

RECEIVED

Jan 07 2026

SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CLARENDON COUNTY
Court of General Sessions

Appellate Case No. 2025-000772

The Honorable R. Ferrell Cothran, Circuit Court Judge

State of South Carolina.....Respondent,

v.

George Smith Appellant.

RECORD ON APPEAL

ALAN WILSON
Attorney General

MARK FARTHING
Senior Assistant Attorney General

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

Attorneys for Respondent

ELIZABETH FRANKLIN-BEST

Elizabeth Franklin-Best, P.C.
3710 Landmark Drive, Suite 113
Columbia, South Carolina 29204

Attorney for Appellant

INDEX

Appendix filed October 2, 2017 in the SC Supreme Court	1
Appellant Pro Se 29(b) Motion Packet	299
Hearing on 29(b) Motion, held July 28, 2023	318
Order Denying Motion for New Trial	336

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

OCT 02 2017

Appeal from Clarendon County

S.C. SUPREME COURT

Clifton Newman, Circuit Court Judge

GEORGE SMITH,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-000027

APPENDIX

SUSAN B. HACKETT
Appellate Defender

ALAN WILSON
Attorney General

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

JULIE COLEMAN
Assistant Attorney General
Attorney General Office
P. O. Box 11549
Columbia, SC 29211

ATTORNEY FOR PETITIONER

ATTORNEYS FOR RESPONDENT

INDEX

INDEX	i
TRIAL TRANSCRIPT DATED DECEMBER 8, 2009	1
FINAL BRIEF OF APPELLANT	149
FINAL BRIEF OF RESPONDENT	158
<u>STATE V. GEORGE SMITH</u> , 2012-UP-350 (S.C. Ct. App. filed June 6, 2012).....	168
REMITTITUR	169
APPLICATION FOR POST-CONVICTION RELIEF	170
RETURN.....	178
POST-CONVICTION RELIEF HEARING TRANSCRIPT DATED SEPT. 10, 2014.....	184
APPLICANT'S EXHIBIT #1 (COPY OF CASE HISTORY).....	270
APPLICANT'S EXHIBIT #2 (SWORN STATEMENT OF TASHA CANNON).....	271
APPLICANT'S EXHIBIT #3 (MOTION FOR DISCOVERY).....	272
COURT'S EXHIBIT #1 (AFFIDAVIT).....	274
ORDER OF DISMISSAL.....	275
INDICTMENT.....	292
SENTENCE SHEETS	294

State of South Carolina)
)
County of Clarendon)
)

State of South Carolina,
Plaintiffis

vs.

General Sessions
2008-GS-14-352

George A. Smith,
Defendants

December 8, 2009
Manning, S.C.

Before The Honorable R. Ferrell Cothran, Judge.

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

Ms. Amy A. Land,
Assistant Solicitor

Mr. Harry Devoe,
Attorney for Defendant

Margaret T. Sullivan,
Court Reporter

	<u>WITNESSES</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
1	JURY QUALIFIED:	3			
2	JURY IMPANELED:	7			
	JURY SWORN:	10			
3	PRELIMINARY REMARKS:	10			
	OPENING STATEMENTS				
4	BY MS. LAND	15			
	BY MR. DEVOE	18			
5	KELVIN BLACK				
	BY MS. LAND	22		49, 59	
6	BY MR. DEVOE		37		52
7	TASHA CANNON				
8	BY MS. LAND	60		72	
	BY MR. DEVOE		70		75
9	THOMAS BURGESS				
	BY MS. LAND	76			
10	BY MR. DEVOE		97		
	MOTIONS				
11	BY MR. DEVOE	103			
	RIGHTS OF DEFENDANT	104			
12	CLOSING STATEMENTS				
	BY MS. LAND	107			
13	BY MR. DEVOE		113		
	CHARGE BY THE COURT	121			
14	VERDICT OF THE JURY	138			
	POLLING OF THE JURY	139			
15	SENTENCE OF THE COURT	147			

	<u>EXHIBITS</u>			
	<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EV.</u>
17	S-1	PHOTO OF APARTMENT COMPLEX		49
18	S-2	PHOTO LINEUP		85
	S-3	PHOTO LINEUP		86
19	S-4	PHOTO LINEUP		88
	S-5	PHOTO		95
20	S-6	PHOTO		95
	S-7	PHOTO		96

1 MS. LAND. Your Honor, the State is
2 prepared to move forward with the State vs. George
3 Arsenio Smith this is Indictment 2008-GS-14-352.
4 He is indicted for armed robbery, assault and
5 battery with intent to kill, and possession of a
6 weapon during a violent crime. If I may, I will
7 pass forward the State's potential witness list.
8 And, Your Honor, the clerk has the original true
9 bill indictment.

10 THE COURT: This is the case of the State
11 of South Carolina versus George Arsenio Smith. I
12 need to know if there is any member of the jury
13 panel connected by blood or marriage or close
14 personal friends or social relations with
15 Mr. Smith. If so, please stand.

16 (Whereupon, no response.)

17 THE COURT: Okay. The potential witnesses
18 in this case are Kelvin Black, Thomas Burgess,
19 Tasha Cannon, Sharelle Campbell, Carlos Rangel,
20 Curtis Hickman, Sean Briley, Bradley Wilkes, Tad
21 Broadway, Barbara Proctor.

22 Any members of the jury panel connected by
23 blood or marriage or close personal friends or
24 social relations with any potential witnesses in
25 this case? If so, please stand.

1 THE JUROR: Yeah, Sean Briley is a member
2 of my church. I interact with him a good bit.

3 THE COURT: And the fact that he may be a
4 witness in this case, would that affect your
5 ability to give both the state and this defendant
6 a fair and impartial trial?

7 THE JUROR: I don't think so.

8 THE COURT: And what was your number?

9 THE JUROR: Two.

10 THE COURT: No. 2?

11 THE JUROR: Yes, sir.

12 THE COURT: Thank you. Anyone else? Yes,
13 ma'am.

14 THE JUROR: I work at Shoney's and Sean
15 and Tad come in Shoney's. So....

16 THE COURT: And the fact that they come in
17 to Shoney's and you may wait on them, would that
18 affect your ability to give both sides a fair and
19 impartial trial?

20 THE JUROR: No.

21 THE COURT: Tell me your number.

22 THE JUROR: It's 21.

23 MR. DEVOE: Your Honor, may we approach a
24 moment?

25 THE COURT: Yes.

(1 (Whereupon, the attorneys approach the
2 bench and confer with the judge.)

3 THE COURT: The attorneys involved in this
4 case are Amy Land who represents the Solicitor's
5 Office, and Harry Devoe who represents the
6 defendant. Is any member of the jury panel
7 connected by blood or marriage, close personal
8 friends, social relations, or been represented by
9 either two of these attorneys? If so, please
10 stand.

11 THE JUROR: Amy Land and I were former
12 neighbors, but that wouldn't affect me.

(13 THE COURT: Give me your number.

14 THE JUROR: 132.

15 THE COURT: Yes, ma'am.

16 THE JUROR: I was a former girl scout
17 leader for one of her children. And my brother is
18 a friend of her sons. Also her family goes to
19 church with my family.

20 THE COURT: So do you think you could you
21 be a fair and impartial?

22 THE JUROR: I definitely think so.

23 THE COURT: What is your number?

(24 THE JUROR: 127.

25 THE COURT: Okay, thank you. Yes, ma'am.

(1 THE JUROR: My brother works in the
2 Anders law firm. And Amy's father owns the --
3 owned the law firm.

4 THE COURT: Okay.

5 THE JUROR: But it won't affect my.

6 THE COURT: And what was your number?

7 THE JUROR: 69.

8 THE COURT: Anyone else? Is there any
9 member of the jury panel who has formed or
10 expressed an opinion about any of the matters or
11 issues involved in this case? This case allegedly
12 occurred on or about April 6th 2008. Any member
13 of the jury panel aware of any bias or prejudice
14 either towards the State of South Carolina or this
15 Defendant? If so, please stand.

16 (Whereupon, no response.)

17 THE COURT Any member of the jury panel
18 served on the Grand Jury here in Clarendon County
19 and have heard this case? If so, please stand.

20 (Whereupon, no response.)

21 THE COURT: Any member of the jury panel
22 due to religious or moral reasons, unable to sit
23 in judgment of your fellow man? If so, please
24 stand.

(25 (Whereupon, no response.)

1 THE COURT: Does any member of the jury
2 panel know any reason whatsoever, why they can't
3 give the State of South Carolina and Mr. Smith a
4 fair and impartial trial? If so, please stand.

5 (Whereupon, no response.)

6 THE COURT: Any further questions from the
7 state?

8 MS. LAND: No, sir, not from the state.

9 THE COURT: From the defense?

10 MR. DEVOE: None from the defense, Your
11 Honor.

12 THE COURT: Madam Clerk, if you will give
13 us a jury. 5 and 10.

14 THE CLERK: No. 58 Scott Jackson (m-w)
15 accepted. No. 78 Cassie McElveen (f-w) defense
16 struck. No. 99 Kenneth Rast (m-w) accepted.
17 Juror No. 121 Debra Therrell (f-w) accepted.
18 Juror No. 127 Shannon Vincent (f-w) defense
19 struck. Juror No. 36 Ida Ree Gamble (f-b)
20 accepted. Jury No. 95 Mazie Pringle (f-b)
21 accepted. Juror No. 87 Willie Nelson (m-b)
22 accepted. Juror No. 39 Nealy George (f-b) state
23 struck. No. 132 Tracy Weeks (f-w) defense struck.
24 No. 8 Donald Brady defense struck. Juror No. 97
25 Leroy Pugh (m-b) accepted. No. 98 Willie Ragin.

1 (m-b) state struck. Jury No. 90 Valerie Oliver
2 (f-b) accepted. No 141 Lee E lemon (m-b) state
3 struck. No. 94 Tiffany Prince (f-b) state struck.
4 No. 135 Laquanda White (f-b) state struck. 143
5 Stephanie McLaughlin (f-w) accepted. No. 30
6 Margaret Eggerton accepted. No. 38 accepted No.
7 12 accepted. No. 40 alternate accepted.

