

Appellate Defender Sarah E. Shipe

1. Exh 23, Petition For Writ of Certiorari
dated June 3, 2024

2. Exh C2, Letter To Disciplinary Counsel
dated January 16, 2024

3. Exh B Letter From Ola Johnson
dated 9/24/23

4. Exh #12 "Re Request Writ of Certiorari,
cross appeal, remand, Special Matter Pleading
pursuant to Fishburn v. State, SCRCP Rule 71.1
(g), 17-27-80, s.c. code ann, and Section 28. USCA
2254(b)(c)."
1 of 5



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1345

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

June 3, 2024

Mr. Ben Robert Stewart, #223006
Lee Correctional Institution
990 Wisacky Hwy.
Bishopville, SC 29010

Re: Your Case

Dear Mr. Stewart:

Enclosed is a copy of the Petition for Writ of Certiorari, which I have filed today with the South Carolina Supreme Court. The Appendix, also filed today, will be mailed to you tomorrow, June 4, 2024.

Please contact me if you have any questions.

Sincerely,

Sarah E. Shipe
Appellate Defender

SES/sm

Enclosures

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to York County

Honorable Eugene C. Griffith, Circuit Court Judge

BEN ROBERT STEWART,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2023-001478

PETITION FOR WRIT OF CERTIORARI

SARAH E. SHIPE
Appellate Defender

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

ATTORNEY FOR PETITIONER

ISSUE PRESENTED

Whether the PCR court erred finding trial counsel was not ineffective where counsel was deficient in failing to move to sever petitioner's trial from his co-defendant and where petitioner was prejudiced by the deficiency because co-defendant's counsel made an impermissible comment on petitioner's right to remain silent where he argued to the jury in closing that the co-defendant wanted to tell the jury what happened, and co-defendant testified and petitioner did not?

l. 18-1296, l. 24.

Appellate counsel for petitioner filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), and the Court of Appeals dismissed the appeal and granted appellant counsel's motion to be relieved. *State v. Stewart*, Op. No. 2012-UP-651 (Ct. App. filed December 12, 2012).

Thereafter petitioner filed an application for post-conviction relief (PCR). App. 1299-1380. An evidentiary hearing was held before the Honorable Eugene C. Griffith, Jr., on April 17, 2023. App. 1401-1504. Petitioner was represented by Ola Johnson and the state was represented by Zachary Jones. App. 1401.

On August 25, 2023, Judge Griffith signed an order denying PCR. App. 1507-26. In the order the PCR court found petitioner was not prejudiced where trial counsel failed to sever his trial from his co-defendant Terrell Addison "because all the evidence that was presented against [petitioner] at the joint trial could have been presented at an independent trial." App. 1523. The court cited *Hughes v. State*¹ and found this case was like *Hughes* because petitioner's co-defendant, Addison took the stand and was subject to cross-examination. App. 1523.

¹ 346 S.C. 554, 552 S.E.2d 315 (2001)

returned fire and Dontavious had a gunshot wound to the back of his left shoulder. App. 251, ll. 3-5. Dontavious pled guilty to murder, armed robbery, kidnaping, possession of a firearm during the commission of a violent crime, possession of a firearm under the age of twenty-one, and possession of a stolen vehicle. App. 233, ll. 1-3. He was sentenced to life without parole. App. 233, ll. 4-6.

Dontavious claimed to be testifying truthfully at petitioner's trial but was forced to admit that he had given multiple false statements over the course of the investigation. App. 270-77. He also admitted that he hoped that his testimony would be helpful in his brother, Davorius's, future sentencing. App. 265, ll. 19-23; 267, ll. 4-9.

Davorius Mack testified his brother, Dontavious, called him and asked him to ride with him to take Terrell Addison home to Rock Hill. App. 385, ll. 15-25. Davorius said they picked up petitioner to ride along with them. App. 387, l. 17-388, l. 16. He said when they got to Rock Hill they were looking for a place to "break into." App. 393, ll. 2-16. Davorius claimed petitioner and Addison both had guns that were visible during the car ride to Rock Hill. App. 391, ll. 10-21. He confirmed petitioner did not want to participate in the BP station robbery, but alleged petitioner gave Dontavious the gun. App. 395, l. 16-396, l. 2. He also stated that after the incident petitioner gave the gun Dontavious used to a man named Reed Allen. App. 404, ll. 3-7.

Davorius pled guilty to accessory after the fact of murder, accessory after the fact of armed robbery, criminal conspiracy to commit armed robbery, attempted escape, possession of a stolen vehicle, and malicious injury to property. App. 385, ll. 2-5. At the time of petitioner's trial Davorius had not been sentenced. App. 6-11. Davorius also claimed he was testifying

While criminal defendants who are jointly tried are not entitled to separate trials as a matter of right a criminal defendant is *entitled to a trial free from bias and confusion*. *Hughes v. State*, 346 S.C. 554, 558–59, 552 S.E.2d 315, 317 (2001) (Moore, J., dissenting) (emphasis added). A severance should be granted only when there is a serious risk that a joint trial would compromise a *specific trial right of a co-defendant or prevent the jury from making a reliable judgment about a co-defendant's guilt*. *State v. Dennis*, 337 S.C. 275, 523 S.E.2d 173 (1999) (emphasis added). “Such a risk might occur when evidence that the jury should not consider against a defendant and that would not be admissible if a defendant were tried alone is admitted against a co-defendant.” *Zafiro v. U.S.*, 506 U.S. 534, 539 (1993) (holding that co-defendants do not suffer *per se* prejudice when presenting mutually antagonistic defenses such that severance would be mandatory, that the risk of prejudice will vary with the facts of each case and setting out examples of possible risks that could warrant severance).

Trial courts should be “cautious in allowing joint trials” and must assure protection of a defendant’s constitutional rights. *State v. Singleton*, 303 S.C. 313, 315, 400 S.E.2d 487, 488 (1991) (reversing conviction obtained in joint trial because defendant’s Sixth Amendment right of confrontation was violated). In *State v. Spears*, 393 S.C. 466, 713 S.E.2d 324 (Ct. App. 2011), the Court of Appeals held that there was no prejudice in a joint trial where the evidence against both defendants was interconnected.

“A severance should be granted only when there is a serious risk that a joint trial would compromise a *specific trial right* of a codefendant or prevent the jury from making a reliable judgment about a codefendant's guilt.” *State v. Walker*, 366 S.C. 643, 657, 623 S.E.2d 122, 129 (Ct.App.2005) (emphasis added).

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to York County

Honorable Eugene C. Griffith, Circuit Court Judge

BEN ROBERT STEWART,

PETITIONER,

V.

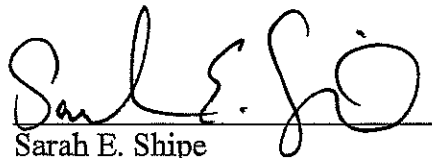
STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2023-001478

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Petition for Writ of Certiorari and Appendix in the above-referenced case has been served upon Zachary W. Jones, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 3rd day of June, 2024.



Sarah E. Shipe
Appellate Defender

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

ATTORNEY FOR PETITIONER

Ben Robert Stewart, 223006
990 Wisacky Highway
Bishopville, S.C. 29010

January 16, 2024

Daniel G. Hayes,
Assistant Disciplinary Counsel
Post office Box 12159
Columbia, S.C. 29211

Re: Amendment to file Number; 23-DE-L-1670
new complaint Sarah E. Shipe

Dear Mr. Hayes;

Thank you for your services, enclosed is a Amended complaint regarding Attorney Sarah E. Shipe. Conflict of interest. Also I am submitting my Exhibits from my last to amendments from Attorney, Kenneth Snow, Solicitor, Walter Thompson, Attorney Robert Dudek and also including Exhibit C12 Indigent Defense Letter, January 9, 2024,

RECEIVED
FEB 21 2024
OFFICE OF
DISCIPLINARY COUNSEL

**OLA JOHNSON
ATTORNEY AT LAW**

Mailing Address:
Box 549
Lexington, SC
29071

Office Address: P.O.
201 West Main St.
Suite G
Lexington, SC
29072

e-mail: olajohnsonlaw@gmail.com

Telephone: (803) 360-8692
Fax: (803)-994-8279

9/24/23

STEWART, BEN ROBERT (00223006)
F3B-1228-B
LEE CORRECTIONAL
990 Wisacky Highway
Bishopville, SC 29010

RE: PCR

I have enclosed a copy of my proposed order and the Order of Dismissal and the Notice of Appeal in your case. This completes my representation on your case. The Office of Appellate Defense has been notified of your appeal and they will represent you. I sent them the AG's package to assist them in your representation. You are also free to hire counsel to represent you on the appeal. Thank you.

Ola Johnson

#12
Ben Robert Stewart, 223006
990 Wisacky Highway
Bishopville, S.C. 29010

February 11, 2024

Attorney, Sarah E. Shipe,
Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, S.C. 29201-3332

Appellate No; 2023-001478
PCR-2013-CP-46-3731

Re; Request Writ of Certiorari, cross appeal, remand,
Special Matter Pleading, pursuant to Fishburn v. State,
SCRCP Rule 71.1 (g), 17-27-80 s.c. code ann.,
and Section 28 U.S.C. 2254 (b) and (c)

Dear Ms. Shipe:

I am in receipt of your letter dated January 25, 2024, could you please take note and fulfill my request for a Petition pursuant to the Fishburn v. State, 427 S.C. 505, 832 S.E. 2d 584 (2019) holding, because of the following reason; PCR Attorney, Ola A. Johnson did not cite any applicable law and Standard of Review, please see; Memorandum of Law in Support filed Dec. 2013 at 1, 2, 3, 4 and 5, citing Nance v. Ozmint, quoting United States v. Cronin 668 U.S. 468 (1984), Jackson v. Virginia, (affirming the Winship Rule/Standard, not the case), United State v. Berger, Brady v. Maryland, and Strickland v. Washington (Cumulative effect of ineffectiveness). More specifically, Mr. Johnson incorporated Nance v. Ozmint, 367 S.C. 547, 626 S.E. 2d 878. (2006) in several

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circumstances and instances of ineffectiveness that rendered a denial of the Sixth Amendment, in both amended Petitions filed November 24, 2021 and November 1, 2022.

I also request the *Baker v. Wingo*, 407 U.S. 514 (1972) standard be applied in this instant case where prejudice exists since there was several warnings that exculpatory witness could be lost due to sickness and due to the state refusal to appoint counsel since the initial PCR filing December 9, 2013 until June 23, 2016 and PCR counsel lacking in diligence or otherwise not filing a proper default Judgment.

Furthermore, PCR Attorney did not submit or include any exhibits in the initial PCR filing nor additional exhibits to the amended claims that was provided to him prior to amending the PCR Application and two days following the requested proposal or from Judge Griffith on April 17, 2023 on April 19, 2023. In addition to these failures, PCR Attorney did not file a statutory 59 Motion, therefore; my PCR claims are not preserved.

According to statutes this Attorney was not relieved as counsel according to 11.1 (g) and forwarding my appeal to your office was wrong respectively.

The York County Clerks office has returned my 59 Motion filing two occasions and was cited for this denial as well as the Chief Appellate Defender Robert M. Dudek for not filing my statutory pleading and was cited. Please take judicial notice that the Supreme Court cannot rule on claims that was not ruled on by the lower Court, my claims were not adjudicated properly because the applicable law was not ruled upon whereas the Plaintiff is the Master

of his complaint and civil procedures according to 71.1 SCRCP sec (9) incorporate Rule of Civil Procedure.

The exhaustion of State remedies doctrine now codified in the Federal Habeas statute, 28 USC § 2254 (b) and (c) is therefore denied in this case.

Also, I hasten to add, PCR Attorney Ola A. Johnson, withdrew PCR claims without my consent or waiver or understanding, and was cited for these infractions. I'm requesting your assistance due to the Supreme Court order on January 31, 2024.

Closing; If there are any claims you are needing to be explained to you please allow me to forward my Exh. B-14 Pro se Applicant Proposal for Post Conviction Relief that may assist you. I have forwarded that along with my Table of Exhibits A, and B Table, B1 to B-12 to Attorney, Dudek including a copy of my 39 motion that was not filed. Regarding the Attorney General, file could you please obtain a copy by order if need be, the office is not responding to my letters and appear to be hindering my request, just as the intentional waiting game with Val Hudson that resulted in her death and unavailability see Memo of Law at 33 please. I have her obituary marked as Exh B-12 2019, your assistance is needed in this matter.

Thank you for your time as to this matter.

cc/Attorney General 3 of 3.

Honorable, Eugene C. Griffith, Judge
Disciplinary Counsel

Ben Robert Stewart 222006
990 Wisc Ky Highway
Bishopville S.C. 29010

Petitioner's

1. Exh[#] 1. Post Conviction Relief Application
filed December 9, 2013
2. Exh[#] 2. Conclusion of Facts And Memorandum
of Law in Support of Application
For Post Conviction Relief
filed December 9, 2013
3. Exh[#] 3A. First Amendment including the
Conclusion of Facts and Memorandum
is Support of PCR and the
Memorandum of Law in Support of
PCR, dated, Nov. ~~2021~~ 2021 pg 1
4. Exh[#] 3B. Second Amendment adopts and
includes all grounds in the original
application and the supporting
documents filed December 9, 2013
Conclusion of Facts and Memorandum
of Law, dated Nov 2022 pg 1

Exhibit #1a

FORM 5

STATE OF SOUTH CAROLINA

County of YORK

Ben Robert Stewart, HK-9369

V.

State of South Carolina

IN THE COURT OF COMMON PLEAS

2013 CP46-3731

APPLICATION FOR
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 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. Applicant 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: SCI-Frackville, 1111 Altamont Blvd., Frackville, PA 17931.
2. Name and location of Court imposing sentence: York County Court of General Sessions,

1675 1G Highway, York, SC 29745.

3. Name(s) of co-defendants Dontavious Mack, Davorius Mack and Terrell Addison.
4. The indictment numbers upon which and the offenses for which sentence was imposed:
 - a. 2007-GS-46-2525, murder
 - b. 2007-GS-46-2526, accessory before the fact to murder
 - c. 2007-GS-46-2527, armed robbery
 - d. 2007-GS-46-2528, accessory before the fact to armed robbery
 - e. 2007-GS-46-2529, kidnapping
 - f. 2007-GS-46-2530, accessory before the fact to kidnapping
 - g. 2007-GS-46-2531, criminal conspiracy

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2013 DEC -9 PM 3:42
DAVID DAWSON
C.C.P. & GS
YORK COUNTY, SC

h. 2007-GS-46-2532, possession of a firearm during the commission of a violent crime.

i. 2007-GS-46-2533, possession of a stolen vehicle

j. 2007-GS-46-2535, accessory after the fact.

5. The date upon which sentence was imposed and terms of the sentence:

a. Sentenced imposed on February 27, 2009.

b. An aggregated term of 30 years was imposed by the Honorable Lee S. Alford.

6. A finding of guilt was made following a trial by jury before the Honorable Lee S. Alford.

7. An appeal was taken from the judgment of conviction and imposition of sentence.

8. Appeal was taken to The Court of Appeals of South Carolina.

a. The result is the appeal was **Dismissed** on December 12, 2012; citation

Unpublished Opinion No. **2012-UP-651**.

9. If you answered "no" to (7), state your reasons for not so appealing.

10. Concisely stated the grounds my allegations are based upon, my custody is unlawful are:

a. Appellate counsel was ineffective in failing to cite trial court error in denying a directed verdict because guilt beyond a reasonable doubt could not be established on the evidence adduced.

b. Appellate counsel was ineffective for failing to raise the issue that no rational jury could have found guilt beyond a reasonable doubt on the evidence adduced at trial.

c. Appellate counsel was ineffective in failing to raise Due Process was denied because the evidence adduced at trial violated the *Winship* rule of establishing proof of every element of the crime charged beyond a reasonable doubt.

d. Trial counsel was ineffective on the Sufficiency of the Evidence Motion.

e. Trial counsel was ineffective for failing to conduct a proper investigation.

f. Trial was counsel ineffective for failing to use compulsory process to call witnesses on Applicant's behalf to offer relevant, material, pertinent and exculpatory evidence.

g. Trial counsel was ineffective for failing to put the prosecution's case to meaningful adversarial testing, such that there was an actual breakdown of the adversarial process during trial.

h. Applicant was denied effective assistance of trial counsel, and a fair trial due to the cumulative effects of counsel's ineffectiveness:

i. Trial counsel was ineffective in misstating the evidence.

W. H. Carter (BS)

W. H. Carter (BS)

l. The Solicitor knowingly used perjured testimony.

m. It was prosecutor misconduct in suppressing *Brady* material, i.e., Monday Bishop's exculpatory statement to the Solicitor.

n. The Solicitor knowingly misstated the evidence to mislead the jury and the court on closing argument.

11. Stated concisely in the same order as the facts which support each of the grounds set forth in ¶ (10) are:

a. The trial court committed error in denying a directed verdict because guilt beyond a reasonable doubt could not be established on the evidence adduced and Appellate counsel, Wanda H. Carter, Esq, (hereafter, Ms. Carter) was ineffective in not raising this issue.

b. That no rational jury could find guilt beyond a reasonable doubt on the evidence adduced at trial and Ms. Carter, appeal counsel was ineffective in failing to raise this issue.

c. Appeal counsel was ineffective for failing to raise that due process within the meaning of *In Re Winship* was denied because proof beyond a reasonable doubt of every essential element of the crime was not established based on the evidence of record.

d. Defense counsel Mr. Snow was ineffective in arguing the Sufficiency of the evidence motion by not citing evidence of record to support the motion such as the DNA excluded Applicant and therefore, it would be physically impossible for Applicant to have been present to commit the crimes charged.

e. Defense counsel, Mr. Kenneth Snow, (hereafter Mr. Snow) failed to properly Investigate this matter because he failed to interview Applicant's sister, Monday Bishop and her friend Val Hudson, who were present at Monday's apartment at the time that Reed Allen, claimed that the Applicant called Monday and Monday gave her phone to Reed and Applicant told Reed he needed a favor (*Record of Appeal pp 525:24-25; 526:2-4; 549:10-19*). And subsequently, Reed alleged that Applicant asked him to "put it up" (i.e., the murder weapon) (*Record of Appeal pp 550:20-21*). And that Applicant gave Reed a bag with a gun and some clothing items in it and Reed left the apartment and "threw it under a bush" (*Record of Appeal 534:8-9*).

Had Mr. Snow interviewed Monday Bishop and called Monday to the witness stand she would have testified that Reed was lying; that she never put him on her phone to speak to Applicant on the night in question, nor did Applicant have a conversation with Reed, nor did Applicant give Reed a bag that Reed took outside, hid it, and returned to Monday's apartment (*See attached Affidavit of Monday Bishop, Exhibit A-1, ¶¶5-7,10-11,16,20-21,24-25,27*). Had Mr. Snow interviewed Monday Bishop and called Monday to the witness stand she would have likewise testified that, neither Davorius Mack (*Record of Appeal 350:15, 19-20; 352:3-6, 21-24; 385:4-7*) nor Terrell Addison (*Record of Appeal 891:1-4; 892:8-11, 13-25*) came to her apartment on the night in question (*See attached Affidavit of Monday Bishop, Exhibit A-1, ¶¶7,11,19, 26-28*).

f. Mr. Snow was ineffective for failing to interview Val Hudson and call Val Hudson, who was present on the night in question with Monday Bishop and Reed Allen. Had Mr. Snow interviewed and called Val to testify, she would have said that no one came to the apartment after her, Monday and Reed, except Ben, and that Ben did not talk to Reed Allen or give him a bag that he took outside of the apartment and returned without the bag. (*See attached Affidavit of Val, Exhibit A-2, ¶¶10, 22-25*).

Mr. Snow confirms his own ineffectiveness for failing to call Monday Bishop and Val Hudson during his closing argument when he rhetorically said to the jury during closing argument:

...Mr. Stewart doesn't have to prove anything, but you think, though, you.

think that we would have heard testimony from either Monday or Val. Val certainly could have possibly cleared this whole thing up, but I don't think there was any mention of her. Who has the resources to bring her here? Who has the recourse to order her here to hear what she has to say? There's not a statement from her. No mention of her. That is the one person that could have cleared this whole thing up involving my client, but you never hear any mention of her. You better believe if she had something that would have implicated my client, what do you think? They would ordered her to be here. Someone would have found her. (*Record of Appeal at 1069*).

The above statement directly from the mouth of trial counsel clearly demonstrates the Mr. Snow did not know or perform his role as defense counsel, to use Compulsory Process to subpoena those witnesses, and if necessary Petition the Court for funds to assure the presence of those witnesses.

(NOTE: Monday Bishop was present for every day of the trial, See Affidavit of Monday Bishop, Exhibit A-1, ¶(4).)

The failure of Mr. Snow to put this essential testimony before the jury was fatal to a fair trial, and denied Effective Assistance of Counsel and the right to Compulsory Process under the 6th Amendment U.S.C.A., and Art I, §14, South Carolina Constitution, Due Process and Equal Protection of the Laws under the 14th Amendment U.S.C.A., and Art I, §3, South Carolina Constitution. That the jury heard testimony from Reed Allen, Davorius Mack and Terrell Addison that Applicant gave Reed a bag with a gun in it to "put up" or otherwise to hide it, in Applicant's sister's, Monday Bishop's apartment, in Monday's and Val's presence, and neither Monday nor Val refuted the testimony, **compelled** the jury to give **undue weight** to the testimony that Applicant allegedly gave Reed a bag with a gun to hide for Applicant, while simultaneously causing the jury to disregard the DNA, the scientific evidence that should have trumped the fabricated, self-serving testimony implicating Applicant. What else could the jury think but that if the defense did not call Monday and Val, what Reed Allen, Davorius Mack and Terrell Addison testified to must be true!

Moreover, the Solicitor capitalized on the failure to call Monday Bishop in his closing argument when he said"

...Ben's sister...How far wouldn't she drive to come here to court? How far would she drive to come here to say things didn't go down that way? She was right there too. (*Record of Appeal at 1113*).

Another telling fact in support of the point that Applicant was prejudiced by failing to call Monday Bishop and Val is the jury's note requesting a re-reading of Reed Allen's testimony; see (*Record of Appeal pp. 1214-15*). In addition, the failure to investigate resulted in the jury and judge being under the false impression that Monday's apartment was actually Reed Allen's apartment. See (*Record of Appeal pp. 1214-15*) which reads in pertinent part: ... "And I asked them did they want to start at the time some persons arrived at **his house that night**" (emphasis my own). This is trial judge Alford apprising opposing counsel of the jury's request of a read back of Reed Allen's testimony; the "his house" comment refers to Reed Allen who was merely an infrequent visitor at Monday Bishop's apartment (See Affidavit of Monday Bishop, Exhibit A-1, ¶13). Moreover, this gave the jury the false— inaccurate impression— that Reed and Applicant were around each other often and had a relationship such that Applicant would trust Reed enough to ask him to do such a thing, a thing that virtually anyone else would have done for themselves.

Mr. Snow had several sources of information to know that Monday Bishop and Val were present at the time that Reed Allen, Davorius Mack and Terrell Addison alleged that Applicant gave a bag with a gun in it to Reed Allen to hide. For example, he had the statement(s) of Reed Allen, Davorius Mack and Terrell Addison; he had ready access to Applicant and his notes from Applicant's interviews; he had or should have had Monday Bishop's statement to the York County Solicitors who came to her apartment to interview her, one of whom she recognized during the trial (See Affidavit of Monday Bishop, Exhibit A-1, ¶31); and at trial when and after the testimony was offered, was enough time for Mr. Snow to do his job. Again, Monday Bishop was present for every day of the trial and was ready, willing, able and even eager to testify (See Affidavit of Monday Bishop, Exhibit A-1, ¶13).

g. Mr. Snow was ineffective in failing to make the trial an adversarial process.

Applicant incorporates by reference the entirety of ¶11, inclusive as if set forth verbatim herein in support of Mr. Snow's failure to put the prosecution's case to adversarial testing, which denied a fair and impartial trial and produced an unreliable verdict.

h. The cumulative effects of Mr. Snow's ineffectiveness was fatal to the defense case; he made

a gaggle of critical errors that handed the prosecution an undeserved conviction where proof was not established beyond a reasonable doubt on every essential element of the crimes charged. For example, failing to investigate potential witnesses (Exh. A-1.2), failing to use compulsory process that permitted the prosecution to capitalize on close that if Reed Allen was lying, Monday Bishop would have driven any distance to refute that testimony (**Record of Appeal 1113**) For being inept regarding DNA excluding Applicant by not objecting to the prosecutor's close when he purposefully misstated the evidence that DNA and fingerprints of Dontavious Mack was not found in the vehicle, and because Applicant's DNA and fingerprints were not found did not mean he was not in the car (**Record of Appeal 1140-1141**).

The forensic evidence demonstrated that every defendant's DNA and fingerprints was either found or could not be included or excluded (**Record of Appeal 749-751**) in the vehicle except the Applicant's fingerprints and DNA. This incontrovertible physical fact, unbelievably, was trumped by the false, self-serving testimony that Applicant was present in the vehicle and supplied the murder weapon. Trial counsel did not raise and argue the **Incontrovertible Physical Facts Doctrine** in the Motion challenging the Sufficiency of the Evidence, which enabled the trial judge to wrongly deny the directed verdict of acquittal pursuant to the Incontrovertible Physical Facts Doctrine; appellate counsel failed to raise this error on appeal and instead filed an Anders Brief.

i. Trial counsel was ineffective for misstating the evidence by saying that Monday Bishop's house was Reed Allen's house and bolstered Reed's testimony and gave the false impression that Applicant was a guest in Reed's home, which implied a trust and relationship that did not exist.

j. The Solicitor knowingly used perjured testimony.

k. The Solicitor committed prosecutor misconduct by suppressing Brady material; namely the exculpatory statement of Monday Bishop.

l. The Solicitor knowingly misstated the evidence to rescue a failed prosecution by falsely conflating that the failure to find Applicant's fingerprints and DNA in the vehicle did not mean that Applicant was not in the car because Dontavious Mack's fingerprints (he wore gloves **Record of Appeal 743**) and DNA was not found either. The real truth is Applicant was excluded from being a possible

contributor (Record of Appeal 749-751) and Dontavious could not be included or excluded (Record of Appeal 749-750):

- a. Any petition in a State Court under South Carolina? 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 petitions, motions or applications in this or any other Court? Yes.

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

a. The specific nature thereof:

- i. Writ of Habeas Corpus filed 02/06/2009 (Pre-trial).
- ii. Notice of Appeal, filed 04/09/2009 (from judgment and sentence)
- iii. PCR Application: Motion for Transcripts and Appointment of Counsel, filed 02/11/2010.
- iv. Motion for Extension of Time to File Response to Ander's Brief and Motion For Transcripts, filed 02/14/2010.
- v. Pro-se Appellant's Brief, filed 08/21/1012
- vi. Writ of Habeas Corpus, filed 11/16/2012
- vii. Petition for Rehearing & Memorandum in Support, filed 12/24/2112.
- viii. Petition to Withdraw Petition for Rehearing, filed 01/23/2013.

b. The name and location of the Court in which each was filed:

- i. York County Court of General Sessions, P.O. Box 649, York, SC 29745-0649
- ii. South Carolina Court of Appeal, P.O. Box 11629, Columbia, SC 29211
- iii. York County Court of General Sessions, P.O. Box, 649, York, SC 29745-0649
- iv. South Carolina Court of Appeal, P.O. Box 11629, Columbia, SC 29211

- v. South Carolina Court of Appeal, P.O. Box 11629, Columbia, SC 29211
 - vi. York County Court of General Sessions, P.O. Box, 649, York, SC 29745-0649
 - vii. South Carolina Court of Appeal, P.O. Box 11629, Columbia, SC 29211
 - viii. South Carolina Court of Appeal, P.O. Box 11629, Columbia, SC 29211
- c. The disposition thereof:
- i. Denied
 - ii. Dismissed
 - iii. Dismissed because direct appeal was still pending; counsel was appointed and transcripts provided.
 - iv. Applicant was provided pre-trial transcripts and granted extension of time to file brief Appellant's Brief.
 - v. Direct Appeal Dismissed.
 - vi. Dismissed
 - vii. Motion to Withdraw Request for Rehearing; moot motion was already heard.
 - viii. Denied
- d. The date of each such disposition:
- i. 02/23/2009
 - ii. 12/12/2012
 - iii. 07/01/2012
 - iv. 02/25/2012
 - v. 12/12/2012
 - vi. 01/25/2013
 - vii. 01/25/2013

13. Has any grounds set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed? **No.**

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

- a. Which grounds have been presented:
- b. The proceeding in which each ground was raised:

15. 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. Issues not previously raised could not be raised except under **Post Conviction Relief**.

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

- a. Your arraignment and plea? **Yes**
- b. Your trial, if any? **Yes**
- c. Your sentencing? **Yes**
- d. Your appeal, if any, from the judgment of conviction or the imposition of sentence?

Appeal counsel filed an Anders letter and was granted permission to withdraw.

e. Preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? **No**

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

- a. The name and address of each attorney who represented you:

- i. Kenneth D. Snow, Esq., 229 South Brevard Street, Suite 300, Charlotte, NC 28202; ph. (704) 358-0026; fax (707) 358-0229

- ii. James C. Cox, Jr., Esquire, 311 W. Home Avenue, Hartsville, SC 29550-4127; phone (843) 332-1531.

- iii. Wanda H. Carter, Deputy Chief Appellate Defender, 1330 Lady Street, Suite 401, Columbia, SC 29201; Tel: 803-734-1343; Fax: 803-734-1397.

- b. The proceeding at which each such attorney represented you:

- i. Pretrial and trial
- ii. Post-trial (was paid \$5,000 but did not actually prosecute my appeal).

iii. Direct appeal

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

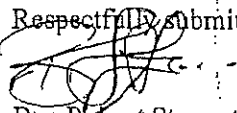
- a. Appoint counsel pursuant to §17-27-60.
- b. Permission to proceed *In Forma Pauperis*
- c. Right to discovery pursuant to §17-27-150 in post-conviction relief proceeding.
- d. Evidentiary Hearing via Closed Circuit Television pursuant to §17-27-80 where trial counsel and appellate counsel are compelled to justify their stewardship of this case and the court can review the denial of motion for direct verdict for insufficiency of the evidence.
- e. Reversal of conviction for insufficiency of the evidence and discharge from custody. Or in the alternative:
 - f. Reversal of the judgment of conviction because no rational trier of fact could find guilt beyond a reasonable doubt on the evidence adduced at trial and grant a new trial.
 - g. Reversal of the judgment of conviction because guilt beyond a reasonable doubt of every essential element was not established at trial and grant a new trial.
 - h. Reversal of the judgment of conviction due to a breakdown in the adversarial process and grant a new trial.
 - i. Reversal of the judgment of conviction because ineffective assistance of counsel is plain on the face of the record and grant a new trial.
 - j. Reversal of the judgment of conviction due to the cumulative ineffectiveness of counsel and grant a new trial.
 - k. Reversal of judgment of conviction due to intentional prosecutor conduct to rescue a failed prosecution—bar retrial and discharge from custody.

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

a. Court of Common Pleas, Philadelphia, PA.

Dated: November 21, 2013

Respectfully submitted,



Ben Robert Stewart HK-9369
SCI-Frackville
1111 Altamont Blvd.
Frackvill, PA 17886-1021

Commonwealth of Pennsylvania

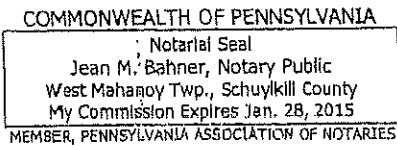
County of Schuylkill

STATE OF CAROLINA) JA

County of YORK)

VERIFICATION

I, Ben Robert Stewart, 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 allegation therein set forth are true upon information and belief.



