

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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CERTIORARI TO DORCHESTER COUNTY

DIANE SCHAFFER GOODSTEIN, CIRCUIT COURT JUDGE

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ERIC BROWN,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000001

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PETITIONER'S JOHNSON PETITION REPLY FOR WRIT OF CERTIORARI

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ERIC BROWN, SCDC#272336  
BRCI-SALUDA UNIT #  
4460 BROAD RIVER ROAD  
COLUMBIA, SOUTH CAROLINA  
29210

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S.C. SUPREME COURT

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ISSUE PRESENTED

THE PETITIONER HEREIN JOINS IN THE ARGUMENT ADVANCED BY APPELLATE COUNSEL  
UNLESS STATED AND PRESENTED IN THE FOLLOWING PAGES.

STATEMENT

THE PETITIONER HEREIN ACCEPTS AS TRUE THE STATEMENT OF FACTS UNLESS STATED  
HEREIN AND/OR ADVANCED IN THE FOLLOWING PAGES.

THE PCR COURT RULING THAT PETITIONER'S PLEA WAS INTELLIGENTLY MADE WAS IN ERROR. WHERE THERE WAS EVIDENCE IN THE RECORD WHICH INDICATED PETITIONER WAS GIVEN INCORRECT ADVICE IN RESPECT OF HIS SENTENCE.

THE PETITIONER WOULD JOIN APPELLATE COUNSEL'S ARGUMENT AT PAGE (4) THRU (6). UNDER "RELEVANT FACTS". WHERE PETITIONER RESPECTFULLY ASK THIS COURT, TO TAKE JUDICIAL NOTICE, THAT AT ALL TIMES THE PETITIONER'S INTENT WAS PREPARING TO GO TO TRIAL. SEE APP. 90, LINES 20-22; APP. 91, LINES 5-14. THE ADVICE GIVEN AT APP. 91, LINE 17-27 AND APP. 91, LINE 25- APP. 92, LINE 1. ULTIMATELY THE ADVICE UNDERMINED THE PETITIONER'S TRUE INTENT.

PETITIONER'S DECISION TO GO TO TRIAL WAS BASED ON THE ERRORS OF TRIAL COUNSEL AND THERE IS A REASONABLE PROBABILITY THAT, BUT FOR COUNSEL'S UNPROFESSIONAL ADVICE, THE RESULT WOULD HAVE BEEN DIFFERENT. CHERRY V. STATE, 300. S.C. 115-117-118, 386 S.E. 2D 624, 625 (1989)

FINALLY, THE PETITIONER'S RELIANCE ON THE STATE'S OFFER WAS DETRIMENTAL AND IS ENFORCEABLE BY THIS COURT. SEE REED V. BECKA, 333 S.C. 676, 511 S.E. 2D 396 (CT.APP. 1999). THE COURT FOUND SUCH AN OFFER BY THE STATE WAS A CONTRACT OFFER AND A VALID ENFORCEABLE CONTRACT.

AGAIN, THE PETITIONER OFFER THE ATTACHED EXHIBIT'S AS SUPPORT OF HIS LEGAL POSITION AND SEEK A FULL BRIEFING ON THE ISSUE'S PRESENTED HEREIN.

RESPECTFULLY SUBMITTED,

S/ Eric Brown

ERCI BROWN, #272336

BRCI-SALUDA #

4460 BROAD RIVER ROAD

COLUMBIA, S.C. 29210

DATED: 9/9 2013  
COLUMBIA, SOUTH CAROLINA

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	FIRST JUDICIAL CIRCUIT
COUNTY OF DORCHESTER	)	CASE # 2005-CP-18-1566
	)	
ERIC BROWN, #272336,	)	
	)	
APPLICANT,	)	
	)	APPLICANT'S STATEMENT
Vs.	)	OF THE ISSUES
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
RESPONDENT.	)	
	)	

Applicant, Eric Brown, is presently confined in the South Carolina Department of Corrections pursuant to an order of commitment of the Dorchester County Clerk of Court. Mr. Brown was indicted at the January 2003 term of the Dorchester County Grand Jury for Murder (03-GS-18-0013). Ms. Marva Hardy Thomas represented Mr. Brown. On November 2, 2004, Mr. Brown offered a guilty plea, which he now alleges to be involuntary, to Voluntary Manslaughter. He was sentenced by the Hon. Steven H. John to confinement for a period of twenty-five (25) years. Mr. Brown did not appeal his conviction or sentence. This PCR was filed on October 11, 2005, within one year of his sentencing. The facts of the case relate to the death of Stacy Fogle, who died on November 9, 2002 in her home. Eric Brown lived with Stacy Fogle on her family's property in Branchville. Stacy Fogle died as a result of a gunshot wound to the head from a 20 gauge shotgun.