8 THE COURT: Are there any matters of law
9 regarding the selection of jury on behalf of the
10 State?

11 MS. LAND: None from the State, judge.

12 THE COURT: Defense?

13 MR. DEVOE: None from the defense, Your Honor.

14 THE COURT: Now would you all approach?

15 MS. LAND: Yes.

16 (Whereupon, the attorneys approach the bench and
17 confer with the judge.)

18 THE COURT: Ladies and gentlemen, we are not
19 going to be able to start with the testimony in this
20 case this afternoon. I need you to come back at 9:30 in
21 the morning. And we will start the testimony at that
22 time.

23 Now you don't know, and I will give you further
24 instructions. The only thing I can tell you tonight is,
25 you don't know anything about this case other than the

(1 name of it. But you can't discuss it or allow anyone to
2 discuss it with you. That would be improper. I don't
3 know if it's going to be anything in the newspaper or
4 the news media. If there is, you can't read it. And
5 when you get home, your family is going to want to know
6 what you have been doing all day. You can't tell them
7 you were selected on this case, because they may have an
8 opinion or they may know something about it. If they
9 are anything like my family, they are going to have an
10 opinion. But you've got to decide this case based on
11 what you hear from this witness stand.

(12 So, I will remind you about that in the morning.
13 I will explain a lot of other things to you in detail as
14 to what your duties will be. But as far as tonight is
15 concerned, just simply don't discuss the case among
16 yourselves or allow anyone to discuss it with you. When
17 you come back in the morning, come straight back to the
18 jury room which is that door right there. And I'll see
19 you all at 9:30 in the morning.

20 (Whereupon at 4:06 p.m. jury is dismissed.)

21 (Whereupon, the trial commences at 9:30
22 a.m. on Tuesday, December 8th, 2008.)

23 THE COURT: Are you ready, Mr. Devoe.
24 Anything before I bring the jury in?

(25 MS. LAND: Your Honor, I would like to add

(1 one thing to my witness list. I believe also that
2 Mr. Devoe told us he had list of witnesses that we
3 could ask the jury about this morning.

4 THE COURT: Is that right, Mr. Devoe?

5 MR. DEVOE: I did mention it, Your Honor.
6 I have not had time to talk to my client morning.
7 I did go over this last evening. The scene of the
8 crime.

9 THE COURT: Well talk to him real quick.

10 MR. DEVOE: I don't see him here. His
11 family I guess talked to him.

12 THE COURT: You may bring the jury.

(13 (Whereupon, the following takes place
14 within the presence of the jury.)

15 MR. DEVOE: May we approach one more time?

16 THE COURT: Yes.

17 (Whereupon, the attorneys approach the
18 bench.)

19 THE COURT: Madam clerk, you may swear the
20 jury.

21 (Whereupon, the jury is sworn.)

22 THE COURT: Ladies and gentlemen, I am
23 going to give you kind of a brief introduction of
24 what your duties will be, and what we are fixing
(25 to do. And I am going to explain to you briefly.

1 Later at the end of the trial, I will give you the
2 full details under the law of this case. I will
3 charge you the full details of the law in this
4 case. We're about to try the case as you know, of
5 George Smith. And he's been indicted by the State
6 with assault and battery with intent to kill,
7 armed robbery and possession of a weapon during a
8 violent crime.

9 I will explain to you at the end of this
10 case the definitions of these crimes and the law
11 that you are to apply. But to this indictment, he
12 has entered a plea of not guilty. Therefore it
13 shifts the burden upon the State of South Carolina
14 to prove each and every element of this indictment
15 beyond a reasonable doubt. This indictment is not
16 evidence in this case. It is simply a charging
17 paper that gets this case to court.

18 The evidence that you will receive in this
19 case will usually come to you in three forms.
20 First, through the sworn testimony from this
21 witness stand. The witness is going to get on the
22 stand under oath and testify to you. As well as
23 any exhibits that may be introduced into evidence
24 in this case. And any stipulations made by the
25 attorneys. That's the evidence you are to

1 consider.

2 The attorneys opening statements and
3 closing statements are not evidence. Their
4 questions are not evidence. The evidence comes
5 from the sworn testimony. And your job is to
6 listen to that evidence, and to find what the true
7 facts are in this case. My job is to rule upon
8 the admissibility of that evidence. Under our
9 rules, certain evidence is admissible and certain
10 evidence is not admissible. Throughout this
11 trial, there may be some objections. I may have
12 to send you to the jury room to rule on under our
13 rules what evidence you are supposed to hear.

14 I don't have an opinion about the facts in
15 this case. My job is simply to rule on the
16 evidence and to give you the law. Your job is to
17 determine what the true facts are in this case.
18 So I need you to pay close attention throughout
19 this trial, because if you make a mistake on the
20 facts, it's very hard to correct that mistake. If
21 I make a mistake on the law, at some other time
22 and some other place, that will be reviewed and
23 corrected.

24 So throughout this trial, if you have are
25 having trouble hearing or you need a break, and I

1 will try to break every hour or hour and a half.
2 It depends on where the witnesses are. But if you
3 need one before that, just raise your hand.
4 Because if you are uncomfortable, you can't pay
5 attention. Because it's real important that you
6 pay attention to the facts in this case, and
7 determine what the true facts are.

8 The way this case will go is, the
9 attorneys will start out making their opening
10 statements. And their opening statements are not
11 evidence. It's simply a road map of where they
12 think the evidence is going to take you in this
13 case. Then we will have the testimony of
14 witnesses. At the end of the trial, they will
15 make a closing argument to you. And at that point
16 they will argue to you as to what they think the
17 evidence shows. Then I will charge you on the
18 law. I will explain the law to you.

19 And just as you are the sole judges of the
20 facts, I am the sole judge of the law. So if you
21 disagree with what I tell you the law is, you have
22 got to accept the law just as I give it to you
23 whether you agree with it or not, and apply that
24 law to the evidence that you determine to be the
25 true facts in the case. And I will explain that

1 to you in great detail at the end of the case.

2 Now as I told you briefly yesterday, you
3 can't discuss this case. We're going to take
4 breaks, as I rule on the evidence. And we'll take
5 breaks. When you go back to the jury room, you
6 can't talk about this. And you're going to say
7 well why can't we. We've heard from one witness.
8 Why can't we talk about what that one witness
9 said. And the reason you can't is because when
10 you go back there and you talk about one witness,
11 and one of you may have an opinion as to where you
12 think this, and you're going to express that
13 opinion. And then at the end of the case you are
14 going to defend that opinion you had very early in
15 the case. And that wouldn't be proper. So I
16 don't want you to start forming an opinion until
17 you have heard all of the case. Until you have
18 heard all the facts that are going to be presented
19 to you through the evidence in this case. As well
20 as the law I charge you. So that's why I tell you
21 you can't discuss the case when you go back in the
22 jury room. And you can't allow anybody outside
23 when you go home or eat lunch or whatever, to
24 discuss the case. Because they haven't been here.
25 You are the only ones that have been here. You

1 know what happened in this courtroom. And you've
2 got to decide this case based on the evidence
3 you hear in this courtroom.

4 So having said that, the Solicitor, the
5 State has the burden of proof. They must prove
6 each and every element beyond a reasonable doubt.
7 So they go first. Ms. Land will give you an
8 opening statement. At that point Mr. Devoe has
9 the right to give you one. He doesn't have to.
10 Under our system of justice, someone accused of a
11 crime doesn't have to prove anything. The State
12 has the burden of proof.

13 So they don't have to put up any evidence
14 and they don't have to prove anything. Most of
15 the time the attorneys are going to make an
16 opening statement. I've never seen one that
17 didn't. So you are going to hear the opening
18 statements from both sides probably, and then we
19 will start with the evidence. And as soon as the
20 evidence is submitted, you will hear the closing
21 arguments, and I will charge you the law. If you
22 will please pay close attention to Ms. Land.

23 MS. LAND: Good morning.

24 THE JURORS: Good morning.

25 MS. LAND: In a few moments Mr. Devoe is

(1 going to get up here and tell you that today and
2 maybe in to tomorrow is the most important day in
3 George Arsenio Smith's life. But he is on trial
4 today. But I beg to differ. I think that today
5 is the most important day in Kelvin Black's life.
6 He is seated behind where I was sitting in the
7 white shirt. And he is the victim in this case.

8 This is a case of assault and battery with
9 intent to kill, armed robbery, and possession of a
10 weapon during a violent crime. On April the 6th
11 of 2008, Kelvin Black had gone to the club from
12 his home in Summerton. And his wife called him
(13 and told him to come home. So on his way home, he
14 was approached by that man. He has known that man
15 for some time. He knew him as the nickname,
16 "Chips." And as he was walking home through a lit
17 pathway, Chips came up behind him, pointed a gun
18 at him and demanded his money.

19 Mr. Black thinking that this is someone he
20 has known all his life, didn't take him serious,
21 continued to walk. And that's when he was shot in
22 the leg.

(23 I submit to you that anytime you shoot
24 another human being, you have the intent to kill
25 them. Any time you fire a bullet into somebody's

1 body, your expectation is that they will not
2 survive. At that point, Mr. Black ran back to his
3 apartment where his wife heard the ruckus, looked
4 out the window and saw who she knew to be "Chips."
5 Ladies and gentlemen, those of you that watch Law
6 and Order or CSI and are intrigued by those shows
7 may be greatly disappointed by this trial. Those
8 are television shows that are put on for our
9 entertainment. There's lots of DNA, lots of fancy
10 evidence, but this is the real world. This is
11 Clarendon County, and we do the best that we can
12 do with what we have and we do a good job, I
13 believe.

14 But in this case, what we have, and what
15 you can rely on according to our laws, are eye
16 witness testimony. What people saw. What people
17 heard. What people felt. You will also hear from
18 the officers who said that when they went to the
19 hospital, Mr. Black, said "Chips shot me." As he
20 laid there believing that he was dying, his story
21 never wavered. Never doubted what he saw. His
22 wife never doubted what she saw. Thank you for
23 being here today. Mr. Devoe probably will also
24 talk about reasonable doubt.

25 And a reasonable doubt is something that

1 causes a reasonable person to hesitate to act.
2 And we will talk much more about that later. But
3 my burden is to prove to you beyond any doubt.
4 And as the judge told you, you are the judges of
5 the law. Those badges that you are wearing that
6 say juror might as well say judges. Because you
7 are going to judge all of the facts in this case.
8 You are going to determine what actually happened
9 on April 6th of 2008.

