not want to have sex with the decedent, so she sent Petitioner in her place. App. 251. According to her trial testimony, Ms. M claimed that Petitioner told her he was busy, and "so I just left it like that." App. 252, ll. 1-2. At trial, she did not testify to the facts she first recounted to law enforcement, but her earlier statement was found admissible as a prior inconsistent statement. App. 295. In exchange for her cooperation, Ms. M's charge of murder remained in the jurisdiction of Family Court. App. 374. In a statement Ms. M has since provided to counsel, she attests that she did not willingly give her statement to law enforcement, but felt pressured to do so because she was 14 years old and threatened with prison. **Exhibit A.**

Petitioner's DNA was located on the Bluetooth headset that was found in the apartment complex. App. 425 Petitioner did not testify at trial.

At the close of the State's case, trial counsel motioned for a directed verdict that the court denied. App. 441. He was subsequently convicted and sentenced to 45 years in prison.

ARGUMENTS IN SUPPORT OF HABEAS RELIEF

1. **The South Carolina Court of Appeals erred when it found the trial court did not err when she declined to grant Petitioner’s motion for a directed verdict when the evidence at trial was not sufficient to support his conviction for murder.**

The South Carolina Court of Appeals resolved Petitioner’s claim by merely providing a string of citations that articulate the standard of review in the South Carolina state courts. In denying his claim, the Court affirmed pursuant to Rule 220(b), SCACR, ² and the following authority: *State v. Weston*, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006) (“When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight.”); *id.* (“When reviewing a denial of a directed verdict, [an appellate court] views the evidence and all reasonable inferences in the light most favorable to the state.”); *id.* at 292-93, 625 S.E.2d at 648 (“If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the [c]ourt must find the case was properly submitted to the jury.”).

The South Carolina Court of Appeals’ opinion is contrary to, or involves an unreasonable application of clearly established federal law as determined by the United States Supreme Court. Its decision is also based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. 28 U.S.C. §2254(d) (1), (2).

² *Decision by the Court.* In every decision rendered by an appellate court, every point distinctly stated in the case which is necessary to the decision of the appeal and fairly arising upon the record of the court must be stated in writing and must, with the reason for the court’s decision, be preserved in the record of the case.

Petitioner’s conviction is unconstitutional under the United States Supreme Court’s decision in *Jackson v. Virginia*, 443 U.S. 307 (1979). The relevant question for this Court is whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.* at 319. As the Court makes clear, this is a higher standard of proof than the “any evidence” standard of *Thompson v. Louisville*, 362 U.S. 199 (1960):

In short, *Winship* presupposes as an essential of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense.

Id. at 316.

The evidence offered by the State against Petitioner was completely circumstantial and weak. The State showed that Petitioner’s young female friend had a relationship with the victim that involved the victim’s wanting to have sex with a minor. The State also showed that Petitioner’s Bluetooth was in the area, and that Petitioner and his this young female left the state. The State also found Petitioner’s fingerprints on the car. But the State never showed that Petitioner had received money from the victim (which was its theory of why Petitioner shot the victim), nor did it show that Petitioner had a weapon that night. Indeed, as further discussed in Claim 2, the State had, in its possession, a statement from a witness to these events that someone else shot the victim.

This case is wholly dissimilar from other cases in which the Fourth Circuit has found evidence sufficient to support convictions. *See United States v. Fields*, 571 Fed. App'x. 238 (2014) (noting evidence sufficient where “several witnesses” testified, appellant threw “black object” over fence and officers retrieved packages in “black covering” containing 1.6 kilograms of cocaine); *United States v. Farmer*, 482 Fed. App'x. 805 (2012) (noting “multiple witnesses” who testified to defendant’s direct involvement in drug distribution conspiracy). *See also Fiore v. White*, 531 U.S. 225 (2001) (*per curiam*) (granting federal habeas corpus relief because the prosecution failed to present sufficient evidence to prove element of crime and therefore petitioner’s “conviction is not consistent with the demands of the Federal Due Process Clause”). Respectfully, Petitioner asks this Court to grant his petition for a writ of habeas corpus.

- (b) This claim is exhausted.
- (c) This claim was raised on direct appeal.
- (d) This claim was not raised in post-conviction.
- (e) This claim has not been raised by way of any other procedures.

2. Trial counsel rendered ineffective assistance of counsel when she did not secure the attendance of a witness who gave a statement to the Dorchester County Sheriff’s Office shortly after the murder informing them that he witnessed someone else shoot the decedent.

On April 4, 2019, Don Sorenson of the First Circuit Solicitor’s Office provided undersigned counsel, upon request, a statement given to law enforcement in connection with this murder investigation by Dante Hubbard. This statement, along with detective notes, were located in the Solicitor’s file. Mr. Sorenson was not

involved in the prosecution of this case. Both the statement and notes were provided to counsel. **Exhibit B.** The detective notes and statement confirm what Mr. Hubbard attested to by way of an affidavit executed on December 11, 2018 in counsel's office—that Don Chisolm, and not Trevee Gethers, shot the victim in this case. **Exhibit C.** Trial counsel has since been disbarred, *see In re Rogers*, 413 S.C. 187, 775 S.E.2d 387 (2015), for egregious misconduct, including making false statements to clients and non-cooperation with Disciplinary Counsel. Failing to interview Dante Hubbard, especially when she had his witness statement given to law enforcement that exonerated her client, is shockingly unreasonable and falls well below professional norms.

The statement given by Hubbard, indeed, accounted for at least some of the forensic evidence the state used in its case against Petitioner. In closing, the state argued it was probative of Petitioner's guilt that Petitioner's fingerprints were on the victim's car. App. 452-53, 459, 462. Hubbard's statement indicates that Petitioner was dealing drugs that night and that he got into the passenger side of the victim's car. As he was sitting there, Don came to the driver's side and looked angry because his arms were moving back and forth. Petitioner then exited the car, but Don was still at the driver's door. Then, Don shot the victim. Hubbard then ran away from the scene. Donsurvi Chisolm is currently serving two life sentences in prison for two separate counts of murder. *See* <https://public.doc.state.sc.us/scdc-public/inmateDetails.do?id=%2000347831> (*last visited* April 15, 2019).

To bring a successful ineffective assistance of counsel claim, Petitioner must demonstrate that his trial counsel's performance was deficient and resulted in prejudice. *See Strickland v. Washington*, 466 U.S. 558 (1984). There is a "a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." *Richter*, 562 U.S. at 104 (quoting *Strickland*, 466 U.S. at 689). To establish prejudice, Petitioner must show a reasonable probability that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 703. "Counsel's errors must be 'so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" *Harrington v. Richter*, 562 U.S. 86 (2011) (quoting *Strickland*, 466 U.S. at 687). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 466 U.S. at 690. However, even when making strategic decisions, counsel's conduct must be reasonable. *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000). "[S]trategic choices made after less than complete investigations are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 690-91.

See Stanley v. Bartley, 465 F.3d 810 (7th Cir. 2006) (finding counsel's failure to interview witnesses are deficient and that the failure prejudiced defendant); *Riley v. Payne*, 352 F. 3d 1313 (9th Cir. 2003) (granting habeas relief when defense counsel failed to interview petitioner's associate who was with him during the confrontation

with the victims); *Allen v. LaMarque*, 50 Fed. Appx. 346 (9th Cir. 2002) (grant of habeas relief for counsel’s failure to interview potentially exculpatory witness); *Black v. Larson*, 45 Fed. Appx. 653 (9th Cir. 2002) (same).

- (b) This claim is not exhausted.
- (c) This claim was not raised on direct appeal because trial counsel rendered ineffective assistance of counsel.
- (d) This claim was not raised in post-conviction proceeding.
- (e) This claim was not raised because PCR counsel rendered ineffective assistance of counsel. *See Martinez v. Ryan*, 566 U.S. 1 (2012).