Ben Robert Stewart
Ben Robert Stewart HK-9369
SCI-Frackville
1111 Altamont Blvd.
Frackville, PA 17931

SWORN or affirmed to and subscribed before me

this 26th day of November, 2013

Jean M. Bahner
Notary Public
My Commission Expires 1/28/2015

Exhibit #2
STATE OF SOUTH CAROLINA

County of YORK

Ben Robert Stewart, HK-9369

V.

State of South Carolina

IN THE COURT OF COMMON PLEAS

2013QP 46-3731

FILED-RECEIVED

2013 DEC -9 PM 3:42

DAVID HAMILTON
C.C.P. & GS
YORK COUNTY, SC

MEMORANDUM OF LAW COVER SHEET

This is an Application pursuant to South Carolina's *Uniform Post-Conviction Procedure Act, §17-27-20 et. seq.*, to vindicate my rights to effective assistance of counsel at trial and on appeal and a fair trial that comports with due process and equal protection of the laws; neither of which were extended to the Applicant during the entire course of the proceedings.

This is a case where DNA evidence exonerated the Applicant, yet due to many factors, including ineffective assistance of counsel and prosecutor misconduct, incredible, false and self-serving testimony seeking leniency for the defendants who committed these terrible crimes were allowed to trump conclusive and reliable DNA evidence collected and testified to by the state's forensic expert witness that Applicant could not have been present and therefore could not have participated in these crime!

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
County of <u>YORK</u>	)	
	)	
<u>Ben Robert Stewart, HK-9369</u>	)	
	)	
V.	)	
State of South Carolina	)	

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STATE OF SOUTH CAROLINA

County of YORK

Ben Robert Stewart, HK-9369

V.

State of South Carolina

) IN THE COURT OF COMMON PLEAS
)

) CONCLUSION OF FACTS AND
) MEMORADUM OF LAW IN SUPPORT
) OF APPLICATION FOR
) POST-CONVICTION RELIEF
)
)

I, Ben Robert Stewart, *pro se*, *In forma pauperis*, Applicant, advances this Memorandum of Law, in support of my application under §17-27-40, for Post-Conviction Relief, pursuant to §17-27-20, *et seq.*, to redress grievances, correct a miscarriage of justice and vindicate rights of a factually innocent person. *Pro se* petitions should be liberally construed.

SUMMARY OF ARGUMENT

Applicant contends that prosecutor misconduct combined with counsel so inept, that he bungled every phase of trial except pointing out the DNA excluded Applicant denied a fair trial. He failed to challenge the prosecution's case and indeed aided the prosecution's case, such that there was a breakdown in the adversarial process within the meaning of the second prong of United States v Cronin, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 1884) and in Nance v Ozmint, 367 S.C. 547, 626, S.E.2d 878 (2006); counsel was ineffective in several other respects.

Also, the Trial Court erred as a matter of law by allowing the case to go to the jury when there was insufficient evidence to find or infer guilt beyond a reasonable doubt. In addition, the testimonial evidence offered was incredible as a matter of law because it related to events which could not have occurred under the laws of nature; i.e., Applicant could not have provided the murder weapon because the DNA/fingerprints collected from the vehicle used in the crime excluded Applicant as being present in the vehicle. Taken singly, in toto, i.e., cumulatively, the errors were pervasive and had a negative effect on the entire trial and resulted in a breakdown in the adversarial process, conviction of a factually innocent person and an unreliable verdict that should not be permitted to stand in a just, lawful, and civilized society!

JURISDICTION

Jurisdiction is conferred upon this Honorable Court pursuant to §17-27-20(a)(1)(4)(6), *et seq.*, because Applicant has been convicted and sentenced for a crime and *averts* that the conviction was in violation of the Constitution and laws of the United States or the Constitution and laws of this State; and the conviction is otherwise subject to collateral attack.

I. PROCEDURAL HISTORY

Please see the Application for Post-Conviction Relief for the procedural history.

II. APPLICABLE LAW & STANDARD OF REVIEW

In a PCR proceeding, the applicant bears the burden of establishing that he is entitled to relief. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000).

The Sixth Amendment of the United States Constitution requires that a criminal defendant receive *effective* assistance of counsel at trial, United States v. Cronig, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Nance v. Ozmint, Director South Carolina Department of Corrections, 626 S.E.2d 878, 367 S.C. 547, 352 (2006); on appeal, Evitts v Lucey, 469 U.S. 387, 105 S.Ct. 830 (1985), Douglas v Calif, 372 U.S. 353 (1963); Thrift v. State, 302 S.C. 535, 397 S.E.2d 523 (1990), and on collateral review, Ryan v Martinez, 132 S.Ct. 1309 (2012).

To prevail on an ineffectiveness claim, "[P]etitioner must meet the standard established in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)." In order to establish a claim of ineffective assistance of counsel, the PCR applicant must show that: (1) counsel's performance was deficient; and (2) there is a reasonable probability that, but

for counsel's errors, the result of the trial would have been different. Caprood, *supra*, 338 S.C. at 109, 525 S.E.2d at 517 citing Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Ard, 372 S.C. at 331, 642 S.E.2d at 596; Strickland, *supra*. "Furthermore, when a defendant's conviction is challenged, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt." Ard, *supra* (quoting Strickland v. Washington, 466 U.S. 668, 695, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). Applicant contends that this standard is met in the Application and supporting Memorandum of Law because, except for trial counsel's unprofessional errors in not objecting to the Solicitor's improper closing argument in equating the **exclusion of Ben Stewart** based on the lack of his DNA/fingerprints in the car and the **inability to exclude or include Dontavious Mack** as being equivalent; and botching the Sufficiency of the Evidence Motion, such as failing to argue that the DNA evidence was fatal to the state's case because it excluded Applicant as a passenger in the vehicle and in the words of the forensic expert: "no chance that it is Ben" (Record of Appeal at 751) and not raising and arguing the **Incontrovertible Physical Facts Doctrine**; this failure **unduly** influenced the court to credit testimony that Applicant was present in the vehicle and provided the gun for a robbery that ended in a murder.

Counsel's unprofessional errors of failing to make reasonable investigations, interview potential witnesses, subpoena them and present exculpatory testimony and otherwise failing to put the state's case to adversarial testing, the jury would have had a reasonable doubt respecting guilt and the outcome of the trial would have been different. Walker v State, 397 S.C. 226, 236 (2102) citing Edwards v State, 392 S.C. 449, at 456, 710 S.E.2d 60 at 64

(2010); Lounds v State, 380 S.C. 454, 670 S.E.2d 646 (2008); Caprood, supra, 338 S.C. at 109, 525 S.E.2d at 517 citing Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

On the law governing Sufficiency of the Evidence the Supreme Court reviews denial of directed verdict motion, it views evidence in light most favorable to nonmoving party, and if there is any direct or substantial circumstantial evidence which reasonably tends to prove guilt of accused or from which guilt may be fairly and logically deduced, refusal by trial judge to direct verdict is not error. State v. Brown, 360 S.C. 581, 591, 596, 602 S.E.2d 392, 397, 400 (2004); State v. Copeland, 468 S.E.2d 620 (S.C., 1996); State v. Stokes, 299 S.C. 483, 386 S.E.2d 241 (1989); State v. Edwards, 298 S.C. 272, 379 S.E.2d 888 (1989); State v. Irvin, 270 S.C. 539, 243 S.E.2d 195 (1978); Jackson v Virginia, 443, US 307, 319; 99 S.Ct. 2781, 2789 (1979); In re Winship, 397 U.S. 358, 362, 90 S.Ct. 1068, 1071, 25 L.Ed.2d 368 (1970).

Also, the law governing the Due Process Clause of the 14th Amendment of the United States Constitution and the South Carolina Constitution Art I, §3 confers the right of Due Process in criminal trials which entails that guilt is proven beyond a reasonable doubt by proving every essential element of the crime charged. See In re Winship, 397 U.S. 358, 362, 90 S.Ct. 1068, 1071, 25 L.Ed.2d 368 (1970).

The Jackson v Virginia inquiry has three prongs: (1) aimed at determining whether there has been an independent constitutional violation—i.e, a conviction based on evidence that fails to meet the Winship standard (establishing every element of the crime beyond a reasonable doubt). Second, the sufficiency of the evidence review authorized by Jackson v Virginia is limited to “record evidence”. Third, the Jackson, inquiry focuses on whether a

rational decision to convict or acquit was made. See Herrera v Collins 506 U.S. 390, 404, 113 S.Ct 853, 861 1993).

The law governing triers of fact as unreasonable for not rejecting testimony that asserts facts that are physically impossible, is incredible or contrary to the laws of nature and in contraventions of human experience is viewing 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. See Jackson v Virginia, 443, US 307, 319, 99 S.Ct. 2781, 2789 (1979).

The law governing prosecutor misconduct is U.S. v Berger, 295 U.S. 78 (1935); Brown v State, 383 S.C. 506, 516, 680 S.E.2d 909, 914 (2009). Berger, and Brown imposes the duty on prosecutors to refrain from improper methods calculated to produce a wrongful conviction; to seek justice and not just to win convictions.

III. APPEAL COUNSEL WAS INEFFECTIVE IN NOT RAISING TRIAL COURT ERROR ON APPEAL FOR DENYING A DIRECTED VERDICT BECAUSE GUILT BEYOND A REASONABLE DOUBT COULD NOT BE ESTABLISHED ON THE EVIDENCE ADDUCED!

Wanda H. Carter, Deputy Chief Appellate Defender was appellate counsel; she filed an *Anders* Brief in this case and was grossly ineffective on the face of the record, Evitts, supra; Robbins v Smith, 125 F.3d 831 (9th Cir. 1997), for failing to cite error on the trial court for denying the Sufficiency of the Evidence Motion or otherwise failing to *sua sponte* direct a verdict of acquittal because the evidence presented to the jury was insufficient as a matter of law to find guilt beyond a reasonable doubt. See e.g., Jackson v Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789 (1979); Brown v State, 383 S.C. 506, 680 S.E.2d 909 (2009); State v. Copeland,

468 S.E.2d 620 (S.C.1996). *State v. Stokes*, 299 S.C. 483, 386 S.E.2d 241 (1989); *State v. Edwards*, 298 S.C. 272, 379 S.E.2d 888 (1989); *State v. Irvin*, 270 S.C. 539, 243 S.E.2d 195 (1978); *In re Winship*, *supra*. In *Brown*, 383 S.C. 506, .

The evidence relied on to implicate Applicant was testimony by Dontavious Mack, Davorius Mack and Terrell Addison claiming Applicant was present in the vehicle in Rock Hill, SC and provided a gun with full knowledge that it would be used to rob the BP gas station. (See **Record of Appeal pp.: 188, 279, 339, 876**). On the other hand, conclusive evidence that Applicant was not present in the vehicle and therefore could not have provided the gun as testified to is the analysis report of DNA testing from the South Carolina Law Enforcement Department (SLED) that excluded Applicant from being in the vehicle ("...no chance it is Ben" (See **Record of Appeal 749-751**) and that Applicant's fingerprints were not found in the vehicle. (See **Record of Appeal 740, 747**). The DNA evidence exposed the state's witnesses for the liars that they are and renders their testimony, incredible, unbelievable, contrary to laws of nature and human experience and should have been rejected as a matter of law. See e.g., *Commonwealth v. Santana*, 460 Pa. 482, 333 A.2d 876 (1975); *Colna v. Northern Metal Co.*, 242 F.2d 546, 549 (3rd Cir. 1957); *Commonwealth v. Karkaria*, 533 Pa. 412, 625 A.2d 1167 (1993). In *Santana*, *supra*, a narcotics officer testified that he observed Santana come out of a door where narcotics was later found. The door was found to be locked by deadbolt that needed a key on both sides; no key was found on Santana or anywhere in the vicinity. The Pennsylvania Supreme Court reversed:

It would appear from the undisputed facts that the door to the second floor apartment had been secured by a dead lock; that although allegedly within the unobstructed view of the officers, appellant was not seen closing the door, fastening the lock, or discarding the key. Further, no key was found when he was searched, nor was any key recovered from the area. We thus conclude that the statement of the officer that appellant was observed actually leaving the room,

should have been rejected by the triers of fact. "It is settled law in Pennsylvania that testimony in conflict with the incontrovertible physical facts and contrary to human experience and the laws of nature must be rejected, . . ." Colna v. Northern Metal Co., 242 F.2d 546, 549 (3rd Cir. 1957). Santana, supra.

In the instant case, that Applicant was excluded from being in the vehicle by the DNA analysis and the fingerprint analysis (**Record of Appeal 740, 747, 749-751**), the trial court was compelled to conclude that the testimony of Dontavious Mack, Davorius Mack and Terrell Addison was/is false, was in conflict with physical and scientific laws, contrary to human experience and should have been rejected. See e.g., Commonwealth v Robinson, 817 A.2d 1153, 1158 (2003) holding:

Where the evidence offered to support the verdict is in contradiction to the physical facts, in contravention to human experience and the laws of nature, then the evidence is insufficient as a matter of law."

Robinson, supra at 1158.

Notwithstanding the fact that Solicitor Brackett in his closing argument misstated the evidence and mislead the jury and apparently the trial judge as well when he falsely claimed that no DNA or fingerprint evidence was found for Dontavious as well as Ben:

Mr. Snow said "there is no forensic evidence to show that Mr. Stewart was in the car at all – no DNA, no fingerprints, no fibers, no hair, nothing to show that Ben Stewart was in that car." Well, guess what, there is no forensic evidence to show that Dontavious was in that car. No DNA, no fingerprints...nothing to show that he was in there. Yet nobody disagrees that Dontavious was in that car. No doubt he was in that car, and he was in the car bleeding...No DNA of Dontavious found in that car. No fingerprints of Dontavious...So I submit to you just because they didn't find anything in there does not mean that Ben Stewart was not in the car...**Record of Appeal 1140-1141**,

It is outright disingenuous and totally false and misleading to argue that Dontavious was excluded by the DNA and fingerprint analysis as was the case with Ben Stewart. The BP video showed Dontavious wearing gloves (**Record of Appeal 747**) and explains why his fingerprints

were not found. As for the DNA, **Dontavious was not excluded**, but **Ben Stewart was excluded**:

The DNA obtained from item 18 is a mixture of at least two individuals. No conclusion can be made regarding the **inclusion or exclusion** of Dontavious Mack, Terrell Addison, or Davorious Mack as possible contributors to this mixture... Basically that means that the sample – there was something there in the DNA sample that was submitted, but there was not enough of a sample to verify whose it belonged – or who exactly the DNA belonged to. (**Record of Appeal 747; also see pg. 749**).

Based on the foregoing, Dontavious, Davorius and Terrell was not **specifically included** as contributors, but more importantly, Dontavious **could not be specifically excluded**. Therefore, the prosecutor committed prosecutorial misconduct in equating on close that no forensics were found on Dontavious but nobody disagrees that he was in the car; this is a very subtle distinction which easily mislead the court and jury. The prosecution should not be permitted to have it both ways, i.e., successfully use forensics to implicate but discount forensics when it exonerates. The forensic expert testified it was **“no chance that it was Ben’s DNA” in the car** (**Record of Appeal 751**).

To draw an analogy, the judge and the jury accepting this testimony is like accepting testimony that a person ran a mile in 30 seconds when the world record for the one mile run is held by Morocco’s Hicham El Guerrouj who lowered the mark to 3:43.13 on July 7, 1999. See <http://trackandfield.about.com/od/worldrecords/tp/Men-s-World-Records.htm>

Legal and scientific information was widely available to Trial Counsel and Appellate Counsel establishing that, testimony is insufficient as a matter of law to convict someone when scientific evidence proved that it would be impossible for the accused to have committed the crime. The Innocence Project catalogued the 311 exonerations to date based on DNA evidence

nationwide; one of these exonerations was the case of Perry Mitchell that occurred in Lexington, SC. The Innocence's Project account follows:

In the late evening of December 29, 1982, a seventeen year old girl was dragged into the woods and raped at knifepoint. These woods were located near Perry Mitchell's home in Lexington, South Carolina. A week later, Mitchell was arrested on the grounds that he somewhat fit the description the girl had given of her attacker and lived "yards away" from the scene of the crime. Mitchell maintained his innocence and said that he had been visiting an elderly neighbor's home on the night of the crime, when he heard someone scream. Mitchell also said that after visiting with his elderly neighbor, he went to a party next door that was attended by about ten to fifteen people... The evidence against Mitchell at trial consisted of the victim's identification and erroneous serological testimony. A forensic analyst testified that semen from the crime scene showed blood group markers consistent with Mitchell's blood group. He said 35% of the population shares Mitchell's blood type and could have been the contributor, but then incorrectly stated that "you would probably have to cut that by another 50% because we're dealing with males..." Mitchell's direct appeal was unsuccessful. Twelve years later, in 1996, the Circuit Court granted Mitchell a hearing on his second post-conviction relief application, which claimed that he had a right to have a DNA test. Mitchell's lawyer asked that DNA tests be performed on the victim's underwear to see if the semen sample matched Mitchell's profile. Testing was completed in June 1998 by Cellmark Diagnostics. Mitchell was excluded from being the depositor of semen on the victim's underwear. Following these test results, Circuit Judge James Johnson Jr. granted Mitchell a new trial. The state did not try him again. Mitchell was released in (sic) August 4, 1998, after being wrongfully incarcerated for nearly fifteen years.

http://www.innocenceproject.org/Content/Perry_Mitchel.php

In the instant case, like the Perry Mitchell saga, where the semen on the victim's underwear excluded Mitchell from being the depositor of that semen and trumped the victim's testimony that Mitchell raped her, the scientific DNA and fingerprint evidence in the instant case (See Record of Appeal at 749-751 and 740, 747) respectively, excluded Applicant from being present in the vehicle used to commit the crime, and therefore, trumped the testimony of the prosecution's witnesses that Applicant provided the gun used to rob BP and murder Mr. Marshall. An inescapable consequence of this is that essential element(s) of the crimes, i.e. that Applicant was present in the vehicle and knowingly provided the murder weapon was not proven

beyond a reasonable doubt, as required by the Due Process Clauses of the United States and South Carolina's Constitutions. See, e.g. In Re Winship, 397 U.S. 358, 326, 90 S. Ct. 1068, 1071, 25 L.Ed. 2d 368 (1970); Evans-Smith v Taylor, 19 F.3d 899 (4th Cir. 1994).

The instant case is distinguishable from the Perry Mitchell case because Mitchell was an honest misidentification; while in the instant case the testimony was based on a frame-up of an innocent person to curry favor and receive lighter sentences for the defendants. For example, Dontavious Mack accused Applicant of being the shooter and admitted that he lied to get Applicant in trouble (See Record of Appeal 222:7-11, and 223:3-12, respectively).

Cf. the holding in Wright v West, 112 S.Ct. 2482, 2492, where the 4th Circuit's holding that there was insufficient evidence to convict was Reversed; 931 F.2d 262 (1991) 505 U.S. 277, 295, (1992). The United States Supreme Court concluded that the case against West was strong. Two weeks after the burglary 15 of the stolen items were found in West's home and he failed to offer specific information of how he acquired the items. He contradicted himself, was vague and evasive and failed to produce any other supporting evidence. "...the trial record contained sufficient evidence to support West's conviction". Id at 2493, 505 U.S. 298. The instant case is distinguishable from Wright v West because the testimonial evidence in the instant case was weak and contradictory ^(S) and was trumped by the forensic evidence that excluded Applicant from being present at the time and scene of the crime.

Also Cf. Evans-Smith v Taylor, *supra*, where the Fourth Circuit reversed the District Court and reversed Evans-Smith's conviction for murdering his wife holding:

We conclude, however, that the evidence assessed in its entirety and in the light most favorable to the prosecution is not sufficient to persuade any rational trier of fact of the petitioner's guilt beyond a reasonable doubt, that Evans-Smith's conviction on the evidence therefore violated his constitutional right to due process, and that he is entitled to the relief sought in this habeas corpus proceeding. Evans-Smith at 910.

The instant case is distinguishable from *Evans-Smith*, because *Evans-Smith* was a circumstantial case. However, there was insufficient evidence to persuade any rational trier of fact to find Applicant guilty beyond a reasonable doubt based on the lack of DNA and fingerprint evidence which should have trumped the testimony. Note:

Dontavious said Applicant got the gun out of the trunk and gave it to him; Davorius said Applicant had the gun on his lap and passed it over the seat; and Terrell said he never saw the gun until minutes before the crime (**Record of Appeal 279, 338, 873 respectively**). Couple those contradictions with the contradiction between pretrial statement and trial testimony of Reed Allen (**Record of Appeal 526, 542-543, 552-553**)(**Exhibit A-3**). How can this and other contradictory and inconsistent testimony be allowed to trump reliable scientific evidence. Expounding on the relevance, veracity and reliability of DNA evidence Chief Justice Roberts wrote: "DNA testing has an unparalleled ability both to exonerate the wrongly convicted and to identify the guilty". See *District Attorney's Office for the Third Judicial District, et. al. v. Osborn*, No. 08-6. Argued March 2, 2009—Decided June 18, 2009. Accordingly, the verdict in my case is absurd and should not be permitted to stand. Credible DNA standing alone renders any testimonial evidence insufficient as a matter of law to convict a person of a crime. The prosecution credited the DNA evidence to implicate the defendants in this case, so it cannot now be allowed to discount the same DNA to prevent the exoneration of Applicant.

If there is doubt as to whether motion for directed verdict on ground of insufficiency of evidence to sustain charge in indictment was properly made will be solved in favor of the appealing defendant. See e.g., *State v. Cody*, 186 S.E. 165 (S.C.1936). Applicant respectfully submits that **the evidence of record is insufficient beyond all doubt** and the matter should be resolved in Applicant's favor. *Id.*

IV. ON THE EVIDENCE ADDUCED AT TRIAL, "NO RATIONAL JURY" COULD HAVE FOUND GUILT BEYOND A REASONABLE DOUBT AND APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO RAISE THIS ISSUE ON APPEAL!

The review of the constitutional sufficiency of evidence to support a criminal conviction is governed by *Jackson v Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789 (1979), which requires a reviewing court to determine whether viewing 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. See, e.g., *U.S. v Nevils*, 598 F.3d 1158, 1163-1164 (9th Cir 2010) citing *Jackson, supra*. Applicant contends that no rational trier of fact could have found the essential elements of the crimes charged beyond a reasonable doubt on the evidence presented.

In the instant case the evidence presented to implicate Applicant was testimony of Davorius Mack, Terrell Addison and Dontavious Mack; the testimony essentially said that Applicant provided the murder weapon. (See Record of Appeal at 350:15, 19-20; 352:1, 24-25; 439:9-14; 514:9-18; 529:9-17; 534:7-17; 891:5-7, 23-24; 892:8-11, 13-25). This evidence standing alone, on its face, appears to place Applicant in the vehicle and knowingly provided the murder weapon to Dontavious Mack. The testimony of Reed Allen, Terrell Addison and Davorius Mack standing alone on, its face appears to have Applicant disposing the murder weapon by giving it to Reed Turner Record on Appeal 350:15; 19-20; 352:1, 3-6. 529:9-17; 534:7-17; 891:5-7, 23-24; 892:8-11, 13-25). This so-called disposal of the weapon testimony will be further clarified and elaborated in the Ineffective Assistance of Counsel section, *infra*.

However, in addition to the state's witnesses providing testimony that placed Applicant in the vehicle and providing the murder weapon, the prosecution likewise offered testimony and forensic DNA and fingerprint evidence by the State's investigator, Mike Williams, to identify the

perpetrators of the heinous crimes in this case. See e.g., State v. James, 179 S.E.2d 41 (S.C., 1971) (Where results of tests or analyses are offered to prove essential element of crime or connect defendant directly with commission of crime, such results must be substantiated by person who conducted tests or analyses). The video evidence conclusively proved Dontavious Mack and Terrell Addison committed the crimes. See (Record of Appeal at 739) and the DNA evidence **could not exclude or include Dontavious, Davorius and Terrell**. See (Record of Appeal at 749). On the other hand, the same DNA and fingerprint evidence testified to by investigator Mike Williams **conclusively proved that Applicant was not present in the vehicle** (Record on Appeal 740:3-14; 747:3-16; 749:11-24; 751:8-17) and therefore, could not have provided the murder weapon as alleged and falsely testified to. Just as **the forensic evidence included or did not exclude them, it excluded Applicant** and therefore, the evidence of record was insufficient as a matter of law to sustain Applicant's conviction. See e.g., Commonwealth v Robinson, 817 A.2d 1153, 1158 (2003) holding:

Where the evidence offered to support the verdict is in contradiction to the physical facts, in contravention to human experience and the laws of nature, then the evidence is insufficient as a matter of law."

Robinson, supra at 1158; *Santana, supra*; *Colna, supra*.

Under the test established in Jackson v Virginia, the court erred by failing to direct a verdict of acquittal, because the testimonial evidence that Applicant was present in the vehicle and provided the murder weapon is insufficient as a matter of law because of the DNA and fingerprint evidence, and Incontrovertible Physical Fact Doctrine, would make it impossible under the laws of nature for Applicant to provide the murder weapon when the physical facts established that Applicant was not even present in the vehicle. See Santana, supra; in Santana, a narcotics officer testified that he saw Santana leave a room where narcotics were found resulting

in Santana's conviction for possession. However, the door to the room was deadbolt locked and needed a key to get in or out. Moreover, no key to the door was found on Santana or in the area. The court held that it was not possible for the officer to have seen Santana leave the locked room and the testimony should have been rejected as incredible and contrary to the laws of nature and human experience.

The testimony that Applicant was present in the vehicle and provided the murder weapon should likewise be rejected because the incontrovertible and unassailable physical facts of the DNA and fingerprint evidence conclusively proved that Applicant was not in the vehicle should have compelled the trial court to reject the testimony as incredible and unbelievable and in contravention of the laws of nature and human experience and directed a verdict of acquittal due to insufficiency of the evidence. Santana, supra. Also see CJS TRIAL § 411, (Evidence that is in conflict with indisputable physical facts or laws of nature is not sufficient to take the case to the jury; A plaintiff is not entitled to go to the jury if evidence in his or her behalf consists of alleged facts and inferences that are inherently impossible and contrary to well-established physical laws or where the physical facts are of such character as to make the evidence unbelievable). See cases from several jurisdictions on this point: Evans v. Briley, 277 S.E.2d 184 (Va.,1981)(When physical evidence demonstrates conclusively that oral testimony upon which plaintiff relies is incredible, it is proper for trial court to remove case from jury); Cahill v. Liswood, 401 N.Y.S.2d 843 (N.Y.App.Div.2.Dept.,1978) (On motion to dismiss complaint at close of plaintiff's case, test is not whether a plaintiff's verdict would have to be set aside as contrary to weight of credible evidence, but whether trial court could hold that there was no rational process by which jury could have found for plaintiff); LaGuardia v. Lantz, 501 P.2d 1341 (Colo.App.,1972) (Where testimony introduced by plaintiff is shown by physical facts and

surroundings to be so inherently improbable that no reasonable person can accept it as true or possible, case should be taken from jury); Commonwealth Life Ins. Co. v. Auxier, 470 S.W.2d 335 (Ky.,1971) (A plaintiff is not entitled to go to the jury if evidence in his behalf consists of alleged facts and inferences which are inherently impossible and contrary to well-established physical laws, or where the physical facts are of such character as to make the evidence unbelievable); Kirkpatrick v. Butler, 483 P.2d 790 (Ariz.App.Div.1,1971) (Where undisputed physical evidence is such that to believe oral testimony, one is required to disregard natural law of physics, the oral testimony is not sufficient to give rise to jury question); Phoenix Ins. Co. of Conn. v. Wisconsin Southern Gas Co., 173 N.W.2d 610 (Wis.,1970) (Incredible evidence", which is evidence of a type insufficient to authorize submission of case to jury is evidence in conflict with uniform course of nature or with fully established or conceded facts); Peterman v. Darby, 419 S.W.2d 747 (Ky.,1967) (Plaintiff is not entitled to go to jury if his evidence consists of statements of alleged facts which are inherently impossible and at variance with well established physical laws, or where certain physical facts are of such character as to make that evidence unbelievable); Johnson v. Moore, 146 N.W.2d 599 (Minn.,1966) (Where admitted or conclusively proved physical facts demonstrate to a certainty the total failure of the testimony upon which plaintiff's case depends, or the falsity thereof, a verdict should be directed for the defendant). A directed verdict of acquittal should have been granted to Applicant in this case.

V. APPLICANT WAS DENIED DUE PROCESS OF LAW BECAUSE THE EVIDENCE PRESENTED AT TRIAL VIOLATED THE WINSHIP RULE BY NOT ESTABLISHING PROOF BEYOND A REASONABLE DOUBT

Applicant contends that Due Process under the United States and South Carolina Constitutions was violated in this case because proof beyond a reasonable doubt of every essential element of the crimes charged were not established based on the evidence

presented at trial. Again, the evidence relied on to implicate Applicant was testimony by Dontavious Mack, Davorius Mack and Terrell Addison that Applicant was present in the vehicle in Rock Hill, SC and provided a gun with full knowledge that it would be used to rob the BP gas station. (See **Record of Appeal pp.: 188, 279, 339, 876**). On the other hand, conclusive evidence that Applicant was not present in the vehicle and therefore could not have provided the gun as testified to is the analysis report of DNA testing from the South Carolina Law Enforcement Department (SLED) that excluded Applicant from being in the vehicle (See **Record of Appeal 749-751**) and that Applicant's fingerprints were not found in the vehicle and the vehicle had not been cleaned or washed. (See **Record of Appeal 740, 747**). See *In Re Winship*, 397 U.S. 358 (1970):

Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that 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. *Id.*

The prosecution failed to establish the essential element that Applicant was in the vehicle that the murder weapon was claimed to be passed from Applicant to Dontavious Mack because the prosecution's DNA and fingerprint evidence and expert witness' testimony excluded Applicant from being present in the vehicle. See (**Record of Appeal 740, 747, 749-751**). Also see *Brown v State*, 383 S.C. 506, 680 S.E.2d 909 (2009); *Dervin v State*, 386 S.C. 164, 687 S.E.2d 712 (2009); *State v. Brown*, 360 S.C. 581, 602 S.E.2d 392 (2004). In *Brown v State*, 383 S.C. 506, the court held there was insufficient evidence to convict and ordered Brown's released. In the instant case, the testimonial evidence was insufficient as a matter of law because the most essential element of the crime: presence in the vehicle, was not proved beyond a reasonable doubt because the forensic evidence trumped the testimony and rendered it unbelievable.

VI. INEFFECTIVE ASSISTANCE OF COUNSEL

To obtain post-conviction relief based on the alleged denial of effective assistance of counsel under the Sixth Amendment, the applicant must satisfy the two-prong test set out in Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Lorenzen v State, 657 S.E.2d 771, 376 S.C. 521, 529 (2008); Edmond v. State, 341 S.C. 340, 346, 534 S.E.2d 682, 685 (2000). First, the applicant must show that trial counsel's performance was deficient based on a standard of "reasonableness under prevailing professional norms." Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant "must demonstrate that this deficiency prejudiced him to the point that he was deprived of a fair trial" Walker v State, 397 S.C. AT 235.