10 And so I appreciate your listening, and I
11 appreciate you being here. This will not be a
12 long trial, but nonetheless, it is a very, very,
13 very important lesson, important trial, and an
14 important day for that man who almost lost his
15 life. Thank you.

16 THE COURT: Mr. Devoe.

17 MR. DEVOE: Good morning.

18 THE JURY: Good morning.

19 MR. DEVOE: As you will recall my name
20 today and maybe yesterday, is Harry Devoe. You
21 can also tell from my accent, I am not from
22 Clarendon County. And I am glad Amy Land knows
23 what I am going to tell you before I know myself
24 what I am going to tell you. But that's a long
25 story itself. I won't go in to probable cause law

1 right now. The judge will go into it later in the
2 trial. I will go into it in closing arguments. I
3 will go into it in the arguments but not today,
4 not now.

5 But I will tell you I got to Clarendon
6 County many, many years ago. More than 20 years.
7 Driving down 301 for my first duty station in the
8 Navy, after I got my wings, Jacksonville,
9 Florida. My hometown is Providence, Rhode Island.
10 I came down 301 and when I came to Manning there
11 was a big sign across the road saying, "Welcome to
12 Manning, South Carolina." This was 1957. About
13 two weeks later in Jacksonville, Florida, I met a
14 girl from Manning, South Carolina. Clarendon
15 County. We dated, and a few years later we got
16 married.

17 And 20 years ago, she made me come back
18 here from Philadelphia, and leave at that time. I
19 became a lawyer here as well as some other states.
20 And I've been a South Carolina lawyer now for 18
21 years. I never did any public defender work or
22 criminal work; any trial work in my former times
23 practicing law. But I'm doing it, and I enjoy
24 doing it and that's why I do it. And I do it for
25 several reasons. And one of the reasons is, I

1 think that defendants who have no money and need a
2 public defender deserve to have justice as though
3 they were a paying client.

4 They have every right in the world to be
5 represented properly and vigorously. And to make
6 sure the state has to follow the burden of prove
7 their case. Everybody has that right. Think of
8 that when you go to trial. My client has chosen
9 to go to trial. He has chosen to tell you he is
10 not guilty of the crime. And that's why we are
11 going to trial. The State has the burden of
12 proving that he is guilty. And I have no burden
13 at all.

14 My client sits at the defense table now
15 just as innocent in the eyes of the law as you all
16 are sitting there. If you think that because
17 someone has been accused of a crime, that he is
18 automatically guilty of a crime, you are sitting
19 in the wrong chair. You're telling yourself you
20 can't be part of this jury. It's up to the State.
21 The State being Clarendon County, or the
22 Solicitor's Office to prove my client is guilty
23 beyond a reasonable doubt. And that's a heavy
24 burden beyond a reasonable doubt.

25 Part of this case is going to revolve

1 around the fact that this took place around 2 to
2 4:00 o'clock in the morning. Ask yourself, how do
3 you see people at 2 or 4:00 o'clock in the
4 morning? How do you identify them? And it's up
5 to the State to show that it is easy to identify
6 someone at 2 or 4 o'clock. Two to four. I
7 mentioned 2 or 4, because the times are different.
8 It's varies.

9 So think of the time sequence in this
10 case when you listen to the witnesses in this
11 case. The victim is, he came all the way down
12 from Connecticut. He's under subpoena to be here
13 today. But my client is the one sitting in jail
14 and will be sitting in jail for a long time. This
15 is very important to him. So think of those-facts
16 and as you listen to the facts, again, listen to
17 the facts not from emotion, not from what Amy Land
18 says or what I say. Because we weren't there. We
19 are not going to jail if we lose. Amy is not
20 going to be going to jail if she loses.

21 So the point is, you have to listen to the
22 facts presented to you, and nothing else. We look
23 forward to this case. Obviously my client is not
24 guilty and we are going to trial. And keep that
25 in the back of your mind. He is not guilty unless

1 you all decide otherwise. Which obviously I hope
2 you will not. I appreciate your attention. Thank
3 you. Can we approach, Your Honor?

4 THE COURT: Yes.

5 (Whereupon, attorneys approach and confer
6 with judge.)

7 THE COURT: You may call your first
8 witness.

9 MS. LAND: Kelvin Black.

10 Kelvin Black, Being
11 first duly sworn, testified as follows:

12 Direct Examination by Ms. Land:

13 Q Kelvin, where do you live?

14 A Bridgeport, Connecticut.

15 Q Prior to living in Connecticut, where did
16 you live?

17 A Meadowfield Apartments.

18 Q Where are Meadowfield Apartments?

19 A Summerton.

20 Q If you will pull your microphone a little
21 bit closer and look over at me. That might be
22 easy for me to hear you. And I will stand over
23 here, because I know if I can hear you the jury
24 can hear you as well. How old are you, Kelvin?

25 A 28.

Kelvin Black-direct by Land

- 1 Q Are you married?
- 2 A Yes, sir.
- 3 Q And who are you married to?
- 4 A Tasha Cannon.
- 5 Q How long have you been married?
- 6 A About a year.
- 7 Q Do you all have any children?
- 8 A Yeah.
- 9 Q How many?
- 10 A Three.
- 11 Q Boys or girls?
- 12 A All boys.
- 13 Q And do you recall April 4th of 2008,
- 14 April 6th of 2008?
- 15 A Yes, I do.
- 16 Q Tell me where you were living at that
- 17 time.
- 18 A I was living in Meadowfield Apartments in
- 19 Summerton, South Carolina.
- 20 Q And that's in Clarendon County?
- 21 A Yes.
- 22 Q And who did you live there with?
- 23 A My wife and my kids.
- 24 Q Was anyone staying with you on those days?
- 25 A Yes, her sister was.

Kelvin Black-direct by Land

1 Q And what is her sister's name?

2 A Sharelle Campbell.

3 Q And what did you do if anything that
4 evening?

5 A Can you repeat that again?

6 Q What did you do that evening of April 6th
7 of 2008?

8 A I was at work.

9 Q You went to work?

10 A Yes, I went to work that evening. And I
11 got off about 9:30.

12 Q Where were you working at that time?

13 A Gold Gist.

14 Q And you got off about 9:30?

15 A Yes.

16 Q What did you do after work?

17 A I got dressed and go into the bar.

18 Q When you say go into the bar, which bar
19 was it?

20 A Bait shop.

21 Q It's called Bait Shop?

22 A Yes, it's called the Bait Shop. Yes.

23 Q How far is it from your residence?

24 A About three streets over. About a good
25 little piece.

Kelvin Black-direct by Land

- (1 Q Is it walking distance?
- 2 A Yes, it's walking distance.
- 3 Q Was it your intention to walk there that
- 4 night?
- 5 A Yes, It was.
- 6 Q And did you walk there that night?
- 7 A Yes, I did.
- 8 Q Was this regular behavior for you to get
- 9 off work and go to the Bait Shop and have a couple
- 10 of drinks?
- 11 A No.
- 12 Q But this evening that's what you were
- 13 doing?
- 14 A Yes.
- 15 Q How would you -- tell the jury what path
- 16 you took to walk to the Bait Shop.
- 17 A I came out through the back, through the
- 18 back gate. And I went straight down to about the
- 19 right and through the path and went up Third
- 20 Street.
- 21 Q When you left your house, what door did
- 22 you exit?
- 23 A The front door.
- 24 Q You left the front door. And then did you
- 25 walk down a pathway?

Kelvin Black-direct by Land

- 1 A Yes.
- 2 Q And is this a common pathway for people
3 that live in the apartment?
- 4 A Yes.
- 5 Q Is it well lit?
- 6 A Yes.
- 7 Q What kind of lights does it have?
- 8 A It has city lights.
- 9 Q City lights?
- 10 A Yes.
- 11 Q What do you mean by that?
- 12 A Light poles with lights on them.
- 13 Q And when you finished down the pathway,
14 where did you go?
- 15 A You come up the street where another
16 street light at.
- 17 Q You turn left or right?
- 18 A I turn left.
- 19 Q And is that another pathway?
- 20 A No, it's a street.
- 21 Q Did you walk down that street?
- 22 A Yes.
- 23 Q How long did you stay at the bar that
24 night?
- 25 A About 2 hours.

Kelvin Black-direct by Land

1 Q And why did you leave the bar?

2 A My wife gave me a call and told me she
3 didn't feel right that I should come home. So I
4 decided to leave.

5 Q Did you ask her what she meant, when she
6 said she didn't feel right?

7 A No, she always have feelings. "I don't
8 feel right, you need to come home." So I decided
9 to come home.

10 Q And what path did you take on the way
11 back, the same path?

12 A I took the same path that I left on. The
13 exact same path.

14 Q And at any time did you see George Arsenio
15 Smith?

16 A Yes, I did.

17 Q When did you see him?

18 A When I got to the back gate. I went to
19 the back gate to where the apartments. To go to
20 the apartments. End of the apartments. I saw him
21 there.

22 Q Okay. And what if anything did he say to
23 you?

24 A What did he say to me?

25 Q Uh-huh. (affirmative.)

Kelvin Black-direct by Land

(1 A He didn't say too much. He told me to
2 give him my chains and stuff around my neck. And
3 he asked me if I had any money. I told him I
4 didn't have any money.

5 Q And let me ask you this. Prior to this
6 date, before that date, did you know him?

7 A Yes, I know him since we were small.

8 Q So you have known him for a good long
9 time.

10 A Yes.

11 Q And did you call him anything other than
12 George?

(13 A Chips.

14 Q Chips. Was that a common nickname in the
15 community?

16 A Yes.

17 Q Is the person that you saw that evening in
18 the courtroom today?

19 A Yes.

20 Q Can you point him out for the jury please?
21 What is he wearing?

22 A Purple and white.

23 Q So he is in the purple suit sitting beside
(24 Mr. Devoe?

25 A Yes.

Kelvin Black-direct by Land

1 Q And you said that he asked you for your
2 chains?

3 A Yes.

4 Q And did he have anything in his hand?

5 A Yes, he had a gun.

6 Q Did you see what kind of gun it was?

7 A No, I didn't.

8 Q Was it a long gun or a short gun?

9 A It was a short gun, all black.

10 Q Like a little handgun?

11 A A little handgun, yes.

12 Q What did you do when he asked you to give
13 him your chains?

14 A At the time he asked me for the chain, I
15 gave it to him.

16 Q You gave it to him at that point?

17 A Yes, I did.

18 Q And then what happened?

19 A He asked me did I had any money. I told
20 him, no. Then he asked me -- no, he didn't ask me
21 nothing after that. He said, this is what I do.
22 And he left.