3. **The PCR court erred in finding that Petitioner was not denied his rights under the Sixth and Fourteenth Amendments to the effective assistance of counsel when counsel failed to object to the admission of Petitioner’s mugshot from his prior arrest approximately four months before the murder where no demonstrable need of the mugshot was established, the mugshot plainly suggested to the jury that Petitioner had a prior record, and the origin of the mugshot was clear as it stated “Charleston County Sheriff’s Office Detention Center” at the top of the photograph and listed the “booking date.”**

During its case in chief, the State called Javon Wright, an employee with the Charleston County Detention Center to testify. App. 323. The State then admitted, without objection, State’s Exhibit #40, which consisted of Petitioner’s major case prints taken during an earlier arrest. App. 324. It then entered a mugshot photograph of Petitioner with a booking date of May 11, 2007, App. 325, again without objection. Trial counsel then, inexplicably, cross-examined Wright to ensure that the earlier date was, in fact, May 11, 2007 thereby ensuring that the jury’s attention was drawn to his prior arrest and mugshot. App. 326.

The PCR court found trial counsel was not ineffective for failing to object to the admission of Petitioner's mugshot. The court found the photograph was introduced "to show how law enforcement identified [Petitioner] as a suspect in the murder." It also found, "This Court finds the booking photo was offered in a relevant line of questioning. Testimony was elicited concerning prints lifted from the automobile where the victim was found murdered. [Petitioner] was identified based upon an earlier set of case prints (State's Exhibit 40) taken from that arrest. The booking photo tied those prints to [Petitioner]." App. 706-707.

Under *Strickland v. Washington*, 466 U.S. 668 (1984), a defendant has a Sixth Amendment right to effective assistance of counsel and a remedy for constitutionally deficient assistance. Counsel renders ineffective assistance of counsel, warranting a new trial, when his performance falls "below an objective standard of reasonableness," taking into account prevailing professional norms, and when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 688. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

Trial counsel's failure to object to the mugshot was reversible error under South Carolina law. According to the seminal case on this issue in South Carolina, *State v. Traylor*, 360 S.C. 74, 84, 600 S.E.2d 523, 528 (2004), "[t]he introduction of a 'mug-shot' of a defendant is reversible error unless: (1) the state has a demonstrable need to introduce the photograph, (2) the photograph shown to the jury does not suggest the defendant has a criminal record, and (3) the photograph is not introduced

in such a way as to draw attention to its origin or implication.” *Id.* (citing *State v. Tate*, 288 S.C. 104, 341 S.E.2d 380 (1986); *State v. Robinson*, 274 S.C. 198, 262 S.E.2d 729 (1980); *State v. Denson*, 269 S.C. 407, 237 S.E.2d 761 (1977)). Here, trial counsel failed to hold both the State to its burden of showing it had a demonstrable need to introduce the photograph. But additionally, a view of the photograph illustrates how clearly it indicates the presence of a prior criminal record, and further, the actual booking date which draws attention to its origin and implication. Petitioner was clearly prejudiced by his attorney’s substandard performance.

The PCR judge’s order of dismissal is contrary to, or involves an unreasonable application of clearly established federal law as determined by the United States Supreme Court regarding ineffective assistance of counsel as propounded in *Strickland v. Washington*, 466 U.S. 668 (1984). Its decision is also based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. 28 U.S.C. §2254(d) (1), (2). Petitioner was substantially and injuriously prejudiced by his attorneys’ substandard performance. *Brecht v. Abrahamson*, 507 U.S. 619 (1993). Petitioner respectfully asks this Court to grant his petition for writ of habeas corpus, and release him from custody.

- (b) This claim is exhausted.
- (c) This claim was not raised on direct appeal because trial counsel rendered ineffective assistance of counsel.
- (d) This claim was raised in post-conviction.

(e) Petitioner raised this claim to the South Carolina Supreme Court by way of a petition for writ of certiorari (that was denied).

4. The PCR court erred in finding that Petitioner was not denied his rights under the Sixth and Fourteenth Amendments to the effective assistance of counsel when counsel failed to object to the trial court's opening statement to the jury that the trial was "a search for the truth in an effort to make sure that justice is done" since this instruction was fundamentally incorrect, was burden shifting, and misdirected the jury's inquiry from the beginning of the trial forward from the correct legal question of whether the State had proved Petitioner's guilt beyond a reasonable doubt.

In her opening instruction to the jury, the trial court informed the jury:

[T]his trial is not for entertainment. It is a ... **search for the truth** in an effort to make sure that justice is done between the State and Mr. Gethers [Petitioner]. **Searching for the truth and making sure that justice is done** is often slow, deliberate, and repetitive, the opposite no doubt of what you may have seen on television, read about in books, or perhaps in the movies.

The attorneys before you are advocates for the parties they represent, but first and foremost, they are officers of the court, sworn to uphold the integrity and fairness of our judicial system and to help **you in a search for the truth**. You should expect them to be professional, competent, and ethical in their representation of their clients.

App. 122, l. 10- 123, l. 4 (emphasis added).

The order of dismissal found trial counsel was not ineffective for failing to object to these remarks:

These remarks are part of the standard opening instructions for many judges, and Judge Goodstein's opening remarks are not an instruction on the law. Additionally, because Judge Goodstein properly instructed the jury on the burden and standard of proof at the close of the case, any error was clearly harmless and did not affect the result.

App. 705.

Under *Strickland v. Washington*, 466 U.S. 668 (1984), a defendant has a Sixth Amendment right to effective assistance of counsel and a remedy for constitutionally deficient assistance. Counsel renders ineffective assistance of counsel, warranting a new trial, when his performance falls "below an objective standard of reasonableness," taking into account prevailing professional norms, and when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 688. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

The language used by the trial court has long been disfavored in South Carolina, and trial counsel should have objected. For example, the jury instruction in *State v. Daniels*, 401 S.C. 251, 737 S.E.2d 473 (2012), stated "whatever verdict you reach will represent truth and justice for all parties that are involved in this case." There, the Court admonished trial judges to remove any language that suggests a criminal jury's duty is to return a verdict that is "just" or fair" since that could effectively alter the jury's understanding of the burden of proof. The South Carolina Supreme Court reversed the post-conviction relief court's finding of trial counsel ineffectiveness, and upheld Petitioner's convictions.

Daniels, however, was not the first South Carolina state case to address burden-diluting jury instructions. Before *Daniels*, the South Carolina Supreme Court explicitly disfavored the following instruction:

Beyond a reasonable doubt, in telling you that that is the degree of proof by which the State must prove, that phrase means exactly what it states in the English language, and *that is a doubt for which you can give a real reason*. That excludes a whimsical doubt, fanciful doubt. You could

doubt any proposition if you wanted to. *A reasonable doubt is a substantial doubt for which honest people, such as you, when searching for the truth can give a real reason.* So it's to that degree of proof that the State is required to establish the elements of a charge.

State v. Manning, 305 S.C. 413, 415, 409 S.E.2d 372, 374 (1991) (emphasis in original). The South Carolina Supreme Court, accordingly, prohibited trial judges from telling jurors “to seek some reasonable explanation of the circumstances proven other than the guilt of the Defendant.” *Id.*, 305 S.C. at 416, 409 S.E.2d at 374. The South Carolina Supreme Court then reaffirmed this principle in *State v. Cherry*, 361 S.C. 588, 596, 606 S.E.2d 475, 479 (2004) (In *Manning*, “we held that a circumstantial evidence charge which requires the jury to seek some reasonable explanation other than the defendant’s guilt ‘turns the State’s burden of proof on its head by requiring the jury to find a ‘reasonable explanation’ of the evidence inconsistent with appellant’s guilt before it can find him not guilty.”).

In *State v. Aleksey*, 343 S.C. 20, 26-27, 538 S.E.2d 248, 251 (2000), the South Carolina Supreme Court again reminded the bench that, “Jury instructions on reasonable doubt which charge the jury to ‘seek the truth’ are disfavored because they ‘[run] the risk of unconstitutionally shifting the burden of proof to a defendant’” (quoting *State v. Needs*, 333 S.C. 134, 155, 508 S.E.2d 857, 867-68 (1998)).