Eric Brown offers the following grounds for Post Conviction Relief, all as set forth with great particularity in his application:

1. Ineffective assistance of counsel in failing to investigate and interview fact and expert witnesses. Evidence will show that there were witnesses to the *sounds, or lack thereof*, before the incident which tend to show that the shooting was accidental, and without malice. The State's theory that the shooting was the result of a heated argument could have been refuted through investigation and interviews. Mr. Brown will show these failure's prejudiced him when relatives and neighbors of Stacy Fogle testify under subpoena at the PCR hearing that they heard no sounds of arguing before hearing the gunshot, and that they knew of no reason or motive as to why Eric Brown would intentionally murder Stacy Fogle. These witnesses were available prior to Mr. Brown's plea to Voluntary Manslaughter and could have raised a reasonable doubt as to malice or heat of passion, opening an opportunity for a determination of Involuntary Manslaughter which carries a much shorter sentence.

2. Ineffective assistance of counsel in advising Mr. Brown to plead guilty to Voluntary Manslaughter without discussing the defense of "accident" or the lesser included charge of Involuntary Manslaughter with Mr. Brown, or investigating facts which could have lead to a reasonable doubt on the charge of Voluntary manslaughter. Prejudice to Mr. Brown will be shown by the same evidence as set forth in issue number 1, above.

3. Ineffective assistance of counsel in failing to consult with an expert to investigate and report upon the finding's of the State's forensic pathologist. No forensic pathologist was consulted by defense counsel to obtain an independent evaluation of the autopsy. The

State's expert stated that the gun was pointed "upward, backward and to the right" at the time of the discharge. This statement could have assisted defense counsel, as such an angle is not consistent with the leveling of a gun before a shot. No expert was retained by defense counsel to point out the lack of other physical injuries to Stacy Fogle, and the lack of defensive wounds to her hands and arms. The lack of defensive wounds or other physical injuries to Stacy Fogle tend to prove that there was no indication of assault or domestic violence and that the weapon may have been fired by accident. Defense counsel did consult with Kelly Fite, a "firearms" expert, who stated in his report, "[The SLED] report of gunshot residue on Stacy Fogle's hands does not negate the possibility that there was a struggle over the weapon resulting in an unintentional discharge." This statement, and the other findings of the autopsy, is consistent with Mr. Brown's version of the facts that the gun was discharged by accident. Indeed, the State's expert told Detective Marshall that the victim "could have grabbed the barrel." If the proper expert had been retained, these facts could have raised reasonable doubt on the charges of Murder and Voluntary Manslaughter, and could have lead to a jury charge on the issue of Involuntary Manslaughter or the defense of "accident." According to Mr. Brown, Kelly Fite, applicant's "expert," was not in the courtroom when 3 juries were struck before Mr. Brown's plea. Mr. Brown does not believe that Mr. Fite was subpoenaed to testify at the trial by defense counsel or if he was even going to attend the trial to put forth the possibility of an "unintentional discharge." If Mr. Fite had attended the trial, there may have been doubts as to his qualifications, as he was not a forensic pathologist, and the weight of his testimony. Additionally, Kelly Fite's report was dated December 19, 2003.

Defense counsel had almost 11 months before Mr. Brown's plea to pursue the issue of an accident discharge of the weapon through the use of an independent forensic pathologist.

4. The trial court lacked subject matter jurisdiction to try Mr. Brown for Murder based upon a failure to charge all of the essential elements of murder pursuant to S. C. Code Ann. §17-19-30 which requires that the allegation of murder state that it was committed "feloniously and willfully." Since there was no proper indictment charging Mr. Brown for murder, since the words "feloniously" or "willfully" do not appear in the indictment, there could be no valid presentment of the indictment to the Grand Jury. In turn, the trial court was without jurisdiction to accept Mr. Brown's plea. Defense counsel failed to move the court to quash the indictment.

As a result, Applicant requests this court to grant his application for Post Trial Conviction Relief; to find that his guilty plea is revoked and rendered involuntary as a result of ineffective assistance of counsel and a lack of subject matter jurisdiction; and to vacate the Applicant's conviction; and to order that Applicant be released from confinement pending further action, if any; by the State of South Carolina.

SOLOMON, BUDMAN & STRICKER, LLP

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(843) 763-1118  
ATTORNEYS FOR APPLICANT  
ERIC BROWN

Charleston, South Carolina  
3<sup>rd</sup> day of March, 2010

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
COUNTY OF DORCHESTER	)	FIRST JUDICIAL CIRCUIT
ERIC BROWN, #272336,	)	CASE # 2005-CP-18-1566
	)	
APPLICANT,	)	APPLICANT'S SUPPLEMENTAL
	)	STATEMENT OF THE ISSUES
Vs.	)	
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
RESPONDENT.	)	

At the PCR hearing on March 3, 2010, Applicant submitted a "Statement of the Issues" to the court to assist with its understanding of the specific issues which Applicant expected to prove.