23 Q Okay. Let's go back a little bit. When
24 you saw him on the path, was there a point when
25 the gun was fired?

Kelvin Black-direct by Land

1 A Yes, It was.

2 Q Tell the jury about that please.

3 A Well when I was coming through the path, I
4 was walking with my head down. I heard a gun
5 click. And I looked back. It was George behind
6 me. George is called, "Chips." He was behind me.
7 I didn't pay no attention. I walked, he fired the
8 gun and missed. Next I had decided to ran. When
9 I ran, I was in front of my apartment building at
10 the time. He shot me. I fell. After he shot me
11 in my leg, I fell. And I scooted myself back to
12 the mailbox. In front of the mailbox. He was
13 coming behind the mailbox. And this was my wife
14 who was looking back through the window. Calling
15 the police. He came over to me with the gun, and
16 get my two chains. And He asked me if I had any
17 money. I didn't have no money at the time. He
18 clicked the gun again and for some reason, it
19 didn't fire.

20 At that time he made a statement and he
21 ran off. And I scooted myself back to the door.
22 I tried to stand up, and when I stand up, I fell
23 forward into my wife's arms, and I don't remember
24 nothing else from there.

25 Q You said that you were walking down a path

Kelvin Black-direct by Land

1 and you heard him do something to the gun behind
2 you. I just didn't know what word you said.
3 A It clicked. I heard something click.
4 Q Okay. So when you hear the click of a
5 gun, what is that?
6 A I guess, cocking, whatever.
7 Q And did that cause you to look back?
8 A Yes, It did.
9 Q Prior to hearing that click, did you know
10 that he was there?
11 A No, I didn't.
12 Q When you looked back, did he say anything
13 to you?
14 A Yes, he did.
15 Q What did he say?
16 A He told me to give him my chains around my
17 neck now.
18 Q Okay. And when he said, "Give me your
19 chains," he meant the ones around your neck?
20 A Yes.
21 Q Were you wearing chains around your neck?
22 A Yes, I did.
23 Q Describe them to the jury, if you will.
24 A I had an all silver one that it was Jesus
25 hand medallion on it, with a cubic zirconic links

Kelvin Black-direct by Land

1 in it. I had a gold one with a Jesus head on it
2 around my neck at the time.

3 Q Then you said that you turned around and
4 you were walking towards your door. How far were
5 you from your front door when the bullet hit you?

6 A How far away was I from my front door? I
7 was about from, probably from here to you.

8 Q Okay. So the distance that we are is how
9 close you were to your apartment.

10 A Yes.

11 Q And in that space, are there lights?

12 A Yes, street lights.

13 Q And is it the same area you described
14 earlier?

15 A Yes.

16 Q Do you have a light on your porch?

17 A Yes, sir, I do.

18 Q Do you all typically leave that light on?

19 A Yes, it was on. Because I was supposed
20 to come home at that time, so she always leaves
21 the light on.

22 Q Do you have any reason to make up a story
23 like this about Chips?

24 A No, ma'am.

25 Q And up until this point, well -- at one

Kelvin Black-direct by Land

1 point, did you and Chips consider -- did you
2 consider Chips a friend?

3 A Well I never did consider him as a friend.
4 We went to the bar one night. Me and him. Well I
5 met him out to the bar. My wife, you know, my
6 wife was out there. And we had a couple of drinks
7 and stuff together. We talked. And it all
8 started from there.

9 Q And is what you are telling this jury
10 today the truth?

11 A Yes, it is.

12 Q What did you do to get here today?

13 A We rented a car and drove down here from
14 Connecticut.

15 Q And when did you leave Connecticut?

16 A We left Connecticut yesterday at 2:15.

17 Q In the afternoon?

18 A Yes.

19 Q How long did it take you to get here?

20 A 13 and a half hours.

21 Q What time did you get here last night.

22 A 4:07.

23 Q And have you been here before to address
24 this situation?

25 A Can you repeat that?

Kelvin Black-direct by Land

(1 Q In other words, to handle things
2 preliminarily with this case?

3 A Can you repeat that again please?

4 Q Is this the first time you have come down
5 from Connecticut in relation to this case?

6 A Yes.

7 Q Who came with you?

8 A Me and my wife and my kids.

9 Q So you had the three children in the car
10 for 13 and a half hours?

11 A Yes.

(12 Q Are you working in Connecticut?

13 A Yes.

14 Q What do you do?

15 A I work for a moving company, "All my
16 sons," in Staford, Connecticut.

17 Q And things are going well in Connecticut?

18 A Yes.

19 Q When the bullet hit you, if you would,
20 stand up and show the jury on your body where it
21 hit you. Outside of your clothes, of course.

22 (Whereupon, the witness steps down from
23 the witness stand.)

(24 A Right here. (witness indicates to the
25 jury.)

Kelvin Black-direct by Land .

(1 Q You can sit back down.

2 (Whereupon, the witness resume the witness
3 stand.)

4 Q So it wasn't actually in the leg, it was
5 above the leg?

6 A Yes.

7 Q And did they ever recover that bullet?

8 A Yes, I did.

9 Q When was that?

10 A About 2 weeks ago.

11 Q Until then it was lodged in your?

12 A In my stomach, yes.

(13 Q Now you said after you fell into your
14 wife's arms, you don't remember anything. What is
15 the next memory you have?

16 A My next memory I have is, I was in the
17 hospital. I don't know what hospital I was at.. I
18 remember seeing a police officer. And he had some
19 papers with pictures on it. And he asked me to
20 point out the person that shot me.

21 Q And did you point to the person that shot
22 you?

23 A Yes.

(24 Q Let me go back one more time. After he
25 shot you the first time and you are approaching

Kelvin Black-direct by Land

1 your house, you backed up to the mailbox you told
2 the jury.

3 A Yes, I did.

4 Q Was there a point that you fell on the
5 ground?

6 A I was, yeah, I was on the ground the whole
7 time. I was just inching myself back. I didn't
8 have no feelings in my leg.

9 Q So were you kind of crab crawling back?

10 A Yes.

11 Q And when he shot the gun the second time,
12 It did not fire, is that correct?

13 A Yes.

14 Q How far above you was he standing?

15 A He was right over he.

16 Q And where was the gun aimed?

17 A At my face.

18 Q Did you believe that the gun was going to
19 go off?

20 A Yes, I did.

21 Q What did you think at that point?

22 A I don't, I don't know. I thought my life
23 was over with, to be honest with you.

24 Q When he said, what did he say after that
25 second shot didn't fire?

Kelvin Black-direct by Land

1 A And he said: "This is what I do. Tell
2 the police this is what I do." And he left.

3 Q What if anything did he take from you?

4 A He just took my chains. I didn't have
5 nothing else on me but that. But he demanded
6 money. I didn't have no money or nothing.

7 Q And when he took your chains he had that
8 gun pointed at your head?

9 A Yes.

10 Q Do you think that is the most scared you
11 have ever been?

12 A That was the most scared I ever been in my
13 life.

14 MS. LAND: I beg the court's indulgence
15 for one moment. Kelvin, that's gall the questions
16 I have. If you will answer anything Mr. Devoe
17 has, please.

18 Cross Examination by Mr. Devoe:

19 MR. DEVOE: Please the Court.

20 THE COURT: Yes, sir.

21 Q Mr. Black, you said you work at Gold Gist?

22 A Yes.

23 Q Did you work on the day in question?

24 A Yes.

25 Q Which would have been the 5th of April, is

Kelvin Black-cross by Devoe

1 that correct?

2 A Yes.

3 Q That's a Saturday?

4 A Yes.

5 Q And what shift are you on?

6 A Second.

7 Q So you get off your second shift at what,
8 8 o'clock at night or 9 o'clock, or what?

9 A It was a weekend. We came in and did some
10 work.

11 Q I couldn't understand you.

12 A It was a weekend. We don't usually work
13 on weekends. But we had to come in and do some
14 rework. We packed boxes and stuff like that. So
15 we had our schedule to come in that Saturday.

16 Q Until what time?

17 A Until whenever we finished.

18 Q What time was that for you that night?

19 A I left work around 8:30. 8:33.

20 Q Now according to this incident report,
21 this situation all happened about 2:00 o'clock in
22 the morning.

23 A Yes.

24 Q I think you testified after you got back
25 to Summerton you went to a bar.

Kelvin Black-cross by Devoe

1 A Yes, I did went to a bar.
2 Q And had a couple of drinks.
3 A Yes, I did.
4 Q Over a four-hour period? A 5-hour period?
5 A When I left my house, I went to the bar.
6 We stayed outside for a while talking. So I went
7 in the bar from about eleven, 11:30, 12:00 o'clock
8 at the time. At the time, after we stayed in the
9 bar, I stayed in the bar until about 1:30.
10 Q That's not what you said before. You said
11 you came back from work right to the bar. Now you
12 say you went home first.
13 A I went -- I came home and got dressed.
14 Then I went straight to the bar.
15 Q And that's when you put your gold chains
16 on.
17 A Yes.
18 Q And you went to the bar around what time?
19 A About 9:30, 9:40.
20 Q And what time did you leave the bar?
21 A About 1:30.
22 Q That's about 4 hours.
23 A Yes.
24 Q How many drinks did you have?
25 A I had a couple of drinks.

Kelvin Black-cross by Devoe

(1 Q I know a couple. How many more than a
2 couple did you have?

3 A I had a lot of drinks.

4 Q A lot of drinks?

5 A Yes.

6 Q You spent all your money.

7 A Yes, I did. The money that I had on me, I
8 took with me. Yes, I did.

9 Q That's right. You spent your money.
10 Drank until you finished your money, right?

11 A Yes.

(12 Q So you finally started walking home from
13 the bar, or staggering home about two in the
14 morning?

15 A Yes.

16 MS. LAND: Your Honor, I object to that
17 characterization.

18 THE COURT: Mr. Devoe, ask the questions,
19 let him answer it.

20 Q And you're testifying that my client all
21 of a sudden appeared behind you at the back gate
22 of your apartment complex?