The PCR court’s order commits an unreasonable legal error. Long before Petitioner’s trial, this Court addressed precisely the issue of burden-diluting jury instructions in *Cage v. Louisiana*, 498 U.S. 39 (1990). Trial counsel should have known that United States Supreme Court law disallowed the jury charge that was given in this case. She was ineffective for failing to object to it. *Strickland v.*

Washington, 466 U.S. 668 (1984). Petitioner is entitled to relief because the jury charge given in this case impermissibly diluted the burden of proof constitutionally required to convict Petitioner of these crimes.

The jury instruction delivered to the jury in this case violated well established United States Supreme Court law. In *Cage*, the Louisiana state court gave the following instruction:

If you entertain a reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your duty to give him the benefit of that doubt and return a verdict of not guilty. Even where the evidence demonstrates a probability of guilt, if it does not establish such guilt beyond a reasonable doubt, you must acquit the accused. This doubt, however, must be a reasonable one; that is one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. *It must be such doubt as would give rise to a grave uncertainty*, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. *It is an actual substantial doubt*. It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a *moral certainty*. *Cage*, 498 U.S. at 40, 111 S. Ct. 328 (citation omitted) (emphases in the original).

Concluding that the instruction was unconstitutional, the Court explained:

The charge did at one point instruct that to convict, guilt must be found beyond a reasonable doubt; but it then equated a reasonable doubt with a “grave uncertainty” and an “actual substantial doubt,” and stated that what was required was a “moral certainty” that the defendant was guilty. It is plain to us that the words “substantial” and “grave,” as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable-doubt standard. When those statements are then considered with the reference to “moral certainty,” rather than evidentiary certainty, it becomes clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause.

Id. at 41, 111 S. Ct. 328 (footnote reference omitted).

The same constitutional infirmity is present in Petitioner's case. By charging the jury that its duty was to search for the truth, the judge improperly minimized the awesome role of the jury in applying the rigorous standards of proof to the state's conduct, thus obviating the State's burden of proof in this case. And see *Yates v. Evatt*, 500 U.S. 391 (1991) (jury instructions on malice violated due process by relieving state of burden of proving every element of crime beyond a reasonable doubt); *Francis v. Franklin*, 471 U.S. 307 (1985) (instruction that person "is presumed to intend the natural and probable consequences of his acts" unconstitutionally gave defendant burden of proof on element of intent to kill).

The jury instruction given in this case was contrary to the Fifth Amendment's guarantee that no one will be deprived of liberty without due process of law and the Sixth Amendment right to a trial by jury, which together require a jury to determine a defendant's guilt on every element of the charged crimes beyond a reasonable doubt. See *United States v. Gaudin*, 515 U.S. 506, 509-10 (1995); *Sullivan v. Louisiana*, 508 U.S. 277, 78; *In Re Winship*, 397 U.S. 358, 364 (1970) ("...the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."); *Patterson v. New York*, 432 U.S. 197, 215 (1977) (a State must prove every ingredient of an offense beyond a reasonable doubt and it may not shift the burden of proof to the defendant); and *Sandstrom v. Montana*, 442 U.S. 510 (1979) (a presumption which, although not conclusive, had the effect of shifting the burden of persuasion to the defendant is constitutionally infirm).

The South Carolina Supreme Court has recently acknowledged similar problems with opening remarks given to the jury in *State v. Michael Vernon Beaty*, 813 S.E.2d 502 (2018)³.

[W]e agree with appellant that a trial court should refrain from informing the jury, whether through comments or through its charge, that its role is to search for the truth, or to find the true facts, or to render a just verdict. These phrases may be understood to place an obligation on the jury, independent of the burden of proof, to determine the circumstances surrounding the alleged crime and from those facts alone render the verdict it believes best serves the jury's perception of justice. We instruct trial judges to avoid these terms and any other that may divert the jury from its obligation in a criminal case to determine, whether the State has proven the defendant's guilt beyond a reasonable doubt.

Petitioner was substantially injured by his counsel's failure to object to the improper remarks to the jury. *Brecht v. Abrahamson*, 507 U.S. 619 (1993). Trial counsel's failure to object to the burden-diluting opening remarks rendered her performance ineffective. Petitioner was prejudiced by her performance. Respectfully, this Court should grant habeas relief.

(b) This claim is exhausted.

(c) This claim was not raised on direct appeal because trial counsel rendered ineffective assistance of counsel.

³ In *Beaty*, appellant objected to the following statements: "This...trial...is a search for the truth in an effort to make sure justice is done. Searching for the truth and ensuring that justice is done is often slow, deliberate, and repetitive." "You also just took an oath to listen to the evidence in this case and reach a fair and just verdict and you are expected to be professional, reasonable and ethical." And, "[i]n determining what the true facts are in this case you must decide whether or not the testimony of a witness is believable. After argument of counsel and the charge on the law by me, you will then be in a position to determine what the true facts are and apply those facts to the law and thus render a true and just verdict."

(d) This claim was raised in post-conviction.

(e) Petitioner raised this claim to the South Carolina Supreme Court by way of a petition for writ of certiorari (that was denied).

13. (a) All grounds for relief that are raised in this petition have been presented to the highest state court having jurisdiction except for Claim 2.
- (b) There is not any ground in this petition that has not been presented in some state or federal court.
14. Petitioner has not previously filed any type of petition, application, or motion in a federal court regarding the conviction that is challenged in this petition.
15. Petitioner does not have any petition or appeal now pending in any court.
16. Petitioner was represented by Sara Jane Rogers at trial. Ms. Rogers is disbarred.

Petitioner was represented by undersigned counsel, Elizabeth Franklin-Best for direct appeal. At that time, undersigned counsel worked for the Commission on Indigent Defense, Appellate Division, 1330 Lady Street, Suite 401, Columbia, South Carolina 29201.

Petitioner was represented by Rodney D. Davis for PCR. Lowcountry Law Office, 4000 Faber Place Drive, Suite 300, Charleston, South Carolina 29405. Petitioner was represented by Lara M. Caudy of the South Carolina Commission on Indigent Defense, Appellate Division, 1330 Lady Street, Suite 401, Columbia, South Carolina 29201 for the appeal of the denial of PCR.

17. Petitioner does not have any future sentence to serve after he completes the sentence for the judgment that he is challenging.
18. This petition is timely filed if it is filed before or on **May 28, 2019**.

Therefore, Petitioner asks that this Court release him from custody, or any other relief to which Petitioner may be entitled.

Respectfully submitted,

/s/ Elizabeth A. Franklin-Best

Elizabeth A. Franklin-Best
Blume Franklin-Best & Young, LLC
Fed ID # 9969
900 Elmwood Avenue, Suite 200
Columbia, South Carolina 29201
(803) 765-1044
betsy@blumelaw.com

April 15, 2019.

DORCHESTER COUNTY SHERIFF'S OFFICE

STATEMENT

STATEMENT OF DANTE M. HUBBART
 HOME ADDRESS [REDACTED] HOME PHONE [REDACTED]
 EMPLOYER BRAIN SCHEDEL BUSINESS ADDRESS Hwy 78
 BUS. PHONE 574-9179 OCCUPATION Builder
 DATE OF BIRTH [REDACTED] SOCIAL SECURITY NUMBER [REDACTED]
 THIS STATEMENT IS GIVEN 11-28-07 (DATE) AT 1050 (TIME)
DCSO DET OFFICE (LOCATION)