The test for effective assistance of counsel is whether the representation was within the range of competence demanded of attorneys in criminal cases; standard is whether counsel's assistance was reasonably effective considering all the circumstances viewed as of the time of counsel's conduct. Alvin Watson, Jr., V State of South Carolina, 287 S.C. 356, 358 338 S.E.2d 636, 638 (1985); Strickland v. Washington, 466 U.S. 668 (1984)

In the instant case, Applicant contends that trial counsel, Mr. Kenneth Snow (hereafter Mr. Snow) was so lacking in every phase of his stewardship of this case that Applicant should be awarded a direct verdict of acquittal based on Sufficiency of the Evidence and the holding in Jackson v Virginia, 443 U.S. at 319, 99 S.Ct. 2781, and the **Incontrovertible Physical Facts Doctrine**, which holds: where the evidence offered to support the verdict is in contradiction to the physical facts, in contravention to human experience and the laws of nature, then the

evidence is insufficient as a matter of law. See e.g., *Commonwealth v. Robinson*, 817 A.2d 1153, 1158 (Pa. Super. 2003); *Commonwealth v. Karkaria*, 533 Pa. 412, 625 A.2d 1167 (1993); *Commonwealth v. Santana*, 460 Pa. 482, 333 A.2d 876 (1975); *Colna v. Northern Metal Co.*, 242 F.2d 546, 549 (3rd Cir. 1957).

a. **Ineffective on the Sufficiency of the Evidence Motion**

Mr. Snow on the motion for a directed verdict said nothing to support the motion and never mentioned the murder charge but appeared to argue against the kidnapping and armed robbery:

May it please the court, Your Honor, at this time we move the court for A directed verdict in favor of my client, Mr. Stewart...Even viewing the the evidence most favorable to the State...we believe the State has failed to create an issue for the jury...And I would argue in general for all these particular cases, particularly the kidnaping; I feel that the kidnapping charge certainly is not a natural occurrence of any conspiracy or any armed robbery. I would ask the court to consider that, in particular, and just move for a directed verdict.

Record on Appeal at 841-842.

In the instant case, the testimonial evidence, false and self-serving testimony, was allowed to trump the scientific DNA evidence collected by the prosecution's own forensic investigator that **excluded** Applicant as being present in the vehicle used to commit the **crime**, but did not **exclude** the other defendants. See **Record of Appeal at 740:3-14; 749-751** (no DNA or fingerprint evidence matched Ben Stewart; no chance that it's Ben, respectively)

b. **Ineffective in Failing to Object to Improper Closing Argument**

The Solicitor on close purposely misstated the evidence to improperly mislead the jury to discount DNA and fingerprints that **excluded Ben Stewart** from being present in the car by conflating as equivalent the inability to **include or exclude Dontavious Mack's** presence in the car based on DNA/fingerprints (**Record of Appeal at 740:3-14; 749-751**). Note:

Mr. Snow said "there is no forensic evidence to show that Mr. Stewart was in the car at all – no DNA, no fingerprints, no fibers, no hair, nothing to show that Ben Stewart was in that car." Well, guess what, there is no forensic evidence to show that Dontavious was in that car. No DNA, no fingerprints...nothing to show that he was in there. Yet nobody disagrees that Dontavious was in that car. No doubt he was in that car, and he was in the car bleeding...No DNA of Dontavious found in that car. No fingerprints of Dontavious...So I submit to you just because they didn't find anything in there does not mean that Ben Stewart was not in the car...**Record of Appeal 1140-1141. Also see Exhibit A-3).**

Compare evidence of record with Solicitor Brackett's comments and any objective observer will agree that he grossly misstated the evidence with the intent to mislead the court and jury, prejudice Applicant and deny Due Process, a fair trial and a true verdict. See *U.S. v Berger*, 295 U.S. 78 (1935); *Mincey v. State*, 444 S.E.2d 510 (S.C., 1994) Note:

The DNA obtained from item 18 is a mixture of at least two individuals. No conclusion can be made regarding the **inclusion or exclusion** of Dontavious Mack, Terrell Addison, or Davorious Mack as possible contributors to this mixture...Basically that means that the sample – there was something there in the DNA sample that was submitted, but there was not enough of a sample to verify whose it belonged – or who exactly the DNA belonged to. (**Record of Appeal 747**).

Based on the foregoing, Dontavious, Davorius and Terrell could not **specifically be included** as contributors, but **also could not be specifically excluded**. Therefore, the prosecutor committed prosecutorial misconduct in equating on close that no forensics were found on Dontavious but nobody disagrees that he was in the car. The prosecution should not be permitted to have it both ways, i.e., use forensics to implicate but discount forensics when it exonerates. The forensic expert testified it was "**no chance that it was Ben's DNA**" in the car (**Record of Appeal 751**). Counsel was ineffective in failing to object to these improper, prejudicial comments. *Strickland, supra*; *Brown v State*, 383 S.C. 506, 680 S.E.2d 909 (2009). In *Brown, supra*, South Carolina Supreme Court reversed the lower court who had found that counsel was ineffective for failing to object to impermissible comments on close by the solicitor on the ground that the comments were impermissible but Brown failed to prove that there was a

reasonable probability that but for the error the result of the trial would have been different. *Brown, supra*, 383 S.C. at 518, 680 S.E.2d at 915. In the instant case but for counsel's failure to object there is a reasonable probability that the result of the trial would have been different. The solicitor's conflating as equivalent that because Applicant's DNA and fingerprints were not found did not mean he was not in the car and Dontavious Mack's DNA and fingerprints were not found and no one doubts he was not in the car is a misstatement of the facts, i.e., the evidence was that Applicant was **excluded** by the forensic evidence and Dontavious could not be **included or excluded**. In the context of the record, i.e., all codefendants testified that Applicant was present and provided the murder weapon, this remark was fatally prejudicial, mislead the court and jury and denied Due Process and a fair trial. Therefore, the court should reverse the conviction for prosecutor misconduct and ineffective assistance of counsel for failing to object.

c. INVESTIGATION

Your Applicant further contends that trial counsel was ineffective in failing to adequately investigate the case and ascertain the applicable law. Had Mr. Snow known the applicable law, he would have known that it was his duty as advocate to subject the state's case to adversarial testing; *Cronic, Supra*; *Nance, supra*. Moreover, Mr. Snow would have known that it was his duty to call witnesses favorable to the defense and not imply as he did on close that the prosecution failed to produce exculpatory and favorable testimony and statements from Monday Bishop and Val Hudson:

...Mr. Stewart doesn't have to prove anything, but you think, though, you think that we would have heard testimony from either Monday or Val. Val certainly could have possibly cleared this whole thing up, but I don't think there was any mention of her. Who has the resources to bring her here? Who has the recourse to order her here to hear what she has to say? There's not a statement from her. No mention of her. That is the one person that could have cleared this whole thing up involving my client, but you never hear any mention of her. You better believe if she had

something that would have implicated my client, what do you think? They would (sic) ordered her to be here. Someone would have found her. (*Record of Appeal* at 1069).

It was indefensible and inexcusable that Mr. Snow did not defend the Applicant's interests, did not discharge his duty to investigate to ascertain the availability of potential witnesses to interview under his duty to provide Constitutionally effective assistance of counsel within the meaning of *Strickland*, *supra*; *Lounds*, *supra*. He utterly failed to conduct a reasonable investigation by failing to even interview Monday Bishop (hereafter Monday), who was present at the time and location that Reed Allen (hereafter Reed), Davorius Mack (hereafter Davorius) and Terrell Addison (hereafter Terrell) testified that Applicant gave Reed the murder weapon to hide (**Record on Appeal 350:15, 19-20; 352:1, 24-25; 439:9-14; 514:9-18; 529:9-17; 534:7-17; 891:5-7, 23-24; 892:8-11, 13-25**). Incredibly, Monday travelled from Hartsville, SC with her mother, Earline Nelson and was present every day of trial; yet Mr. Snow failed to avail the defense of this critical, indispensable testimony! *Lounds v. State*, 380 S.C. 454, 670 S.E.2d 646 (2008). In *Lounds*, *supra* the Court held that Lounds' attorney failed to adequately prepare for trial by failing to interview potential witnesses. *Id* at 460. Mr. Snow likewise failed to interview indispensable witnesses. See **Exhibit A-1, Monday Bishop's Affidavit**.

Also, Mr. Snow failed to interview Lawanda (Val) Hudson (hereafter Val) who was also present at the time and location that Reed (**Record on Appeal 529:9-17; 531:24**), Davorius (**Record on Appeal 350:15; 19-20; 352:1, 3-6**), and Terrell (**Record on Appeal 891:1-7, 23-24; 892:8-11, 13-25**), testified that Applicant gave Reed the murder weapon to hide. Also see **Exhibit A-2, Lawanda (Val) Hudson's Affidavit**.

Had Mr. Snow interviewed Monday (See Monday Bishop **Exhibit A-1, Affidavit**) and (Lawanda "Val" Hudson **Exhibit A-2, Affidavit**) these two witnesses would have refuted testimony that Applicant gave Reed the murder weapon to hide. Moreover, Monday and Val would have refuted testimony that Davorius and Terrell were present in Monday's house on the

night in question (Exhibit A-1, ¶¶11, 18, 19, 27, 28 and 'A-2, ¶¶3, 4, 7, 8, 12, 14, 15).

"[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." *Walker v State*, 397 S.C. 226, 236 (2012), citing *Edwards v State*, 392 S.C. 449, at 456, 710 S.E.2d 60 at 64 (2010); *Lounds v State*, 380 S.C. 454, 670 S.E.2d 646 (2008). Mr. Snow failed miserably in regard to undertaking a **reasonable investigation** in failing to interview Monday and Val and calling them to testify!

In *Lounds v State*, *supra*, the matter was reversed and remanded for a new trial because, as in the instant case, trial counsel failed to perform a reasonable investigation, *Id*, 380 S.C. 454, 460-463 (2008). Applicant implores the court to grant an evidentiary hearing via video conferencing and order Mr. Snow to articulate a valid reason for not interviewing Monday and Val under the circumstances, applicable law and facts of this case; applicant submits that it is impossible under the facts and circumstances of this case for Mr. Snow or anyone else to articulate an objectively strategic reason for not interviewing Monday and Val. Like counsel in *Lounds*, *supra*, the facts, testimony, circumstances and the trial transcripts "inescapably point to the conclusion that" Mr. Snow "simply had not adequately prepared the defense case". *Id*, at 380 SC 463. Mr. Snow's performance was not within the range of competence demanded of attorneys in criminal cases. See *Strickland*, *supra*; and *Alvin Watson v South Carolina*, 287 S.C. 356, 338 S.E.2d 636 (1985) where counsel was ruled ineffective for failing to inform *Watson* of his right to have a jury impaneled to consider a recommendation of mercy. Also see *Walker*, *supra*; *Edwards*, *supra*; *Lounds*, *supra*.

Again, Mr. Snow failed miserably in this regard because he knew that Monday and Val was present and their testimony would destroy the credibility of this critical testimony alleging

Applicant passed off the murder weapon. See **Record of appeal at 1069**. Even though he failed to properly investigate at the outset, Mr. Snow still had ample opportunity to interview Monday at the start of trial or as late as when the state rested its case; because Monday was in the courtroom for the entire trial. See Monday Bishop **Exhibit A-1, ¶(4)**.

d. COMPULSORY PROCESS

Mr. Snow was ineffective in failing to utilize compulsory process to subpoena witnesses to offer favorable evidence on Applicant's behalf. Applicant incorporates by reference ¶c, above as if written verbatim and in its entirety to support allegations that Mr. Snow failed to subpoena Monday and Val to offer favorable evidence bearing on guilt and innocence and the credibility of the prosecution's witnesses.

The 6th Amendment of the U.S. Constitution and South Carolina Constitution Art I, § 14, confers the right of compulsory process to obtain witnesses on the defense's behalf. Those same rights were likewise denied under the South Carolina Constitution, namely, Art. I§3, *Due Process and Equal Protection*; and Art. 1 §14, of the *United States Constitution*.

In the instant case, Mr. Snow subpoenaed two witnesses, Qiauna Efrid (was a prosecution witness) and Anna Warner who provided nothing helpful to the defense (See Record on Appeal pp 972-975 & 976-978 respectively). Apparently Mr. Snow tried to show via Ms. Efrid that only three people were present in the parking lot and therefore Applicant was not one of them. With Ms. Warner he also tried to show that it was less than four people present. But in both instances the witnesses said that they could not see well enough to say with any certainty who or how many people were in the parking lot. On the other hand Mr. Snow, in his own words, failed to secure relevant and favorable testimony available from Monday (See **Exhibit A-1 Affidavit**) and Lawanda (Val) (See **Exhibit A-2 Affidavit**):

...Mr. Stewart doesn't have to prove anything, but you think, though, you think that we would have heard testimony from either Monday or Val. Val certainly could have possibly cleared this whole thing up, but I don't think there was any mention of her. Who has the resources to bring her here?

Who has the recourse to order her here to hear what she has to say? There's not a statement from her. No mention of her. That is the one person that could have cleared this whole thing up involving my client, but you never hear any mention of her. You better believe if she had something that would have implicated my client, what do you think? They would ordered her to be here. Someone would have found her. (*Record of Appeal at 1069*).

There is no reasonable basis for Mr. Snow to forego first of all interviewing Monday and Val, and issuing subpoenas and eliciting testimony bearing on the credibility of Reed Turner, the prosecution's most important witness. Mr. Brackett, the Solicitor capitalized on this failure to call Monday and Val as witnesses and falsely bolstered the credibility of Reed Allen:

...Ben's sister...How far wouldn't she drive to come here to court?
How far would she drive to come here to say things didn't go down
that way? She was right there too. (*Record of Appeal at 1113*).

Mr. Snow, by his unprofessional errors of failing to investigate and produce this testimony, bolstered Reed's credibility and influenced the jury to believe this incredible testimony of a person who the jury questioned his veracity by requesting a read back of his testimony "of handing over the gun" (*Record of Appeal at 1193-1194 & Court's Exhibit #9*). The testimony of Monday Bishop and Lawanda (Val) Hudson would have shed much needed light on Reed Allen's unchallenged, un-refuted testimony. Furthermore, the failure to refute Reed's testimony influenced the jury to discount the fact that Applicant was **excluded based on DNA and fingerprints evidence in the vehicle** where every other defendant was **either included, or was unable to be included or excluded**. See *Record of Appeal at 740, 747, 749-751*. There is a reasonable probability that the errors affected the outcome, and without the errors there would have been a different outcome; i.e., Applicant would have had a directed verdict of acquittal due to insufficient evidence or acquittal by the jury. See *Strickland, supra; Lounds, supra; Walker, supra; Edwards, supra*. A reasonable probability is a probability sufficient to undermine the reliability of the outcome. See *Strickland, supra*, at 2068, 406 US 693. "In other words, [the applicant] must show that the factfinder would have had a reasonable doubt respecting guilt." *Id.* (quoting *Strickland*, 466 U.S. at 695, 104 S.Ct. 2052). This standard has been met!

In *Lounds, supra*, the South Carolina Supreme Court reversed and ordered a new trial when counsel in that case failed to call witnesses to testify for the defense:

As to the prejudice resulting from counsel's deficient performance, we believe. Petitioner clearly was prejudiced by Newell's failure to subpoena and call witnesses who would have supported petitioner's own testimony at trial. Moreover, the jury's questions during deliberations indicates it also struggled with whether petitioner was guilty of kidnapping. Thus, we find that if additional witnesses had confirmed petitioner's there is a reasonable likelihood the result of the trial would have been different on the kidnapping count. *Id* at 380 SC 463.

The instant case is distinguishable from *Lounds, supra* in that your Applicant did not testify. However, the testimony of Monday and Val would have destroyed Reed, Davorius and Terrell's testimony alleging that Applicant gave Reed the murder weapon to hide; casting more doubt on already doubtful testimony and would have put the case in a whole different light. In the instant case the jury likewise struggled with testimony of Reed Allen (Record of Appeal 1193-1194) who claimed that Applicant gave him the murder weapon to hide (Record on Appeal 514:9-18, 531:24; 534:711). His pretrial statement was utterly contradictory *vis-à-vis* his trial testimony:

I got a home phone call from Ben Stewart. I been knowing Ben for two or three months. Because he is not from here, he don't stay down here for one, he's from Philadelphia. Ben calls me and he asked me to do something for him. He didn't go into detail over the phone. Eventually when he got there, I want to say, at least two people were with him... This was at Monday Bishop's place. Val was there too... Ben told me to stash the bag. I went across the parking lot to the next apartments and slid the bag under a bush. I was by myself. I walked back and told Ben where the bag was. Then they all left... Next I got a call from Ben saying he need to get the bag from me. I got the bag and took it to him... When I handed the bag to Ben I could tell it was still the same way as when I put it under the bush... Everything was still in the bag - the gun, gloves, and skully (Reed Allen's Statement to Rock Hill Police Department, 10/27/06. **Exh. A-3**).

When Reed's pretrial statement is compared to his trial testimony the home phone call became Monday's phone, and him getting a call from Ben to retrieve the bag and gun, is that he did not get it and give it to him but he knows that he got, but did not actually see him get it. See (Record on Appeal 526, 542-543, 569-570, 553 respectively).

Had Mr. Snow called Monday and Val to refute that testimony the result of the trial would have been different. Strickland, supra; Lounds, supra. Counsel's unprofessional errors served to bolster the doubtful, but uncontested testimony of Reed, Davorius and Terrell regarding the murder weapon being given to Reed to hide by the Applicant. The jury was basically compelled to believe testimony that Applicant passed the murder weapon when Monday and Val who were present but did not testify to the contrary. Lounds, supra. The Solicitor capitalized on this egregious error on close telling the jury that if it was not true Monday would drive any distance to set the record straight (**Record on Appeal 1113**).

Mr. Snow himself proves that his competence was far below the standard demanded of attorneys in criminal cases, Watson v State of South Carolina, supra, during his close to the jury when he apparently failed to realize that it was his duty to bring the favorable testimony of Monday and Val before the jury, and to request funds to do so if necessary instead of attempting to shift that duty to the prosecutor. See (**Record of Appeal at 1069**).

It is plain on the face of the record to any objective observer that Mr. Snow utterly failed to provide effective assistance of counsel within the meaning of Strickland v. Washington, supra; Watson, supra; Lounds, supra; Cronic, supra; Nance, supra.

e. FAILURE TO TEST THE PROSECUTION'S CASE

Mr. Snow utterly failed to hold the prosecution to its burden of proof of guilt beyond a reasonable doubt. See Victor v Nebraska, 511 U.S. 1 (1994). In United States v Cronic, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 1884 and the holding in Nance v Ozmint, 367 S.C. 547, 626, S.E.2d 878 (2006) it was ruled that "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of *Sixth Amendment* rights that makes the adversarial process itself presumptively unreliable. Cronic, supra; Nance v

Ozmint, supra. Your Applicant respectfully submits that Mr. Snow entirely failed to subject the prosecution's case to meaningful adversarial testing by allowing testimony that Applicant passed the murder weapon to Reed Allen in his sister's house in her and Val's presence, yet neither of them was called to refute that testimony is tantamount to Monday and Val confirming that the testimony of Reed, Davorius and Terrell was true! Your Applicant further submits that Mr. Snow failed to investigate and prepare this case for trial because he apparently thought from day one that he could induce Applicant to plead out. See **Exhibit A-5**, letter from defense counsel, Mr. Snow dated February 17, 2009, stating in part, "I recommend you accept this plea." His view expressed in the letter expressing his view that testimony of Davorious Mack, Dontavious Mack and Reed Allen "creates a great challenge to your defense and acquittal", conclusively demonstrates that he did not do his homework in investigating the case, locating witnesses, exercising compulsory process to present exculpatory testimony from Monday Bishop and Lowanda (Val) Hudson), opposing the above mentioned testimony. Recall the Solicitor capitalizing on close of the failure of Monday Bishop to testify. See *infra* at 24:

...Ben's sister...How far wouldn't she drive to come here to court?
How far would she drive to come here to say things didn't go down
that way? She was right there too. (*Record of Appeal at 1113*).

Monday and Val's testimony coupled with the the DNA would have put this case in a much different light. I am convinced that if Mr. Swerling had represented me I would have got justice in this case.

Even worse though, it appears that Mr. Snow failed to understand, as Chief Justice John Roberts does: "DNA testing has an **unparalleled** ability both to exonerate the wrongly convicted and to identify the guilty". See District Attorney's Office for the Third Judicial District, et. al. v. Osborn, No. 08-6. Argued March 2, 2009—Decided June 18, 2009; emphasis

my own. Adequate representation by Mr. Snow would have shredded the state's weak case and won a deserved acquittal. Applicant incorporates by reference §§I-VI inclusive of this Memorandum of Law as though it was set-forth verbatim herein in support of this argument.

f. CUMULATIVE EFFECT OF COUNSEL'S INEFFECTIVENESS

Applicant incorporates by reference §§ IV-VI inclusive as if set forth verbatim herein as support for the cumulative effect of trial counsel's ineffectiveness regarding failing to make proper investigation, ascertaining the applicable laws, interviewing potential witnesses, failing to use compulsory process to subpoena witness who were, available, ready, willing and eager to provide exculpatory testimonial evidence on Applicant's behalf and otherwise failing to make the trial an adversarial process. See *Nance v Frederick*, 358 S.C. 480, 596 S.E.2d 62 (2004).

i. Misstating the evidence!

Mr. Snow was ineffective in misstating the evidence that events occurred at Reed Allen's house when in fact it was Monday Bishop's house (Record on Appeal 350:15, 19-20; 352:1, 24-25; 439:9-14; 514:9-18; 529:9-17; 534:7-17; 891:5-7, 23-24; 892:8-11, 13-25). Applicant was prejudiced because it falsely bolstered Reed's testimony and falsely implied that he and Applicant knew each other well and would be close enough for Applicant to ask him to hide the murder weapon. *Strickland, supra*.

g. PROSECUTOR MISCONDUCT

i. Knowingly using perjured testimony!

The prosecutor plays a unique role in our criminal justice system; that role imposes the duty to refrain from improper methods calculated to produce a wrongful conviction; to seek justice, not convictions. *U.S. V Berger*, 295 U.S. 78 (1935); *Brown v State*, 680 S.E.2d 909 (S.C. 2009) In the instant case the prosecutor purposely used improper methods calculated to

secure a tainted conviction of Applicant by **suborning the perjured** testimony of Dontavious Mack, Davorious Mack, Terrell Addison and Reed Allen. How is this so? Because the prosecution knew that the DNA and fingerprint evidence exonerated Applicant and thus the aforementioned testimony could only be false. It is plain to see that the prosecution on direct of investigator Mike Williams had him testify based on a report that did not exclude Applicant, but failed to question him on the report that did exclude Applicant (**Exh. A-4**). According to the investigator on cross, "...there is no chance that it is Ben..." (**Record of Appeal 749-751**).

ii. Failing to disclose Brady material!

Two Solicitors, including Mr. Brackett interviewed Monday Bishop at her home in Hartsville, SC and suppressed her exculpatory statement to them that the events testified to as transpiring at her house by Reed Allen, Davorious Mack and Terrell Addison was false. See **Exhibit A-1, Monday Bishop Affidavit**.

In Brady v. Maryland, 373 U.S. 83 (1963) the court held:

We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. . See Kyles v Whitley, 514 U.S. 419, 440-441, 434-435, 115 S.Ct. 1555 (1995).

In the instant case the prosecution was acting in bad faith in withholding the statement as evidenced by his falsely bolstering the credibility of Reed Allen's testimony by stating that if Reed's testimony was false that Monday would have drove any distance to refute the testimony that Ben gave Reed the murder weapon to hide or dispose of. See (**Record of Appeal at 1113**).

Applicant will contemporaneously seek discovery of the suppressed, exculpatory statement taken from Monday Bishop, see § 17-27-150 and also seek a subpoena to have Mr. Brackett explain

the circumstances surrounding his decision to suppress this exculpatory evidence. Moreover, Monday was present each day of trial. See **Monday Bishop Affidavit**.

iii. **Knowingly Misstating the Evidence on Closing Argument!**

On several occasions the prosecution knowingly and intentionally misstated the evidence on close that prejudiced Applicant and influenced the judge and jury to discount the exculpatory forensic evidence and credit the **incredible and unbelievable testimony** that Applicant provided the murder weapon to Dontavious Mack and disposed of it through Reed Allen.

"Mr. Snow said 'there is no forensic evidence to show that Mr. Stewart was in the car at all -no DNA, no fingerprints, no fibers, no hair, nothing to show that Ben Stewart was in that car.' Well, guess what, there is no forensic evidence to show that Dontavious was in that car. No DNA, no fingerprints...nothing to show that he was in there. Yet nobody disagrees that Dontavious was in that car. No doubt he was in that car, and he was in the car bleeding...No DNA of Dontavious found in that car. No fingerprints of Dontavious...So I submit to you just because they didn't find anything in there does not mean that Ben Stewart was not in the car"...**Record of Appeal 1140-1141.**

It is outright disingenuous, totally false and misleading to argue that Dontavious was **excluded** by the DNA and fingerprint analysis as was the case with Ben Stewart. The BP video showed Dontavious wearing gloves (Record of Appeal 747) and explains why his fingerprints were not found. As for the DNA, Dontavious was **not excluded**, but Ben Stewart was **excluded**:

The DNA obtained from item 18 is a mixture of at least two individuals. No conclusion can be made regarding the inclusion or exclusion of Dontavious Mack, Terrell Addison, or Davorious Mack as possible contributors to this mixture...Basically that means that the sample - there was something there in the DNA sample that was submitted, but there was not enough of a sample to verify whose it belonged - or who exactly the DNA belonged to. (Record of Appeal 747; also see pg. 749).

Based on the foregoing, Dontavious, Davorius and Terrell could not **specifically be included** as contributors, but also could not be **specifically excluded** (Record of Appeal 749-

751). Therefore, the prosecutor committed prosecutorial misconduct in equating on close that no forensics were found on Dontavious but nobody disagrees that he was in the car. The prosecution should not be permitted to have it both ways, i.e., use forensics to implicate but discount forensics when it exonerates. The forensic expert testified it was "no chance that it was Ben's DNA" in the car (Record of Appeal 751). These impermissible remarks were pervasive and so infected the entire trial with unfairness that the resulting conviction denied due process. See Brown v State, 383 S.C. 506, 517, 680 S.E.2d at 917; Berger, supra; Mincey, supra. In Mincey, trial counsel failed to object to prejudicial closing argument falsely insinuating that Mincey had intimidated witnesses not to testify against him.

VII. EVIDENTIARY HEARING

South Carolina's PCR Statute grants the unfettered right to an evidentiary hearing to all PCR applicants. See Uniform Post-Conviction Procedure Act § 17-27-80. In Leamon v State, 363 S.C. 432, 611 S.E.2d 494 (2005) the Supreme Court ruled that even if you are confined in another state, as is the Applicant, the one year statute for Post-Conviction still applies. Because Applicant is confined in the Commonwealth of Pennsylvania, Due Process mandates the hearing is via video conferencing; a practice that has become quite common.

VIII. VIDEO CONFERENCING

SCI-Frackville has agreed to accommodate the Honorable Court of South Carolina by making its video conferencing facilities available for my evidentiary hearing when scheduled. See (Exhibit A-6). Counselor, Ms. Newberry, of SCI-Frackville contact information is as follows: 1111 Altamont Boulevard, Frackville, PA 17931-2699 (570) 874-4516.

In the United States District Court for the District of South Carolina Magistrate Judge George C. Kosko conducted an evidentiary hearing on a Post-Conviction Motion to vacate. See Jose R. Ortiz v United States of America, 2006 U.S. Dist. Lexis 28461 (D.S.C. May 3, 2006). Also see Bernard Martin v United States of America, 2012 U.S. Dist. Lexis 119416 (S.D. W. Va., May 3, 2011); United States of America v. Leroy Baker, 836 F.Supp. 1237; 1993 U.S. Dist. Lexis 16363 (E.D. North Carolina, 1993); Estate of Hezekiah Harvey v. Roanoke City Sheriff's Office, et al, 2007 U.S. Dist Lexis 71511 (W.D. Virginia, Roanoke Division, September 26, 2007); Vilchez v Holder, 682 F.3d 1195 (9th Cir. 2012). Due Process in the instant application for post-conviction relief compels this Court to order an evidentiary hearing via video.

conferencing so that timely litigation of this matter is provided to prevent the loss or unavailability of essential witnesses and the substantial prejudice that will result. For example, Val Hudson is ailing and nearly incapacitated and could very well succumb to her ailments in the very near future. Justice delayed is justice denied! Her testimony, in the words of defense counsel, Mr. Snow "Val certainly could have possibly cleared this whole thing up,...". (**Record of Appeal 1069, Exhibit A-2**). The *Fourteenth Amendment's due process clause* guarantee of fundamental fairness" requires the state to take steps to assure that criminal defendants have a fair opportunity to present their defense. See e.g., *Ake v. Oklahoma*, 470 U.S. 68, 76-77, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). An evidentiary hearing via video conferencing will permit truth and justice to prevail.

CONCLUSION AND RELIEF

Applicant's conviction cannot be reconciled with the facts of this case, the applicable law, and evidence-based peer-reviewed scientific research. Nor can this conviction be reconciled with legal standards regarding proof beyond a reasonable doubt, proof beyond a reasonable doubt of every essential element of the crime, sufficiency of the evidence, the adversarial system, the duty of a prosecutor to seek justice and not just conviction, and effective assistance of counsel. As the court explained in *Ard v Catoe*, 372 S.C. 318, 642, S.E.2d 590 (2007) (Waller, J.) because of the strong presumption that counsel did provide adequate assistance, in order to prove effective assistance of counsel, it must be shown that "(1) counsel's performance was deficient and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." *Id.* at 596. Deficient performance includes the trial counsel's failure to perform his/her duty to conduct a reasonable investigation, which requires that "at a minimum, counsel has the duty to interview potential witnesses and to make an independent

investigation of the facts.” *Ard*, at 597, 372 S.C. 331-32 (citing *Troedel v Wainwright*, 667 F.Supp. 1456, 1461 (S.D. Fla. 1986), *aff’d* 828 F.2d 670 (11th Cir. 1987); *Lounds*, *supra*.

The failure of defense counsel to effectively capitalize on the DNA evidence that **excluded** Applicant as a perpetrator of these crimes constitutes gross deficiencies in performance in this case. As Chief Justice John Roberts so aptly wrote: “DNA testing has an **unparalleled** ability both to exonerate the wrongly convicted and to identify the guilty”. Reliable DNA evidence should always trump testimonial evidence, and should do so in this case. The 311 exonerations nationwide to date reported by the Innocence Project (see page nine *infra*) is testament of the frailty and likely unreliability of testimony, especially, as here, when leniency is being sought for criminal behavior. Therefore, there is a reasonable probability that, but for counsel’s errors, including failing to object to the prosecution’s misstatement of the evidence on close that equated the **exclusion** of Applicant’s DNA and the inability to **include or exclude** Dontavious Mack’s DNA as the same, and failing to investigate and call Monday Bishop and Lawanda (Val) Hudson to counter Reed Allen’ testimony, that the prosecution capitalized on close by saying if Reed was lying Monday would drive any distance to set the record straight, See(*Record of Appeal at 1113*) page 24 *infra*, the result of the trial would have been different. Accordingly, the following relief is requested:

- a. Appoint counsel pursuant to §17-27-60.
- b. Grant permission to proceed *In Forma Pauperis*
- c. Grant the right to discovery pursuant to §17-27-150.
- d. Grant an evidentiary Hearing via Closed Circuit Television pursuant to §17-27-80

where trial counsel and appellate counsel are compelled to justify stewardship of this case, and the Solicitor is compelled to explain his suppression of **Brady**, material i.e., Monday Bishop’s

statement to him, and so that the court can review the denial of motion for direct verdict for insufficiency of the evidence, and to consider and determine whether any rational jury could find guilt on the evidence adduced at trial, and to consider and determine whether every essential element of the crimes charged were established beyond a reasonable doubt and to consider and determine whether the complained of instances of prosecutor conduct so infected the trial that Applicant was prejudiced and a fair trial was denied.

e. Reverse the conviction for insufficiency of the evidence and discharge from custody. Or in the alternative:

f. Reverse the judgment of conviction because no rational trier of fact could find guilt beyond a reasonable doubt on the evidence adduced at trial and grant a new trial.

g. Reverse the judgment of conviction because guilt beyond a reasonable doubt of every essential element was not established at trial and grant a new trial.

h. Reverse the judgment of conviction due to a breakdown in the adversarial process and grant a new trial.

i. Reverse the judgment of conviction because ineffective assistance of counsel is plain on the face of the record and grant a new trial.

j. Reverse the judgment of conviction due to the cumulative ineffectiveness of counsel and grant a new trial.

k. Reverse the judgment of conviction due to intentional prosecutor misconduct to rescue a failed prosecution—bar retrial and discharge from custody.