After hearing testimony from the Applicant's witnesses, and Applicant, the court heard testimony from Marva Hardee Thomas, Applicant's trial counsel. A letter from defense expert, Kelly Fite, was admitted during the hearing. The basis of Mr. Fite's opinions were not in Ms. Hardee-Thomas' possession. Counsel for the State said that the Dorchester County Sheriff's Department was in possession of its investigative file. Applicant sought permission of the court to review the investigative file. The court granted the request, continued the PCR hearing, and instructed Applicant's counsel to specifically look for any evidence in the file which would shed light on the forensic evidence in the case, as it may relate to any possible defenses.

The investigative file was produced to Applicant's counsel in April 2010. The reconvened PCR hearing is scheduled for December 10, 2010.

There is a significant amount of forensic and exculpatory evidence in the investigative file showing that the wounds to the victim, Stacy Fogle, could have been suffered as a result of an accident or an un-intentional firing of the weapon in this case. A defense of accident, or a reduction to Involuntary Manslaughter should have been pursued by trial counsel. Applicant pled guilty to the charge of Voluntary Manslaughter when there was competent forensic and witness testimony available to support the lesser charge and defense.

The evidence found in the investigative file showed the existence of forensic and exculpatory findings:

1. There were quantities of metals detected on the palms and backs of both hands of Stacy Fogle, which may be associated with gunshot residue.

Report of SLED Trace Evidence Department January 30, 2003. This supports Kelly Fite's opinion of the possibility "that there was a struggle over the weapon resulting in an un-intentional discharge."

2. The State's pathologist reports that the gun was fired from a distance of 2 - 4 feet. Measurements show that both the trigger on shotgun, and the muzzle to wound are both within that range. Det. Marshall asked Dr. Yacoub, "Could victim have grabbed barrel?" Dr. Yacoub said, "Could have."

Handwritten and typed notes of observation of autopsy dated 11/10/02 - Det. Miller

Investigative report dated 11/21/02 - Det. Marshall

Report of SLED Firearms Department 12/02/02

3. No items of Applicant's clothing or shoes contained blood spatter that would be consistent with "impact spatter."

Report of SLED Latent Prints Department 10/03/03. This shows that Eric Brown was not standing next to the victim at the time of impact.

4. Numerous statements by Applicant and others referencing the unintentional nature of this shooting:

Statement of unknown officer 11/10/02  
Statement of Tony Raspberry 11/13/02  
Report of Det. Marshall 11/15/02  
Supplementary report - Det. Marshall 12/03/02  
Statement of Eric Brown 11/26/02

All of these statements refer to the unintentional discharge of the weapon consistent with an accident or involuntary manslaughter. All are made within on month of the shooting which occurred on 11/09/02.

This potential evidence, in combination with the letter of defense firearms expert, Kelly Fite, could have been used to pursue a reduction in charges or defenses for Applicant, Eric Brown. Rather than focusing on what was done for Mr. Brown, the focus should center on what was not done by the public defender.

As Applicant testified to earlier, his attorney had little contact with him prior to jury selection. Applicant has no evidence that his counsel was in contact with Kelly Fite after his letter of December 19, 2003. There is no evidence that his counsel had contact with Dr. Ynez Yacoub, the pathologist that performed the autopsy or that counsel had a copy of the autopsy report. Applicant saw no evidence that Mr. Fite had been subpoenaed for trial; no evidence that a forensic pathologist had been consulted; and no evidence that

any of the witness testimony had been followed up and prepared for trial, such as Tony Raspberry or Thomas Murray.

There was also no evidence that counsel sought to use the exculpatory evidence offered by the Lowcountry Children's Center, who found that there were no allegations of physical abuse by Eric Brown made by the children of Stacy Fogle. Stacy Fogle's relatives testified at the PCR hearing in March 2010 that they were unaware of any violence between Eric Brown and Stacy Fogle, and that they did not hear any arguments on the night of the shooting.

In summary, this evidence contained in the investigative file, provided the basis of a claim for reduced charges of involuntary manslaughter or the defense of accident. But for the inaction of defense counsel, this evidence was never discovered; and if it was discovered there was not any follow-up, all leading to severe prejudice to the Applicant.