ON A MONDAY MORNING IN NOVEMBER I WAS AT HOME WHEN TRUCE
 GOTHERS CALLED ME ON THE CELL. HE WANTED TO KNOW IF I
 WAS GOING TO COME CITE WITH HIM. I WALKED OVER TO HAVEN
 OAKS AND WENT TO "PSYCH" APARTMENT. I WAS OUTSIDE THE APARTMENT
 WHEN TRUCE GOT THERE AND WE ALL JUST CITE IN THE COURT
 935 1100 SO "PSYCH" WENT BACK IN AND IT WAS JUST "T" (TRUCE) AND
 ME OUT THERE. WE SAW THIS WHITE TRUCK COME IN AND
 DRIVE AWAY ONCE AND THEN COME BACK AND PARK AT
 THE BACK OF THE APARTMENTS. "T" FIGURED THAT MIGHT
 BE A SALE AND I CAN GO TO THE PASSENGER SIDE, OPENED
 THE DOOR AND GOT IN. NOT LONG AFTER THIS, "DON" CAME
 UP TO THE DRIVERS DOOR AND LOOKED LIKE HE WAS ARGUING.
 HIS ARMS WERE MOVING BACK AND FORTH. "T" GOT OUT AND
 WAS BY THE PASSENGER DOOR. DON WAS STILL AT THE DRIVERS DOOR
 AND LOOKED LIKE HE SAW THE GUY IN THE TRUCK. WHEN I
 HEARD THE SHOT, I RAN BACK TO MY HOUSE AND I DIDN'T
 SEE EITHER "T" OR DON LEFT. WHEN I GOT HOME, "T" CALLED
 ME TO SEE IF I WAS OK. WE DIDN'T TALK LONG BECAUSE I
 HAD TO PICK UP MY BROTHER AT SONIC AND HE GOT OFF
 AT 11:30 PM. I NEVER HEARD FROM "T" IT SEEMED LIKE

I HAVE READ THE FOREGOING STATEMENT OR HAVE HAD IT READ TO ME AND IT IS TRUE AND CORRECT TO THE BEST OF
 MY KNOWLEDGE. I HAVE GIVEN THIS STATEMENT FREELY AND VOLUNTARILY AND HAVE BEEN PROVIDED A COPY OF MY
 STATEMENT.

WITNESS:

Det. J. Banno

WITNESS:

Det. S. L. Mully

SIGNATURE:

Dante M. Hubbard

AFTER THAT NIGHT. I'M NOT SURE WHAT TIME HE WAS
WAS BUT MY BROTHER GOT OFF BETWEEN 11:30^{PM} AND 12:00 AM
AND IT WAS BEFORE THAT. I HAD NEVER PICK HIM UP ON
TIME. I WENT CROSSED TO SEE OFF IN THE DISTANCE BUT
DIDN'T HAVE THEM ON THAT NIGHT. I DON'T KNOW DOW'S
FULL NAME BUT DET. GARRISON AM MANEZZI SHOWING
ME (6) SIX PICTURES AND I PICKED OUT WHO DOW IS

I HAVE READ THE FOREGOING STATEMENT OR HAVE HAD IT READ TO ME AND IT IS TRUE AND CORRECT TO THE BEST OF
MY KNOWLEDGE. I HAVE GIVEN THIS STATEMENT FREELY AND VOLUNTARILY AND HAVE BEEN PROVIDED A COPY OF MY
STATEMENT.

WITNESS:

Det. J.B. Barnes

WITNESS:

Det. J.D. Mally

SIGNATURE:

Det. J. H. H. H.

11-28-07 1020 DCSO

32-0150

DANTE HUBBARD

Summ

C

Bureau Bldg. Cat 0192
1130

WAS 41 TRUCKY CHIEF IN THE JAILHOUSE
WHICH SERVED DIRECTLY. DROVE AROUND ONCE
& PARKED. TRUCKY WENT TO PASS. SIDE OPENED
DOWN & ~~WENT~~ GOT IN PASS SEAT. RIGHT
P. DON CAME UP TO ADDITIONAL & WAVING
ITINERARY HE WAS UPSET w/ SENSATION.
TRUCKY GOT OUT & DON SHOT ONE TIME
TRUCKY ~~HAD~~ WENT. HE BACK FROM CAR TO
HIS HOUSE. DIDNT SEE WHEN DON WENT.
TRUCKY CALLED WENT. ON CELL PH. TO SEE IF
WAS OK.

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

AFFIDAVIT of DANTE HUBBART

My name is Dante Hubbard, 522-79-2803, and I swear and affirm the following under penalties of perjury:

- 1) I am 31 years old, and I am giving this affidavit of my free will.
- 2) I was with Trevee Gethers on September 17, 2007 and saw the shooting of the decedent.
- 3) Trevee Gethers and I were selling drugs at the time.
- 4) I saw the decedent pull into the area. He frequently bought drugs in the area. I had seen him before.
- 5) After he pulled in, Trevee Gethers went up to the driver's side to sell him drugs. Don Chisolm came from the other side of the car and started yelling, "where's my money, where's my money" at the guy. Don Chisolm is currently in prison for murder.
- 6) The man was bickering with Don.
- 7) Then I saw Don Chisolm open the door, got in the car, and that's when Trevee walked to the back of the car. Trevee Gethers never went into the car.
- 8) Then I saw the flash inside the car.
- 9) After I saw the flash, I took off running.
- 10) I was scared because I didn't know what happened to Trevee Gethers.
- 11) About one or two months later I told someone with the Dorchester County Sheriff's Department about what I saw. I went there voluntarily. They took notes and took an affidavit, and I signed it. I told them what is contained in this affidavit. Upon information and belief, this affidavit was not turned over to Trevee Gether's defense counsel.
- 12) No one called me, or subpoenaed me to testify.
- 13) At the time of Trevee Gether's trial, I was in Jacksonville, North Carolina. I didn't know that his trial was starting. It was three years later.

FURTHER AFFIANT SAYETH NAUGHT.


Dante Hubbard

Sworn before me
this 11th day of December
2018.
Jill B. Avery
expires 3/09/26

Affidavit of Veronica M

Name - Veronica J M

Occupation - Warehouse

I Veronica M Swears or affirm

I am Veronica M of Summerville, S.C.

That on or about January 2008 I gave a coerced statement to the authorities of Dorchester County to detectives Morrelli, about my co-defendant Treve J. [unclear].

The things that are in this statement was one of my account, all of what the detectives wanted to put their case together. I actually didn't written any of it, it was all written by the detectives, I just signed off on it, the reasons I signed off on it at the time because I was 14 years old and I was afraid because I was told I could go away for a long time... For two I was promised that if I signed the statement and testified that my case would be kept in Juvenile and eventually drop.

After court they were mad because I didn't agree to what they were saying, because I knew that it wasn't the truth at all.

7-5-2018

DATE

Veronica M
Name

S B Kampmeyer
S B KAMPMEYER

Notary Public, State of South Carolina
My Commission Expires 7/17/2025

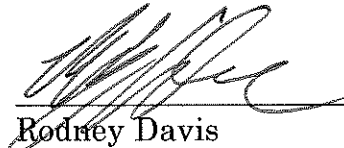
STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)

AFFIDAVIT OF RODNEY DAVIS

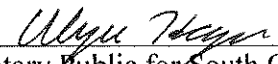
I hereby affirm and swear under penalty of perjury:

- 1) I am an attorney in good-standing with the South Carolina Bar, and I am currently employed with the Charleston County Public Defender's Office.
- 2) I represented Trevee Gethers during the evidentiary hearing portion of his state post-conviction relief proceeding before Judge Frank Addy on October 28, 2015.
- 3) During the course of my representation of Mr. Gethers, I did not request a copy of the Solicitor's file.
- 4) I did not have any strategic reason for not requesting the file.
- 5) Prior to the hearing, I did not have contact information for Sarah Jayne Rogers (now Sarah McClellan). I met her for the first time at the evidentiary hearing. She appeared in court without any documentation on this case.

FURTHER AFFIANT SAYETH NAUGHT.


 Rodney Davis
 Bar #: 12396

SWORN to and subscribed to me
 this 10 day of July, 2019.


 Notary Public for South Carolina
 My Commission expires August 29, 2028

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2021CP1801217

Trenee Gethers	2023 JUL -6 AM 9:14	South Carolina State Of
	CHEYL CRAHAM CLERK OF COURT	

PLAINTIFF(S)	DEFENDANT(S)
Submitted by:	Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit);
☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.

Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

S/
Health Taylor, Circuit Court Judge

2775
Judge Code

7/6/2023

Date

For Clerk of Court Office Use Only

This judgment was entered on **7/6/2023**, and a copy mailed first class or placed in the appropriate attorney's box on **7/6/2023**, to attorneys of record or to parties (when appearing pro se) as follows:

Trenee Gethers Ridgeland Corr. Inst., Scdc#343706
5 Correctional Road
Ridgeland, SC 29936

Danielle Dixon
PO Box 11549
Columbia, SC 29211

Dayne C Phillips
Price Benowitz Llp
1614 Taylor Street, Ste. D
Columbia, SC 29201

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)



Court Reporter

Cheryl Graham - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF DORCHESTER	)	FOR THE FIRST JUDICIAL CIRCUIT
	)	
Treveen Gethers, #343706,	)	Case No.: 2021-CP-18-1217
	)	
Applicant,	)	
	)	
v.	)	ORDER OF DISMISSAL
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

2023 JUL -6 AM 9:41
 CHERYL GRAYHAM
 CLERK OF COURT
 DORCHESTER COUNTY

This matter is before this Court on Applicant's post-conviction relief application filed July 6, 2021. The State's return and motion to summarily dismiss the application was filed on October 14, 2021. By order dated June 29, 2022, the Honorable Edgar W. Dickson ordered a full evidentiary hearing be held in this matter. An evidentiary hearing was held on January 24, 2023 at the Orangeburg County Courthouse. Dayne C. Phillips, Esquire, represented Applicant. Assistant Attorney General Chelsey F. Marto represented Respondent. After reviewing all records and evidence, this Court finds Applicant is entitled to post-conviction relief but denies and dismisses this application with prejudice as barred by the statute of limitations. The Court's findings of fact and conclusions of law are set forth below.

Procedural History

Applicant is presently confined in the South Carolina Department of Corrections. During its December 2007 term, the Dorchester County Grand Jury indicted the Applicant for murder (2007-GS-18-01755). On November 15-16, 2010, Applicant exercised his right to a jury trial before the Honorable Diane S. Goodstein. Sara Jayne Rogers, Esquire, represented Applicant. Russell D. Hilton, Esquire and Harrison Bell, Jr., Esquire of the First Circuit Solicitor's Office

prosecuted the case. Applicant was found guilty as indicted and Judge Goodstein sentenced him to forty-five years in prison.

Applicant filed a timely notice of appeal. Appellate Defender Susan Hackett, Esquire perfected Applicant's appeal. Following briefing, the Court of Appeals affirmed Applicant's conviction and sentence. *State v. Gethers*, 2012-UP-576 (S.C. Ct. App. Filed October 25th, 2012). The case was remitted back to the circuit court on May 7, 2014.

Applicant filed his first application for post-conviction relief on July 3, 2014, alleging ineffective assistance of trial counsel (1) in failing to object to Judge Goodstein's opening instruction; (2) in failing to object the solicitor's comments regarding robbery as a motive despite the fact that Applicant was not indicted for robbery; (3) in failing to object to the admission of Applicant's booking photo; and (4) in failing to request a voluntary manslaughter charge. The State filed its Return on February 26, 2015. Applicant was represented by Rodney D. Davis, Esquire. An evidentiary hearing was held on October 28, 2015 before the Honorable Frank R. Addy at the Dorchester County Courthouse. On January 8, 2016, Judge Addy issued an order denying and dismissing Applicant's application with prejudice.

Subsequently, Applicant appealed the denial of post-conviction relief and was represented on appeal by Appellate Defender Lara M. Caudy, Esquire who filed a petition for writ of certiorari. Respondent filed its Return to the Petition on September 7, 2016. On March 2, 2017, the post-conviction relief appeal was transferred to the South Carolina Court of Appeals. The South Carolina Court of Appeals denied Applicant's petition by Order filed April 24, 2018. The Remittitur was issued on May 15, 2018.

Applicant subsequently filed a Petition for Habeas Corpus under 28 U.S.C. § 2254 on April 15, 2019. Applicant was represented by Elizabeth A. Franklin – Best, Esquire. In the Petition,

Applicant set forth several grounds for relief alleging (1) the South Carolina Court of Appeals erred when it found the trial court did not err in denying Applicants' motion for a directed verdict; (2) trial counsel rendered ineffective assistance of counsel when she did not secure the attendance of a witness who gave a statement to the Dorchester County Sheriff's Office shortly after the murder informing them that he witnessed someone else shoot the decedent; (3) the post-conviction relief court erred in finding that Applicant was not denied his rights under the Sixth and Fourteenth Amendments to the effective assistance of counsel when counsel failed to object to the admission of Applicant's mugshot from his prior arrest; and (4) the post-conviction relief court erred in finding that Applicant was not denied his rights under the Sixth and Fourteenth Amendments to the effective assistance of counsel when counsel failed to object to the trial court's opening statement to the jury.

Respondent filed its Return and Motion for Summary Judgment and Motion to Strike Exhibits Attached to Petition for Writ of Habeas Corpus on July 1, 2019. Applicant moved for an evidentiary hearing on July 11, 2019. The Honorable Shiva V. Hodges, United States Magistrate Judge, issued a Report and Recommendation on October 17, 2019 recommending that (1) the Respondent's motion for summary judgement be granted; (2) the Respondent's motion to strike be denied; (3) Applicant's motion for an evidentiary hearing be denied; and (4) the Petition be dismissed with prejudice. Applicant timely objected on October 29, 2019 and the Respondent replied. The Honorable Sherri A. Lydon, United States District Judge, denied Applicant's Petition on June 5, 2020 and accepted the Report and Recommendation for summary judgment. Applicant filed a notice of appeal with the Fourth Circuit Court of Appeals on June 7, 2020 and filed an informal opening brief on July 15, 2020. The Fourth Circuit Court of Appeals dismissed Applicant's appeal by unpublished *per curiam* opinion on March 22, 2021. *Treveen Gethers v. Bryan*

Stirling, No. 20-6850 (4th Cir. March 22, 2021). The formal mandate of the Fourth Circuit Court of Appeals was issued on April 13, 2021.

In his current post-conviction relief application, Applicant alleges he is being held in custody unlawfully because of ineffective assistance of counsel based upon newly-discovered evidence related to the existence of a witness, Dante Hubbard, and a statement given to law enforcement by Mr. Hubbard indicating Applicant did not shoot the victim. Additionally, the application alleges the State wrongfully withheld and failed to produce the exculpatory statement during discovery. At the hearing, Applicant proceeded on the allegations listed above. All other allegations raised in his initial application and amendments are deemed waived and abandoned and, accordingly, will not be addressed in this order.

Factual Background

On September 17, 2007, the victim was found fatally shot in the chest while sitting in the driver's seat of a vehicle outside of an apartment complex. Neighbors in the apartment complex heard arguing in the parking lot just prior to the gunshots but none of the witnesses identified Applicant as the shooter. Based on the testimony presented at the trial, the apartment complex was known as a very high crime area and gunshots were "fairly common." An officer with the Dorchester County Sheriff's Office confirmed this was a violent area with "a lot of fights, a lot of drug-related calls."

During their investigation, the police seized cigarette butts, a .40 caliber shell casing and a Bluetooth telephone headset. The cigarette butts that were in the immediate vicinity of the victim's vehicle and were never analyzed for DNA. The .40 caliber shell casing was determined not to be relevant to the crime scene. Three individuals were identified based on the 34 latent fingerprints

that were extracted from the victim's car but were never pursued by police during their investigation. Applicant's prints were also on the vehicle.

The State subsequently obtained a DNA profile from Applicant and his DNA was found on the Bluetooth headset. The headset was not found in close proximity to victim's body. Specifically, a detective testified at trial: "That was just inside the first crime scene tape that was stretched across the road. It was actually in front of Apartment [redacted]. It was not located anywhere around the vehicle. It was between Apartment [redacted] and [redacted], the apartment complex to the right. It was in that area on the road as you came in."

During the trial, Brandee Kieffer, Applicant's former girlfriend, recalled that around the time of this incident, she and Applicant switched cars. Veronica M., who was 14 years old at the time, testified that on the date of the incident she was supposed to meet with the victim because he allegedly wanted to bring her money in exchange for sex. Veronica M. stated that she was using her friend's telephone that evening. At some point after the incident, Veronica M. and Applicant went to Virginia and eventually to New York.

During their investigation, law enforcement obtained the telephone that belonged to the victim and noticed numerous telephone calls to his son and to a telephone that was registered to Maggie Reid. The police were able to identify Applicant's telephone number and obtained search warrants based on those telephone calls. Notably, those records did not uncover anything of evidentiary value to the investigation.