Respectfully submitted,



Ben Robert Stewart HK-9369
SCI-Frackville
1111 Altamont Blvd.
Frackville, PA 17886-1021

IN THE COURT OF COMMON PLEAS

2013 QP 46-3731

MOTION REQUESTING DISCOVERY

V

State of South Carolina

MOTION FOR DISCOVERY

NOW COMES Ben Robert Stewart, the Applicant herein, being duly sworn under oath and the penalties for perjury deposes and says:

1. That I am the Applicant herein and moves this Honorable Court pursuant to §17-27-150
 2. I am applying for Post-Conviction Relief contemporaneously with this discovery request.
 3. I am wrongly convicted in violation of due process of law/effective assistance of counsel.
 4. The Applicant needs to discover exculpatory material the prosecution failed to disclosed
- in violation of Brady v. Maryland, 373 U.S. 83 (1963); more specifically, the statement of my sister Monday Bishop to Solicitor Brackett wherein she refuted the allegations that Applicant gave a gun to Reed Allen in her home to dispose of.

5. The suppression of this statement infected the entire trial and there is a reasonable probability that with the statement, the outcome of the trial would have been different.

Applicant likewise needs Court **exhibit #9** relating to jury request for read back of testimony.

WHEREFORE, Applicant prays that discovery is granted to permit justice to have a chance to prevail.

Dated: November 25, 2013

Ben Robert Stewart, HK-9369
SCI-Frackville
1111 Altamont Blvd.
Frackville, PA 17886-1021

FILED-RECEIVED
2013 DEC -9 PM 3:42
DAVID HAMILTON
C.C.P. & GS.
YORK COUNTY, SC

STATE OF SOUTH CAROLINA

County of YORK

Ben Robert Stewart, HK-9369

V.

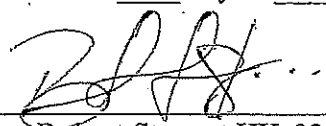
State of South Carolina

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PROOF OF SERVICE

I, BEN ROBERT STEWART, HK-9369, hereby certify that I am timely submitting my Application for Post-Conviction Relief, within the one year time frame, and in accordance with the Mailbox Rule for incarcerated litigants, I will place in the mailbox at SCI-Frackville, on the date listed below, in accordance with the South Carolina Post Conviction Relief Statute, one copy of my Application for Post-Conviction Relief, one copy of my Table of Exhibits and Table of Cases, one copy of my Memorandum of Law in Support, one copy of my Motion for Discovery via certified mail return receipt requested addressed to Clerk of York County South Carolina Court of General Session 1675 1G Highway, York, SC 29745 for filing and service upon the respondent. *P.O. box. 649, York, SC. 29745-0649*

Dated this 26th day of November, 2013.



Ben Robert Stewart HK-9369
SCI-Frackville
1111 Altamont Blvd.
Frackville, PA 17931

Exhibit #
3. A

STATE OF SOUTH CAROLINA

COUNTY OF YORK.

BEN STEWART

Applicant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

CASE NO.: 2013-CP-46-3731

**AMENDMENT TO APPLICATION
FOR POST CONVICTION RELIEF**

Applicant, by and through his undersigned attorney, hereby amends his application for Post-Conviction Relief filed December 9, 2013. This amended complaint adopts and includes all grounds in this original application and the supporting documents filed on December 9, 2013 including the Conclusion of Facts and Memorandum in Support of PCR application and the Memorandum of Law in support of PCR. Applicant seeks to have his conviction and sentence vacated. Applicant further alleges that the court gave an improper jury charge for Murder and further alleges as additional grounds regarding a claim of ineffective assistance of counsel as follows:

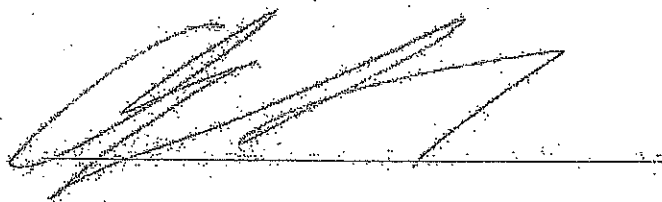
1. Applicant's trial counsel, Kenneth Snow, failed to discuss a defense strategy with applicant.
2. Applicant's trial counsel, Kenneth Snow, failed to review evidence with Applicant or provide a copy of the evidence to applicant.
3. Applicant's trial counsel, Kenneth Snow, failed to properly investigate the case.
4. Applicant's trial counsel, Kenneth Snow, failed to obtain information from Monday Bishop or to call her as a witness for the defense.

5. Applicant's trial counsel, Kenneth Snow, failed to obtain information from Lawanda Val Hudson or to call her as a witness for the defense.
6. Applicant's trial counsel, Kenneth Snow, failed to properly argue the issue of Applicants competence to stand trial.
7. Applicant's trial counsel, Kenneth Snow, failed to interview the witness Reed Allen
8. Applicant's trial counsel, Kenneth Snow, failed to object to a leading question by the solicitor to Dontavious Mack, "ben didn't want to go in he gave you the gun" (p 188, line 12) and "he gave you the gun, he knew you were robbing the BP station" (p188, line 18).
9. Applicant's trial counsel, Kenneth Snow, failed to object to hearsay by Davorius Mack, "he told me to come to girlfriends house, "take Terrel Addison home" (p333, line 21-23) and Terrel Addison saying "lets stick" (p338, line 21).
10. Applicant's trial counsel, Kenneth Snow, failed to object to Reed Allen's hearsay statement "Ben Stewart told me to put gun up" (p515, line 12-18).
11. Applicant's trial counsel, Kenneth Snow, failed to object to Reed Allens hearsay "I heard something about Donte being shot" (p529, line 4).
12. Applicant's trial counsel, Kenneth Snow, failed to object to Reed Allens hearsay statement "Ben Stewart told me to put gun up" (p532, line 14).
13. Applicant's trial counsel, Kenneth Snow, failed to object to hearsay following question if someone is "asking Terrell about putting his gun up?", "did Stewart or Mack ask him?", followed by the response "it could have been" (p535, lines 2, 23).
14. Applicant's trial counsel, Kenneth Snow, failed to object to testimony from Lt. Rudick regarding suspected "straw and crack cocaine" in car. (p 650, lines 17-19).

15. Applicant's trial counsel, Kenneth Snow, failed to make a sufficient pre-trial motion to sever the trials of Ben Stewart and co-defendant Terrell Addison and Addison testified that "Ben gave the gun to Dontavious" (p 942, line 16-19).
16. Applicant's trial counsel, Kenneth Snow, failed to object to the jury charge for Murder that included the instruction that inferred malice "may arise when the deed is done with a deadly weapon" (p1160, line 25, p 1161, line 1).
17. The court gave an improper jury charge for Murder that included the instruction that inferred malice "may arise when the deed is done with a deadly weapon" (p1160, line 25, p 1161, line 1).
18. The court failed to charge constructive possession regarding accomplice liability or hand of one hand of all for the charge of Possession of a Firearm During the Commission of a Violent Crime (p1203, line 22-25) following a jury question regarding this (p1201-1202).
19. Applicant's Appellate counsel Joseph Savitz and Wanda Carter, failed to appeal these issues regarding the improper jury charges.

Furthermore, the Applicant requests that he be permitted to Amend his PCR application to conform to the evidence presented at the PCR hearing should any new or unaddressed issues arise during the course of the hearing that have not been specifically addressed in the Application. See Simpson v. Moore, 367 S.C. 587, 627 S.E.2d 701 (2006).

Respectfully submitted,

A handwritten signature in dark ink, consisting of several overlapping, stylized strokes, positioned above a horizontal line.

OLA JOHNSON
Attorney for Applicant
P.O. Box 549
Lexington, SC 29071
803-360-8692 Phone
olajohnsonlaw@gmail.com

This 24 day of November, 2021,

STATE OF SOUTH CAROLINA

COUNTY OF YORK

BEN STEWART,

Applicant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

CASE NO.: 2013-CP-46-3731

CERTIFICATE OF SERVICE

I, Ola Johnson, hereby certify on that on November 24, 2021, I served a copy of the
AMENDMENT TO APPLICATION FOR POST CONVICTION RELIEF on William H. Ray,
Assistant Attorney General by Email and U.S. Mail to the following address:

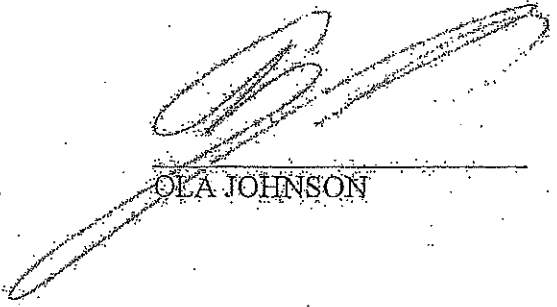
William H. Ray, Asst. Attorney General

SC Attorney General's Office

P.O. Box 11549

Columbia, S.C. 29211

11-24-21
Date


OLA JOHNSON

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF YORK

FILED-RECEIVED

2022 NOV 29 AM 9:22

BEN STEWART

DAVID HAMILTON
C.G.P. & GS
Plaintiff(s)
YORK COUNTY, SC

CIVIL ACTION COVERSHEET

2013-CP -46- 03731

VS.

STATE OF SOUTH CAROLINA

Defendant(s)

Submitted By: OLA JOHNSON

Address: PO BOX 549 LEXINGTON, SC 29071

SC Bar #: 68563

Telephone #: 8033608692

Fax #: 8039948279

Other: _____

E-mail: olajohnsonlaw@gmail.com

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing cases that are NOT E-Filed. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint. This form is NOT required to be filed in E-Filed Cases.

DOCKETING INFORMATION (Check all that apply)

**If Action is Judgment/Settlement do not complete*

JURY TRIAL demanded in complaint.

NON-JURY TRIAL demanded in complaint.

This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.

This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.

This case is exempt from ADR. (Certificate Attached)

NATURE OF ACTION (Check One Box Below)

Contracts	Torts - Professional Malpractice	Torts - Personal Injury	Real Property
Constructions (100)	Dental Malpractice (200)	Conversion (310)	Claim & Delivery (400)
Debt Collection (110)	Legal Malpractice (210)	Motor Vehicle Accident (320)	Condemnation (410)
General (130)	Medical Malpractice (220)	Premises Liability (330)	Foreclosure (420)
Breach of Contract (140)	Previous Notice of Intent Case # 20 ____ -NI- ____ -	Products Liability (340)	Mechanic's Lien (430)
Fraud/Bad Faith (150)		Personal Injury (350)	Partition (440)
Failure to Deliver/ Warranty (160)	Notice/ File Med Mal (230)	Wrongful Death (360)	Possession (450)
	Other (299) _____	Assault/Battery (370)	Building Code Violation (460)
Employment Discrim (170)		Slander/Libel (380)	Other (499) _____
Employment (180)		Other (399) _____	

4. Cases are exempt from ADR under ADR Rule 3(b) upon the following grounds:

- a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
- b. Requests for temporary relief;
- c. Appeals;
- d. Post Conviction relief matters;
- e. Contempt of Court proceedings;
- f. Forfeiture proceedings brought by governmental entities;
- g. Mortgage foreclosures; and
- h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.

5. Cases may also be exempt from ADR under ADR Rule 3(c) upon motion to and approval by the court.

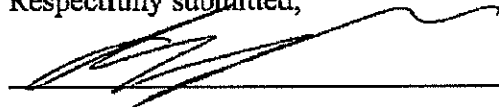
6. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.

7. Application of a party to be exempt from payment of neutral fees due to indigency should be filed with the Clerk of Court prior to the scheduling of the ADR conference.

Please Note: You must comply with the Supreme Court Rules regarding ADR.
Failure to do so may affect your case or may result in sanctions.

1. Applicant's counsel, Kenneth Snow, failed to challenge the indictment for Applicants pistol charge.
2. Applicant's counsel, Kenneth Snow, failed to challenge the time served credit that would allow Applicant to receive credit from his original arrest date in Pennsylvania on 1-27-07.
3. Applicant's counsel, Kenneth Snow, failed to challenge the Applicants removal to South Carolina under the Agreement on Detainers S.C. Code 17-11-10 Art. VI, Sec. b. based on the mental health history of Applicant
4. Furthermore, the Applicant requests that he be permitted to Amend his PCR application to conform to the evidence presented at the PCR hearing should any new or unaddressed issues arise during the course of the hearing that have not been specifically addressed in the Application. *See Simpson v. Moore*, 367 S.C. 587, 627 S.E.2d 701 (2006).

Respectfully submitted,



OLA JOHNSON

Attorney for Applicant

P.O. Box 549

Lexington, SC 29071

803-360-8692 Phone

olajohnsonlaw@gmail.com

This 25 day of November, 2022.

Petitioners, Objections, notice, Affidavit

1. Exh #10. Applicant's Return to Conditional Motion To Dismiss, dated May 2014
2. Exh #9. VERIFIED COMPLAINT FOR MANDAMUS AND WRIT OF PROHIBITION AND REQUEST FOR EXPEDITED REVIEW dated June 2015
3. Exh #7. NOTICE, AFFIDAVIT AND MOTION FOR EXPEDITED PCR, dated Jan 2016

Exhibit
#10

STATE OF CAROLINA

County of YORK

Ben Robert Stewart, HK-9369

v.

State of South Carolina

) IN THE COURT OF COMMON PLEAS

)

) 2013-CP-46-3731

)

) **APPLICANT'S RETURN TO**
) **CONDITIONAL MOTION**
) **TO DISMISS**

)

I, Ben Robert Stewart, *pro se, In forma pauperis*, Applicant being duly sworn, present my Return to the "Conditional Order to Dismiss" deposes and says the following:

EXTENSION OF TIME TO FILE RETURN

I. On April 28, 2014, Applicant placed in the mailbox at SCI-Frackville a Motion for a 30 day Extension of Time to submit my Return to the Conditional Order of Dismissal.

LACK STANDING

II. The Conditional Order to Dismiss, signed by the Honorable J. Derham Cole, was obviously drafted by Assistant Attorney General J. Croom Hunter; it held at pg. 4, that Applicant "lacks standing to bring this post-conviction relief application at this time..." and the Court "intends to dismiss this Application without prejudice unless the Applicant provides specific reasons, factual and legal, why the Application should not be dismissed in its entirety".

The Order demonstrates several things: one is that Mr. Hunter deliberately reframed issues raised by Applicant; and two, that the Court has not read Applicant's PCR Petition and Memorandum of Law because Applicant did not request to be transported to South Carolina for an evidentiary hearing as falsely implied by Mr. Hunter and the Court in the "Conditional Order to Dismiss" that the Court signed.

Let's be crystal clear: Applicant requested a hearing via video-conferencing that was agreed to by officials at SCI-Frackville where Applicant is confined. How it is that Mr. Hunter

and the Court refuses to understand this simple straight forward request? See PCR Application at pg. 11 ¶(d); Memorandum of Law at 32-33 (hereafter Memo), and Exhibit A-6. It is Applicant's PCR and it is Applicant's and only the Applicant's prerogative to raise issues; it is not the Assistant Attorney's General right or prerogative to reframe Applicant's issues. Therefore, the reliance on Clayton v State, 278 S.C. 655, 658, 301 S.E.2d 133, 134 (1981) is misplaced and the holding and rationale in this case is erroneous because the instant case is distinguishable from the case cited to support the rationale that Applicant lacks standing because South Carolina has no duty to transport Applicant for a hearing. I repeat; I did not and am not requesting to be transported for the hearing, but for the hearing to be held via video-conferencing. See PCR Application at 11; Memo at 32-33.

In Leamon v State, 363 S.C. 432, 611 S.E.2d 494 (2005) the court held:

In Clayton, the Court concluded the State does not have the duty and authority to ensure an out-of-state prisoner's presence at a South Carolina PCR hearing. **However, the fact that the State is not required to transport federal inmates for State PCR proceedings does not prevent an out-of-state inmate from filing a PCR application within the statute of limitations.** Emphasis added.

In Leamon, *supra*, the Applicant served a sentence in North Carolina and filed a PCR within one year after returning to South Carolina and the South Carolina Supreme Court dismissed Leamon's PCR as untimely. Therefore, the State's position that time is tolled until Applicant returns to South Carolina is wrong. *Id.*

In Finklea v. State, 273 S.C. 157, 255 S.E.2d 447(1979), the Court ruled that South Carolina's Post-Conviction Procedure Act is designed to incorporate all rights available under federal *habeas corpus*. See Harvey v. South Carolina, 310 F. Supp. 83 (D.C.S.C. 1970). In Oken v Warden, Maryland State Prison, 233 F.3d 86 (1st Cir. 2000), the court held that Oken did not have a right to be physically present at a post-conviction hearing. *Id* at 93. What the court

did find is that "Due Process requirements of fundamental fairness apply to state post-conviction proceedings. *Id* at 94-95. *Cf. Ake v Oklahoma*, 470 U.S. 68, 76-77, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). Due Process of law requires that the proceedings **shall** be fair, and fairness in the instant case is a timely evidentiary hearing via video conferencing while a key witness is able to testify and be subjected to cross examination before her ill-health disables her or death occurs. In *Oken, supra*, the court held that Oken was not due trial type confrontation on post-conviction and the process provided was fundamentally fair, *Oken, supra*; at 95-96. In the instant case, Applicant, unlike *Oken, supra*, has an actual innocence claim proved by DNA, *Id* at 95-96.

Hearings via video-conferencing is common since technology has proliferated. In the United States District Court for the District of South Carolina Magistrate Judge George C. Kosko conducted an evidentiary hearing on a Post-Conviction Motion to vacate. See *Jose R. Ortiz v United States of America*, 2006 U.S. Dist. Lexis 28461 (D.S.C. May 3, 2006).

Also see *Bernard Martin v United States of America*, 2012 U.S. Dist. Lexis 119416 (S.D. W. Va., May 3, 2011); *United States of America v. Leroy Baker*, 836 F.Supp.1237; 1993 U.S. Dist. Lexis 16363 (E.D. North Carolina, 1993); *Estate of Hezekiah Harvey v. Roanoke City Sheriff's Office, et al.*, 2007 U.S. Dist Lexis 71511 (W.D. Virginia, Roanoke Division, September 26, 2007); *Vilchez v Holder*, 682 F.3d 1195 (9th Cir. 2012). Due Process in the instant application for post-conviction relief compels this Court to order an evidentiary hearing via video

conferencing so that timely litigation of this matter is provided to prevent the loss or unavailability of essential witnesses and the substantial prejudice that will result. For example, Val Hudson is ailing and nearly incapacitated and could very well succumb to her ailments in the very near future. Justice delayed is justice denied! Her testimony, in the words of defense counsel, Mr. Snow "Val certainly could have possibly cleared this whole thing up,...". (**Record of Appeal 1069, Exhibit A-2**). The *Fourteenth Amendment's due process clause* guarantee of fundamental fairness" requires the state to take steps to assure that criminal defendants have a fair opportunity to present their defense. See e.g., *Ake v. Oklahoma*, 470 U.S. 68, 76-77, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). An evidentiary hearing via video conferencing will permit truth and justice to prevail.

Therefore, the state's position that Applicant lacks standing fails miserably. To the contrary, Applicant totally has standing:

SECTION 17-27-20. Persons who may institute proceeding; exclusiveness of remedy.

(a) Any person who has been convicted of, or sentenced for, a crime and who claims:

(1) That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;

(4) 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;

(6) That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy; may institute, without paying a filing fee, a proceeding under this chapter to secure relief. Provided, however, that this section shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction.

In the instant case, Applicant stands convicted of and sentenced for crimes in South Carolina and claims that the conviction is in violation of the Constitution of the United States and the Constitution and laws of the State of South Carolina. See PCR Application and Memo at 2, where Applicant wrote:

Jurisdiction is conferred upon this Honorable Court pursuant to **§17-27-20(a)(1)(4)(6), et seq.**, because Applicant has been convicted and sentenced for a crime and *avers* that the

conviction was in violation of the Constitution and laws of the United States or the Constitution and laws of this State; and the conviction is otherwise subject to collateral attack.

What part of **“any person who has been convicted of, or sentenced for a crime”** and claims the elements contained in subsections (1) (4) (6) of **§17-27-20**, does the Applicant not meet? Therefore, the allegation that Applicant lacks standing is **WRONG** and has no basis in fact, law or reality and should be categorically rejected!

In addition, Applicant alleged 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. For example, Applicant alleged ineffective assistance of counsel for failing to conduct a proper investigation; see PCR Application at 4; Memo at 20-23. And, defense counsel failed to **interview exculpatory witnesses**; see PCR Application at 4; Memo at 20-23; **Exhibits A-1 & A2**, Affidavits of Monday Bishop and Lowanda (Val) Hudson, respectively) and utilize compulsory process to call them to provide exculpatory testimony on Applicant's behalf; see PCR Application at 4-6; Memo at 23-26. Indeed, counsel confirms his ineffectiveness:

Mr. Stewart doesn't have to prove anything, but you think, though, you think that we would have heard testimony from either Monday or Val. Val certainly could have possibly cleared this whole thing up, but I don't think there was any mention of her. Who has the resources to bring her here? Who has the recourse to order her here to hear what she has to say? There's not a statement from her. No mention of her. That is the one person that could have cleared this whole thing up involving my client, but you never hear any mention of her. You better believe if she had something that would have implicated my client, what do you think? They would ordered her to be here. Someone would have found her. (*Record of Appeal at 1069*).

PCR at 4-5; Memo 23-24.

And unfortunately for Applicant the Solicitor capitalized on this failure on closing argument:

Ben's sister...How far wouldn't she drive to come here to court?
How far would she drive to come here to say things didn't go down
that way? She was right there too. (*Record of Appeal at 1113*).

PCR at 5; Memo at 24. Ben's sister Monday, mother and cousin were in the courtroom every day of trial.

Defense counsel's own remarks that were highlighted and capitalized on along with other egregious errors, such as the DNA evidence exonerating Applicant. See Memo at 7, 9, 13, 18, and 20; and **Exhibit A-4** (six pages). These and other missteps place this case within the four corners of the holdings in United States v. Cronin, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984) and Nance v. Ozmint, 626 S.E.2d 878, 367 S.C. 547, 352 (2006) for failing to subject the state's case to adversarial testing that compels reversal and prejudice should be presumed, albeit there are numerous instances of prejudice that are plain on the face of the record. See Memo at 1, 2, 20 and 26.

The time and form for submitting a PCR Application is also clear and does not apply to the procedural posture of Applicant's case. See *Rule 71.1(a) SCRPC*

(b) Time and Form of Application. An application for post-conviction relief cannot be made while an appeal from the conviction or sentence is pending or during the time in which an appeal may be perfected....

Accordingly, the state's position that Applicant lacks standing is without merit!

APPOINTMENT OF COUNSEL

Applicant takes issue with the fact that the Clerk of Court and the Court are ignoring my request to appoint counsel and entertaining the state's request to dismiss my PCR Application, and takes particular issue with a letter dated December 10, 2013, from the York County Clerk's Office to J. Rutledge Johnson, Office of the Attorney General with a carbon copy to Applicant and Mr. Kevin Brackett, Solicitor wherein it was written:

Enclosed please find a copy of the Post Conviction Relief Application reference for the above named person. Pursuant to a memorandum issued by Chief Justice Toal dated January 12, 2004, the Clerk's office is not to appoint an attorney until directed to do so by the Office of the Attorney General.

Clerk of Court

Civil Division

See copy of letter attached.

How is it that the agency tasked with defending legal challenges to convictions and court cases is authorized to decide when and if an indigent adversary is assigned an attorney are not? This does not comport with the Equal Protection Clause and Right to Counsel enshrined in the United States Constitution and laws and that of South Carolina's Constitution and laws; this is a complete travesty of justice, an obvious conflict of interest that gives the Attorney General's Office an unfair and unlawful advantage in our adversarial legal system.

Moreover, the ineffectiveness of counsel claims affords Applicant the unfettered right to appointment of counsel. The PCR Statute mandates a hearing when the applicant is indigent; see *Whitehead v. State*, 310 S.C. 532, 426 S.E.2d 315 (1992); also see *Ryan v Martinez*, 132 S.Ct. 1309 (2012) (right to effective assistance of counsel on Post Conviction); SCRPC Rule 71.1(d), (g), or when ineffective assistance of counsel claims are raised. See See Rule 71.1(d):

(d) Appointment of Counsel for Hearing. If, after the State has filed its return, the application presents questions of law or fact which will require a hearing, the court shall promptly appoint counsel to assist the applicant if he is indigent. Counsel shall be given a reasonable time to confer with the applicant. Counsel shall insure that all available grounds for relief are included in the application and shall amend the application if necessary.

The state has filed its return and specific questions of law and fact regarding trial counsel's ineffectiveness, the DNA exoneration and other issues raised *ante* and all issues raised in Applicant's original PCR Application, including ineffectiveness of appellate counsel, Wanda H. Carter, Esquire, for failing to *inter alia*, the ineffectiveness and other issue raised in PCR; see Memo at 5-12; 17-28 merits a hearing so that trial and appellate counsel can defend their stewardship of this case. See *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Ard v Cato*, 372 S.C. 318, 331, 642 S.E.2d 590, t 596 (2007); *Edwards v State*, 392 S.C. 449, at 456, 710 S.E.2d 60 at 64 (2010); *Lorenzen v State*, 376 S.C. 521, 657 S.E.2d 771 (2008); *Walker v State*, 397 S.C. 226, 236 (2102); Memo at 17.' Therefore, the proposed "Conditional Order to Dismiss" should be denied because instances of alleged ineffective of assistance are plain on the face of the record, see Memorandum of Law at 18-28, denying the proposed "Conditional Order to Dismiss" should be an easy call.

Because Applicant is not requesting to be physically present at the hearing, the state's theory of the case and legal argument are bogus, does not address the issues Applicant raised and attempts to illegally and improperly reframe the issues that Applicant raised.

All applicants, including this Applicant is entitled to a full and fair opportunity to present claims in one PCR application. See Herbert Wayne Odom v. State of South Carolina, 337 S.C. 256, 262, 426 S.E.2d 315(1999). Under the PCR rules, an applicant is entitled to a full adjudication on the merits of the original petition, or "one bite at the apple." Id.; Aice v. State, 305 S.C. 448, 452, 409 S.E.2d 392, 395 (1991).

A full and fair adjudication in this case requires prompt appointment of counsel, an evidentiary hearing via video-conferencing because an essential witness, Lowanda (Val) Hudson who will provide exculpatory testimony (Exh. A-2) is very ill and could likely succumb to her illness and would be lost to Applicant. See Barker v Wingo, 407 U.S. 514 (1972) Also, memories could fade when years after the fact elapses. Id.

The foregoing are specific legal and factual reasons for the Condition Order of Dismissal to be denied, the Court to appoint counsel and schedule an evidentiary hearing via video-conference after sufficient time for counsel to appointed and prepare. See Memo at 32-33; Exh. 6, (SCI-Frackville agreeing to accommodate South Carolina Court for video-conference evidentiary hearing).

WHEREFORE, the Applicant prays that an evidentiary hearing is granted, counsel is promptly appointed, and the case is decided upon the law, the facts and in the interest of justice.

Dated: May 21, 2014

Respectfully submitted,

Ben Stewart HK-9369
SCI-Frackville
1111 Altamount Blvd.
Frackville, PA 17931

#9 Exhibit

#137,

THE STATE OF CAROLINA
IN THE SUPREME COURT

IN THE ORIGINAL JURISDICTION
OF THE SUPREME COURT

Ben Robert Stewart Petitioner

v.

David Hamilton Clerk of Court York County, South Carolina, Respondent
Supreme Court Justice Jean Hoefer Toal, Respondent
York County Circuit Judge J. Derham Cole, Respondent
York County Solicitor Kevin Brackett, Respondent

**VERIFIED COMPLAINT FOR WRIT OF MANDAMUS (*Pro-Se*)
AND WRIT OF PROHIBITION (*Pro-Se*)
AND REQUEST FOR EXPEDITED REVIEW**

Ben Robert Stewart HK-6369 (*Pro-se*)
SCI-Frackville
1111 Altamont Blvd.
Frackville, PA 17866-1021

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**VERIFIED COMPLAINT FOR WRITS OF MANDAMUS,
PROHIBITION AND REQUEST FOR EXPEDITED REVIEW**

Pursuant to *Article V, § 5*, of the South Carolina Constitution and *Rule 245 (b) SCACR*, *Rule 65(a)(b)((f)(1)*, Ben Robert Stewart, HK-9369, *In Forma Pauperis* (hereafter Petitioner) petitions this Honorable Court in its original jurisdiction.

I, Ben Stewart, hereby verify that I am the Petitioner herein and that the facts and statements contained in the foregoing Petition are true and correct upon knowledge, belief or information. I understand that any false statements subject me to the penalties relating to unsworn falsification to authorities.

Petitioner seeks. *Writ of Mandamus* compelling “**immediate**” appointment of counsel by the Post-Conviction Judge The Honorable Denham Coleman, and *Writ of Prohibition* to prohibit Solicitor Kevin Brackett from unlawfully blocking appointment of counsel for Petitioner’s Post Conviction Application and *Writ of Prohibition* prohibiting Supreme Court Chief Justice Jean Hoefer Toal from unlawfully authorizing the Attorney General to determine when and if counsel should be appointed for Petitioner’s PCR Application and prohibiting Chief Justice Toal from likewise authorizing the Attorney General to schedule evidentiary hearing on PCR Applications thereby depriving Petitioner of his right of petitioning the Courts for redress of grievances.

Petitioner’s requests that his Federal and State Constitutional right to Procedural and Substantive Due Process, and Statutory and Common Law rights to appointment of counsel have been and continue to be ignored and egregiously violated since the inception of his PCR Application on December 9, 2013, in contravention of Due Process, Equal Protection of both the U.S. and South Carolina’s Constitution and case law. The aforementioned actions are giving the state an unfair/illegal advantage in attempting to sustain an unlawful conviction.

Petitioner respectfully invokes this Honorable Court to issue Writ of Mandamus compelling York County Official(s) to appoint counsel, i.e., the PCR judge or the York County Court Clerk, and that the PCR Judge schedule an evidentiary hearing so Petitioner can proffer and prove allegations of ineffective assistance of counsel at every stage of the proceedings and to demonstrate the illegality of this conviction and sentence.