23 A Yes.

(24 Q Or after you got through the gate?

25 A Before I got through the gate.

Kelvin Black-cross by Devoe

1 Q Before?

2 A Yes.

3 Q Did he say something to you before you got
4 through the gate?

5 A Did he say anything to me before I got to
6 the gate? Yes, he did.

7 Q Did you actually see him or sort of sense
8 him being there?

9 A I saw him.

10 Q And it's pretty dark there, wasn't it?

11 A No, it wasn't. You can see the light
12 right there behind the gate.

13 Q Behind the gate there is a light?

14 A Yes, there's a light back there.

15 Q Where does that gate lead to? Where does
16 that path go?

17 A It leads to the apartments. Back there to
18 my apartment.

19 Q I am talking about the other side of the
20 gate.

21 A The whole complex. The whole apartment
22 complex.

23 Q There's no shrubbery back there?

24 A Would you repeat that again?

25 Q There's no shrubbery behind the gate?

Kelvin Black-cross by Devoe

(1 Where the gate is coming in the apartment complex.

2 That's the back gate, right?

3 A Yes.

4 Q That's right behind the building you live

5 in?

6 A Yes.

7 Q Where does that road or path go to?

8 A It leads to the left and to the right.

9 Q Where does it go to the left?

10 A It goes -- it leads to the left from the
11 basketball court to the right. Go to my house, of
12 my apartments, right there on the corner.

(13 Q After you're coming through the gate
14 towards the apartment, right?

15 A Yes.

16 Q I'm asking you, the other side of the gate
17 off the property.

18 A It's a path.

19 Q Where does that path go to?

20 A To another street.

21 Q Is there a lot of shrubbery back there?

22 A Yes.

(23 Q So I am asking which side of the gate do
24 you sense my client being on? The gate -- the
25 part of the gate outside the property, or the gate

Kelvin Black-cross by Devoe

1 inside the property?

2 A Outside the property.

3 Q I'm asking you did you see him there, did
4 you sort of hear his voice, or did you sense him
5 there?

6 A When the gun clicked, I looked back and I
7 saw him. I didn't sense him being there or no
8 nothing.

9 Q It's pretty dark back there, isn't it?

10 A No, It's not.

11 Q Are there any lights back there?

12 A Yes, it is.

13 Q Where?

14 A There's one right there at the end of the
15 gate, as you are going in through the back gate.
16 And there's one right before. Right in front of
17 the trailer a few feet up.

18 Q And did he walk with you, or behind you,
19 or what?

20 A He was behind me.

21 Q The whole time.

22 A Not the whole time.

23 Q He never came up to you to talk to you?

24 He was behind you?

25 A He never came up to me and talked to me.

Kelvin Black-cross by Devoe

1 Q And when did he get behind you?

2 A As I was walking through the gate.

3 Q After you saw him, he got in behind you?

4 A Could you repeat that again?

5 Q You said you saw him.

6 A When I looked back at the time, the gun
7 clinked, I looked back and I saw him. That's when
8 I saw him.

9 Q You said 2:00 o'clock in the morning.

10 A It was about 2:00 o'clock, yes. Around
11 2:00 o'clock, yes.

12 Q And he followed you, the path between your
13 apartment building and the other apartment
14 building?

15 A Yes.

16 Q And your apartment is at the end of the
17 building, isn't it?

18 A It's in the middle.

19 Q The middle?

20 A Yes, it is.

21 Q The apartments are numbered. And your
22 number is H, right?

23 A Yes.

24 Q And there are 8 units in the building?

25 A Yes.

Kelvin Black-cross by Devoe

1 Q And you're saying H is in the middle of 8
2 units?

3 A It's not in the middle of the 8 units,
4 it's the middle going towards the sidewalk. This
5 is my building right here. And there's another
6 building right here. My apartment where I live in
7 was right here, and there's another building.

8 Q And that's the end of that building.

9 A Yes, it is.

10 Q You said the middle of the building.

11 A In the building, yes.

12 Q And the mailbox that holds all the
13 mailboxes is in front of your unit sort of off to
14 the right about 50 feet away, correct?

15 A Yes. I know it was 50 feet away.

16 Q So my question to you is why, if you say
17 you were shot by my client some other place, why
18 did you end up at the mailbox here instead of at
19 your front door?

20 A Because I couldn't go forth at the time.
21 When he shot me, I fell backwards. I couldn't go
22 forward because I couldn't feel my legs. So what
23 I did, I take myself and I scoot myself back
24 towards the mailbox, because I couldn't go
25 forward.

Kelvin Black-cross by Devoe

1 Q Well where were you located when you saw
2 you were shot there that night?

3 A Where was I located?

4 Q Where were you?

5 A I was walking home.

6 Q Where on the property were you actually
7 physically located when you got shot?

8 A On the sidewalk.

9 Q The side that comes from the back, you are
10 talking about?

11 A The sidewalk that comes right in front of
12 my building, as you are walking out my front
13 door. That sidewalk. That walkway.

14 Q Well how far were you from your front door
15 when you got shot?

16 A I was about 15 feet from my front door.

17 Q So you go from there to the mailbox and
18 it's 50 feet away.

19 A No, about 20, 25 feet.

20 Q You moved to Connecticut right after that?

21 A No, I didn't move to Connecticut right
22 after that.

23 Q When did you move to Connecticut?

24 A I moved to Connecticut about 5 months ago,
25 6 months ago.

Kelvin Black-cross by Devoe

- (1 Q Was a job waiting for you up there?
- 2 A Yes.
- 3 Q Do you have family up there?
- 4 A Yes.
- 5 Q The night in question that you were --
- 6 this all happened, were you using drugs at all?
- 7 A No, I don't.
- 8 Q You don't, Or you didn't that night?
- 9 A No, I don't use none.
- 10 Q You never used drugs? Were you convicted
- 11 of drugs?
- 12 A Yes.
- (13 Q Weren't you convicted of marijuana in
- 14 2005?
- 15 A Yes.
- 16 Q Weren't you convicted of domestic violence
- 17 a couple of years before that?
- 18 A Yes.
- 19 Q And you had another drug conviction in
- 20 2004?
- 21 A Yes.
- 22 Q Did you have any drugs on you that night?
- 23 A No, I didn't.
- (24 Q You weren't dealing that night?
- 25 A No.

Kelvin Black-cross by Devoe

1 Q Were you tested at all that you know of
2 for blood alcohol after you got shot?

3 A I don't know.

4 Q For drugs?

5 A I don't know.

6 Q Are you saying you were not friendly with
7 my client, you just knew him once or something
8 like that. You had drinks with him one time at a
9 bar?

10 A Yes, I knew him since he was small.

11 Q What?

12 A I knew him since he was young. Since he
13 was coming up.

14 Q So you've known him for a long time.

15 A Yes.

16 Q You didn't hang with each other at all?

17 A No.

18 Q Never?

19 A Me and him one time at that bar. That was
20 it.

21 Q What's that?

22 A One night at a bar. That was it. And we
23 just buy each other drinks back and forth.

24 MR. DEVOE: I don't have any further
25 questions. Thank you.

Kelvin Black-cross by Devoe

1 Redirect Examination by Ms. Land:

2 Q Mr. Devoe, asked you about being at the
3 bar. Did you ever see Chips at the bar?

4 A That night I got shot?

5 Q That night.

6 A No, I didn't.

7 Q So the first time you saw him was walking
8 down the sidewalk.

9 A Yes.

10 Q And Mr. Devoe asked you very specifically
11 about a sidewalk. Kelvin, if I can show you this
12 picture. Is that an accurate representation of
13 the sidewalk that you were walking down when you
14 were shot?

15 A Yes.

16 MS. LAND: Your Honor, I would like to put
17 in to evidence as State's Exhibit No. 1.

18 THE COURT: What says defense?

19 MR. DEVOE: No objection, Your Honor.

20 THE COURT: It's in without objection.

21 (Photograph marked State's Exhibit No. 1
22 into evidence.)

23 Q So if you will hold that picture. When
24 you said you went through the walkway that's the
25 gate that you went through?

Kelvin Black-redirect by Land

1 A Yes, it is.

2 Q And that's the sidewalk that you were
3 walking down?

4 A Yes, exactly.

5 Q Looking at that picture, can you see your
6 front door?

7 A No, I can't.

8 Q Where is your front door in relation to
9 that picture?

10 A In front of the building. This is the
11 back of the building.

12 Q Okay. That's the back of the building?

13 A Yes, it is.

14 Q And where in relation to that picture were
15 you when you were shot?

16 A I was all the way up to -- by the bush.
17 Which would be right up here.

18 Q Okay. So you can see some other yellow
19 tabs that the law enforcement officers put up.
20 Would that have been about where you were when you
21 were shot?

22 MR. DEVOE: Your Honor,---

23 A Yes.

24 MR. DEVOE: I object to that without
25 seeing it. It is a leading question. I would

Kelvin Black-redirect by Land

1 like to see it first.

2 MS. LAND: I am confused, because it is
3 already in evidence. And I was asking him a yes
4 or no question. I don't believe it was leading.

5 MR. DEVOE: I think she asked him to
6 point -- point on the picture where he says he was
7 shot.

8 THE COURT: You can ask him where he was
9 shot in revelation if there is any at all.

10 Q Are there any identifying marks in that
11 picture that shows exactly where you were shot?

12 A Yes.

13 Q What are they?

14 A The yellow markings.

15 Q And is that the area that you said is well
16 lit by city lights that they keep around the
17 apartment?

18 A Yes.

19 Q And who is the person that shot you?

20 A Chips.

21 Q Is he in the courtroom?

22 A Yes.

23 MS. LAND: That's all the questions I
24 have.

25 Recross Examination by Mr. Devoe:

Kelvin Black-redirect by Land

1 Q Are you now testifying that you were shot
2 as you went in to the apartment complex where No.
3 2 is located with the yellow marker? Is that what
4 you are saying?

5 A No.

6 Q What are you staying?

7 A What I am saying the two yellow markers
8 are in the back.

9 Q Well that's in the back side of the
10 apartments.

11 A Yes.

12 Q But you testified before you were shot on
13 your sidewalk. Do you consider that to be your
14 sidewalk?

15 A That is my sidewalk.

16 Q That's not in front of your building, is
17 it?

18 A Yes, it is.

19 Q It's behind the building.

20 A But there are two yellow markers there.

21 It's right there by that bush. It's a bush right
22 there.

23 Q But you're still behind the building.

24 A No, it is not behind the building.

25 Q This is the sidewalk here. Do you see

Kelvin Black-recross by Devoe

1 this article here?