In addition to the unidentified fingerprints located in the car, the police were never able to locate the murder weapon in this case. Veronica M. ultimately provided a statement to the police suggesting that Applicant met with the victim to get money from him for her. She also testified that she did not want to have sex with the victim so she sent Applicant in her place to obtain the

money. In exchange for her cooperation, Veronica M.'s charge of murder remained in the jurisdiction of Family Court.

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 evidentiary hearing. Before this Court are the Dorchester County Clerk of Court records regarding the subject convictions; Applicant's records from the South Carolina Department of Corrections; records from Applicant's direct appeal, including the trial transcript; the final order from Applicant's previous post-conviction relief action and subsequent appeal; records from Applicant's federal habeas action; and the records of the current post-conviction relief action. 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 conclusions of law and conclusion of law as required by S.C. Code Ann. § 17-27-80 (2014) based upon the evidence presented to the Court.

At the evidentiary hearing, Elizabeth Franklin – Best, Esquire testified about her extensive background and experience in the following practice areas: criminal defense; appeals; post-conviction relief; and federal habeas corpus. Ms. Franklin - Best represented Applicant on his federal habeas corpus action. Applicant moved to admit his Petition for Writ of Habeas Corpus into evidence and the petition was admitted as Applicant's Exhibit 1 without objection. During her representation of Applicant in the federal habeas matter, Ms. Franklin - Best obtained a statement that Dante Hubbard provided law enforcement in connection with the murder investigation in this case from Don Sorenson, Esquire of the First Circuit Solicitor's Office.¹ It

¹ Assistant Solicitor Sorenson was not involved in the prosecution of Applicant's case.

appears that this statement and the detective's notes were found in the State's file. Applicant moved to admit this statement and the detective's notes into evidence and the documents were admitted as the Applicant's Exhibits 2 and 3 without objection. The statement and notes indicated Applicant did not shoot and kill the victim and positively identified another individual as the shooter.

Ms. Franklin - Best obtained an affidavit from Dante Hubbart affirming his prior statement that Donsurvi Chisolm shot and killed the victim in this case. Applicant moved to admit this affidavit into evidence and the affidavit was admitted as Applicant's Exhibit 4 without objection. Donsurvi Chisolm is serving two life sentences for murder.² Ms. Franklin - Best also obtained an affidavit from Applicant's original post-conviction relief counsel, Rodney Davis, Esquire who admitted he did not request a copy of the State's file and had no strategic reason for failing to do so. Further, he did not contact trial counsel prior to the evidentiary hearing. Applicant moved to admit this affidavit into evidence and the affidavit was admitted as Applicant's Exhibit 6 without objection. According to Ms. Franklin - Best, a State's witness at trial, Veronica M., provided an affidavit recanting her testimony and declaring that she was coerced by law enforcement to write a statement and testify at Applicant's trial. Applicant moved to admit this affidavit into evidence and the affidavit was admitted as Applicant's Exhibit 5 without objection.

As to the murder investigation, Ms. Franklin - Best testified that that Applicant was not identified as the shooter and that the three people identified based on the presence of fingerprints in the decedent's car were never pursued by law enforcement. The murder weapon was not found. Applicant's DNA was found on a Bluetooth telephone headset that was not close to the victim's

² See <https://public.doc.state.sc.us/scdc-public/inmateDetails.do?id=%2000347831>

body and a search warrant for the Applicant's phone records did not contain any inculpatory evidence.

Applicant's brother, Jamal Gethers, happened to see Dante Hubbard in public and Hubbard asked about his brother. During their discussion, Hubbard told him about making the statement to law enforcement about Donsurvi Chisolm being the shooter. Gethers informed Applicant of this information. It is unclear from the record when this conversation with Mr. Hubbard occurred.

Applicant's trial counsel, Sara Rogers, was appointed to represent Applicant after he had numerous prior lawyers. Ms. Rogers acknowledged that she was disbarred from the practice of law in 2015.³ At the time of Applicant's trial, Ms. Rogers was a new attorney and did not have a lot of time between her initial appointment to represent Applicant and the scheduled trial date to prepare. She thought prior counsel would assist her with the case but he did not. Ms. Rogers believed the Applicant was not guilty of the charges and looked closely through the discovery for exculpatory evidence. She did not see Exhibits 2 and 3 before the trial of the case

Ms. Rogers reviewed Dante Hubbard's statement to law enforcement and the detective's notes. She had not seen the documents prior to Applicant's trial and believed the trial would have been different had she been in possession of these documents. Ms. Rogers acknowledged on cross-examination that she met with Assistant Solicitor Russell Hilton and reviewed the State's file prior to trial. However, Ms. Rogers maintained that she did not see the statement or notes in the State's file during that review.

Former assistant solicitor, Russell Hilton, was the lead prosecutor in Applicant's case. Hilton maintained that his typical practice was to have an open-file policy and that Sara Rogers reviewed the State's file with him prior to trial. Hilton maintained that the statement and

³ See *In re Sara Jayne Rogers*, Op. No. 27550 (Sup. Ct. filed July 23, 2015).

detective's notes had always been in the file. Hilton admitted that he could not recall whether he specifically discussed or reviewed Hubbard's statement with Rogers or that the statement was provided directly to Rogers due to Applicant having numerous prior lawyers. Over Applicant's objection, Hilton testified that the other prosecutor on the case had sent a letter to one of Applicant's former lawyers about this evidence. The State failed to call that prosecutor as a witness and Hilton conceded that he did not know whether the former lawyer had shared the evidence with Applicant or Rogers.

Applicant had never seen Dante Hubbard's statement prior to trial but acknowledged that he knew Hubbard was a witness. The Applicant had five prior lawyers and had provided a previous lawyer a list of potential witnesses. He did not hear anything else about Dante Hubbard or any other investigation done prior to trial from his lawyers

From a substantive perspective, Applicant is entitled to the relief he seeks. However, the application currently before the Court is procedurally barred and for the reasons set forth below, must be denied. Nonetheless, the Court is compelled to address merits of the application. The State and Applicant ground their arguments in the doctrine of newly discovered evidence. The two documents at issue in the matter are the statement of Dante Hubbard (Exhibit 2) and the investigative notes from the interview with Dante Hubbard (Exhibit 3). Both are dated November 28, 2007. These documents were not newly discovered. The State was aware of the evidence all along. Either the State wrongfully withheld the documents from Applicant's trial counsel or trial counsel and Applicant's initial post-conviction relief counsel simply missed the documents and their paramount importance of having positively identified a person other than Applicant as committing the murder in this case. There is nothing in the record before this Court to suggest the State engaged in any wrongful conduct. Consequently, the analysis of this case does not revolve

around newly discovered evidence but ineffective assistance of counsel.

This action is Applicant's second post-conviction relief application. S.C. Code Ann. § 17-27-90 (2014) generally prohibits successive applications ". . . unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended application." Our Supreme Court has permitted a successive application upon a showing of a ". . . 'sufficient reason' why the new grounds for relief he asserts were not raised, or were not raised properly." *Aice v. State*, 305 S.C. 448, 450, 409 S.E.2d 392, 394 (1991). This Court finds that Applicant has shown a sufficient reason why the current grounds for relief were not raised. Applicant was not afforded effective assistance of counsel at the trial level or during his initial post-conviction relief application. "In order to prove trial counsel was ineffective, the PCR applicant must show: (1) counsel's performance was deficient; and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Rutland v. State*, 415 S.C. 570, 576, 785 S.E.2d 350, 353 (2016) citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). The same standard applies to post-conviction relief counsel.

Applicant's trial counsel failed to locate the exculpatory statement of Dante Hubbard. Not only did the statement indicate Applicant did not shoot the victim but the statement also positively identified another individual as the shooter. Failure to locate and present exculpatory evidence of this magnitude is unquestionably deficient under the *Strickland* standard. Additionally, this Court finds and concludes that there is a reasonable probability that but for Ms. Rogers' error, the result of Applicant's trial would have been different.