JURISDICTION

Jurisdiction is conferred upon this Honorable Court pursuant to *Section VIII, Provisional and Final Remedies and Special Proceedings, Rule 65*. Also see e.g., *Porter v. Jedziniak*, 334 S.C. 16, 18, 512 E.2d 497 (1999).

QUESTIONS PRESENTED

1. Whether Petitioner's clear and unfettered right to appointment of counsel in his Post-Conviction Relief proceeding has been, and continues to be violated?
2. Whether the Post-Conviction Judge has a duty to appoint counsel when allegations of ineffective assistance of counsel are plain on face of the record or unrefuted in the record?
3. Whether Petitioner's right to Procedural and Substantive Due Process was/is violated by failing to appoint counsel and schedule an evidentiary hearing to entertain allegations of ineffective assistance of counsel at trial and on direct appeal?
4. Whether then Clerk of Court (J. Rutledge Johnson) failed in his duty to appoint counsel when requested in Petitioner's PCR Application filed December 13, 2013?
5. Whether York County Solicitor Kevin Brackett acted without lawful authority and in bad faith when he requested that counsel not be appointed until the Office of the Attorney General directed that counsel be appointed for Petitioner? (See **Exhibit P-1**)
6. Whether Petitioner's right of Access to Court is being violated by the failure to schedule

an evidentiary hearing(s) for trial and appeals counsel to demonstrate a rational basis for their stewardship of Petitioner's trial and appeal and to otherwise dispel Petitioner's allegations of failing to make the trial an adversarial process and other ineffective assistance of counsel claims?

7. Whether the PCR Court should be prohibited from allowing the state to submit another "Return", i.e., have a second bite of the proverbial apple, to Petitioner's PCR Application after making a deliberate calculation not to address the substantive issues raised by Petitioner? (**Exh. P-2**, State's Return and Conditional Order of Dismissal and attachments [eight total pages]).

8. Whether Petitioner's right of Equal Protection of the Laws is being violated by the allegations stated in Questions 1-4, 6 above.

INTRODUCTION

The General Assembly established a comprehensive framework to conduct the Post-Conviction Relief process by enacting the Uniform Post-Conviction Procedure Act Title 17-27 et seq. Therefore, all acts engaged in outside of that framework are without legal authority. Thus, the action(s) and or inaction(s) by the York County Post Conviction Court, York County Solicitor, York County Clerk of Court and South Carolina Supreme Court Justice The Honorable Jean Hoefer Toal, simultaneously violates Petitioner's rights under the Laws and Constitutions of the United States and of South Carolina to Appointment of Counsel, Access to Courts and Equal Protection of the Law.

RELEVANT FACTS

Petitioner was extradited from the Commonwealth of Pennsylvania where petitioner is serving an 8-16 year term. Petitioner was convicted before The Honorable Lee S. Alford and a York County jury for murder, armed robbery and related offenses; a sentence of 30 years was imposed on February 27, 2009 by Judge Alford. Subsequently, appeal was dismissed December

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12, 2012 in an unpublished Opinion, No. 2012-UP-651. On December 10, 2013, Petitioner's Post Conviction Relief Petition requesting appointment of counsel, raising, *inter alia*, six allegations of ineffective assistance of trial and two allegations of ineffectiveness of appeal counsel was filed by York County Clerk of Court (Exh.P-2, see State's Return pp. 3-4). The State's Return by Assistant Attorney General J. Croom Hunter enumerated grounds Petitioner raised in his Pro-se PCR Application). The State's Return incredibly alleged that Petitioner lacked standing; this despite Petitioner alleging that I stood convicted and sentenced for a crime that was in violation of the laws and Constitutions of the United States and South Carolina. The State's "Return" **did not** address the substantive issues raised. Judge Cole signed that "Conditional Order of Dismissal on April 7, 2014. Petitioner's Reply to the State's Return was filed March 31, 2014, within the twenty day period; the instant case has been at a stand-still since. See **Exh. P-3**, nine total pages) wherein, Petitioner rebutted the State's baseless allegation that Petitioner "lacked standing".

ARGUMENT AND CITATION TO LEGAL AUTHORITIES

This Court has the power to issue *writs* or orders of *injunction* or *mandamus*. See *S.C. Consti. Art V, § 5*; *S.C. Code Ann. § 14-3-310*. The writ of mandamus is "the highest judicial writ known to the law." *Sandford v S.C. State Ethics Comm'n*, 385 S.C. 483, 685S.E.2d 600 (2004) quoting *Willimon v City of Greenville*, 243 S.C. 82, 86, 132 S.E.2d 169, 170 (1963). The power to issue writs of mandamus arises when necessary to enforce an established right or a duty created by law. See, e.g., *Edwards v State*, 383 S.C. 82, 95, 678 S.E.2d 412, 419 (2009) [Mandamus] is a coercive writ which orders public official to perform a ministerial duty. The "principal function" of mandamus "is to command and execute, and not to inquire and

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adjudicate; therefore, it is not the purpose of the writ to establish a legal right, but to enforce one which has already been established.” *Sanford, supra*, 385 S.C. at 493, 685 S.E.2d at 605.

In order to prevail on mandamus requiring the performance of an act, petitioner must satisfy four elements: (1) a duty to perform the act; (2) the ministerial nature of the act; (3) the petitioner’s specific legal right for which discharge of the duty is necessary; and (4) a lack of any other remedy. *Sanford, supra* 385 S.C. at 494, 685 S.E.2d at 606; *Porter, supra* 334 S.C. at 18, 512 S.E.2d at 497.

Duty to Perform the Act

The circumstances imposing a duty to appoint counsel for indigent Petitioners on PCR when requested are present here. See *Rule 71.1(d), SCRPC, and in S.C. Code Ann. § 17-27-60*:

(d) Appointment of Counsel for Hearing. If, after the State has filed its return, the application presents questions of law or fact which will require a hearing, the court shall promptly appoint counsel to assist the applicant if he is indigent. Counsel shall be given a reasonable time to confer with the applicant. Counsel shall insure that all available grounds for relief are included in the application and shall amend the application if necessary.

The State filed its Return on February 28, 2014. Moreover, numerous questions of law and fact are presented in Petitioner’s Application; .e.g., “Whether trial counsel was ineffective in failing to investigate, interview and subpoena exculpatory witnesses, and subject the State’s case to adversarial testing are plain on the face of the record. Incredibly trial counsel, Kenneth Snow, Esq., on close proved his own ineffectiveness in failing to investigate, interview and subpoena exculpatory witnesses to testify on Petitioner’s behalf:

Mr. Stewart doesn’t have to prove anything, but you think, though, you think that we would have heard testimony from either Monday or Val. Val certainly could have possibly cleared this whole thing up, but I don’t think there was any mention of her. Who has the resources to bring her here? Who has the recourse to order her here to hear what she has to say? There’s not a statement from her. No mention of her. That is the one person that could have cleared this whole thing up involving my client, but you never hear any mention of her. You better believe if she had

something that would have implicated my client, what do you think? They would (sic) ordered her to be here. Someone would have found her. (*Record of Appeal at 1069*).

The above is a *prima facie* demonstration of questions of law or fact requiring a hearing and thus requiring appointment of counsel. The Statute is clear and unambiguous and its literal meaning should be applied. See, e.g., *Paschal v. State Election Comm'n*, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995). It is equally clear that counsel should have been “**promptly**” appointed under the facts and circumstances of the instant case. Moreover, the word “**shall**” is mandatory. See *State v. Foster*, 277 S.C. 211, 212, 284 S.E.2d 780, 780 (1981); *Ex Parte Tolbert*, 206 S.C. 300, 34 S.E. (2d) 49 (1945).

Another obvious and blatant example of ineffective assistance of counsel that is plain on the face of the record is defense counsel’s failure to object to prosecutor misconduct on close when he falsely conflated DNA and fingerprint evidence that **excluded Ben Stewart** from being present in the car by conflating as equivalent the inability to **include or exclude Dontavious Mack’s** presence in the car based on DNA/fingerprints (*Record of Appeal at 740:3-14; 749-751*). Note:

Mr. Snow said “there is no forensic evidence to show that Mr. Stewart was in the car at all – no DNA, no fingerprints, no fibers, no hair, nothing to show that Ben Stewart was in that car.” Well, guess what, there is no forensic evidence to show that Dontavious was in that car. No DNA, no fingerprints nothing to show that he was in there. Yet nobody disagrees that Dontavious was in that car. No doubt he was in that car, and he was in the car bleeding...No DNA of Dontavious found in that car. No fingerprints of Dontavious...So I submit to you just because they didn’t find anything in there does not mean that Ben Stewart was not in the car...**Record of Appeal 1140-1141. Also see Exhibit A-3).**

When as here, credible allegations of ineffective assistance of counsel and questions of law and fact are raised counsel “**must be appointed or a knowing and intelligent waiver of right to counsel be obtained.** See *Whitehead v. State*, 310 S.C. 532, 426 S.E.2d 315 (1992).

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Tragically, neither appointment of counsel or a waiver of right to counsel has occurred in this case. Justice delayed is justice denied! A hearing is necessary where factual allegations that lead to a constitutional deprivation are not conclusively refuted by the record. *Clayton v. State*, 278 S.C. 655, 301 S.E.2d 133 (1983). Allegations raised by Petitioner are not refuted by the record, conclusively or otherwise. Quite the contrary, Petitioner's allegations are substantiated by the record. Also see *Norman v State*, 276 S.C. 278, 280 S.E.2d 707-709 (1981).

Defense counsel needs to articulate a reasonable basis first of all for not interviewing and calling Monday Bishop (who was present in the court room every day of trial) and Lawanda (Val) Hudson to offer exculpatory evidence on Petitioner's behalf); *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Nance v. Ozmint*, Director South Carolina Department of Corrections, 626 S.E.2d 878, 367 S.C. 547, 352 (2006); *Walker v State*, 397 S.C. 226, 236 (2102) citing *Edwards v State*, 392 S.C. 449, at 456, 710 S.E.2d 60 at 64. And for failing to object and request a curative instruction for the improper closing argument. See e.g., *U.S. v Berger*, 295 U.S. 78 (1935); *Mincey v. State*, 444 S.E.2d 510 (S.C., 1994).

Additionally, Petitioner's application presents further questions of law and fact requiring a hearing, and the applicant is indigent, counsel must be appointed or a knowing, intelligent waiver of the right to counsel must be obtained promptly. *Whitehead, supra*, 310 S.C. 532, 426 S.E.2d 315 (1992).

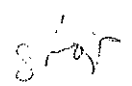
Ministerial Nature of the Act

Ministerial describes an act or function that conforms to an instruction or a prescribed procedure. It connotes obedience and is performed without the use of judgment or discretion. Therefore, the presence and presentment of questions of law or fact mentioned *ante* places the

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instant case squarely within the four corners of Rule 71.1(d), SCRPC, and in S.C. Code Ann. § 17-27-60 and compels “prompt appointment” of counsel. See *Whitehead, supra*. Moreover, the use of the word “shall” is mandatory language in statutory construction compelling appointment of counsel on PCR. Therefore, mandamus should issue.

Petitioner’s Specific Legal Right

SWA That Petitioner has an unfettered right to prompt appointment of counsel on PCR is beyond question. See Rule 71.1(d), SCRPC, and S.C. Code Ann. § 17-27-60; *Whitehead, supra*. Moreover, this is Petitioner’s first opportunity to raise ineffective assistance of counsel under South Carolina’s direct appeal scheme which forbids raising ineffective assistance of counsel issues until initial collateral review. In *Ryan v Martinez*, 132 S.Ct. 1309, 1319-1320 (2012) the United States Supreme Court held that states (citing *S.C. Rule Civ. Proc. 71.7(d)*) that preclude the raising of ineffective assistance claims until initial collateral review, that if counsel is not appointed on post-conviction can establish cause for procedural default—an exception to the holding in *Coleman v. Thompson*, 501 U. S. 722, 753–754 (1991), that an attorney’s errors in a post-conviction proceeding does not qualify as cause for a default. See *id.*, at 754–755. 

The state’s efforts to delay this matter is obvious and designed to prejudice Petitioner as my exculpatory witness Lawanda (Val) Hudson is gravely ill and could likely succumb if this matter continues to be purposely delayed by the State. See *Herring v. State*, 262 S.C. 597, 206 S.E.2d 885 (1974). Also see *S.C. Consti Art I, § 3, Due Process and Equal Protection*; *S.C. Consti Art I, § 9 Speedy Remedy*.

No Other Adequate Remedy Available

There is no other adequate remedy available. As stated *supra* at page 2, ¶5, in a letter dated December 10, 2013, to Clerk of Court, J. Rutledge Johnson, Solicitor Kevin Brackett

forwarded a Memorandum issued by Chief Justice Toal dated January 12, 2003 (**Exh. P-2**),
“**purportedly**” prohibiting the Clerk’s Office from appointing counsel until directed to do so by
the Office of the Attorney General; this is absurd under any circumstance!

However, the procedural posture and circumstances of the instant case are inapposite.
Chief Justice Toal’s Memorandum points specifically to applications, which are successive, filed
beyond the statute of limitations, and those that raise jurisdictional issues without any specifics.
These applications should be summarily disposed of without the necessity of the appointment of
counsel or a hearing; the instant case is not such a case.

In cases such as the instant case, the notion that in our **adversarial** system of justice, that
the adversary holds sway over the opponent’s ability to establish its position is beyond
comprehension and makes it crystal clear that fairness, Due Process and Equal Protection is
systematically being denied. Moreover, the PCR Court appears to be complicit in denying
Petitioner his right of Access to Courts to redress grievances enshrined in the Bill of Rights to
the U.S. Constitution and S.C. Constitution. Art 1, §§ 3, 9. Pro se petitions should be liberally
construed.

CONCLUSION & RELIEF SOUGHT

Based on the foregoing, i.e., the clear right Petitioner has to redress grievances of an
unfair trial that included ineffective assistance of counsel, prosecutor misconduct and a
conviction founded on evidence that no rational jury would have found guilt beyond a reasonable
doubt, and where the evidence presented at trial failed to meet the *Winship Rule* of establishing
guilt beyond a reasonable doubt. Also, Petitioner’s unfetter right to “**prompt appointment of
counsel**” because question of law or fact are plain on the face of the record that mandates a
hearing and thus appointment of counsel.

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Petitioner respectfully requests the following relief:

- A. That a *Writ of Mandamus* issues compelling the PCR Court, The Honorable Derham Cole to perform his ministerial duty to promptly appoint counsel; and
- B. That a *Writ of Prohibition* issues Prohibiting the Supreme Court Chief Toal's Memorandum authorizing the Attorney General to determine when and if counsel is appointed to indigent Petitioners from being obeyed because the Memorandum is unlawful, is a conflict of interest in our adversarial system of justice and a violation of Due Process and Equal Protection of the Law.
- C. That a *Writ of Mandamus* issues compelling Judge Derham to schedule a hearing within a reasonable time after counsel has been appointed and had ample time to consult with Petitioner and to otherwise prepare for the hearing.
- D. That a *Writ of Mandamus* issues compelling The Honorable Supreme Court Justice, Jean Hoefer Toal to withdraw her unlawful Memorandum authorizing the Attorney General to determine when and if counsel is appointed.
- E. That a *Writ of Prohibition* issues prohibiting The Honorable Supreme Court Justice, Jean Hoefer Toal authorizing the Attorney General to PCR evidentiary hearing are scheduled as unlawful as violating Equal Protection, Procedural Due Process and obstructing Substantive Due Process.

WHEREFORE, Petitioner prays that this Honorable Court grants the requested relief and compel the named parties to perform the ministerial duties imposed upon by the applicable law and or prohibit the unlawful actions that violate Petitioner's clear rights to redress grievances and allow an actual innocence claim to be timely adjudicated. And for other and further relief deemed just and proper based on the facts of this case, the law and in the interest of justice.

Dated this _____ day of _____, 2015

Respectfully submitted,

Ben Robert Stewart HK-9369
SCI-Frackville
1111 Altamont Blvd.
Frackville, PA 17886-1021

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THE STATE OF CAROLINA
IN THE SUPREME COURT

IN THE ORIGINAL JURISDICTION
OF THE SUPREME COURT

Ben Robert Stewart Petitioner

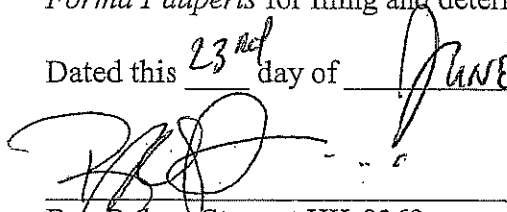
v.

David Hamilton Clerk of Court York County, South Carolina, Respondent
Supreme Court Justice Jean Hoefer Toal, Respondent
York County Circuit Judge J. Derham Cole, Respondent
York County Solicitor Kevin Brackett, Respondent

CERTIFICATE OF SERVICE

I, BEN ROBERT STEWART, HK-9369, Petitioner, hereby certify that I will place in the mailbox at SCI-Frackville, to be mailed to the Clerk of The South Carolina Supreme Court, 1231 Gervais Street, Columbia, SC 29201 on the date listed below, via Certified Mail Return Receipt Requested, in accordance with the *South Carolina Rules of Civil Procedure, Rule 3(a)(1)(b)(1)* my Verified Complaint For Writs of Mandamus and Prohibition With Expedited Review, Argument and citation to legal authorities together with Exhibits and Motion to Proceed *In Forma Pauperis* for filing and determination of my inability to pay the cost of this proceeding.

Dated this 23rd day of JUNE 2015.



Ben Robert Stewart HK-9369
SCI-Frackville
1111 Altamont Blvd.
Frackville, PA 17931

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THE STATE OF CAROLINA
IN THE SUPREME COURT

IN THE ORIGINAL JURISDICTION
OF THE SUPREME COURT

Ben Robert Stewart Petitioner

v.

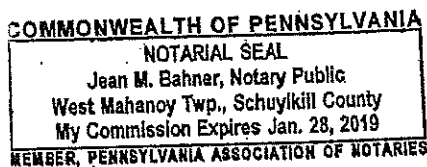
David Hamilton Clerk of Court York County, South Carolina Respondent
Supreme Court Justice Jean Hoëfer Toal, Respondent
York County Circuit Judge J. Derham Cole, Respondent
York County Solicitor Kevin Brackett, Respondent

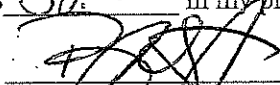
In Forma Pauperis

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

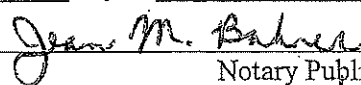
I, Ben Robert Stewart, hereby apply for leave to proceed in this action without payment of fees or costs or security thereof. In support of my application I declare under penalty of perjury that the following facts are true:

1. I am the Petitioner 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.
3. I have been confined for the past eight years and my only income is my inmate wages and an occasional money order from my ailing mother. I have \$ 50.00 in my prison account.




Ben Robert Stewart HK-9369
SCI-Frackville
1111 Altamont Blvd.
Frackville, PA 17931

SWORN or affirmed to and subscribed before me
this 23rd day of June, 2015


Notary Public
My Commission Expires 1/28/2016

Commonwealth of Pennsylvania
County of Schuylkill

Exhibit # 7.
STATE OF CAROLINA)

IN THE COURT OF COMMON PLEAS

County of YORK)

2013-CP-46-3731

Ben Robert Stewart, #223006)

Petitioner)

V)

State of South Carolina)

NOTICE, AFFIDAVIT AND MOTION FOR EXPEDITED PCR

PLEASE TAKE NOTICE that Ben Robert Stewart SCGC #223006, will move this Honorable Court for immediate **Appointment of Counsel** on Post-Conviction, an **Expedited Evidentiary Hearing** after sufficient time for consultation with appointed counsel and related relief deposes and say under penalties of perjury that the following is true and correct upon belief or information:

1. This is an abbreviated procedural history; for a fuller history see PCR Application.
2. That I am the Petitioner in the above captioned matter and is currently confined at Kirkland Reception & Evaluation Center-Unit C2, Cell 15, 4344 Broad River Road, Columbia, SC 29210 following my return from serving a sentence in Pennsylvania on 11/23/15, after a grant of parole.
3. Petitioner was convicted before The Honorable Lee S. Alford and a York County jury for murder, armed robbery and related offenses; a sentence of 30 years was imposed on 2/27/09.
4. Direct appeal was dismissed 12/12/12 in an unpublished Opinion at: No. 2012-UP-651.
5. Petitioner's application for Post-Conviction Relief was mailed on 12/4/13, and was filed/received by York County Clerk's Office on 12/9/13, requesting, *inter alia*
 - a. Appointment of counsel pursuant to §17-27-60;
 - b. Permission to proceed *In Forma Pauperis* pursuant to §17-27-60;

c. Discovery pursuant to §17-27-150;

d. An Evidentiary Hearing via Closed Circuit Television pursuant to §17-27-80.

6. On 12/10/13, contrary to §17-27-60 mandate to appoint counsel, the York County Clerk of Civil Division wrote a letter to J. Rutledge Johnson of the South Carolina Attorney's General Office citing a memorandum issued by Chief Justice Jean Toal that counsel should not be appointed until the Attorney General directed the Clerk's office to do so.

7. To authorize the Attorney General—who defend convictions from challenges to decide when and if counsel is appointed for an indigent on PCR—gives the Attorney General an unfair advantage, is beyond absurd and violates Due Process and Equal Protection of both the United States and South Carolina Constitution.

8. Subsequently, J. Croom Hunter, Esq., in lieu of a *Return* to Petitioner's PCR Application, filed a Conditional Motion to Dismiss for the Office of the Attorney General on the ground that Applicant "**lacked standing** to bring a post-conviction relief application at this time"; notwithstanding Petitioner citing 27 §17-27-20 (A)(1)(4)(6) as grounds for relief.

9. On March 5, 2014, Petitioner requested an extension of time to respond to the Conditional Motion to Dismiss, and later responded to it.

10. My PCR Application has been at a stand-still since.

11. That Petitions for Mandamus to compel appointment of counsel, an expedited evidentiary hearing and Prohibition of the Attorney's General Office preventing the clerk from appointing counsel was filed with South Carolina Supreme Court and denied.

12. That Lawanda Valeen (Val) Hudson an exculpatory witness is in failing health and if this matter continues to be delayed—and even deliberately delayed—could cause Petitioner to lose this witness' exculpatory testimony, and fatally and irreparably prejudice Petitioner's case.

13. That a Petition for Mandamus to compel appointment of counsel, an expedited evidentiary hearing and Prohibition of the Attorney's General Office preventing the clerk from appointing counsel was filed with South Carolina Supreme Court and denied

14. The General Assembly established a comprehensive framework to conduct the Post-Conviction Relief process by enacting the Uniform Post-Conviction Procedure Act Title 17-27 et seq.

15. Therefore, all acts engaged in outside of that framework are without legal authority. Thus, the action(s) and or inaction(s) by the York County Post Conviction Court, York County Solicitor, York County Clerk of Court and South Carolina Supreme Court Justice The Honorable Jean Hoefer Toal, simultaneously violates Petitioner's rights under the Laws and Constitutions of the United States and of South Carolina to Appointment of Counsel, Evidentiary hearing, Access to Courts and Equal Protection of the Law.

16. The State filed its return numerous questions of law and fact that require a hearing. Note:

(d) **Appointment of Counsel for Hearing.** If, after the State has filed its return, the application presents questions of law or fact which will require a hearing, the court shall promptly appoint counsel to assist the applicant if he is indigent. Counsel shall be given a reasonable time to confer with the applicant. Counsel shall insure that all available grounds for relief are included in the application and shall amend the application if necessary.

17. For example, there are several ineffective assistance of counsel issues that trial and appeal counsel need to justify their stewardship of this matter.

18. Mr. Kenneth Snow, Esq., failed to put the State's case to adversary testing, failed to conduct a proper investigation and failed interview exculpatory witnesses and subpoena them to testify on Petitioner's behalf. Indeed Mr. Snow confirmed his ineffective during closing argument:

...Mr. Stewart doesn't have to prove anything, but you think, though, you think that we would have heard testimony from either Monday or Val. Val certainly could have possibly cleared this whole thing up, but I don't think there was any mention of her. Who has the resources to bring her here? Who has the recourse to order her here to hear what she has to say? There's not a statement from her. No mention of her. That is the one person that could have cleared this whole thing up involving my client, but you never hear any mention of her. You better believe if she had something that would have implicated my client, what do you think? They would (sic) ordered her to be here. Someone would have found her. (*Record of Appeal at 1069*).

19. All of the above failures are in violation of the mandates *United States v Cronin*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d (1984); *Nance v Frederick*, 358 S.S. 480, 596 S.E.2d 62 (2004); *Strickland v Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). See Memorandum of Law at 20-21. Had the jury heard the testimony of LaWanda (Val) Hudson and Monday Bishop refuting Reed Allen testimony that Petitioner gave the murder weapon to Reed to hide, there is a reasonable probability that the outcome would have been different. See *Strickland, supra*; *Caprood v State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000).

20. Mr. Snow's failure to subpoena Monday Bishop and LaWanda (Val) Hudson was capitalized on by Mr. Brackett on close when he falsely bolstered Reed Allen's testimony when said on closing argument that if Reed's testimony was false that Monday would drive any

distance to refute Reed's testimony when Monday was present each day of trial. See Memorandum of Law at 29.

21. Moreover, Mr. Snow was ineffective in failing to object to the State's closing argument that purposely misstated the evidence to improperly mislead the jury to discount DNA and fingerprints that **excluded Ben Stewart** from being present in the car by conflating as equivalent the inability to **include or exclude Dontavious Mack's** presence in the car based on DNA/fingerprints (**Record of Appeal at 740:3-14; 749-751**). Note:

Mr. Snow said "there is no forensic evidence to show that Mr. Stewart was in the car at all – no DNA, no fingerprints, no fibers, no hair, nothing to show that Ben Stewart was in that car." Well, guess what, there is no forensic evidence to show that Dontavious was in that car. No DNA, no fingerprints...nothing to show that he was in there. Yet nobody disagrees that Dontavious was in that car. No doubt he was in that car, and he was in the car bleeding...No DNA of Dontavious found in that car. No fingerprints of Dontavious...So I submit to you just because they didn't find anything in there does not mean that Ben Stewart was not in the car...**Record of Appeal 1140-1141. Also see Exhibit A-3**).

Compare evidence of record with Solicitor Brackett's comments and any objective observer will agree that he grossly misstated the evidence with the intent to mislead the court and jury, prejudice Applicant and deny Due Process, a fair trial and a true verdict. See U.S. v Berger, 295 U.S. 78 (1935); Mincey v. State, 444 S.E.2d 510 (S.C., 1994) Note:

The DNA obtained from item 18 is a mixture of at least two individuals. No conclusion can be made regarding the **inclusion or exclusion** of Dontavious Mack, Terrell Addison, or Davorious Mack as possible contributors to this mixture...Basically that means that the sample – there was something there in the DNA sample that was submitted, but there was not enough of a sample to verify whose it belonged – or who exactly the DNA belonged to. (**Record of Appeal 747**).

Based on the foregoing, Dontavious, Davorius and Terrell could not **specifically be included** as contributors, but **also could not be specifically excluded**. Therefore, the prosecutor committed prosecutorial misconduct in equating on close that no forensics were found on

Dontavious but nobody disagrees that he was in the car. The prosecution should not be permitted to have it both ways, i.e., use forensics to implicate but discount forensics when it exonerates. The forensic expert testified it was **"no chance that it was Ben's DNA" in the car (Record of Appeal 751)**. Counsel was ineffective in failing to object to these improper, prejudicial comments. *Strickland, supra*; *Brown v State*, 383 S.C. 506, 680 S.E.2d 909 (2009). In *Brown, supra*, South Carolina Supreme Court reversed the lower court who had found that counsel was ineffective for failing to object to impermissible comments on close by the solicitor on the ground that the comments were impermissible but Brown failed to prove that there was a reasonable probability that but for the error the result of the trial would have been different. *Brown, supra*, 383 S.C. at 518, 680 S.E.2d at 915. In the instant case but for counsel's failure to object there is a reasonable probability that the result of the trial would have been different. The solicitor's conflating as equivalent that because Applicant's DNA and fingerprints were not found did not mean he was not in the car and Dontavious Mack's DNA and fingerprints were not found and no one doubts he was not in the car is a misstatement of the facts, i.e., the evidence was that Applicant was **excluded** by the forensic evidence and Dontavious could not be **included or excluded**. In the context of the record, i.e., all codefendants testified that Applicant was present and provided the murder weapon, this remark was fatally prejudicial, mislead the court and jury and denied Due Process and a fair trial.

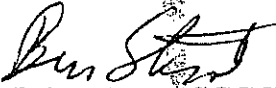
WHEREFORE, Petitioner prays that his Honorable Court, grant the following relief:

- A. Permission to proceed *In Forma Pauperis* pursuant to §17-27-60;
- B. Immediate appointment of counsel pursuant to §17-27-60;
- C. Discovery pursuant to §17-27-150;
- D. An Evidentiary Hearing after sufficient time to consult with appointed counsel.

And for other and further relief deemed just and proper based on the facts of this case, the law and in the interest of justice.

Dated this 21 day of December 2015

Respectfully submitted,



Ben Robert Stewart SCGC #223006
Kirkland Reception & Evaluation Center-Unit C2, Cell 15
4344 Broad River Road
Columbia, SC 29210

STATE OF CAROLINA

IN THE COURT OF COMMON PLEAS

County of YORK

2013-CP-46-3731

Ben Robert Stewart, SCDC#223006

Petitioner

V

State of South Carolina

DAVID HAMILTON
CLERK OF COURT
YORK COUNTY, SC

2016 JAN -8 PM 4:25

CERTIFICATE OF SERVICE

I, BEN ROBERT STEWART, hereby certify that I am submitting my Motion for permission to proceed in *forma pauperis*, immediate appointment of counsel, discovery and an expedited evidentiary hearing after sufficient time to consult with appointed counsel and expedited PCR adjudication for filing and service.

Three copies of said motion will be mailed via certified mail returned receipt requested to The Honorable David Hamilton, Clerk of Court for York County Civil Division, PO Box 649, York, SC 29745-0649.

Under separate cover I will mail one copy of said motion via certified mail returned receipt requested to Asst. Attorney General, J. Rutledge Johnson, Esq., at Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211-1549.

A self-addressed stamp envelop is enclosed to date-stamp and return the first page of the motion.

Respectfully submitted,



Ben Robert Stewart SCDC#223006
Kirkland Evaluation & Reception Center
4344 Broad River Road
Columbia, SC 29210-4010

The State's Response

1. Exh # 4. STATE'S Order of Dismissal dated
August 25, 2023

2. Exh # 6 STATE'S Amended Return dated
July 28, 2015

3. Exh # 6 STATE'S Return dated
MARCH 2014

4. Exh # 6.A STATE'S Conditional Order of Dismissal
dated
April, 2014

Exhibit
#4.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF YORK	)	FOR THE SIXTEENTH JUDICIAL CIRCUIT
	)	
Ben Robert Stewart, #223006,	)	
Applicant,	)	Case No.: 2013-CP-46-3731
	)	
v.	)	ORDER OF DISMISSAL
	)	
State of South Carolina,	)	
Respondent.	)	
	)	

This matter comes before the Court by way of an application for post-conviction relief filed by Ben Robert Stewart ("Applicant") on December 9, 2013, and amended on November 29, 2021 and again on November 29, 2022. The Court convened an evidentiary hearing into the matter on April 17, 2023, at the Moss Justice Center in York, South Carolina. Applicant was present at the hearing and represented by Ola A. Johnson, Esquire. Assistant Attorney General Zachary W. Jones, of the South Carolina Attorney General's Office, represented Respondent.