SOLOMON, BUDMAN, & STRICKER, LLP



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ATTORNEYS FOR PLAINTIFF

St. George, South Carolina  
December 10, 2010

STATE OF SOUTH CAROLINA )  
 COUNTY OF DORCHESTER )  
 ERIC BROWN, #272336, )  
 APPLICANT, )

CERTIFIED COPY )  
 2012 APR -4 )  
 RM 12:00 )  
 COURT OF COMMON PLEAS )  
 FIRST JUDICIAL CIRCUIT )  
 CASE # 2005-CP-18-1566 )

*Cheryl Steakman*  
 CLERK OF COURT  
 DORCHESTER COUNTY

Vs. )  
 STATE OF SOUTH CAROLINA, )  
 RESPONDENT. )

APPLICANT'S NOTICE OF  
 MOTION AND MOTION TO  
 AMEND, ALTER OR OBTAIN  
 RELIEF FROM JUDGMENT  
 (RULES 59e and 60b SCRPC)

TO: ALL PARTIES NAMED ABOVE:

PLEASE TAKE NOTICE that the undersigned will move before the Honorable Diane S. Goodstein, Judge of the Circuit Court, First Judicial Circuit, Dorchester County Court of Common Pleas, at the Dorchester County Courthouse, 5200 East Jim Bilton Blvd., St. George, South Carolina, 10 days after service hereof, or as soon thereafter as counsel may be heard, for an Order amending or altering the Order of Dismissal filed in this case on March 23, 2012 and received by counsel for Applicant on March 28, 2012. The grounds for such amendment or alteration are:

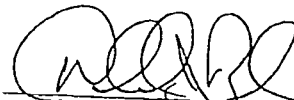
1. Based upon the evidence presented at the PCR hearing, the PCR court erred in ruling that the Applicant failed to demonstrate that he was prejudiced as a result of trial counsel's purported failure to interview certain fact witnesses.
2. The PCR court erred in failing to find that trial counsel for PCR Applicant was deficient in failing to contact and retain an expert witness, such as a forensic pathologist, to assist in his defense or mitigation, and that trial counsel's failure to do so was prejudicial to the Applicant.

3. The PCR court erred in failing to find that PCR Applicant suffered a presumption of prejudice as a result of trial counsel's failure to obtain the services of a forensic pathologist, as such failure entirely failed to subject the prosecution's case to meaningful adversarial testing.
4. The PCR court erred in finding that even if trial counsel for PCR applicant had made a successful objection to the court's subject matter jurisdiction, based upon the language of the indictment, the solicitor could simply re-indict, as said finding improperly surmises what the solicitor might have done if the indictment was struck down.

The effect of an amendment, alteration or relief from the judgment in this matter would be to grant Applicant the relief requested in his Petition for PCR relief resulting from the deprivation of his constitutional rights to effective assistance of counsel. This motion is based upon Rules 59-e and 60-b SCRPC and shall be based upon such affidavits, memoranda of law, transcripts of proceedings and evidence filed in this case.

PLEASE BE PRESENT IF SO MINDED.

SOLOMON, BUDMAN & STRICKER, LLP




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(843) 763-1118

ATTORNEYS FOR APPLICANT  
ERIC BROWN

Charleston, South Carolina  
3<sup>rd</sup> day of April, 2012

CERTIFICATE OF SERVICE

I hereby certify that on this 3<sup>rd</sup> day of April, 2012, I have mailed a copy of the foregoing Motion to Amend, Alter or Obtain Relief from Judgment upon all counsel of record, and have mailed a copy of this motion to Judge Goodstein, in accordance with the South Carolina Rules of Civil Procedure.

  
DONALD J. BUDMAN

*Cheryl Merdian*  
CLERK OF COURT  
DORCHESTER COUNTY  
2012 APR -4 PM 12: 04  
CERTIFIED COPY

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

CERTIORARI TO DORCHESTER COUNTY  
DIANE SCHAFFER GOODSTEIN, CIRCUIT COURT JUDGE

ERIC BROWN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000001

CERTIFICATE OF SERVICE

I CERTIFY THAT A TRUE COPY OF PETITIONER'S JOHNSON PETITION FOR WRIT OF CERTIORARI HAVE BEEN SERVED ON HON. DANIEL E. SHEAROUSE, CLERK OF COURT, THE SUPREME COURT OF SOUTH CAROLINA, P.O. BOX 11330, COLUMBIA, SOUTH CAROLINA 29211 ON THIS 9<sup>th</sup> DAY OF September 2013.

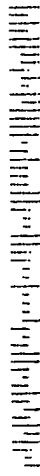
*E-c Brown*

ERIC BROWN, #272336  
BRCI-SALUDA UNIT #  
4460 BROAD RIVER ROAD  
COLUMBIA, S.C. 29210

SWORN TO AND BEFORE ME THIS  
\_\_\_\_\_ DAY OF \_\_\_\_\_ 2013

\_\_\_\_\_  
(L.S.)  
NOTARY PUBLIC FOR SOUTH CAROLINA

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