In addition to receiving ineffective assistance of counsel at the trial level, Applicant also was not provided effective assistance of counsel during his initial post-conviction relief

application. Applicant's counsel during his initial post-conviction relief proceeding provided an affidavit indicating he did not request a copy of the State's file during the course of his representation of Applicant. *See* Exhibit 6. He stated that he had no strategic reason for failing to request or review the file. Further, he did not interview trial counsel or otherwise discuss the case with her prior to Applicant's evidentiary hearing. Failure to complete these rudimentary steps necessary to investigate Applicant's claims amounts to deficient performance under *Strickland*. Had Applicant's post-conviction relief counsel reviewed the State's file, he likely would have discovered Mr. Hubbard's statement in similar manner as Applicant's federal habeas counsel. This Court finds and concludes that there is a reasonable probability that but for Mr. Davis' failure to minimally investigate Applicant's case, the result of Applicant's initial post-conviction relief proceeding would have been different.

The State contends Applicant could have easily obtained this statement through the exercise of due diligence and that the information is not material because the statement only matters in so far as it established that the witness was on the scene and had a different perspective than that of the State's witnesses. This Court finds and concludes that Applicant could not have obtained the statement of Mr. Hubbard on his own but instead was at the mercy of his attorneys to properly investigate and prepare his case at the trial level and post-conviction relief proceeding. Further, Mr. Hubbard's statement was unquestionably material. While Mr. Hubbard's statement was not entirely consistent with the physical evidence present at trial, the exculpatory value is obvious and material.

The Uniform Post-Conviction Procedure Act provides that "[a]ny person who has been convicted of, or sentenced for, a crime and who claims: . . . [t]hat there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in

the interest of justice” is authorized to file a post-conviction relief action. S.C. Code § 17-27-20 (A)(4) (2014). The Act also provides that “[i]f the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence.” S.C. Code § 17-27-45 (C) (2014).

Despite the woefully ineffective assistance of counsel, this Court finds Applicant’s current application must be dismissed with prejudice. If Applicant contends there is evidence of a material fact not previously presented, under the discovery rule, the application must be filed within one year after the date of actual discovery of the facts by Applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence. S.C. Code Ann. §17-27-45 (C) (2014). Applicant’s federal habeas petition was filed on or about April 15, 2019. While Applicant likely knew of the existence of Mr. Hubbard’s exculpatory statement and his counsel’s ineffective assistance prior to the filing of the habeas petition, he certainly knew or should have known in April of 2019. The current application was filed July 6, 2021. In the memorandum of law accompanying his application, Applicant contends he did not discover the existence of Mr. Hubbard’s exculpatory statement until his habeas counsel filed a brief in that matter on July 9, 2020. This Court does not find Applicant’s assertion that he did not discover the information with regard to Mr. Hubbard until July 9, 2020 to be credible. Therefore, this PCR application must be denied and dismissed with prejudice.

Conclusion

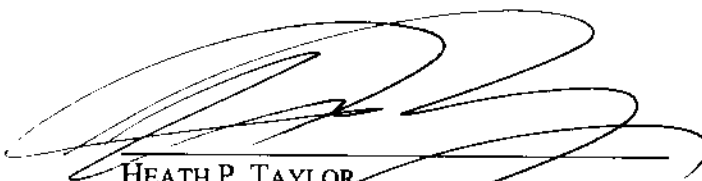
This Court is of the opinion that the interests of justice suggest Applicant should receive a new trial. However, this Court has neither the constitutional nor statutory authority to ignore the

one-year statute of limitations set forth in S.C. Code § 17-27-45 (C) (2014). Jurists in lower courts generally loathe a reversal by a higher court. In this instance, however, this Court invites a reversal that provides Applicant the fair trial with competent counsel afforded to him by the United States and South Carolina Constitutions.

This Court notifies Applicant that he must file and serve a notice of appeal within thirty days of receipt by counsel of this order in order to secure appropriate appellate review. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has the right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP provides that if Applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a notice of appeal on Applicant's behalf. Counsel's attention is directed to South Carolina Appellate Court Rule 243 for appropriate appellate procedures.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the post-conviction relief application is hereby denied and dismissed with prejudice and Applicant is hereby remanded to the custody of Respondent.

AND IT IS SO ORDERED!



HEATH P. TAYLOR
Presiding Judge
First Judicial Circuit

July 3, 2023

Orangeburg, South Carolina.

THE STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF DORCHESTER)
2023 JUL 17 PM 4:03)
FIRST JUDICIAL CIRCUIT

Treveen Gethers,

Applicant,

v.

State of South Carolina,

Respondent.

CHERYL D. RAHAM
CLERK OF COURT
DORCHESTER COUNTY

Case No.: 2021-CP-18-01217

**MOTION TO ALTER OR AMEND
PURSUANT TO RULE 59(E), SCRPC**

TO: THE HONORABLE HEATH P. TAYLOR

The Applicant, by and through the undersigned Counsel, moves this Court to alter or amend the Order of Dismissal filed in the above-captioned case on July 6, 2023, pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. See U.S. Const. amends. V, VI, XIV; S.C. Const. art. I, §§ 3 and 14. In support of this motion, Applicant submits the following arguments and does not abandon or waive any previous issues or arguments raised in the prior pleadings, proposed orders, and evidentiary hearing in this PCR action:

- (1) Applicant incorporates by reference the issues and arguments raised in Applicant's Proposed Order Granting Applicant Post-Conviction Relief as if fully set forth verbatim into this motion. See (Attachment A).
- (2) The Order of Dismissal fails to properly address the Court's finding that Applicant's PCR application is procedurally barred by the one-year statute of limitations set forth in Section 17-27-45(C) of the South Carolina Code of Laws.
- (3) Specifically, this Court should apply the equitable tolling doctrine to the statute of limitations based on attorney Elizabeth Franklin-Best's decision to file a Petition

for a Writ of Habeas Corpus in the United States District Court for the District of South Carolina. *See generally Pelzer v. State*, 378 S.C. 516, 521, 662 S.E.2d 618, 620-621 (Ct. App. 2008) (summarizing the doctrine of equitable tolling: "The time requirements in lawsuits between private litigants are customarily subject to equitable tolling if such tolling is necessary to prevent unfairness to a diligent plaintiff. However, equitable tolling, which allows a plaintiff to initiate an action beyond the statute of limitations deadline, *is typically available only if the claimant was prevented in some extraordinary way from exercising his or her rights, or, in other words, if the relevant facts present sufficiently rare and exceptional circumstances that would warrant application of the doctrine.*") (emphasis added).

- a) This unique and compelling situation is akin to the Court's finding that Applicant was "at the mercy of his attorneys to properly investigate and prepare his case at the trial level and post-conviction relief proceeding", Applicant was also at the mercy of attorney Franklin-Best who failed to file a successive PCR action in state court; but instead, filed a habeas corpus action in federal court.
- b) In sum, it is not Applicant's fault that his Counsel chose to file a habeas corpus action instead of filing a successive PCR action. *See generally Moses v. State*, 420 S.C. 500, 803 S.E.2d 718 (finding "tolling the statute of limitations in circumstances in which an applicant demonstrates the failure to timely file for PCR was *due to no fault of his own* does not create an exception by which incarcerated litigants may avoid time restrictions. . . . Instead, it provides PCR applicants with functionally equivalent time bars

and seeks to ensure equal access to the courts for all.” (internal quotations and citations omitted) (emphasis added).