2 A Yes.

3 Q That's the utility shed behind the
4 building, isn't it?

5 A Yes, it is.

6 Q So you're sure it's in front of the
7 building, and the mark is before that utility
8 shed.

9 A Yes. I said right there where those two
10 yellow markers are at.

11 Q Well what are you saying? Were you shot
12 in front of the building, or behind the building?

13 A When I felt the bullet, I was right in the
14 front of the building. And my legs gave out on
15 me. So at that time, I felt that's when I got
16 shot.

17 Q Well that marker---

18 A That's when I felt it.

19 Q But that marker is not in front of the
20 building.

21 A It was on the side of the building.

22 Q It's behind the building.

23 MS. LAND: Your Honor, that wasn't a
24 question. I would ask that he ask a question, and
25 let him answer it.

Kelvin Black-recross by Devoe

1 Q I am asking is that beside the building,
2 or behind the building.

3 A It's beside the building.

4 Q Look carefully.

5 A I am looking at it carefully. That's
6 beside the building.

7 Q The marker you are talking about, I
8 believe, is right there.

9 A Yes.

10 Q You are pointing to the marker on the
11 sidewalk, correct?

12 A Yes.

13 Q You said beside the building, in front of
14 the building?

15 A Right there on the side of the building.
16 Right where the corner was on the building.

17 Q But my question is, you said you were shot
18 in front of the building.

19 THE COURT: The jury has not seen that
20 evidence. They can't see the picture you are
21 holding.

22 MR. DEVOE: Is this in evidence?

23 THE COURT: Yes, it is.

24 Q I am going to show this to the jury then.
25 This is the gate behind the building you are

Kelvin Black-recross by Devoe

1 talking about.

2 MS. LAND: Your Honor, I object.

3 THE COURT: You've got to let him point it
4 out.

5 Q Come down here and point out where the
6 gate behind the building is.

7 A This is the gate behind the building.

8 Q Right.

9 THE COURT: How about step down there.
10 And keep your voice up where the Court Reporter
11 can hear you. There is no need to do it twice.
12 Where the jury can see and keep your voice up.

13 (Whereupon, the witness steps down from
14 the witness stand.)

15 Q This here is the utility shed attached to
16 the back of the apartment complex, correct?

17 A Yes.

18 Q Apartment complex. Can you all see it
19 back there? The utility shed right here? Your
20 marker you say was behind -- at the doorway of
21 this yellow marker here, correct?

22 A Yes. That's the corner of the building
23 right here. You can see a little mark right here.

24 Q Your billing is not this building. It's
25 the building over here, is that correct?

Kelvin Black-recross by Devoe

1 A Yes, it is.

2 Q There's another building over here with
3 the path, I guess, serves both buildings?

4 A Yes.

5 Q You can barely see it. Can you see those?

6 (Whereupon, the Witness resumes the
7 witness stand.)

8 Q So this picture shows no light in front of
9 that at all. It's a light where the gate is.

10 A Yes.

11 Q There's no light further up. At least not
12 in this picture.

13 A Yes, you're right.

14 Q And you are saying you were shot at that
15 small light that shows in this picture. Is that
16 correct?

17 A Small light.

18 Q Well whatever marker it is.

19 A Yes.

20 Q Find it where it is. You are saying you
21 were shot right there the first time, right?

22 A Yes.

23 Q And you managed to walk forward between
24 those two buildings?

25 A I didn't walk.

Kelvin Black-recross by Devoe

- 1 Q Well crawl, walk. You got somehow got
2 behind the buildings---
- 3 A Yes.
- 4 Q ---is that correct? And how deep are
5 those buildings?
- 6 A How far apart they are?
- 7 Q How deep from the front of your front door
8 to your back door? How far is that in the
9 apartment?
- 10 A Probably about 40 feet.
- 11 Q 40 feet.
- 12 A Yes, sir.
- 13 Q So you get to the corner.
- 14 A Yes.
- 15 Q Right. And then your corner is right to
16 the right.
- 17 A My door is right there. I mean the corner
18 is right there.
- 19 Q That's about 20 feet over or 15 feet over.
20 Do you have a door on the far side of the building
21 towards the interior of the building?
- 22 A Yes.
- 23 Q And the building is about 14 feet wide of
24 your apartment?
- 25 A Yes, I guess.

Kelvin Black-recross by Devoe

1 Q And the mailbox is not quite in front.
2 But front and off to the right a little bit. More
3 in front of the apartment next to you?

4 MS. LAND: Your Honor, I know this is---

5 A No.

6 MS. LAND: ---recross and he can lead.
7 But if he would ask the witness questions instead
8 of telling him all this, we might all be a little
9 bit more clearer.

10 MR. DEVOE: You say I am leading?

11 THE COURT: Go ahead. This is recross.
12 But you are limited to what she brought up.

13 MR. DEVOE: I am limited to the fact that
14 she had the mailbox situation there.

15 A Right in front of my building, yes.

16 Q And what number is that?

17 A H?

18 Q And how far away is that post box from
19 your front door?

20 A It's right here. It's probably about from
21 that mark. This is the bush right there. And my
22 front door is right there by the gate. So I would
23 say about 10, 15 feet.

24 Q Does that postmark serve the entire
25 building?

Kelvin Black-recross by Devoe

1 A Repeat that again?

2 Q Does the post office box serve the entire
3 building? Is there a bunch of markers around it
4 in a square?

5 MS. LAND: Judge, this is beyond the
6 scope. Again, irrelevant.

7 A Repeat it again.

8 THE COURT: You can ask it. You can ask
9 that question.

10 Q The Post office box we're talking about,
11 it's just one post office box, isn't it?

12 A It's the post office box for that building
13 H.

14 Q For that building. So there are 8 boxes
15 clustered in a square.

16 A Yes.

17 MR. DEVOE: Thank you very much. I
18 appreciate it.

19 THE COURT: Anything further, Ms. Land?

20 MS. LAND: Your Honor, just one.

21 Redirect Examination by Ms. Land:

22 Q Kelvin, when you are in your apartment,
23 can you look out your back window and see the area
24 that was depicted in that picture?

25 A Yes, you could.

Kelvin Black-redirect by Land

1 Q Okay. And if you go around to the right,
2 you would be at your front door.

3 A Yes.

4 Q And that's the area where this happened?

5 A Yes.

6 MS. LAND: That's all the questions I
7 have, thank you.

8 MR. DEVOE: Can I ask one question? Can I
9 ask a brief question, Your Honor?

10 MS. LAND: I think it's my witness and I
11 get the last word.

12 THE COURT: Yeah, I'm not going to let
13 you. You don't get to go after cross. The fact
14 that she put in the case -- this will go on
15 forever.

16 MS. LAND: Your Honor, we'd call Tasha
17 Cannon.

18 Tasha Cannon, after being duly sworn,
19 testified as follows:

20 Direct Examination by Ms. Land:

21 Q State your name for the jury, please.

22 A Tasha Black.

23 Q And, Tasha, you are -- are you married to
24 Kelvin Black?

25 A Yes, ma'am:

Tasha Cannon-direct by Land

- 1 Q Where do you live?
- 2 A In Bridgeport, Connecticut.
- 3 Q Who do you live there with?
- 4 A My husband and my three kids.
- 5 Q Where did you live on April 6th of 2008?
- 6 A In Summerton, Meadowfield Apartments.
- 7 Q Who did you live there with?
- 8 A The same people.
- 9 Q Your husband and children?
- 10 A Uh-huh. (Affirmative.)
- 11 Q Was anyone else staying there during that
- 12 time?
- 13 A Myself.
- 14 Q Do you recall that night for any reason?
- 15 A Yes.
- 16 Q Would you tell the jury what stands out in
- 17 your mind from that evening?
- 18 A I had called my husband telling him to
- 19 come home because I didn't feel right.
- 20 Q Do you recall what time of day or night
- 21 that was?
- 22 A It had be about 12 -- between 12 and 1
- 23 o'clock.
- 24 Q And is that something that you typically
- 25 do?

Tasha Cannon-direct by Land

1 A Yes.

2 Q Tell the jury about that.

3 A Sometimes when he goes out and he drinks,
4 I don't feel like he is not really safe walking
5 home, because he usually walks home by himself. I
6 called him and let him know, you know, come home
7 at, you know, an earlier time.

8 Q So this is just a feeling that you get
9 that you called him and say, "Come home, I don't
10 feel right. "

11 A Uh-huh. (affirmative.)

12 Q And there was nothing about that specific
13 evening that hadn't happened before in the past?

14 A No.

15 Q When you called him and told him to come
16 on home, what did he say to you?

17 A He said he would be there in about 30
18 minutes.

19 Q And what happened next?

20 A I went upstairs and put the baby in the
21 crib. And I went to lock -- I opened a window
22 because it's kind of hot in the room. I just cut
23 the TV off and I laid down. And I was about to
24 close my eyes, I heard his voice in the back of
25 the apartment arguing with someone.

Tasha Cannon-direct by Land

1 Q Let me stop you there. You said you went
2 to put the baby down. And you laid down. Did you
3 lay down in the baby's room or in your room?

4 A Yeah, in the baby's room.

5 Q What part of house is that on?

6 A It's on the back side of the apartments.

7 Q Okay. And you lifted the window?

8 A Uh-huh. (Affirmative.)

9 Q And then what if anything happened?

10 A After I laid down, that's when I heard his
11 voice. And then I heard somebody else. And I
12 jumped up. And then that's when I heard the
13 gunshots. Then I ran downstairs, and I told my
14 sister. Because she was downstairs on a chair. I
15 told her I said, "Sounds like I hear Black in the
16 background, in the back of the building, arguing.
17 And I just heard gunshots." So that's when she
18 jumped up, and she started panicking. So she went
19 to look out the back door. The back door sliding
20 door to see if she had seen anybody. She didn't
21 see anybody.

22 Q Let me stop you there. When you said I
23 think I heard Black, who do you call Black?

24 A My husband.

25 Q Okay. And his last name is Black.

Tasha Cannon-direct by Land

(1 A Uh-huh. (Affirmative.)