The Court has before it Applicant's records from the South Carolina Department of Corrections, a copy of the original trial transcript, the records of the York County Clerk of Court regarding the subject convictions, the records of Applicant's direct appeal, the pleadings and all attachments thereto. After reviewing all records and evidence before this Court, this Court finds as follows:

I. Procedural History

Applicant is presently confined in the South Carolina Department of Corrections. Applicant was indicted at the July 2007 term of the York County Grand Jury for accessory before the fact to murder (2007-GS-46-2526), accessory before the fact to armed robbery (2007-GS-46-2528); accessory before the fact to kidnapping (2007-GS-46-2530), criminal conspiracy (2007-GS-46-2531), possession of a firearm during the commission of a violent crime (2007-GS-46-

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1. Appellate counsel was ineffective for failing to cite trial court error in denying a directed verdict because guilt beyond a reasonable doubt could not be established on the evidence adduced.
2. Appellate counsel was ineffective for failing to raise the issue that no rational jury could have found guilt beyond a reasonable doubt on the evidence adduced at trial.
3. Appellate counsel was ineffective for failing to argue due process was denied because the evidence adduced at trial violated the *Winship* rule of establishing every element of the crime charged beyond a reasonable doubt.
4. Trial counsel was ineffective on the sufficiency of the evidence motion when he failed to argue that the DNA evidence excluded Applicant, rendering it physically impossible for him to have been present to commit the crimes charged.
5. Trial counsel was ineffective for failing to conduct a proper investigation when he failed to interview Monday Bishop and Val Hudson, who would have testified that Reed Allen was lying when he stated Applicant gave Allen the murder weapon and told him to hide it, and who would have contradicted testimony that Applicant's co-defendants Davorious Mack and Terrell Addison came to Bishop's apartment on the night in question.
6. Trial counsel was ineffective for failing to use compulsory process to call witnesses on Applicant's behalf to offer relevant, material, pertinent and exculpatory evidence. To wit: Trial counsel failed to call Val Hudson, who also would have testified that Applicant's co-defendants did not come to Bishop's apartment and that Applicant never spoke to Allen or gave him a bag to hide.
7. Trial counsel was ineffective for failing to put the prosecution's case to meaningful adversarial testing, such that there was an actual breakdown of the adversarial process during trial.
8. Applicant was denied effective assistance of trial counsel and a fair trial due to the cumulative effects of counsel's ineffectiveness.
9. Trial counsel was ineffective in misstating the evidence when he stated Monday Bishop's house was Reed Allen's house, bolstering Allen's testimony and giving the false impression that Applicant had a close relationship with Allen.
10. Withdrawn.
11. Withdrawn.
12. The solicitor knowingly used perjured testimony.
13. It was prosecutor misconduct in suppressing *Brady* material, i.e., Monday Bishop's exculpatory statement to the solicitor.
14. The solicitor knowingly misstated the evidence to mislead the jury and the court during closing argument when he falsely conflated the absence of Applicant's DNA and fingerprints in the vehicle with the absence of Dontavious Mack's DNA and fingerprints.

On November 29, 2021, Applicant, through counsel, filed an amended application raising the following issues:

1. Counsel failed to discuss a defense strategy with Applicant.
2. Counsel failed to review evidence with Applicant or provide a copy of the evidence.

submitted to it by the parties, and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented:

Ineffective Assistance of Counsel, Generally

In a PCR action, Applicant bears the burden of proving the allegations in his application by a preponderance of the evidence. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985); Rule 71.1(e), SCRPC. Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result.” *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in *Strickland*. First, Applicant must prove that counsel’s performance was deficient. *Strickland*, 466 U.S. at 687; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney’s performance by its “reasonableness under prevailing professional norms.” *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” *Id.* (citing *Strickland*, 466 U.S. at 690). “When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect.” *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). The Court, in determining deficiency, must affirmatively entertain the range of possible reasons

1. Allegations related to Applicant's claim that the DNA evidence obtained from the vehicle exonerated him;
2. Allegations related to Applicant's claim that Monday Bishop's story contradicted Reed Allen's testimony implicating Applicant as an accomplice to the murder.²

The Court finds that all these allegations can be resolved based on the fact that the DNA evidence did *not* exonerate Applicant and that Monday Bishop's story was *not* materially inconsistent with Reed Allen's testimony at trial.

1. DNA evidence did not exonerate Applicant

Applicant's criminal charges stem from the shooting of Ned Marshall, a clerk at a convenience store, during an armed robbery. According to the State's theory of the case, on October 10, 2006, Applicant and three co-conspirators—Davorius Mack, Dontavious Mack, and Terrell Addison—drove to Rock Hill from Hartsville looking for a place to rob. They settled on the BP convenience store. After parking the car nearby, the group decided that Terrell and Dontavious would go into the store to rob it, while Applicant and Davorius waited in the car. Dontavious did not have a gun, so Applicant gave him his gun, a 0.380 semi-automatic pistol. Dontavious and Terrell, wearing masks, entered the store and demanded cash from the clerk, Marshall. Eventually, Marshall produced a revolver and exchanged shots with Dontavious. Marshall was ultimately killed by two shots from the 0.380 Applicant had given to Dontavious. Dontavious was shot in the back-left shoulder as he and Terrell fled from the store.

² Applicant's original application and Allegation 5 of his first amended application also mention Val Hudson as a potential witness Trial Counsel allegedly failed to interview. However, Applicant did not produce her testimony at the evidentiary hearing. Therefore, he has failed to prove Trial Counsel was ineffective for failing to interview or call her. *See, e.g., Martin v. State*, 427 S.C. 450, 455, 832 S.E.2d 277, 279–80 (2019) (holding a PCR applicant who claims trial counsel was ineffective for failing to call certain witnesses must produce those witnesses or their testimony at the PCR hearing).

the shooting, he, Davorius, and Applicant went to Monday Bishop's apartment. Reed Allen was at the apartment and was given a brown bag.

Applicant did not testify. Following deliberations, the jury found Applicant guilty of criminal conspiracy; possession of a weapon during the commission of a violent crime; and accessory, before and after the fact, to murder, armed robbery, and kidnapping.

Applicant now claims he could not have been present in the car with the other conspirators because he was excluded as a contributor to a DNA sample obtained from the car. Specifically, Applicant contends he was excluded as a contributor to DNA on items 26 and 30.2, namely, a yellow straw and a cigarette butt taken from the vehicle. (Trial Tr. p.750). Applicant contends this evidence incontrovertibly proves that he could not have been present in the car, contradicting the testimony of Dontavious, Davorius, and Terrell.

On the contrary, the Court finds this portion of the DNA report cannot be construed as incontrovertible proof that Applicant was not present in the car. Investigator Mike Williams testified that only two items from the vehicle, a yellow straw and a cigarette butt, were tested against the DNA sample taken from Applicant. The mere fact that Applicant was excluded as a contributor to those items does not mean Applicant was not in the car at all; it only means the DNA that was recovered from those items did not belong to Applicant. It is possible that Applicant was in the car but simply did not touch the items from which the DNA samples were taken.³ In other words, the DNA evidence was not necessarily inconsistent with the testimony of Dontavious,

³ There was evidence introduced at trial that the conspirators were wearing gloves at the time of the robbery and that Applicant gave some gloves to Reed Allen to hide along with the murder weapon. From this evidence, it is inferable that Applicant could have been in the car wearing gloves, which would easily explain why his fingerprints and touch DNA were not found inside the car. Regardless, fingerprints and DNA could only be found in the parts of the car where investigators checked for such evidence; therefore, even if Applicant was not wearing gloves, he could have been in the car without leaving any fingerprints or DNA evidence in those places.

Trial Counsel testified at the evidentiary hearing that he spoke extensively with Monday Bishop prior to the trial because she is Applicant's sister. He testified that she never told him anything that would have made her a useful witness for the defense. Walter W. Thompson, who prosecuted Applicant, testified at the evidentiary hearing that he did not remember speaking to Monday Bishop except briefly at the courthouse just before Applicant's trial. He testified she told him that she did not know anything about what happened on the night of the murder, that she was asleep, and that she did not hang around with Applicant's associates. Thompson recorded his conversation with Bishop in a handwritten note.

The Court finds, based on the credible testimony of Trial Counsel and Thompson, that Trial Counsel had no reason to believe Monday Bishop's testimony would have been helpful to the defense. Both testified consistently that Bishop did not appear to know anything material about what happened the night of the murder. Monday Bishop admitted that she was asleep, just as she had told Thompson; therefore, naturally, she would not have noticed what happened at her apartment after she fell asleep. Therefore, even if she had testified at Applicant's trial, it is not likely that the result of Applicant's trial would have changed. Accordingly, Applicant has failed to establish either ineffective assistance on the part of Trial Counsel from failing to properly interview Monday Bishop or call her as a witness. Applicant has also failed to establish a *Brady*⁴ violation by the prosecution related to Monday Bishop's pre-trial conversation with the solicitor, which contained nothing exculpatory or favorable to the defense.

Applicant also complains that Trial Counsel "misstated the evidence" because he referred to Monday Bishop's house as Reed Allen's house. However, Reed Allen was concededly staying

⁴ *Brady v. Maryland*, 373 U.S. 83 (1963).

deficient as to this allegation. In addition, Applicant has failed to explain what other defense strategies he could have pursued had Trial Counsel discussed the matter more thoroughly with him or how those strategies might have led to a different outcome. Therefore, Applicant has failed to prove he was prejudiced by Trial Counsel's alleged deficiency. Accordingly, the Court finds Applicant has not met his burden of proving ineffective assistance of counsel as to this allegation.

2. Failure to review evidence with Applicant or to provide evidence

Trial Counsel credibly testified that Applicant received a copy of the evidence and that Trial Counsel went over the evidence with him. Therefore, the Court finds Applicant has failed to prove Trial Counsel was deficient. In addition, to prove prejudice from failure to review discovery, a PCR applicant must present some new evidence or defenses that could have been discovered by counsel's further review of the discovery. *Harris v. State*, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145-46 (2008) (citing *Jackson v. State*, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998)), *abrogated on other grounds by Smalls*, 422 S.C. 174, 810 S.E.2d 836. Furthermore, an applicant must also show how the new evidence or defenses would have resulted in a different outcome. *Id.* (citing *David v. State*, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997); *Skeen v. State*, 325 S.C. 210, 214, 481 S.E.2d 129, 132 (1997)). Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. *Id.*, 377 S.C. at 75, 659 S.E.2d at 145 (citing *Glover v. State*, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)). In this case, Applicant has not explained how further review of the evidence would have resulted in a different outcome at trial. The strongest evidence against Applicant, ultimately, was the testimony of his co-conspirators, rather than any physical or photographic evidence. Therefore, the Court also finds Applicant has not met his burden of proving prejudice.

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The Court finds that the questions were not leading. Therefore, Trial Counsel was not deficient for failing to object to those questions.

9. Failure to object to hearsay by Davorius Mack

Applicant claims Trial Counsel should have objected to the following testimony by Davorius Mack as hearsay: “[Dontavious] told me to come to his girlfriend’s house . . . and take Terrell Addison home.” (Trial Tr. p.333). The Court finds this testimony is not hearsay because hearsay is a statement offered to prove the truth of the matter asserted, and Dontavious’s words cited in this portion of Davorius’s testimony do not constitute an assertion. *See* Rule 801(c), SCRE. Trial Counsel, therefore, had no grounds to object to this testimony as hearsay. Similarly, Terrell Addison’s statement “Let’s stick” was not an assertion, and therefore was not objectionable on hearsay grounds. (Trial Tr. p.338). In addition, Applicant has not proved he was prejudiced by the failure to object because the challenged testimony is not material to any of the substantive issues at Applicant’s trial; in fact, Applicant is not even mentioned anywhere in the statements, and neither of the statements refer to the robbery or murder of Ned Marshall. Therefore, the Court finds this allegation is without merit.

10, 11, 12, and 13. Failure to object to hearsay by Reed Allen

Applicant contends Trial Counsel should have objected to the following statements by Reed Allen as inadmissible hearsay:

- “[Applicant] told me to put it up” (i.e., to hide the murder weapon—Trial Tr. p.515); this is not an assertion, but a verbal act by Applicant constituting the crime of accessory after the fact to murder. *See, e.g., N.L.R.B. v. Lexington Chair Co.*, 361 F.2d 283, 288 n.5 (4th Cir. 1966). In addition, these words by Applicant are



finds Applicant has not met his burden of proving either deficiency or prejudice as to this allegation.

15. Failure to move to sever the trials of Applicant and Terrell Addison

Applicant claims Trial Counsel was ineffective for failing to move to sever his trial from the trial of his co-defendant, Terrell Addison. The Court finds that there was no prejudice from failing to sever the trials, because all the evidence that was presented against Applicant at the joint trial could have been presented at an independent trial. *See Hughes v. State*, 346 S.C. 554, 552 S.E.2d 315 (2001) (holding counsel was not ineffective for failing to sever a defendant's trial from his co-defendant's trial where the same evidence would have been presented at an independent trial). In this case, as in *Hughes*, Applicant's co-defendant took the stand and was, therefore, subject to cross-examination. Therefore, there was no confrontation clause violation from trying both co-defendants together. Accordingly, the Court finds Applicant has failed to prove ineffective assistance of counsel as to this issue.

16 and 17. Failure to object to jury instruction that malice may be inferred from the use of a deadly weapon.

Applicant claims Trial Counsel should have objected to the trial court's jury instruction that malice may be inferred from the use of a deadly weapon; Applicant also claims Appellate Counsel was ineffective for failing to challenge that instruction on appeal. This instruction was not held to be improper until *State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019), more than ten years after Applicant's trial.⁵ Trial Counsel, therefore, had no grounds to object to the trial

⁵ *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009), predated *Burdette*, but its holding was limited to cases in which there was evidence to excuse, justify, or mitigate the homicide, such as self-defense or adequate legal provocation; no such evidence existed in this case. Regardless, *Belcher* came out in October 2009, whereas Applicant's trial was held in February 2009, so *Belcher* was also not in effect at the time of Applicant's trial.

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time served for the duration of his Pennsylvania sentence. Applicant has not explained why he should receive credit for that entire time, contrary to the express intent of the trial court. Accordingly, this Court finds Trial Counsel not ineffective as to this allegation.

2. Failure to challenge removal under the Interstate Agreement on Detainers

Applicant contends his removal from Pennsylvania to South Carolina was barred by the Interstate Agreement on Detainers ("IAD"), S.C. Code Ann. § 17-11-10 Art. VI(b), which prohibits removal of persons adjudged to be mentally insane. Applicant did not provide any evidence supporting his claim to have been adjudged "mentally insane" as that term is defined by the IAD. Regardless, the Court finds that, after Applicant was actually removed to South Carolina, the IAD did not bar his prosecution. Therefore, Trial Counsel's alleged failure to properly challenge Applicant's removal did not affect the result of Applicant's trial. Accordingly, Applicant has failed to prove either deficiency or prejudice as to this allegation.

Exhibit #
6.

STATE OF SOUTH CAROLINA
COUNTY OF YORK

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

Ben Robert Stewart,

Applicant,

v.

State of South Carolina,

Respondent.

2013-CP-46-3731

AMENDED RETURN

FILED-RECEIVED
2015 JUL 24 AM 11:42
DAVID E. HAMILTON
C.C. CLERK
YORK COUNTY, SC

Respondent, making its Return to the Application for post-conviction relief filed on December 9, 2013, would respectfully show this Court:

I.

Applicant is presently confined in the Pennsylvania Department of Corrections. Applicant was indicted at the July 2007 term of the York County Grand Jury for accessory before the fact to murder (2007-GS-46-2526), accessory before the fact to armed robbery (2007-GS-46-2528); accessory before the fact to kidnapping (2007-GS-46-2530), criminal conspiracy (2007-GS-46-2531), possession of a firearm during the commission of a violent crime (2007-GS-46-2532), and accessory after the fact to murder, armed robbery, and kidnapping (2007-GS-46-2535). Kenneth D. Snow, Esquire, represented him.

On February 27, 2009, Applicant proceeded to jury trial pursuant where he was found guilty as indicted for the above referenced offenses. The Honorable Lee S. Alford sentenced him to confinement for a period of thirty (30) years for accessory before the fact to murder, twenty (20) years for accessory before the fact to armed robbery, ten (10) years for accessory before the fact to kidnapping, five (5) years for criminal conspiracy, five (5) years for the weapon charge,

and ten (10) years for accessory after the fact to murder, armed robbery and kidnapping. All sentences imposed are concurrent to each other, except for the thirty year sentence which runs consecutive to Applicant's Pennsylvania sentence.

A timely Notice of Appeal and a brief pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), was filed on the Applicant. The South Carolina Court of Appeals dismissed the appeal by written Order on December 12, 2012. State v. Stewart, 2012-UP-651 (filed December 12, 2012).

2010-CP-46-0661

Applicant subsequently filed an application for post-conviction relief (PCR) on February 16, 2010, alleging he was being held unlawfully for the following reasons:

1. "Judicial error, their(sic) was no plea, only a conviction."
2. "Judicial error, trial by ambush within both partys(sic)."
3. "DNA evidence exonerates being linked to convicted charges."
4. "Ineffective Assistance of Counsel."
5. "Petitioner needs transcripts to perfect appeal process and or any denfence(sic)."

The State filed its Return and Motion to Dismiss without prejudice on or about June 24, 2010. The Honorable Lee S. Alford issued a Conditional Order of Dismissal dated July 1, 2010 and filed July 6, 2010, as the Applicant had a pending direct appeal and lacked standing as he is incarcerated within the Pennsylvania Department of Corrections. Judge Alford also gave the Applicant twenty days, from receipt of the Conditional Order of Dismissal, to respond with factual and legal reasons why the PCR action should not be dismissed in its entirety. The Applicant was served with the Conditional Order of Dismissal via Registered Mail on December

19, 2011. The Applicant made no Response to the Conditional Order of Dismissal, and Judge Alford entered a Final Order of Dismissal without prejudice on April 26, 2012.

2012-CP-46-4229

Applicant subsequently filed a Petition for Writ of Habeas Corpus with the York County Clerk of Court on December 10, 2012. In that document, the Applicant raised the following grounds for relief:

1. South Carolina waived extradition from Pennsylvania.
2. Mental illness/incompetence.

The Respondent made its Return and Motion to Dismiss on or about January 25, 2013. By Order of Dismissal dated January 28, 2013 and filed February 6, 2013, the Honorable John C. Hayes, III, dismissed the petition with prejudice.

II.

In his current application for post-conviction relief, the Applicant alleges that he is being held unlawfully for the following reasons:

1. "Appellate counsel was ineffective in failing to cite trial court error in denying a directed verdict because guilt beyond a reasonable doubt could not be established on the evidence adduced."
2. "Appellate counsel was ineffective for failing to raise the issue that no rational jury could have found guilt beyond a reasonable doubt on the evidence adduced at trial."
3. "Appellate counsel was ineffective in failing to raise Due Process was denied because the evidence adduced at trial violated the *Winship* rule of establishing proof of every element of the crime charged beyond a reasonable doubt."
4. "Trial counsel was ineffective on the Sufficiency of the Evidence Motion."
5. "Trial counsel was ineffective for failing to conduct a proper investigation."
6. "Trial counsel was ineffective for failing to use compulsory process to call witnesses on Applicant's behalf to offer relevant, material, pertinent and exculpatory evidence."
7. "Trial counsel was ineffective for failing to put the prosecution's case to meaningful adversarial testing, such that there was an actual breakdown of the adversarial process during trial."

8. "Applicant was denied effective assistance of trial counsel, and a fair trial due to the cumulative effects (emphasis added by Applicant) of counsel's ineffectiveness."
9. "Trial counsel was ineffective in misstating the evidence."
10. "The solicitor knowingly used perjured testimony."
11. It was prosecutor misconduct in suppressing *Brady* material, i.e., Monday Bishop's exculpatory statement to the solicitor."
12. The solicitor knowingly misstated the evidence to mislead the jury and the court on closing argument."

For the purposes of this Return, the Respondent incorporates herein and by reference the records of the York County Clerk of Court, Applicant's records from the Department of Corrections, and the prior PCR records. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

III.

Respondent contends that Applicant's trial counsel rendered adequate assistance and provided representation within the range of competence required by attorneys in criminal cases. In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its reasonableness under professional norms. Id. 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. 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, 104 S. Ct. 2052. The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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. Id. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

Respondent submits that 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. Respondent requests an evidentiary hearing to fully resolve this issue. Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

The allegation that appellate counsel was ineffective is without merit. Respondent contends that Applicant's appellate counsel rendered adequate assistance and provided representation within the range of competence required by appellate attorneys. A defendant is constitutionally entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830 (1985). Where ineffective assistance of appellate counsel is alleged, the applicant must show that appellate counsel's performance was (1) deficient; and (2) that there was prejudice from the appellate counsel's deficiency. Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999). To be effective, appellate counsel must give assistance of such quality as to

make appellate proceedings fair. Id. Appellate counsel must provide effective assistance but need not raise every non-frivolous issue presented by the record. Id. Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

When a claim of ineffective assistance of appellate counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

Respondent submits that Applicant cannot satisfy either requirement of the Strickland v. Washington test with regard to the ineffectiveness claims against appellate counsel. However, the allegation of ineffective assistance of appellate counsel probably raises questions of fact that cannot be conclusively refuted by the record. Respondent requests an evidentiary hearing to fully resolve this issue. Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

V.

Applicant also alleges prosecutorial misconduct. Prosecutorial misconduct is not an issue for post-conviction relief, but rather a direct appeal issue that is procedurally barred by S.C. Code Ann. § 17-27-20(b) (2003). Post-conviction relief is not a substitute for an appeal. Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993). Applicant could have raised this issue on

appeal. The failure to do so has waived this allegation as grounds for relief. Regardless, it is Applicant's burden to prove actual prosecutorial misconduct. Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201 (1989). Therefore, Respondent submits this allegation should be summarily dismissed.

VI.

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

VII.

WHEREFORE, Respondent requests an evidentiary hearing for the purpose of determining whether the Applicant's trial and appellate counsel were ineffective.

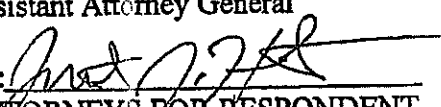
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

JUSTIN J. HUNTER
Assistant Attorney General

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

July 28, 2015

Exh #6

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)
Ben Robert Stewart,)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS

2013-CP-46-3731

RETURN AND MOTION TO DISMISS

CLERK OF COURT
YORK COUNTY, SC

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The Respondent, making its Return to the Application for post-conviction relief filed on December 9, 2013, would respectfully show this Court:

I.

The Applicant is confined in the Pennsylvania Department of Corrections. Applicant was indicted at the July 2007 term of the York County Grand Jury for accessory before the fact to murder (2007-GS-46-2526), accessory before the fact to armed robbery (2007-GS-46-2528); accessory before the fact to kidnapping (2007-GS-46-2530), criminal conspiracy (2007-GS-46-2531), possession of a firearm during the commission of a violent crime (2007-GS-46-2532), and accessory after the fact to murder, armed robbery, and kidnapping (2007-GS-46-2535). Kenneth D. Snow, Esquire, represented him.

On February 27, 2009, Applicant proceeded to trial pursuant to which the jury found him guilty as indicted for the above referenced offenses. The Honorable Lee S. Alford sentenced him to confinement for a period of thirty (30) years for accessory before the fact to murder, twenty (20) years for accessory before the fact to armed robbery, ten (10) years for accessory before the fact to kidnapping, five (5) years for criminal conspiracy, five (5) years for the weapon charge,

Response to the Conditional Order of Dismissal and this Court entered a Final Order of Dismissal without prejudice on April 26, 2012².

2012-CP-46-4229

Applicant subsequently filed a Petition for Writ of Habeas Corpus with the York County Clerk of Court on December 10, 2012. In that document, the Applicant raised the following grounds for relief:

1. "The petitioner has reached the age of seventy-six years and six months which clearly places him in the category of 'geriatric' and considering the medical conditions described [in his petition], it is clear that the petitioner, upon being thoroughly examined and his medical records examined, would certainly he declared physically and permanently disabled."

The Respondent made its Return and Motion to Dismiss on or about January 25, 2013. By Order of Dismissal dated January 28, 2013 and filed February 6, 2013, the Honorable John C. Hayes, III, dismissed the petition with prejudice.

II.

In his current application for post-conviction relief, the Applicant alleges that he is being held unlawfully for the following reasons:

1. "Appellate counsel was ineffective in failing to cite trial court error in denying a directed verdict because guilt beyond a reasonable doubt could not be established on the evidence adduced."
2. "Appellate counsel was ineffective for failing to raise the issue that no rational jury could have found guilt beyond a reasonable doubt on the evidence adduced at trial."
3. "Appellate counsel was ineffective in failing to raise Due Process was denied because the evidence adduced at trial violated the *Winship* rule of establishing proof of every element of the crime charged beyond a reasonable doubt."
4. "Trial counsel was ineffective on the Sufficiency of the Evidence Motion."
5. "Trial counsel was ineffective for failing to conduct a proper investigation."

² As noted in the Final Order, the Petitioner has one year from the time he is transferred to the custody of South Carolina to file an application for PCR as he is in Pennsylvania's custody and cannot be transported for a hearing pursuant to Clayton v. State, 278 S.C. 655, 301 S.E.2d 133 (1981).

IV.

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

V.

WHEREFORE, Respondent moves to summarily dismiss the application because the Applicant lacks standing to bring the action while he is incarcerated outside of South Carolina.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

J. CROOM HUNTER
Staff Attorney

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

By:


Attorneys for the Respondents

Columbia, South Carolina
February 28, 2014

Exhibit #
6-A

STATE OF SOUTH CAROLINA
COUNTY OF YORK

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

2013-CP-46-3731

Ben Robert Stewart,

Applicant,

v.

State of South Carolina,

Respondent.

CONDITIONAL ORDER OF DISMISSAL

In response to the post-conviction relief application filed December 9, 2013, the Respondent would show this Court:

I.

The Applicant is confined in the Pennsylvania Department of Corrections. Applicant was indicted at the July 2007 term of the York County Grand Jury for accessory before the fact to murder (2007-GS-46-2526), accessory before the fact to armed robbery (2007-GS-46-2528); accessory before the fact to kidnapping (2007-GS-46-2530), criminal conspiracy (2007-GS-46-2531), possession of a firearm during the commission of a violent crime (2007-GS-46-2532), and accessory after the fact to murder, armed robbery, and kidnapping (2007-GS-46-2535). Kenneth D. Snow, Esquire, represented him.

On February 27, 2009, Applicant proceeded to trial pursuant to which the jury found him guilty as indicted for the above referenced offenses. The Honorable Lee S. Alford sentenced him to confinement for a period of thirty (30) years for accessory before the fact to murder, twenty (20)

years for accessory before the fact to armed robbery, ten (10) years for accessory before the fact to kidnapping, five (5) years for criminal conspiracy, five (5) years for the weapon charge, and ten (10) years for accessory after the fact to murder, armed robbery and kidnapping. All sentences imposed are concurrent to each other, except for the thirty year sentence which runs consecutive to Petitioner's Pennsylvania sentence.

A timely Notice of Appeal and a brief pursuant to Anders¹ was filed on the Applicant. The South Carolina Court of Appeals dismissed the appeal by written Order on December 12, 2012. State v. Stewart, 2012-UP-651 (filed December 12, 2012).

2010-CP-46-0661

The Applicant subsequently filed an application for post-conviction relief (PCR) on February 16, 2010. The Applicant raised the following issues in his first PCR:

1. "Judicial error, their(sic) was no plea, only a conviction."
2. "Judicial error, trial by ambush within both partys(sic)."
3. "DNA evidence exonerates being linked to convicted charges."
4. "Ineffective Assistance of Counsel."
5. "Petitioner needs transcripts to perfect appeal process and or any denfence(sic)."

The State filed its Return and Motion to Dismiss without prejudice on or about June 24, 2010. The Honorable Lee S. Alford issued a Conditional Order of Dismissal dated July 1, 2010 and filed July 6, 2010, as the Applicant had a pending direct appeal and lacked standing as he is incarcerated within the Pennsylvania Department of Corrections. Judge Alford also gave the

¹ Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967).

2. "Appellate counsel was ineffective for failing to raise the issue that no rational jury could have found guilt beyond a reasonable doubt on the evidence adduced at trial."
3. "Appellate counsel was ineffective in failing to raise Due Process was denied because the evidence adduced at trial violated the *Winship* rule of establishing proof of every element of the crime charged beyond a reasonable doubt."
4. "Trial counsel was ineffective on the Sufficiency of the Evidence Motion."
5. "Trial counsel was ineffective for failing to conduct a proper investigation."
6. "Trial counsel was ineffective for failing to use compulsory process to call witnesses on Applicant's behalf to offer relevant, material, pertinent and exculpatory evidence."
7. "Trial counsel was ineffective for failing to put the prosecution's case to meaningful adversarial testing, such that there was an actual breakdown of the adversarial process during trial."
8. "Applicant was denied effective assistance of trial counsel, and a fair trial due to the **cumulative effects** (emphasis added by Applicant) of counsel's ineffectiveness."
9. "Trial counsel was ineffective in misstating the evidence."
10. "The solicitor knowingly used perjured testimony."
11. It was prosecutor misconduct in suppressing *Brady* material, i.e., Monday Bishop's exculpatory statement to the solicitor."
12. The solicitor knowingly misstated the evidence to mislead the jury and the court on closing argument."

III.

This Court finds that the Applicant lacks standing to bring this post-conviction relief application at this time. According to the information provided by the Applicant, he is incarcerated in the Pennsylvania Department of Corrections. Respondent has no duty or authority to ensure Applicant's presence at a scheduled hearing should one be granted, while he is incarcerated out of state. Clayton v. State, 278 S.C. 655, 658, 301 S.E.2d 133, 134 (1981). Accordingly, this Court finds the current PCR application should be summarily dismissed without prejudice to the Applicant's right to file another application when he returns to state custody. Id. This Court further cautions Applicant that the statute of limitations applies to Applicant and begins to run once he is

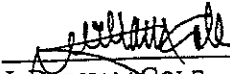
returned to this jurisdiction. See Carter v. State, 337 S.C. 17, 522 S.E.2d 342 (1999).

V.

Pursuant to S.C. Code Ann. § 17-27-70(b), the Court intends to dismiss this Application without prejudice unless the Applicant provides specific reasons, factual or legal, why the Application should not be dismissed in its entirety. The Applicant is granted twenty (20) days from the date of service of this Order upon him to show why this Order should not become final. The Applicant shall file any reasons he may have with the York County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
Attn: J. Croom Hunter, Esquire
P.O. Box 11549
Columbia, South Carolina 29211

AND IT IS SO ORDERED this 7 day of April, 20 14.



J. DERHAM COLE
Presiding Judge⁴
Sixteenth Judicial Circuit Court

_____, South Carolina

⁴ Pursuant to subsection (c) of the attached Order from the Chief Justice of the Supreme Court of South Carolina, this Court is granted the authority to sign the Conditional Order of Dismissal.

The State's deprivation of Witness

1. Exh A2 Val Hudson Affidavit dated Feb. 22, 2013 - filed Dec. 9, 2013.

2. Exh #22 Post Conviction Relief hearing April 17, 2023. pgs (105) total.
At page 20-22 Lawanda Val Hudson Affidavit read into the record at PCR hearing.