- (4) The denial of Applicant's PCR action based on the statute of limitations is fundamentally unfair because equitable tolling is justified under the circumstances and is in the interest of justice. *See Hooper v. Ebenezer Senior Servs. & Rehab. Ctr.*, 386 S.C. 108, 115, 687 S.E.2d 29, 32 (2009) (“Where a statute sets a limitation period for action, courts have invoked the equitable tolling doctrine to suspend or extend the statutory period to ensure fundamental practicality and fairness.” (internal quotation marks and citations omitted)); *see also Hooper*, 386 S.C. at 117, 687 S.E.2d at 33 (“Equitable tolling may be applied where it is justified under all the circumstances. We agree, however, that equitable tolling is a doctrine that should be used sparingly and only when the interests of justice compel its use.”).
- (5) Although it is a rare, our appellate courts have permitted successive PCR applications. *See generally Washington v. State*, 324 S.C. 232, 478 S.E.2d 833 (1996) (permitting successive PCR application where multiple procedural irregularities, including the denial of a direct appeal, prohibited applicant the benefit of due process); *Carter v. State*, 293 S.C. 528, 362 S.E.2d 20 (1987) (authorizing a successive PCR application where the applicant did not have PCR counsel that differed from his trial counsel); *Case v. State*, 277 S.C. 474, 289 S.E.2d 413 (1982) (allowing a successive PCR application where applicant's first PCR application was dismissed without assistance of legal counsel and without a hearing).
- (6) The Order of Dismissal fails to properly address what specific evidence supports

the Court's finding that Applicant's testimony regarding when he learned about this issue being raised in the federal action was not credible.

- (7) Specifically, there was no evidence presented during the hearing that directly contradicted Applicant's testimony, and any circumstantial evidence regarding when Applicant knew of this issue being raised in his habeas corpus petition is merely speculative.
- (8) Applicant has shown a sufficient reason why the current allegations for relief were not raised in his original PCR action.
- (9) Based on the testimony and evidence presented at the evidentiary hearing, Applicant has established constitutional violations and deprivations that would require post-conviction relief. Specifically, Trial Counsel's and original PCR Counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. See *Strickland*, 466 U.S. at 687-88. Trial Counsel's and original PCR Counsel's deficient performance also prejudiced Applicant because it "so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Butler*, 286 S.C. at 442, 334 S.E.2d at 814 (quoting *Strickland*, 466 U.S. at 692).
- (10) Accordingly, Trial Counsel and original PCR Counsel provided effective assistance of counsel because "there is a reasonable probability that, but for [trial] counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625 (internal citations omitted); See U.S. Const. amends. VI, XIV; S.C. Const. art. I, §§ 3 and 14.

Therefore, this Court should reconsider its Order of Dismissal, withdraw that order, and enter an Order Granting Applicant Post-Conviction Relief.

CONCLUSION

Based on the foregoing reasons, the undersigned Counsel respectfully requests this Court reconsider the Order of Dismissal, withdraw that order, and enter an Order Granting Applicant Post-Conviction Relief allowing him to receive a new trial.

IT IS SO MOVED.

Respectfully submitted,

s/ Dayne Phillips


Dayne C. Phillips, Esq.

Price Benowitz LLP
1614 Taylor Street, Suite D.
Columbia, SC 29201
O: 803-272-4503
C: 803-807-0234
F: 803-380-8035
dayne@pricebenowitz.com

ATTORNEY FOR THE APPLICANT

July 12, 2023

THE STATE OF SOUTH CAROLINA)

IN THE COURT OF **COMMON PLEAS**COUNTY OF **DORCHESTER**)**FIRST JUDICIAL CIRCUIT****Treveen Gethers,**)Case No.: **2021-CP-18-01217**

Applicant,)

v.)

CERTIFICATE OF SERVICE

State of South Carolina,)

Respondent.)

I hereby certify that I have this date served the within and foregoing Motion to Alter or Amend pursuant to Rule 59(e), SCRPC, by depositing a true and correct copy of the same via first-class mail, postage prepaid, upon all parties as follows:

Danielle Dixon, Esq.
Office of Attorney General
PO Box 11549
Columbia, SC 29211

The Honorable Cheryl L. Graham
Dorchester County Clerk of Court
5200 E Jim Bilton Blvd
St George, SC 29477-8020

The Honorable Heath P. Taylor
PO Box 1949
Orangeburg, S.C. 29116

By: 
Harliann Hendrix
Law Clerk for Dayne C. Phillips, Esq.

1614 Taylor Street, Suite D.
Columbia, SC 29201
(803) 567-3403
pblawclerksc@gmail.com

July 12, 2023

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2021CP1801217

Trevee Gethers

South Carolina State Of

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy; ☐ Other: _____
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Heath P. Taylor
Circuit Court Judge

2775
Judge Code

8/3/2023
Date

For Clerk of Court Office Use Only

This judgment was entered on 8/3/2023, and a copy mailed first class or placed in the appropriate attorney's box on 8/3/2023, to attorneys of record or to parties (when appearing pro se) as follows:

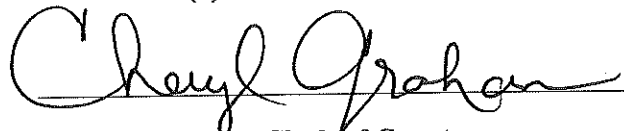
Trenee Gethers
Ridgeland Corr. Inst., Scdc#343706
5 Correctional Road
Ridgeland, SC 29936

Danielle Dixon
PO Box 11549
Columbia, SC 29211

Dayne C Phillips
Price Benowitz Llp
1614 Taylor Street, Ste. D
Columbia, SC 29201

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)


Cheryl Graham - Clerk of Court

Court Reporter

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

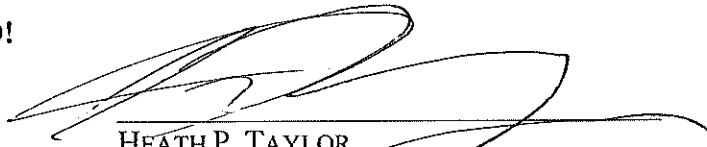
This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF DORCHESTER	)	FOR THE FIRST JUDICIAL CIRCUIT
	)	
Treveen Gethers, #343706,	)	Case No.: 2021-CP-18-1217
	)	
Applicant,	)	
	)	
v.	)	ORDER
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

CERTIFIED COPY
 2023 AUG -3 PM 1:48
 CLERK OF COURT
 DORCHESTER COUNTY

This matter is before the Court on Applicant's Motion to Alter or Amend Pursuant to Rule 59 (e), SCRCF. Applicant urges this Court to apply the doctrine of equitable tolling and find that his application is not time barred based upon his pursuit of a Writ of Habeas Corpus in U.S. District Court. Applicant's motion is denied. *See, Green v. State*, 353 S.C. 29, 576 S.E.2d 182 (2003)(Statute of limitation for filing application held not to be tolled by applicant's action seeking federal habeas corpus relief).

AND IT IS SO ORDERED!


 HEATH P. TAYLOR
 Presiding Judge
 First Judicial Circuit

August 1, 2023

Orangeburg, South Carolina.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

The Honorable Heath P. Taylor, Circuit Court Judge

Case No. 2021-CP-18-1217

Treveen Gethers, Petitioner,

v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Petitioner Treveen Gethers appeals the Honorable Heath P. Taylor's Order Denying his Application for Post-Conviction Relief filed on **July 6, 2023**, and the Order Denying Applicant's Motion to Alter or Amend Judgment (Rule 59(e), SCRCR) filed on **August 1, 2023**.


Dayne C. Phillips, Esq.
1614 Taylor Street, Suite D.
Columbia, SC 29201

ATTORNEY FOR PETITIONER

August 2, 2023

Other Counsel of Record:

Danielle Dixon, Assistant Attorney General
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, SC 29211

cc: Cheryl Graham, Dorchester County Clerk of Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

The Honorable Heath P. Taylor, Circuit Court Judge

Case No. 2021-CP-18-1217

Treveen Gethers, Petitioner,

v.

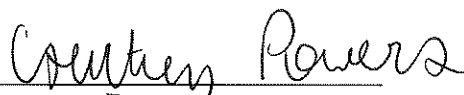
State of South Carolina, Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Assistant Attorney General Russ Barlow, and the Honorable Cheryl Graham, by depositing a copy in the United States Mail, postage prepaid, on **August 2, 2023**, addressed to the following parties:

Danielle Dixon, Esq., SC Attorney General's Office
P.O. Box 11549, Columbia, SC 29211

The Honorable Cheryl Graham, Dorchester County Clerk of Court
5200 E Jim Bilton Boulevard, St George, SC 29477


Courtney Powers
Paralegal for Dayne Phillips, Esq.
1614 Taylor Street, Suite D.
Columbia, SC 29201

August 2, 2023