2 Q Before this date, did you know the person
3 that is sitting over there in the purple shirt?

4 A I didn't know him personally. But I met
5 him at a nightclub. Because he asked me to hold
6 his coke.

7 Q So you knew who he was.

8 A Yes.

9 Q And what did you know him as?

10 A Chips.

11 Q So what did you see or hear next?

(12 A After that, I heard another gunshot. And
13 I ran outside to see if he was okay. As I was
14 coming around the bush, there is a big bush right
15 by my -- there was a big bush right by my front
16 door. As I was coming around the bush, I saw
17 Kelvin running towards the house. And I saw him.
18 And when he shot the gun, I saw fire come out of
19 the gun. And that's when I ran back in the house
20 and locked the door.

21 Q Now when you said I saw him, who did you
22 see?

23 A Chips.

(24 Q What did Chips have?

25 A A gun.

Tasha Cannon-direct by Land

1 Q What did he do with it?

2 A He was shooting it at -- the fire shots
3 past his head.

4 Q Okay.

5 A Kelvin's head.

6 Q At that point do you know if your husband
7 had been shot?

8 A No, I didn't.

9 Q And was your husband still on his feet?

10 A Yes.

11 Q And what did you do after that?

12 A After that I ran back in the house, and I
13 locked the door. I grabbed the phone and I called
14 911. And my sister, she ran upstairs and she was
15 looking out the window the whole time this
16 happened. I ran to the window in my laundry room,
17 and I looked out the window, and I saw him
18 standing over him. And then that's when I backed
19 up, because I didn't want to get hit just in case
20 it was coming through the window.

21 Q You saw who standing over who?

22 A I saw Chips standing over Black.

23 Q When he was standing over him, what did he
24 have?

25 A He had the gun.

Tasha Cannon-direct by Land

1 Q Did you see him do anything else?

2 A No, because I got out of the window at
3 that time.

4 Q You said that you called 911?

5 A Uh-huh. (Affirmative.)

6 Q Did anybody respond to that call?

7 A Yes.

8 Q Do you recall who?

9 A No.

10 Q Do you recall if the officer responded?

11 A I remember his face, but I don't know

12 their names.

13 Q Well I'm just asking you, did anyone from
14 law enforcement show up?

15 A Yes.

16 Q Did you tell them what you had seen?

17 A Yes.

18 Q At one point did you give a statement to
19 law enforcement?

20 A As they was putting him in to the
21 ambulance, that's when they pulled me and sat me
22 in the car and I wrote my statement.

23 Q Okay. Now of course this statement, how
24 were you feeling when you gave this statement?

25 A Upset. Scared. Nervous.

Tasha Cannon-direct by Land

1 Q Had you had a chance at that time to speak
2 with your husband?

3 A No. They wouldn't let me touch him.

4 Q So at that point from the incident, you
5 had never spoken to your husband?

6 A Uh-uh. (Negative.)

7 Q Do you recognize that document?

8 A Uh-huh. (Affirmative.)

9 Q What is that?

10 A My statement.

11 MS. LAND: Your Honor, at this point I
12 would like this admitted into evidence as State's
13 Exhibit No. 2.

14 THE COURT: What says the defense?

15 MR. DEVOE: I object, Your Honor.

16 THE COURT: I couldn't hear you.

17 MR. DEVOE: I would object.

18 THE COURT: You would object. Okay.

19 MR. DEVOE: It's not a dated statement.

20 It's not notarized.

21 THE COURT: Is that the basis of your
22 objection?

23 MR. DEVOE: I have now idea when the
24 statement was made.

25 THE COURT: What?

Tasha Cannon-direct by Land

1 MR. DEVOE: I have no idea when the
2 statement was made.

3 MS. LAND: Your Honor, she just testified
4 that it was made several moments after the...

5 THE COURT: And your basis is solely on
6 the fact that it is not dated and it is not
7 notarized.

8 MR. DEVOE: That's correct.

9 THE COURT: Well she's testified as to
10 when it was given. I will sustain the objection.
11 You all approach a minute.

12 (Whereupon, the attorneys approach the
13 bench and confer with judge.)

14 Q Ms. Cannon, do you recall giving a
15 statement to law enforcement also?

16 A Uh-huh. (Affirmative.)

17 Q And in that statement did you tell that
18 officer what you told the jury today?

19 A Yes, ma'am.

20 Q Did you indicate that the shooter was
21 Chips?

22 A Yes, ma'am.

23 Q And you indicated that the person that
24 shot your husband was in fact George Arsenio Smith
25 who you know as chips?

Tasha Cannon-direct by Land

1 A Yes, ma'am.

2 Q Is that person who shot your husband in
3 the courtroom today?

4 A Yes, he is.

5 Q Can you identify him?

6 A Sitting right there.

7 Q Wearing?

8 A Purple.

9 MS. LAND: I beg the Court's indulgence.

10 THE COURT: Yes, ma'am.

11 Q Do you recall at a later time speaking to
12 investigator Burgess?

13 A Yes, ma'am.

14 Q And were you shown a photographic lineup?

15 A Yes, ma'am, at the hospital.

16 Q At that time, did you pick out the who you
17 believed or who you saw shoot your husband?

18 A Yes, ma'am.

19 Q When you picked that person out, at that
20 point, had you spoken to your husband?

21 A No.

22 Q You hadn't spoken to him on the cell
23 phone? When was the last time you spoke to him?

24 A The last time I spoke to him was when I
25 gave him that phone call.

Tasha Cannon-direct by Land

(1 Q So you two had no time to speak to each
2 other to concoct a story or come up with the same
3 thing, or anything like that.

4 A No, ma'am.

5 MS. LAND: Okay. That's all the questions
6 I have. Thank you.

7 THE COURT: Mr. Devoe.

8 MR. DEVOE: Thank Your Honor.

9 Cross Examination by Mr. Devoe:

10 Q When you looked out the back window of
11 your apartment that night, did you see your
12 husband there?

(13 A I didn't look out the back window.

14 Q At all.

15 A No.

16 Q You saw gunshots -- you heard gunshots.

17 A Yes.

18 Q You didn't see anybody.

19 A Uh-uh. (negative.)

20 Q You testified after that you went to the
21 front of the house. You went to the laundry room
22 or utility room window.

23 A Uh-huh. (affirmative.)

(24 Q And looked out that.

25 A Yes.

Tasha Cannon-cross by Devoe

(1 Q Is that correct?

2 A Uh-huh. (Affirmative.)

3 Q How high off the ground is that utility

4 room window? I mean it's not a very---

5 A It's at my height. If I stand at the

6 window, I can stand just like this and look right

7 out the window.

8 Q It's not a real normal window, is it?

9 A No, it's not.

10 Q It's high off the ground.

11 A Uh-huh. (affirmative.)

12 Q How high is it from the window itself?

(13 A It's about my height.

14 Q Well I don't mean that. I am talking not

15 from the ground. But the window itself, the

16 dimensions of the window.

17 A It's about this big.

18 Q Right. Does it open and close or just a

19 fixed window?

20 A It slides like that.

21 Q And you are tall enough you can see out

22 the window itself?

23 A Uh-huh. (Affirmative.)

(24 Q Were you on your tiptoes or you take a

25 ladder and---

Tasha Cannon-cross by Devoe

1 A No, I'm standing on my feet. No tiptoes.

2 Q Where the washing machine is located.

3 A I don't even have a washer. It was empty.

4 Q You just use it for a storage room?

5 A Uh-huh. (Affirmative.)

6 Q And so you looked out that window at that
7 height, and what did you see?

8 A I saw him standing over my husband.

9 Q Where?

10 A In front of the mailbox.

11 Q That's what you saw that night?

12 A Uh-huh. (Affirmative.)

13 Q At 2:00 o'clock in the morning, was it?

14 A I can't recall the time, but that's what I
15 saw.

16 Q Are there any lights at mailbox?

17 A No.

18 MR. DEVOE: I have further questions.

19 Thank you.

20 Redirect Examination by Ms. Land:

21 Q Mr. Devoe, asked you about lights. Were
22 there any lights on at your apartment?

23 A Yes, I always keep my porch light on.

24 Q Any lighting around the apartment complex?

25 A It had like, you know, street lights.

Tasha Cannon-redirect by Land

- (
- 1 Q Okay, street lights?
- 2 A Uh-huh (affirmative.)
- 3 Q Now you told him that you never looked out
- 4 of your window. But you did open the back window,
- 5 is that correct?
- 6 A No. The sliding door my sister looked out
- 7 that door. I went out the front door, and that's
- 8 what I saw him running behind Kelvin. And that's
- 9 when he shot. I saw the fire come out of the gun
- 10 and I ran back in the house and locked the door.
- 11 Q When you first heard the ruckus,---
- 12 A Uh-huh. (Affirmative.)
- (
- 13 Q ---where were you?
- 14 A Upstairs in the bedroom.
- 15 Q And that was the bedroom that's on the
- 16 back side of the house, is that correct?
- 17 A Uh-huh. (Affirmative.)
- 18 Q Did you open that window.
- 19 A Yes, when I first took the baby upstairs.
- 20 Q And that's when you heard fighting and
- 21 gunshots?
- 22 A Uh-huh. (Affirmative.)
- 23 Q When you went out of the back, I mean, out
- 24 of the front, that's when you saw Chips shoot your
- 25 husband?
- (

Tasha Cannon-redirect by Land

1 A Yes.

2 Q Was it straight out front, or to the side?

3 A It was to the side. I stepped out and I
4 came around the bush.

5 Q Okay.

6 A And that's when he was running towards the
7 house and that's when he was running behind him.

8 Q Very good. Did you at one point assist
9 your husband?

10 A Yeah. When after he got what he wanted
11 from him, he came to the door and he fell in front
12 of the door. And after I heard him leave, that's
13 when I opened the door, and I pulled him into the
14 door and locked it until the ambulance came.