3. Exh B12 Val Hudson - Obituary, dated July 12, 2019

EXHIBIT A-2

A-2 Lawanda (Val) Hudson Affidavit Dated February 22, 2013 (two pages) 21, 23

IN THE STATE OF SOUTH CAROLINA

AFFIDAVIT

I, Lawanda Valeen Hudson, hereby swear or affirm under penalties for perjury pursuant to *§16-9-10, et seq. South Carolina Code* that the following statements are true and correct upon belief or information:

1. Currently, I reside at 208 Leesburg Street, Hartsville, SC 29550; phone (843) 383-6804.
2. In making this affidavit, I read the testimony of Reed Allen, Davorious Mack, and Terrell Addison. My testimony will comment by page(s) and line(s).
3. I provide this affidavit to tell the truth of what happened at my friend Monday Bishop's place on the night in October, 2006, when Reed Allen, who had been partying with us, lied that Monday's brother Ben Stewart gave him a gun in a bag to hide for him.
4. I also provide this affidavit to say that Davorious Mack and Terrell Addison did not come to Monday's place that night and are lying when saying they was there and Ben gave Reed a gun.
5. Ben's lawyer did not talk to me about what happened on that night.
6. If Ben's lawyer had asked me what happened and called me to testify in court I would have said:
7. (pg. 350:15, 19-20) Davorious did not come to Monday's place that night because I was there all night long.
8. (pg. 515:9-25) When Ben came he did not talk to Reed and did not give him anything.
9. (pg. 524:15-19) Reed did not know Ben like that cause at the time we all just met Ben when Ben came down from Philly to visit and Reed hardly ever was around us cause we would be from my house to Monday's house. Monday was never in a relationship with Reed Allen he just liked her.
10. (526:14-19) Monday said she had to go let Ben in cause he did not have a key to get in

the house so we went straight there from leaving the spot we hung out at to have drinks from time to time.

11. (527:2-5) Monday never passed her phone to Reed when we left the juke joint because I would have seen her do it.

12. (527:9-16) Yes me (Val), Reed, Ben and Monday was the only ones at Monday's place.

13. (pg. 528:5) No one came in with Ben that night; he was by himself and he did not talk to anybody.

14. (pg. 530: 19-23) Ben was the last and only person who came to Monday's place that night. Me and Monday was on the couch and Reed was walking back and forth from the living room to the kitchen to the living room. None of this stuff happened.

15. (pg. 534) We never saw, knew or heard anything about a gun because no gun was passed around.

Lowanda Valeen Hudson

Lowanda Valeen Hudson
208 Leesburg Street
Hartsville, SC 29550

Sworn before me this 22 day of February, 2013

Felicia T. Bane

Exh#
22

1 STATE OF SOUTH CAROLINA.

2 -----x

3 BEN ROBERT STEWART,

Case numbers

4 Applicant,

2007-GS-46-2526

5 -against-

2007-GS-46-2528

6 STATE,

2007-GS-46-2530-32

7 Respondent.

2007-GS-46-2535

8

9 -----x

10 York, S.C.

11 April 17, 2023

12 B E F O R E:

13 HONORABLE EUGENE GRIFFIN

14

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

16 OLA JOHNSON,

17 Attorney for the Applicant

18

19 ZACHARY JONES

20 Attorney for the Respondent

21

22 Aileen Butler

23 Official Court Reporter

24

25

E X H I B I T S.

<u>NO.</u>	<u>DESCRIPTION</u>	<u>I.D.</u>	<u>EVD</u>
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1 charge and ten years for accessory after the fact to
2 murder, armed robbery and kidnapping.

3 All sentences imposed were to run concurrently to
4 each except for the thirty-year sentence which was to
5 run consecutively to Mr. Stewart's Pennsylvania
6 sentence.

7 THE COURT: Which is not related, but what is the
8 Pennsylvania sentence?

9 MR. JONES: Your Honor, I don't know off the top
10 of my head.

11 THE COURT: All right. We will find out in a
12 moment.

13 MR. JONES: Eight to sixteen according to
14 Solicitor Brackett who is present here.

15 A timely Notice of Appeal and brief pursuant to
16 Anders v California was filed on behalf of Mr.
17 Stewart. The South Carolina Court of Appeals
18 dismissed the appeal by written order on December 12,
19 2012 and Mr. Stewart has since filed this post
20 conviction relief application. With that I will turn
21 over to Mr. Johnson.

22 THE COURT: All right Mr. Johnson.

23 MR. JOHNSON: Thank you, Your Honor. My client
24 Mr. Stewart wants to address the court with some
25 concerns he had.

1 went to one of the co-defendant's house when I had
2 actually went to my sister's house and the solicitor
3 had misstated the same fact and my attorney as well
4 has misstated the same fact. So I was wanting them
5 present as well just to show you because the applicant
6 has the burden of establishing a claim and they are
7 not here.

8 THE COURT: Judge Alford is not -- you can't call
9 him as a witness. Do you understand that?

10 MR. STEWART: No, I didn't.

11 THE COURT: Okay. He has a picture over there on
12 the wall. He has since retired and he's fully
13 inactively retired. Meaning he doesn't come to court.
14 Some judges come and hold a little bit here and there.
15 He's totally retired and enjoying his grandchildren I
16 hope. And Mr. Thompson is not practicing law here. I
17 think he's in Colorado. That's why he's not here.
18 He's out in the Rocky Mountains, I believe.

19 MR. JONES. If I may, the State was planning to
20 call Mr. Thompson, understanding he is ready to
21 participate via the court's virtual courtroom.

22 THE COURT: All right. Let's go back to Mr.
23 Stewart. You were concerned about this. Judge Alford
24 wouldn't be much -- he's not allowed to testify as a
25 witness either way. So there's no harm there. Your

1 certified mail because she didn't have a copy machine
2 but once it was sent she told me it came and I always
3 took note of that, and I said did we ever get that
4 statement because, you know, I had asked Mr. Snow if
5 she received it and he said he would find out. So,
6 you know, once I looked through my transcript I saw
7 that, you know, on my witness list that with my sister
8 was --

9 THE COURT: You have got to speak up.

10 MR. STEWART: -- was a key factor regarding --
11 regarding me being exonerated or was helpful. So, I
12 had asked well -- well, I had actually got in contact
13 with my sister and my other witness to try a get them
14 to file affidavits. I had present today filed my
15 memoranda of law and with that I had filed a motion to
16 discovery and we just been waiting to get discovery.
17 We had got the exhibit but never got the discovery.

18 THE COURT: All right. Your lawyer told me you
19 had some concerns. What are you asking me for?

20 MR. STEWART: Brady violation. The statement --
21 the actual statement. I got a letter stating this is
22 you know the exhibits. But I didn't request exhibits.
23 I requested one exhibit. I didn't request the other
24 additional exhibits. I just need the statement.

25 THE COURT: Your sister's statement?

1 statement.

2 THE COURT: Okay. All right, he's given a fairly
3 succinct presentation of what he believes was a
4 violation. Is that part of your case you're going to
5 pitch today?

6 MR. JOHNSON: Well, Your Honor, I was going to put
7 in here -- I put in my second amended, second amended,
8 that it was ineffective for him not to pursue those
9 witnesses. I don't have -- I'm not sure what Mr. Snow
10 is going to say about whether or not he received a
11 statement, but he said he clearly knew about the
12 existence of the witnesses, and so I don't know what
13 he going to say. If he said I received the statement
14 or if he says, well, I never received it so I don't
15 know if it exists. You know, I'm stuck with what I
16 got.

17 THE COURT: I don't know the facts of the case,
18 but an accused sister -- and she's not part of the
19 victim's side of things -- seems like she would be
20 very available to counsel for her brother.

21 MR. JOHNSON: Right. And that's the whole point.
22 She was. That is my understanding. Her testimony is
23 going to be she made herself available to Mr. Snow.
24 She made it quite obvious to him that she was going to
25 be a valuable witness and he did not pursue it.

1 MR. STEWART: Val Hudson had actually -- she had
2 died. She had passed away, three years ago, four
3 years ago and I have an obituary. But, you know, I
4 was wanting to get her affidavit in the record. You
5 know because I believe she was an essential witness
6 and I was showing due diligence getting to court and
7 coming to court and I was ready, you know, trying to
8 get her here. I even had a couple hearings where I
9 was going to represent myself pro se and they wouldn't
10 allow me. I knew that she was sick. I was --

11 THE COURT: I got that. So she didn't get called
12 --

13 MR. STEWART: No, sir.

14 THE COURT: -- by your lawyer?

15 MR. STEWART: No.

16 THE COURT: Similar to your sister?

17 MR. STEWART: Yes, sir, she didn't.

18 THE COURT: Anything else?

19 MR. STEWART: No.

20 THE COURT: Okay. All right, Mr. Johnson, you
21 intend to call how many witnesses?

22 MR. JOHNSON: Just Miss Bishop.

23 THE COURT: Let's get going.

24 MR. JOHNSON: Yes, sir. We call Mr. Stewart.

25 THE COURT: Come up here.

1 starting with some of the grounds that you listed in your
2 original application. Could you describe why you feel
3 appellant counsel was ineffective for failing to appeal the
4 court in denying the directed verdict motion? Can you talk
5 about that?

6 A Yes. Could I start from the top how I believe my whole

7 --

8 Q Wherever you feel like you need.

9 A Okay. I said I filed issues under the rules of
10 ineffective assistance of counsel regarding his failure to raise
11 and argue incontrovertible physical facts doctrine or theory,
12 wherever the defendant's DNA was found in the vehicle, accept my
13 DNA. I said appeals counsel was ineffective for failing to
14 raise judicial error for failing to sua sponte find as a matter
15 of law that based on incontrovertible physical fact doctrine or
16 theory, that the testimony was insufficient to convict in light
17 of my DNA not being present in the vehicle.

18 The other issues are that trial counsel was inept
19 regarding investigating the case, determining the applicable
20 law, interviewing witnesses and failing to exercise my right to
21 compulsory process to refute testimony from co-defendants that I
22 gave murder weapon to a co-defendant in my sister's
23 apartment. I said I have sworn notarized affidavits from my
24 sister and her friend that I came to her apartment alone on the
25 night and did not give him a bag with a gun in it to hide. Note

1 that was my DNA, it was un identified male individual and they
2 said it was mine. So once I took the DNA test it exonerated me.
3 It was four people and I was suppose to be the fourth
4 perpetrator and it was an identified male individual. I didn't
5 understand why once they took my DNA and they said I was
6 exonerated who was the fourth perpetrator. You know, that's not
7 my job. I didn't know.

8 Q I don't mean to cut you off. It was your allegation
9 you also stated appellant counsel was ineffective for failing to
10 raise issue that no rational jury could have found the defendant
11 guilty beyond a reasonable doubt. That is related to what you
12 just testified about?

13 A Yes, sir.

14 Q And also, your allegation, trial counsel failed to
15 effectively argue directed verdict motion. Does that go into
16 that same area of evidence?

17 A Yes, it does.

18 Q Okay.

19 A Hold on.

20 Q Go ahead.

21 A But with that, on the motion for directed motion - for
22 the motion to directed verdict, I believe Mr. Snow only argued
23 against kidnapping charge and I'm going to trial for a murder
24 charge. He only argued for one charge. He just said that he's
25 going to basically agree with Mr. Swerling's position and not my

1 my lawyer thought that Val could have possibly cleared me in my
2 entire case because she was a neutral party. She wasn't my
3 sister and she wasn't, you know, to the state. So I was like,
4 I looked at it the same way. So I got an affidavit from Val
5 and, you know, Val corroborated his testimony. Everything that
6 he said.

7 It's been ten years since I looked at it but I know it
8 wasn't nothing damaging to me. It was said the truth that I
9 came in the house and I went in my room and sleep. That's all I
10 remember reading. I have it though if the judge or anyone want
11 to see it.

12 Q And as far as Val Hudson -- and also the attorney
13 referenced the testimony of Miss Bishop on closing as well,
14 correct?

15 A Yes, sir.

16 Q Monday Bishop is your sister?

17 A I'm not sure if he really referred to my sister. The
18 only thing I remember is Val. I know he said Val for a fact.

19 Q Monday Bishop is your sister?

20 A Yes, Monday Bishop is my sister.

21 Q And in the amended application where I incorporated
22 what you had filed and I referenced something entitled
23 conclusion of facts, memorandum of law, and support of
24 application for post conviction relief. You included the
25 affidavit for Lawanda Valeen Hudson in that didn't you?

1 tell Terrell Addison. My testimony will comment by
2 pages and line. I provided this affidavit to tell the
3 truth of what happened at my friend, Monday Bishop's
4 place on the night in October, 2006, when Reed Allen,
5 who had been partying with us, lied that Monday's
6 brother, Ben Stewart, gave him a gun in a bag to hide
7 for him.

8 I also provided this affidavit to say that
9 Davorious Mack and Terrell Addison did not come to
10 Monday's place that night and are lying when saying
11 they was there and Ben gave Reed a gun.

12 Ben's lawyer did not talk to me about what
13 happened on that night. Ben's lawyer had asked me
14 what happened and testify in court I would have said,
15 page 315, 19-20, Davorious did not come to Monday's
16 place that night because I was there all night long.
17 Page 515, 9-25. When Ben came he did not talk to Reed
18 and did not give him anything.

19 Page 524, 15-19, Reed did not know Ben like that
20 because at the time we all just met Ben. When Ben
21 came down from Philly to visit and Reed hardly ever
22 was around us cause we would be from my house to
23 Monday's house. Monday was never in a relationship
24 with Reed Allen. He just liked her.

25 526, 14-19, Monday said she had letting to let go

1 THE COURT: I got it already.

2 MR. JOHNSON: Thank you, judge.

3 Q Mr. Stewart, to continue, you said in your original you
4 filed that trial counsel failed to object to prosecutor's
5 statement regarding DNA evidence on closing. Can you kind of
6 expand on that a little bit?

7 A Yes, also I had forgot because I didn't have my notes
8 out, but regarding my appellant attorney, she also filed an
9 Ander's brief. She filed Ander's brief on my behalf and I just
10 wanted to note that. But you say you wanted me to explain what
11 now?

12 Q Did ineffective trial counsel fail to object to
13 prosecutor's statement regarding DNA on closing?

14 A Oh, yes. Regarding the DNA?

15 Q Yes, sir.

16 A I said the solicitor knowingly misstated the evidence.

17 Q Basically you're indicating he misstated the evidence.
18 How did he do it?

19 A On closing the State had misstated the evidence
20 regarding the inability -- the inability or the positive of
21 whether or not the DNA was mixed -- was a mixture he said
22 verbatim -- this chains. One second.

23 MR. JOHNSON: Your Honor, if I can pass him a copy
24 of the transcript, if that's okay for me to pass that
25 up for him to reference it.

1 DNA was found in the car and his brother's DNA was found in the
2 car and Terrell DNA was in the car, but my DNA wasn't found in
3 the car. So that was -- you know, he misstated the evidence
4 when he said that, you know, they found his fingerprints wasn't
5 in there. He just basically tried to shift it saying that it
6 was okay to say that their DNA was in there when they needed it
7 but then turned around and discounted it when I -- when I said
8 there was no DNA on me. So that wasn't fair. He couldn't be
9 permitted to use it both ways. Use DNA to convict but then turn
10 around and then say no, it doesn't matter because Mr. Stewart
11 don't have DNA in the case.

12 So, you know, I felt as though Mr. Snow should have
13 objected to the misstatement of the evidence.

14 Q Okay. Your Honor, I am going to move on to the -- I
15 filed two amended applications here. So I will move on to the
16 first one here filed November 29, 2021. In this I incorporated
17 and adopted the application filed by the applicant originally.
18 Number one, on that amendment to application.

19 Mr. Stewart, can you talk about whether or not Mr. Snow
20 failed to discuss a defense strategy with you?

21 A Well, prior to trial I met and had him had sat down with
22 the solicitor's office, Mr. Thompson and I can't remember
23 someone else. But we actually sat down and we was talking to
24 them about me possibly taking a plea and I was headstrong on
25 trying to get my case dismissed based on my mental disability.

1 Q Okay. Do you feel he fail to properly investigate the
2 case?

3 A I do.

4 Q Tell me about that?

5 A Well, I think he realized that during trial it was at
6 the end of trial, but during the end of trial that Val could
7 have possibly cleared the whole thing up. Those were his words
8 and he should have called her. I believe had he called Val or
9 had he rebutted Mr. Thompson stating that my sister testimony
10 she would have drove any distance. Because he stated that.
11 What sister wouldn't come to trial and testify on behalf of her
12 brother and she actually came and she was there every day at
13 trial. So I felt as though that, you know, as a defense
14 attorney I would call her.

15 Q Are you talking about Monday Bishop?

16 A Yes, sir.

17 Q Your sister?

18 A Yes, sir.

19 Q So you made it clear to him that she was a available
20 witness?

21 A Yes. They actually spoke. They actually spoke and she
22 told him that she was willing to testify. My mom said she
23 didn't know anything about the case, but my sister said well, I
24 was there. If you need me I'll talk to them and during -- I
25 think like in the middle of my trial I'll talked to her and she

1 Q And his testimony, part of it was about this exchange
2 of the weapon taking place back at the residence with Miss
3 Monday Bishop and Miss Val Hudson being there?

4 A Correct.

5 Q Okay. And that's who Reed Allen was. Go ahead.

6 A And the plea agreement I had noted as an exhibit that
7 Mr Snow didn't believe that I had a chance for acquittal. He
8 stated that in his plea agreement. So when I looked at that I
9 was like, you know, I was blown away. I say wow. This is case
10 where there's no physical evidence. I have all contradiction
11 evidence. All contradiction statements. I have co-defendant
12 saying I got a gun out of a trunk. I have a co-defendant saying
13 I never had a gun. I had a co-defendant saying that I had a gun
14 inside of the car. So, you know, all of these inconsistencies
15 along with the physical evidence it through me off. So you know
16 -- you know, it didn't sit right as far as defense strategy.

17 Q Okay. Mr. Stewart I'm going to go into some more kind
18 of details about what was said at the trial and some of the
19 things that your attorney did or failed to do.

20 Do you recall Mr. Snow talking to you about why he failed
21 to object to leading question by the solicitor, Dontavious Mack,
22 "Ben didn't want to go in. He gave you the gun." Page 188,
23 line 12, and "He gave you the gun. He knew you were robbing the
24 BP station" page 188, line 18. Did Mr. Snow ever kind of
25 justify to you why he failed to object to that?

1 A No.

2 Q Okay. Did attorney Snow explain why he failed to
3 object to testimony from Lt. Rudick regarding suspected "straw
4 and crack cocaine" in car, page 650, lines 17-21?

5 A No.

6 Q Okay. Discuss -- do you feel that Mr. Snow fail to
7 make a sufficient pre-trial motion to sever the trials between
8 you and your co-defendants and especially considering the
9 testimony of Addison, "Ben gave the gun to Dontavious" page 942,
10 line 16-19. Did you have a conversation or did he justify as to
11 why did not make a sufficient pre-trial motion to sever the
12 cases?

13 A I remember my pretrial motion regarding severance but I
14 don't believe he was my attorney. I think Mr. Matthews was my
15 attorney.

16 Q Did he raise it at all?

17 A Not to my knowledge. I don't know.

18 Q Okay. And did Mr. Snow discuss with you his reasons
19 for his failure to object to jury charge for murder that
20 included the instruction that inferred malice "May arise when
21 the deed is done with a deadly weapon," one 1160, line 25. Page
22 1161, line one?

23 A No, he didn't.

24 Q Okay. And did he discuss with you why the court failed
25 to charge constructive possession regarding accomplice liability

1 were getting credit on December 27, 2009 on the charges, accept
2 for the murder -- accessory murder ending 2526 where your start
3 date is listed as November 23, 2015.

4 Did Mr. Snow discuss with you why he did not argue for you
5 to receive more time served credit dating back to that
6 Pennsylvania arrest?

7 A No, he never objected to it.

8 Q Okay. And did Mr. Snow ever discuss with you or
9 justify his failure to properly argue or challenge your removal
10 to South Carolina under the agreement on detainers under section
11 South Carolina Code 17-11-10 based on mental health history?

12 A No, he actually abandoned the claim I had filed pro se.

13 Q Okay. Are there any details of the evidence that you
14 you feel Mr. Snow failed to prepare for or discuss with you?

15 A Yes. In pretrial prior to going to trial I had filed
16 emergency writ habeas corpus with the circuit and I had raised
17 about five grounds regarding a violation of the interstate
18 agreement on detainers. Specifically, article 6(B). It states,
19 no provision of this agreement, and no remedy made available by
20 this agreement, shall apply to any person that is adjudged to
21 be mentally ill.

22 Prior to trial a month -- no, October. October I had
23 pretrial motion where I was relieving appointed counsel and I
24 had told him that I was receiving social security disability for
25 mental illness and he had alerted the solicitor, the solicitor's

1 you remember having an evaluation and receiving a copy of the
2 report finding you competent?

3 A Yes, I had got an evaluation.

4 Q Okay.

5 A But regarding the act it doesn't -- it don't say that
6 whether or not the person is competent to go to trial. Whether
7 or not the person is mentally ill. It says mentally ill, all --
8 all acts of congress or statutes must be liberally construed not
9 to -- I mean, to effectuate it's purpose. That's Article 9
10 under IAD.

11 Also under Dwyer verses Sims it says that any party in
12 conjunction -- independently in its act they must adhere to --
13 it says, any party in conjunction or in agreement with the party
14 state they must not alter or amend the intended meaning. So the
15 State had used the position to find me competent and disregard
16 the fact that I was actually under social security disability.
17 I had provided my actual psychiatric evaluation from the
18 Pennsylvania bureau of disability determination and I got that
19 evaluation here from the doctor.

20 My sister had actually talked to him a few months ago,
21 about a nine, ten months ago. I believe I talked to you about
22 the doctor and this is the doctor that okayed me for social
23 security disability.

24 What had happened was in Pennsylvania when South Carolina
25 had originally asked for me in that first request it was denied

1 petition, but you didn't even amend it in court. You didn't
2 even file it with the clerk's office. I got the receipts right
3 here. I got the entire file. I have, you know, I caught him
4 saying he can't say that he tried to amend it.

5 Q Just lastly, I wanted judge, this is one last question
6 about the previous allegation.

7 You had stated in there that there should have been an
8 objection to the judge's statement and I'm referencing page
9 1214. This is lines 16 through 18 and it says -- and I ask
10 them, did they want to start the time some persons arrived at
11 his house that night and you seem to raise that that would be
12 the judge referencing his house implying where Reed Allen was
13 residing. Can you go into what you feel was objectionable about
14 that?

15 A Okay. Yes. What had happened was the jury had asked
16 for a read back -- the jury had asked for a read back of Reed
17 Allen's testimony regarding me coming to the house. When Judge
18 Alford had explained that he was referring to Reed Allen's house
19 or at least that's how it was explained, that he was referring
20 to Reed Allen's house and from that moment that he said that, my
21 own attorney has stated -- and it was misstatement because I was
22 actually at my sister's house. I actually came to my sister's
23 house. I got a right to be at my sister's house.

24 It started from there after Judge Alford had misstated it,
25 you know, mistakenly because he don't got discovery. He's just

1 A He is my little brother.

2 Q Miss Bishop, he's your brother?

3 A Yes.

4 Q Okay. And now when this whole thing happened and there
5 was an investigation and then a trial, did Mr. -- did you
6 communicate with Mr. Snow, his attorney, about that night and
7 what evidence or testimony you could provide?

8 A Yes, I did.

9 Q Okay, and what did you tell him?

10 A I told him exactly what happened that night and it's no
11 way that my brother could have been at the scene or whatever and
12 he told me one day during the trial period that whatever if I
13 testified for my brother and did I think Val would be able to
14 testify for him during trial. I told him yes. I contacted Val.
15 She said she will and he never ever called me to come to the
16 stand or anything that week and I kept reaching out to him and
17 he just like brushed it off and I had let my brother know all
18 that too.

19 Q So, did you ever provide a written statement?

20 A A written statement, no, with Mr. Snow?

21 Q Or the police or anybody?

22 A No.

23 Q Okay. Who came to talk to you from law enforcement or
24 solicitor?

25 A The solicitor Thompson. He came to my house one

1 I would have known if they came to my house. I slept on the
2 couch. I stayed in the living room that night, me and Val and
3 Reed. Reed don't live there so I don't know why they even said
4 that did at my house. Reed stay at Lincoln Avenue. Like I said
5 down the spot from where we was that night.

6 Q And did you provide information about whether or not
7 you did or did not give a phone to Reed to talk to your brother?

8 A No, I never gave Reed no phone because first of all,
9 Reed didn't get there until we was about to go home.

10 Q And about whether or not your brother had a key. Had
11 to call you to get in?

12 A I told Val that. I didn't even tell Reed that. He
13 just left out and walked with us.

14 Q Okay. And so you had a pretty strong opinion about
15 whether or not these telephone conversations took place in your
16 house or Reed passed a gun or had a conversation?

17 A They didn't even know each other like that. Reed use
18 to be out there hanging out in the apartments just like
19 everybody else. I do hair and I would have him like -- he'll go
20 pick my son up from the boys and girls club. We were friends.
21 We was cool.

22 Q Well, thank you. And you said you didn't reduce it to
23 writing but you did speak to Mr. Snow about it?

24 A I did. Yes.

25 Q Okay. Thank you.

1 in front of the bench.

2 WILLIAM THOMPSON, having been duly sworn by the
3 clerk of court testified as follows:

4 THE COURT: All right, Mr. Jones, your witness.

5 MR. JONES: Thank you, Your Honor.

6 DIRECT EXAMINATION

7 BY MR. JONES:

8 Q Good morning Mr. Thompson.

9 A Good morning.

10 Q Just briefly, can you describe the investigation that
11 you conducted in this case concerning witnesses from the
12 Hartsville area?

13 A Yes. I went once to the Hartsville with one of our

14 Q Sorry. He is breaking up.

15 MR. JONES: Can we will put him on on the phone
16 because he is breaking up.

17 MR. BRACKETT: Willy can you hear me?

18 MR. THOMPSON: Yes.

19 Q All right. Thank you, Mr. Thompson. Do you recall
20 speaking with a Monday Bishop?

21 A Yes, I do.

22 Q All right. When did that conversation take place?

23 A I'm sorry.

24 Q One minute. Can you hear me now Mr. Thompson? Mr.
25 Thompson, can you hear me?

1 MR. JONES: Your Honor, I would like to have this
2 marked as State's Exhibit Number One.

3 THE COURT: All right, come forward and have the
4 court reporter mark it and then go back and ask that
5 question.

6 (WHEREUPON, State's Exhibit One was received for
7 identification.)

8 Q Mr. Thompson, can you describe what she told you at
9 that conversation?

10 A Yes. When I was speaking with Miss Bishop she said she
11 had been sleeping the night that this had occurred. Had been
12 drinking. That Val Hudson was with her. I asked her if Reed
13 was there. If Mr. Reed was there. She said she thinks so but
14 couldn't be completely sure. I asked her what other people were
15 there as far as the other people charged in the case and she
16 said she doesn't know if they came or not. She does not
17 remember the day that Donte was shot, and of that is Mr. Mack,
18 the principle who had shot Ned -- Ned Marshall in this crime.
19 She could not remember that day according to what she was saying
20 at that point in time.

21 She said that Ben Stewart had denied this incident to her.
22 She said she does not hang out with Ben and his friends. That
23 she was too old for that. She no longer would put up with the
24 type of things that they were doing.

25 Q So did you testify that this conversation occurred in

1 A No, I did not. That would have been the only time that
2 I spoke with her.

3 Q You don't recall having any other interviews with her?

4 A No.

5 Q Do you recall -- I believe you were listening to her
6 testimony earlier?

7 A Yes.

8 Q Do you recall her saying that you came to her house
9 early in the morning?

10 A Yes, I recall her saying that.

11 Q Does that -- do you recall going to her house?

12 A No, I do not recall ever speaking with her in
13 Hartsville. And again, I was with an investigator. The
14 investigator in those situations would be the one taking the
15 notes. In addition, we would leave our cards with every person
16 that we spoke with that was a lay witness and we clearly did not
17 do that with her. I did speak with her before the trial and
18 there would be no other reason to speak with her if I had
19 already spoken to her.

20 Q So do you recall her saying that Ben didn't do it or
21 that Donte or Davorious never came to her house or any other way
22 refuting any of the testimony?

23 A Well, I know that she had told us that Ben had told her
24 he did not do it. That he denied having done it. But other
25 than that that's the only thing that she really said about Ben

1 clear that the defendant did not want to be evaluated at that
2 point in time. He was very clear to the court that he did not
3 want to be evaluated and the court at that time, it was Judge
4 Alford said he would leave it up to the next attorney to decide
5 if an evaluation was necessary and ultimately I think Mr. Snow
6 out of an abundance of caution doing his due diligence went
7 ahead and we had one scheduled just to make sure there wouldn't
8 be an issue with that.

9 Q All right. Thank you. You mentioned something about
10 the issue of the interstate agreement on detainers being
11 discussed during that hearing. Can you go into more detail
12 about that?

13 A Yes. We weren't completely over that. I left with the
14 court a number of pieces of paperwork. The agreement itself it
15 was a request by the department for us to try him within 180 day
16 period. That's in that particular document required by that
17 agreement.

18 In addition to that, we received a continuance that day
19 because -- well, for a number of reasons. The defendant
20 switched attorneys that day. We were making sure that we would
21 be able to have accommodated the attorney's schedules both the
22 new attorney and Mr. Swerling. Mr. Swerling I know had a trial
23 that would take up part of the time that we had wanted to
24 schedule it. So we made sure that we covered that that day.
25 And as well I believe the hearing that we did pretrial, I quoted

1 not offer him anything and we were very clear that we would not
2 offer anything for himself or for his brother. And he said I
3 believe in his testimony that he hoped this would somehow help
4 his brother. But he testified and I thought it was very, very
5 credible. I had never seen this happen before, someone who
6 actually did the shooting to come forward and admit what he had
7 done. In addition to what each other person had done including
8 his brother in the commission of this crime. So I found that
9 very compelling. But in addition to that, Mr. Addison the
10 co-defendant on trial in this case also testified and he also
11 implicated Ben Stewart in the crime itself. So in addition to
12 the other witnesses, Mr. Reed, and the other Mack brother they
13 also testified and showed the guilt of Ben Stewart during that
14 trail. So I felt that at this point we were quite confident
15 that we were going to have have a conviction in this case no
16 matter what, because the evidence at that point I felt was truly
17 overwhelming.

18 Q All right.

19 MR. JONES: Thank you Mr. Thompson. I think that
20 is all the questions I you have for you at this time.

21 MR. THOMSPON: All right.

22 MR. JONES: Your Honor, I would like to introduce
23 this as into evidence as State's Exhibit One.

24 THE DEFENSE: No objection to that. We just ask
25 for a copy of it.

1 Q Did you communicate the contents of this to his
2 attorney at all?

3 A I don't recall communicating this to the attorney at
4 all. These were -- it's basically she said she didn't know
5 anything and so there was no need for me to tell that to Mr.
6 Stewart who had already told me he was possibly going to call
7 her during that period of time. So I knew he had spoken to her
8 as well.

9 Q Well, it says here in the exhibit, "Sleeping. Had been
10 drinking". Is that to indicate Miss Bishop was she had been
11 drinking?

12 A Yes.

13 Q And then it says Val Hamilton.

14 A Right.

15 Q What is that referencing?

16 A I think she was saying that Val Hamilton was there that
17 night.

18 Q Okay. And says, " Reed there. Thinks so. Doesn't
19 know if they come or not. Does not remember they " -- something
20 shot --

21 A Does not remember Dante shot is what that says.

22 Q Okay. So then it says Ben denies this to her. You're
23 indicating that she indicated to you that Mr. Stewart denied
24 involvement?

25 A Correct.

1 brothers. That sort of thing. So I did not think that would
2 really be contradictory.

3 Q Okay. So moving on to the discussion of the competency
4 issue. You talked about a mental eval was done to find
5 competence to stand trial, but that would not really be --
6 actually that wouldn't be the same as defining mental illness
7 for purposes of that statute, correct?

8 A Well, I would think it would because really a lot of
9 people have a mental illness. It's really truly in the criminal
10 justice system and the way I've always understood it, are they
11 competent to stand trial. So is the mental illness so severe
12 that they can not assist their attorney and do the things that
13 they need to do under the various tests that we have. So, no, I
14 don't feel that's an issue at all because once someone is found
15 competent -- and quite honestly having talk to the defendant
16 myself with Mr. Snow and having heard him in front of the Judges
17 and even hearing him today it's clear that he does not have any
18 type of mental illness that would prevent him from being able to
19 understand what is going on or to assist in his representation.
20 So I feel that there was really never a question of that other
21 than whatever he had told the attorneys about some prior
22 diagnosis.

23 Q Well, you're lawyer. You're not a doctor, correct?

24 A That is correct.

25 Q Okay. And the statute I was referencing 17-11-10 that

1 end of line seven. Page seven, line seven.

2 A Okay.

3 Q I believe it's you speaking. You said because even
4 under this interstate agreement we're required to show that he's
5 not mentally ill. He's competent to stand trial or else this
6 agreement doesn't apply at all and I don't know that we have a
7 jurisdiction to try him on this case if this agreement does not
8 apply. So that's what you said?

9 A Yes.

10 Q Okay.

11 A Yes, again as you can see I'm concentrating on
12 competency even in that statement because that is what we always
13 consider in these cases is the competency. So I equated that
14 with mentally ill.

15 Q Okay.

16 MR. JOHNSON: Judge, I don't think I have any more
17 questions. I just want to make something clear on the
18 record. I received a copy of exhibit one.

19 Judge, can I talk to my client?

20 THE COURT: You may.

21 MR. JOHNSON: Judge, we just wanted to make it
22 clear -- judge, I just want to make it clear that
23 exhibit one I received that today. It does appear to
24 be some notes and the witness testified that he was
25 solicitor who got those at trial or right before trial

1 Q Good morning, Mr. Brackett.

2 A Good morning.

3 Q Do you recall the factual background of this case?

4 A I do.

5 Q Can you discuss basically what the incident was? What
6 these charges arose out of?

7 A Certainly. My name is Kevin Brackett. I'm the
8 solicitor for the Sixteenth Circuit and I was solicitor at the
9 time this case was tried. I along with my then Deputy Solicitor
10 Willy Thompson who we just heard from tried this case in
11 February of '09 and it pertained to the armed robbery and murder
12 of a convenience store clerk in the City of Rock Hill in October
13 of 2006, Ned Marshall, the clerk at the convenience store BP at
14 the corner of Celanese and India Hook Road was found deceased on
15 the floor at about four o'clock in morning by a newspaper
16 carrier. The police were called. It was whodunit. They had no
17 information at that time.

18 There was some security footage tape. Ultimately what
19 transpired in the investigation they discovered that the
20 perpetrators had come in. Two individuals robbed and shot Mr.
21 Marshall. Left him dying on the floor and Mr. Marshall was able
22 to fire one shot from his 22 striking one of the assailants in
23 the back as he fled the store, and ultimately it was that bullet
24 in the back of what turned out to be Dontavious Mack, the
25 shooter in this case that resulted in the breaking of the case

1 Stewart had the 380 and provided the weapon to Dontavious that
2 was used to kill Ned Marshall.

3 Q Thank you. Did you interview any witnesses from the
4 Hartsville specifically Monday Bishop or Valerie Hudson?

5 A No, I did not participate in any of the interviews. I
6 did not go to Hartsville at any point in time. I know an
7 affidavit was executed by Monday Bishop at some point indicating
8 that I had come to her apartment and interviewed her but I never
9 did. I never went to Hartsville and I never spoke to her.

10 Q Did you ever obtain a statement from her either you or
11 law enforcement?

12 A Not to my knowledge. Not a formal written statement.
13 I understand that Mr. Thompson spoke with her. I remember she
14 was present in the courtroom during the trial. She came to
15 court every day and there was some discussion at some point by
16 Mr. Snow that she may or may not be a witness. So at some point
17 I knew she was interviewed but nothing came of it. She had no
18 information based on Mr. Thompson's interview of her and then
19 ultimately Mr. Snow confirmed that she would not provide any
20 information. She had no information that would be useful in
21 defense of Mr. Stewart so she was not called by the defense
22 either.

23 Q Thank you. Can you briefly discuss the nature of the
24 DNA evidence and the fingerprint evidence in this case as it
25 relates to Mr. Stewart?

1 carjacking up there and Pennsylvania would not send him back to
2 South Carolina until they had disposed of their case. So we had
3 the sort of extended back and fourth. I'm not sure, but I want
4 to say it was like maybe late spring of '08 before Mr. Stewart
5 was returned to South Carolina after he had been sentenced to
6 eight to sixteen years on the carjacking case and then we were
7 able to proceed with the prosecution of the case. Dontavious
8 Mack was determined to be the shooter. He acknowledged that and
9 plead guilty and received a life sentence as I said with no
10 agreement that he come back and testify. There was nothing to
11 that effect. Mr. Mack was one of the most damning witnesses
12 against Mr. Stewart because he had nothing to gain. His
13 testimony as Mr. Thompson said was very compelling because it
14 provided no benefit for him. It wasn't going to change his
15 sentence or his situation whatsoever. But he was very straight
16 forward and put himself right there. Put himself as the
17 shooter. Everybody who testified -- all the other co-defendants
18 including Mr. Addison, his co-defendant, who was on trial with
19 him testified and they all put Mr. Stewart right in the thick of
20 it.

21 There was some mention of a severance motion earlier.
22 There wasn't a Bruton issue so there wouldn't have been a
23 severance. There was no statement from Mr. Addison that we were
24 going to use against Mr. Stewart that he then would not be able
25 to cross examine him on. That wasn't an issue. And in fact Mr.

1 but as I recall all of them said that it was like a mixture of
2 people and Davorius Mack could not be excluded.

3 Q Solicitor, when you said on your report where it says
4 no conclusion can be made regarding the inclusion or exclusion
5 of the individuals, would that be considered a match in your
6 interpretation of it?

7 A No, it just says they can't exclude somebody. They
8 can't say that it wasn't them which sometimes DNA can do that.
9 DNA can sometimes say it is definitely this person and sometimes
10 it can say it is definitely not this person. What they did say
11 as I recall was, is that they couldn't exclude somebody. Which
12 is really not a match and not helpful in saying whether somebody
13 was in the car which was the point that was being raised is
14 that, you know, the fact that Mr. Stewart's DNA was not found in
15 the car is not conclusive on the issue of if he was ever in the
16 car because you can be in a car and not leave DNA.

17 Q To be clear solicitor, did you guys have any specific
18 information about where all the co-defendants were seated in the
19 car?

20 A I don't recall that we did, but I can't say for sure.

21 Q And you have no solid DNA evidence linking my client to
22 interior of that car?

23 A We had no solid DNA evidence linking anybody to the
24 interior of that car and that was my point in closing.

25 MR. JOHNSON: No other questions.

1 in any event, it actually is a positive match when
2 someone else's DNA is combined.

3 THE COURT: I understand your statement and I
4 understand his as well. The DNA in that car wasn't
5 very helpful in doing anything in this case as I
6 understood it. It didn't say anybody can be
7 conclusively be seated in that car. It said nothing.

8 MR. STEWART: What it actually said was that no
9 conclusion could be made on excluding.

10 THE COURT: Or including them. It goes both ways.

11 MR. STEWART: Right, but it was an item or two --
12 I think one or two items that they conclusively proved
13 that it was I believe Donte Mack.

14 THE COURT: And Donte testified in your trial.

15 MR. STEWART: Yes, sir.

16 THE COURT: So I don't understand why you're
17 focused on the DNA issue. It seems to be nonissue.

18 MR. STEWART: Okay. What I'm saying is in closing
19 they had used the same inclusion and exclusion
20 scenario and said just because they have inclusion and
21 exclusion it doesn't mean that I wasn't there because
22 nothing was shown of mine. See what I'm saying?

23 THE COURT: I don't see what your saying.

24 MR. STEWART: Okay.

25 THE COURT: They didn't use DNA evidence to put

1 Q Thank you Mr. Snow. How long have you been practicing
2 law?

3 A Now probably about 23, 24 years.

4 Q And about what proportion of that has been criminal
5 law?

6 A Ninety-nine percent.

7 Q All right. Do you recall this case?

8 A Very well.

9 Q Do you recall how you began representing Mr. Stewart?

10 A Yes, I do.

11 Q All right. Could you discuss that briefly for the
12 court.

13 A My recollection that I got a call from the court, from
14 the clerk or even the judge saying they needed a lawyer to
15 represent young man who was charged with murder and the trial
16 was coming up pretty shortly. It was clear that there would not
17 be a continece in the matter but I had about -- I think about
18 two months maybe to get prepared for the case. I recall at that
19 time I wasn't as busy and at that time I was also single so
20 money wasn't the issue. I could close down my practice somewhat
21 and devote my time to pretty much primarily that case.

22 Q All right. And in preparation for that case did you
23 ever have a chance to speak to Monday Bishop?

24 A Yes, I spoke with Miss Bishop my recollection a number
25 of times. Back at that time we had a good relationship. I

1 case and she just said no, it's his choice.

2 In fact right before the jury was impaneled I asked --
3 looked at my client, talk to her and I looked at her and she
4 look right across. I could see like it was yesterday. She
5 looked and said it's his choice. That was her mouth.

6 Q Why did you feel that this case was going to be a tough
7 case?

8 A Well, because he -- he relied on the DNA. He talked
9 about DNA quite a bit and the lack of DNA and I told him that
10 there are witnesses lined up that were going to put him there
11 including potentially I think Mr. Addison who was going to be
12 tried at the time. I can recall that he believed that Mr.
13 Addison was not going to put him in the car. But my
14 recollection is Mr. Addison's defense was duress and I explained
15 to my client that Mr. Addison was going to likely going to have
16 to tell the truth about everything but if he lied about that
17 then the jury would certainly not believe he was under any
18 duress.

19 Mr. Swerling is a good lawyer and he's going to ask that
20 question whether you were there and so -- in fact even in the
21 back when they were locked up before the trial started Mr.
22 Stewart yelled. They were kind of chuckling about it and asked
23 Mr. Addison if he was going to have his back and Mr. Addison
24 responded --

25 MR. STEWART: Object to that. Object to that.

1 trial?

2 A Well, I remember this -- something like this. The
3 imagine that came from Hartsville. They came or they drove
4 around and I think they may have stopped at one other place and
5 robbed that place. But I remember his testimony that they got
6 to this particular convenience store and he had testified -- in
7 fact at that point he had testified all the way about them
8 coming from Hartsville and riding around and no mention of my
9 client and in fact I was like, wow, he's not going to mention.
10 Maybe my client is right, he's not going mention him. And then
11 when they got to the store, before they went in and attempted to
12 rob the store he continued to talk about going into the store
13 with the other co-defendant and then I believe Mr. Swerling
14 said, his attorney said, what happened before you went into the
15 store. And so, that's when Ben gave me the gun and I recall my
16 client kind of dropped his head.

17 Q So would you characterize the DNA and fingerprint
18 evidence against your client as either nonexistent or not
19 important to the case?

20 A It was an nonissue and in fact I certainly may have
21 tried to make it out as an issue but it was nonissue when it
22 came down to everything else because we had to deal with four
23 other witnesses that put him there. That talked about his
24 involvement and I tried to explain that to my client. Tried to
25 explain it to his sister that was something that even though the

1 be helpful.

2 Q All right. Since the trial has any information come --
3 any new information come to light to you regarding something that
4 may have been withheld by the solicitor or by law enforcement
5 regarding your client's guilt?

6 A No, not at all. We had -- you know, I respect those
7 prosecutors. We fight and they know I was on the other side,
8 but they were professional and we had a professional
9 relationship. They're doing their job and I was doing mine. I
10 think they respected I was fighting for my client.

11 Q Did you see any grounds to object to any of the
12 solicitor's statements about the DNA evidence?

13 A At that time, no. I mean, I don't recall anything I
14 could have objected to and maybe so, this is 10, 12 years later.
15 I'm probably more a seasoned lawyer now. Perhaps I would have
16 objected, but certainly nothing that would have effected the
17 outcome of the case.

18 Q Did you meet with Mr. Stewart to discuss defense
19 strategy and the evidence against him.

20 A A number of times. As I said earlier, I basically
21 closed my practice for at least two months, a month and a half
22 to focus primarily on this case.

23 Q Did you have any concerns about Mr. Stewart's
24 competency?

25 A Not at all. Mr. Stewart is -- even at that time was a

1 Q Did you -- never mind. I think that is all questions I
2 have for you Mr. Snow. Thank you.

3 THE COURT: All right Mr. Johnson.

4 MR. JOHNSON: Thank you, Your Honor.

5 CROSS EXAMINATION

6 BY MR. JOHNSON:

7 Q Mr. Snow, I just wanted to touch back on something you
8 said. Did you testify that Terrell Addison said when asked,
9 that Mr. Stewart gave him a gun?

10 A Something to that effect. I don't know exactly what he
11 said but he certainly indicated that Mr. Stewart had the gun and
12 gave someone a weapon to go into the store.

13 Q Attorney Snow, I got the transcript here and I don't
14 want to -- I'm not trying to confuse or trick anybody, but it
15 doesn't it appear to be in transcript. Is it possible that was
16 not said?

17 A Perhaps not that way, but he indicated that Mr. Stewart
18 was there.

19 Q He said he was there?

20 A I don't remember the exact words, but it was clear that
21 he indicated that Mr. Stewart was there.

22 Q Okay, and just to move on. The discussion with -- all
23 right. Attorney Snow, I just wanted to touch briefly on some of
24 these points we made. Do you feel during your directed verdict
25 motion was that limited to one of the charges or do you feel

1 information that was helpful to the defense?

2 A No.

3 Q But you didn't sit down with them and go into detail
4 and ask about the case, is that right?

5 A Well, I spoke with Miss Bishop a number of times. So
6 she certainly had the opportunity to tell me anything about her
7 brother that I thought was credible. I don't...

8 Q Okay. And you're saying this exhibit one that were the
9 notes provided today, as notes from the solicitor with the
10 interview with Miss Bishop, that was something that was never
11 provided to you?

12 A I can't say that. I don't recall one way or the other.

13 Q You don't have a copy with you?

14 A I don't have a copy with me, no.

15 Q And do you recall the closing argument from the
16 solicitor about DNA? Do you feel like they misstated the
17 evidence in the presence of one subject or absence of a subject
18 based on the DNA?

19 A I honestly don't recall that.

20 Q The trial strategy, did you get into a discussion with
21 Mr. Stewart at all to discuss a defense strategy?

22 A Of course.

23 Q What was that?

24 A Well, as I recall, pretty much we talked about the lack
25 of the DNA. That was probably -- even though the State had

1 Q Do you remember failing to object to Reed Allen's
2 hearsay statement, "Ben Stewart told me to put the gun up"?

3 A I don't recall that.

4 Q And do you recall failing to object to Reed Allen's
5 hearsay, I heard something about Donte being shot?

6 A I don't recall. It has been a while and certainly I
7 may have. Yeah, it's been a long time. I don't recall any of
8 those questions specifically.

9 Q Okay. Do you recall failing to object to Reed Allen's
10 hearsay statement, Ben Stewart told me to put the gun up?

11 A I don't recall that.

12 Q Do you recall failing to object to hearsay following
13 question, if someone is, "Asking Terrell about putting the gun
14 up. Did Stewart or Mack ask him," followed by response, "It
15 could have been." Do you recall failing to object to that or
16 why you failed to object as hearsay?

17 A I don't recall. I will say this. We had a week of
18 trial. During the entire week there were a lot of questions
19 that were asked and certainly I don't know of any trial lawyer
20 that can say that they've never missed an objection. What I
21 will say though, I don't know of anything that I may have not
22 done effected the outcome of the case. I don't believe anything
23 I've done or any mistake I may have made, if you deemed it of
24 missing an objection, I don't believe it effected the outcome of
25 the case. I believe what effected the outcome of the case is

1 inferred malice with the use of a deadly weapon, but your
2 understanding of the law at that time was that law had not come
3 down yet about banning that charge about inferred malice?

4 A Yeah, that was not the law at that time.

5 Q Okay. Do you recall the Court failing to charge
6 constructive possession regarding accomplice liability under
7 hand of one, hand of all for the possession of a firearm and a
8 jury question coming back about that? Do you remember that
9 discussion?

10 A I don't remember that.

11 Q And do you remember the issue of time served? Did you
12 not argue or bring up the issue -- the potential credit dating
13 back to Mr. Stewart's Pennsylvania arrest under that statute
14 17-11-10 regarding his mental health history and that you did
15 not challenge them going forward with extradition and putting
16 them on trial based on that statute having an exception for
17 those that are mentally ill. Did you not pursue that?

18 A I don't recall that.

19 Q You never made that motion?

20 A Not that I recall. I don't recall any -- I don't
21 recall again a whole lot of conversation about something that I
22 took -- that I though was immaterial to his trial. I remember
23 things that I thought were material, but I don't remember that.

24 Q Well, do you remember he was evaluated?

25 A I -- my recollection was refreshed as I prepared -- as

1 Your Honor.

2 THE COURT: Any redirect?

3 MR. JONES: Just very briefly.

4 REDIRECT EXAMINATION

5 BY MR. JONES:

6 Q Mr. Snow, regarding the directed verdict issue, do you
7 recall whether Mr. Stewart was eventually acquitted of murder and
8 kidnapping as a principal?

9 A No. Well, he was not acquitted. He was not -- I don't
10 believe he was convicted as a principal.

11 Q So, regarding his remaining charges as to the accessory
12 before the fact and accessory after the fact, did you believe
13 that there was any evidence when viewed in the light most
14 favorable to the State that would support a conviction?

15 A I believe it was substantial evidence.

16 Q So do you believe that making a directed verdict motion
17 would have changed outcome?

18 A I don't believe it would have changed outcome.

19 Q All right. That's all I have thank you.

20 THE COURT: All right, you may step down.

21 MR. SNOW: May I be excused, Your Honor?

22 THE COURT: Suits me.

23 MR. JOHNSON: Judge, my client is trying to make a
24 statement to the Court I believe.

25 THE COURT: All right. Is that all the witnesses

1 besides Addison, the one I went to trial with, willing
2 to come to my PCR hearing on behalf of me. I had Mr.
3 Reed Allen come two or maybe three of my PCR hearings
4 trying to actually tell the truth and during trial he
5 had actually recanted his testimony. He said that he
6 don't even remember if I ever gave him a gun. He
7 don't even remember if I came and got a gun. He said
8 he don't even know if I came to the house. That was a
9 lie. I came to the house and I went to sleep. But he
10 was here numerous times trying to come, you know, and
11 testify, you know, to the truth.

12 I wanted to shed light on Mr. Snow's
13 representation under -- I don't want to start speaking
14 cases and stuff -- but you know, cumulative -- I'm not
15 a lawyer. I don't know if it's cumulative or cuative
16 (sic) effect. You know that I believe that my
17 attorney raised a whole lot of errors and he even just
18 lied to me on the stand and said I was saying that I
19 was thinking that someone will have my back when I
20 actually told him that I was innocent of this crime.
21 Why would I say someone has got my back if I'm
22 innocent of the crime. I don't understand that.
23 Frustrated me he was saying that in court.

24 Other than that, that's really about it. I just
25 wanted to make sure I get all my claims on record. If

1 convicted and getting life or plead and got life and
2 his little brother?

3 MR. STEWART: His little brother got like 10 or 15
4 years or 20 years or something like that. And I had
5 saw the agreement.

6 THE COURT: Let me ask you this, this wasn't
7 brought up, but I heard Mr. Snow say and then Mr.
8 Matthews was mentioned in the trial. Represented you
9 some and whether you were offered some sort of plea to
10 some charges of some sort, short of going to trial and
11 as I understand it you weren't interested in any kind
12 of offer. You wanted a trial because there was no DNA
13 in the car. That you were solely focused on that. Is
14 is that unfair? That's kind of what I heard.

15 MR. STEWART: When you're innocent it's hard to
16 plead. I've done a lot of dumb stuff. I done that
17 crime in Pennsylvania. I'm not afraid to admit it
18 because I learning from my mistakes. I've learned
19 from my mistakes. I've been in prison 16 years. I was
20 foolish. I was stupid. I was retarded. I acted like
21 my mother didn't even raise me right, but I didn't do
22 this crime right here. And I spoke to Mr. Snow and
23 Mr. Thompson regarding that. I told them my strengths
24 that I believe that, you know, was right. The State
25 had forensic -- the forensic analysis guy got on the

1 and they hear it all and they weigh the evidence and
2 decide whether considering all that the State has the
3 burden of proof to proved the guilt of Addison and as
4 to you and it appears that was presented, and the jury
5 weighed the evidence. What you're talking about is
6 credibility, which is not a lawyer issue. That's a
7 witness issue. A factual question that the jury
8 determined and you came in on the wrong side of that.

9 MR. STEWART: Right, and he again turned around
10 that same night that he made that statement and turned
11 around and said I was the shooter and I got shot. He
12 actually said that I was shooter and I got grazed by
13 the bullet. Then his brother made six statements.

14 THE COURT: I know, but again, you don't have the
15 standing to challenge or suppress co-defendant's
16 statement. You testified you got them in there and
17 they can say whatever they're going to say and your
18 lawyer had an opportunity to cross examine them.
19 Well, you've given an inconsistent statements before
20 because the statements are in. So I don't understand.

21 I want you it make your record as to what you want
22 the court to consider as errs by Mr. Snow because that
23 you got to do that for me and I'm having a hard time
24 following the DNA argument. I really am because the
25 DNA didn't say you were there. It didn't say you

1 in Rock Hill, South Carolina and provided a gun with
2 full knowledge that it would be used to rob a BP
3 station and on the other hand conclusive evidence that
4 I was not present in the vehicle and therefore could
5 not have provided the gun as testified to is the
6 analysis report for DNA testing from the South
7 Carolina law enforcement department, SLED, that
8 excluded applicant from being in the vehicle.
9 Stating no chance it was Ben. On record of appeal on
10 pages 749 to 751 and that my fingerprints was not
11 found in the vehicle. No DNA evidence exposed the
12 State relies on rendering their testimony incredible,
13 unbelievable and contrary to the laws of nature in
14 human experience. Based on the foregoing it stated
15 that -- it stated that the DNA obtained from items 18
16 is mixture of at least two individuals.

17 THE COURT: All right. All right. Now, look
18 here. You're reading kind of your summary of the
19 facts. I want to know what Mr. Snow did wrong. I
20 think I'm pretty versed on the law. What did Mr. Snow
21 do wrong?

22 MR. STEWART: All right. I believe that he failed
23 to test the prosecutors case for adversary testing.
24 Such as reasoning and arguing that the DNA excluded me
25 from being present in the vehicle --

1 not testify. They were allowed to rebut that they
2 didn't call her. Yet she was there. Why didn't he
3 call her as a witness?

4 THE COURT: I think he said kind of why his
5 decision to not call her is she would not give helpful
6 testimony to your case because she was at her house.
7 She had been drinking. She was with the other lady
8 who is now deceased and that's about it.

9 MR. STEWART: Your Honor, I believe in this
10 position that I was in any testimony that was not
11 incriminating would have been helpful because she said
12 she didn't see him give me no weapon. She didn't give
13 no weapon and she watched it and Val corroborated her
14 testimony and that was the essential witness he was
15 talking about, Val Hudson. He didn't actually say my
16 sister. He was talking about Val. He said Val could
17 have possibly cleared this whole thing up in his
18 closing argument and he failed to call her as witness.

19 THE COURT: Okay. All right. Next issue.

20 MR. STEWART: My interstate detainer's claim. I
21 had raised in pretrial and he said he couldn't
22 remember. Mr. Thompson he remembered it because he
23 said that he didn't know if they had jurisdiction to
24 trial my case.

25 THE COURT: No, what he said was that interstate

1 Department of Corrections there they requested for me
2 again. I didn't actually sign a waiver, but they took
3 it as me signing a waiver and I was down here. So
4 once I was down here I had filed my emergency writ of
5 habeas corpus telling them that I didn't actually sign
6 a waiver. I was telling them that I had filed in my
7 petition that I was mentally ill under Article 6
8 section B and that I was accepted under social
9 security disability. I was getting disability. I had
10 told my attorney and my attorney had told Mr.
11 Thompson.

12 At this particular hearing I was relieving my
13 attorney. My attorney explained my diagnosis was
14 Cyclothymic disorder and he explained the problems and
15 things like that that I have. Mr. Thompson replied
16 that it would be a problem. He didn't know whether or
17 not the State had jurisdiction and he would basically
18 in my words he would challenge it to say that I was
19 competent to stand trial. I had done my own
20 investigation and did my petition and tried to get it
21 dismissed based off of that. We had the hearing on
22 the same day at trial. We started just before we did
23 the jury. And he didn't explain none of the claims
24 that I had raised in my habeas corpus. In fact, he
25 raised the claim that I actually had a pre-transfer

1 told me -- he asked me, was it my position that I was
2 incompetent. I said I don't know. I'm not a judge.
3 I mean, I said I don't know. I'm not a doctor. He
4 said, all right, I'm basing my opinion on your
5 evaluation. So on my direct appeal it wasn't objected
6 to it. It was but it wasn't. I had raised it and my
7 attorney had filed an Anders brief. I didn't know the
8 law but I had raised it. I said based on my mental
9 illness and protection under IAD that I was required
10 by me going to trial, being convicted, proving
11 prosecutorial misconduct, proving ineffective
12 assistance of counsel it amounted to a fundamental
13 miscarriage of justice.

14 THE COURT: I didn't hear anything about your
15 argument that there was prosecutorial misconduct other
16 than you think they characterized the DNA clusivity or
17 inclusivity or whatever that term that you've been
18 tossing around is that they misused that.

19 MR. STEWART: No, not exactly. I was basically
20 spinning off of the fact that -- off of this -- this
21 habeas corpus that I had done pretrial that, you know,
22 I'm sorry to say it I believe it was colluded.

23 THE COURT: Okay. I don't think that's an issue.
24 I think you're off base on that.

25 MR. STEWART: Okay. Well, what I had took from it

1 THE COURT: How does it have anything to do with
2 what happened at the trial in York County.

3 MR. STEWART: Because -- you know, when I went to
4 trial I was basically, you know, trying to tell my
5 lawyer that, you know, they have me on psychiatric
6 medication. It wasn't right. I didn't feel right.
7 You know what I'm saying, I was taking -- I had took
8 Remorod. I had took Remorad for two days. I didn't
9 like it. I had took another anti-depressant and they
10 finally put me on Prosac. So by the the time I was
11 going to trial I was taking Prosac and every time I
12 don't take that, you know, I'm kind of relaxed. I can
13 think a little. If I'm taking Prosac I kind of like
14 zoom. I think too fast. I'm real irritable. I can't
15 sit still. So I'm just basing on, you know, the
16 precautions of the IAD which amounted to a fundamental
17 miscarriage of justice based on me getting convicted
18 wrongfully and my errors along with me going to trial
19 under psychiatric medications. There's a case US
20 versus Damian. It's a 4th Circuit case where he even
21 plead guilty where they said that it's reversible
22 required based on him taking psychiatric medication
23 and they said they would make his sentence stand but
24 the conviction of him -- no, no, no, they would make
25 his conviction reversed but his sentence will stand

1 THE COURT: Okay, well, you've argued that.
2 You're protected on that issue.

3 MR. STEWART: Okay. That's all I was saying. I
4 was quoting everything combined and it still fit under
5 Nance as well. I just wanted it noted.

6 THE COURT: Okay. Your entire application and
7 your memorandum and the facts that you outlining
8 that's in the packet right now, and it sits on my
9 desk.

10 MR. STEWART: Okay. Thank you for your time.

11 THE COURT: Yes, sir.

12 MR. JOHNSON: Judge, do you want me making a
13 closing.

14 THE COURT: I think I'll you all do proposed
15 orders. I think that will be better. I can follow
16 them better and everything will be incorporated.
17 That's my safest course of action. I can review my
18 notes, the record of the trial, the memorandum that
19 Mr. Stewart presented. I can do it that way. I think
20 that will be the most efficient way we can get to
21 the end.

22 MR. JONES: Suits me, Your Honor. Thank you.

23 MR. JOHNSON: We'll wait for you're ruling and
24 then make a proposed order.

25 THE COURT: I want you to propose an order

C E R T I F I C A T E

I, the undersigned Aileen Butler, Official Court Reporter for the 16TH Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings in the captioned case, in the Circuit Court for York County, South Carolina, on the 17th day of April, 2023.

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

November 19, 2023

Aileen Butler

B-12

Obituary

Behold, I show you a mystery; We shall not all sleep, but we shall all be changed, In a moment, in the twinkling of an eye, at the last trumpet shall sound, and the dead shall be raised incorruptible and we shall be changed. -1 Corinthians 15:51-52

Lawanda "Val" Hamilton was born to Sarah Pouncey and Cleveland Hudson on May 21, 1980 in Darlington, SC. Our beloved was elevated from labor to reward on Friday, July 12, 2019.

Lawanda Hamilton, known as "Val Big Baby", was married to Frank D. Hamilton and they have two children, and one grandchild. To her family she was loving. She made every effort to ensure their happiness and comfort. We command the family to love and have compassion of our heavenly Father with divine assurance of truth that lies within the words found in Psalms 27:14. "Wait on the Lord, be of good courage, and He shall strengthen thine heart."

Our beloved Lawanda V. Hamilton attended Southside Baptist Church in her early years of life. She enjoyed singing praises to our God and she enjoyed her sister and cousins singing to her. She received her education in the Darlington County public schools. She was a hard worker and took care of her family.

She preceded in death by her grandfather, Willie Coe, two aunts, Evangelist Patricia Shaw and Gloria Hudson.

Lawanda "Val Big Baby" Hamilton leaves to cherish and rejoice in her memories and legacy of love: her beloved husband, Frank Hamilton, three children, Jayla Hudson, Dee Hamilton, Shaquana Hamilton, stepdaughter, Adaja Hamilton, grandsons, Jaceion Hudson and Deonte Hamilton, loving mother, Sarah Pouncey and stepfather Kendel Pouncey, father, Cleveland Hudson, grandmother, Sarah Lee Coe, sister, Tonya Hudson, nephew, Dominick Hudson, niece, A'Shanti Hudson, special aunts, Doris (Frank) McFarland, Eunice Pouncey, aunts and uncles, Brenda (Bobby) Brown, Willie (Michelle) Coe Jr, Tommie (Martha) McCall, Michael Coe, Ronnie (Betty) Coe, Shelli Coe, Deborah (Alphonso) Sellers, Allen (Joanne) Coe, Sarah Jean (Donald) Alston, Jim (Judy) Hudson, and Roland (Nancy) Hudson, Kim Burns, special cousins, Travis Coe, Timothy Coe, Shanel Bishop, Monica McFarland, Kimberly Johnson, Christopher Coe, special friends, Antonio Montgomery, Leonard (Squirrel) Baldwin, Lisa Jefferson, Deadra Dawson, Tip McClain, Monday Bishop, Kernan (Stacey) Huggins, Renata Brunson, and a host of cousins and friends that were dear to her heart.