15 Q You said he fell in to the door, was he
16 conscious?

17 A Uh-huh. (Affirmative.)

18 Q So he was awake.

19 A Yeah, he was awake.

20 Q Did you all speak?

21 A The only thing he said was, he wanted to
22 see the baby. He wanted me to go upstairs and get
23 the baby.

24 Q But you all didn't have any conversation
25 about who did that to him, or anything like that.

Tasha Cannon-redirect by Land

1 A No.

2 MS. LAND: Thank you. That's all the
3 questions I have.

4 Recross Examination by Mr. Devoe:

5 Q How far away is the street light from the
6 mailbox?

7 A It's right -- it goes like around the
8 apartments. Goes right from the side of the path
9 where they ran from.

10 Q Pardon me? Isn't there a street light at
11 the end of building but across the street?

12 A I am not sure.

13 MS. LAND: Judge,---

14 MR. DEVOE: You are not sure. I have no
15 further questions. Thank you.

16 THE COURT: You can step down. Do you
17 need to take a break? You do. We'll take 10
18 minutes. I remind you please don't discuss this
19 case. And I will get you back out in 10 minutes.

20 (Whereupon, the following takes place
21 outside the presence of the jury.)

22 THE COURT: For the record, it's my
23 understanding Mr. Devoe asked for a sequestration
24 of witnesses and Ms. Land agreed. And after that
25 we discussed it and Mr. Devoe agreed. Do you

Tasha Cannon-redirect by Land

1 understand, Mr. Devoe?

2 MR. DEVOE: I am sorry?

3 THE COURT: My understanding there is a
4 sequestration order in place on both sides.

5 MR. DEVOE: That's correct.

6 THE COURT: I just noticed the number of
7 people that showed up. I assume they are not
8 going to be witnesses.

9 MR. DEVOE: I hope not.

10 THE COURT: Okay. We will be in recess
11 for 10 minutes.

12 (Whereupon, the Court Breaks.)

13 THE COURT: If the jury is ready, you may
14 bring them in.

15 (Whereupon, the following takes place
16 within the presence of the jury.)

17 THE COURT: All right.

18 MS. LAND: Your Honor, we would call
19 Thomas Burgess.

20 Thomas Burgess, after being
21 first duly sworn, testified as follows:

22 Direct Examination by Ms. Land:

23 Q If you would, state your name please,
24 sir, for the record.

25 A I am Thomas Burgess.

Thomas Burgess-direct by Land

1 Q And, Investigator Burgess, where are you
2 employed?

3 A I am currently lieutenant over
4 investigations with the Clarendon County Sheriff's
5 Office.

6 Q How long have you been with the Sheriff's
7 Office?

8 A 10 years.

9 Q And how long have you been in the capacity
10 as investigator?

11 A The past last 10 years.

12 Q And prior to that, do you have law
13 enforcement experience?

14 A Yes, ma'am. I worked with the city of
15 Manning. And also started my career with Bureau
16 of Protective Services in Columbia.

17 Q So in total, how long have you been in
18 law enforcement?

19 A I am working almost for 13 years.

20 Q As the investigator, what are some of your
21 duties and responsibilities?

22 A My current role, I am supervising the
23 investigations unit. But we also respond to all
24 calls that involve burglaries, vandalisms.
25 Depending on the type of calls, we're not

Thomas Burgess-direct by Land

1 specialized. We're not a big enough department.

2 But we do work crime scenes. Gather evidence from

3 the witnesses. The entire gambet of

4 investigations.

5 Q And are you on call from time to time?

6 A Yes, ma'am. I am on call once every 5th
7 week.

8 Q And explain to the jury what happens when
9 you are on call.

10 A The on-call investigator is responsible
11 for whatever calls come after hours. We get
12 called out to the crime scene, which would be by
13 road units. So that they handle and determine the
14 crime scene. We get called at the house, and we
15 get up and respond.

16 Q What sort of scenes are you typically
17 called for?

18 A Typically we are called for burglaries or
19 more violent scenes; such as, assault and battery
20 with intent to kill, murder scenes, homicide,
21 serious property damage.

22 Q Typically are you called to the type of
23 scenes that need more evidence processing?

24 A Yes, ma'am.

25 Q And evidence collection?

Thomas Burgess-direct by Land

1 A Yes, ma'am.

2 Q And is that part of your job to collect
3 evidence?

4 A Yes, ma'am.

5 Q Do you recall April 6th of 2008?

6 A I was investigator on call when I received
7 a call in reference to a shooting in Summerton.

8 Q Tell the jury if you would, what occurred
9 that evening.

10 A On this particular evening, I responded to
11 the hospital. I sent investigator Lin Ham, on a
12 shooting incident. An investigator has to be
13 called out to investigate. I sent him to the
14 scene, and I went to the hospital to see the
15 victim. We want to get as much information as we
16 can, as quickly as we can. Typically when there
17 is a shooting, 48 hours. We want to get crime
18 running and get as much information as we can as
19 quickly as we can. We send one investigator to
20 the scene, and I went to the hospital. I
21 received a call at my residence. I began to
22 monitor the radio. In fact, the first thing when
23 I get dressed, it aggravates my wife, but I turn
24 on the radio. And I'm listening to the radio and
25 try to get a sense of what is going on. When I

Thomas Burgess-direct by Land

1 get in my vehicle, I start to call different
2 officers. Getting information about what's on the
3 scene. What we have in case I have to call on
4 other resources like Sled or some other team like
5 a dog team from another county or something of
6 that nature.

7 Q When you sent, did you call Investigator
8 Ham yourself?

9 A Actually I think I had dispatch call him
10 that night; and asked him to respond. When I got
11 in my vehicle I did correspond with him.

12 Q And despite the fact that he was also
13 called out were you considered the lead
14 investigator?

15 A Yes, ma'am.

16 Q And what additional duties does that
17 entail being the lead investigator?

18 A You are responsible for coordinating the
19 kind of case. Putting together the case file and
20 the evidence to preparing the prosecution.

21 Q When you got to the hospital, what did you
22 find?

23 A Actually I was waiting at the hospital. I
24 got there when the ambulance arrived. They were
25 taking Mr. Black off the ambulance. From his

Thomas Burgess-direct by Land

1 shooting case, the monitoring, they were worried
2 about his vitals like monitor EMS. So I went
3 straight to the back of the ambulance. And the
4 first question I try to ask is, "Who shot you." I
5 want the basic information.

6 Q And did you ask Mr. Black that?

7 A Yes, I did.

8 Q And what was his answer?

9 A "Chips. Chips shot me."

10 Q Was there any hesitation or doubt in your
11 mind?

12 A No. He just said, "Chips". Chips shot
13 him. That's when I began to put it together. On
14 my way to the scene, the officers were already
15 talking about "Chips." And as you know, he
16 mentioned something to one of the officers that
17 Chips was the possible shooter. I was familiar.
18 At that point, I left and went to the office,
19 because they working on it for awhile. And put
20 together a lineup.

21 Q Did you know who Chips was?

22 A Yes, ma'am.

23 Q Did you have the opportunity at the
24 hospital to speak with Mr. Black's wife, Tasha
25 Cannon?

Thomas Burgess-direct by Land

(1 A Yes. She was in the emergency room's
2 waiting area. And when I got the lineup, again, I
3 went out and spoke with her and asked her if she
4 would look at the lineup.

5 Q As you left the hospital after speaking
6 with Ms. Black, you went to your office and
7 composed a lineup?

8 A Yes, ma'am.

9 Q And then you came back?

10 A Yes, ma'am.

11 Q When he got off the ambulance, did you
12 know where Ms. Cannon was at that time?

(13 A I did not. I did not know where she was
14 at at the time.

15 Q Do you know if she was on that ambulance?

16 A She was not.

17 Q So when you got there, you had some
18 information from your road officers that someone
19 named Chips, you got confirmation from him. And
20 this is very important. Did you say, "Did Chips
21 shoot you, or who shot you."

22 A My question is always open ended: "Who
23 shot you."

(24 Q And when you go to the academy, tell the
25 jury a little bit about your legals.

Thomas Burgess-direct by Land

1 A Well you go through the first part of the
2 academy. And my time I was there 8 weeks. There
3 is two weeks of core legals. And the rest of the
4 weeks after that you go in to interrogation
5 interviewing. I think there are numerous
6 specialized classes and interviewing since then.
7 I've actually taken several on line classes as
8 well in referencing to interviewing folks. And
9 one of the things we are taught is, you stay open
10 ended. You stay non-biased and impartial.

11 You don't want to lead them because they
12 may have a different person in mind who sways
13 them.

14 Q And so you are very careful to say who
15 shot you?

16 A Yes.

17 Q And his answer was, "Chips?"

18 A Yes, ma'am.

19 Q Tell the jury about composing a second
20 lineup.

21 A In our particular system we use a log
22 track. We are fortunate that this has a way to
23 tie pictures to what we call the master person ID
24 list. So from traffic stops, all of our tickets.
25 are keyed in. Any time we interview somebody who

Thomas Burgess-direct by Land

1 is a victim, whether they were a victim in court,
2 or say somebody came to your house and somebody
3 stole your lawn mower, you called the law, we get
4 your information. We have your photo. We
5 actually give that number, your ID information; to
6 compose a picture data base to correspond with our
7 master ID.

8 So what I can do on my particular log
9 tracks is, I can punch in the characteristics,
10 age, height, race. As well as hair or no hair.
11 Those kind of things. And then it will give a
12 composite picture lists. And from there you pick
13 six pictures for a photo lineup.

14 Q Is that purpose of these lineups to get
15 six people who look similar?

16 A Yes.

17 Q And you did compose a lineup on this case?

18 A Yes.

19 Q Can I show you that document?

20 A Yes, ma'am.

21 Q Can you tell the jury what that document
22 is?

23 A This is the lineup I composed on
24 4/6/2008. It has the date by the computer.

25 Q And you have the names of the individuals

Thomas Burgess-direct by Land

1 under their pictures, is that correct?

2 A Yes, ma'am. This would be, the first page
3 you get, prints out just the individual pictures.
4 The second page has the name corresponding with
5 each individual.

6 MS. LAND: Your Honor, I would like this
7 put in to evidence as State's No. 2.

8 THE COURT: What says the defense?

9 MR. DEVOE: I have not seen it yet, Your
10 Honor.

11 MR. DEVOE: Okay.

12 THE COURT: Okay. It's in without
13 objection.

14 (Photo lineup marked State's Exhibit No. 2
15 into evidence.)

16 MS. LAND: Your Honor, may I publish this
17 to the jury?

18 THE COURT: Yes.

19 Q While they are looking at this,
20 Investigator Burgess, you said that there are two
21 copies that print out.

22 A Yes, ma'am.

23 Q And the first one is what has been
24 admitted as State's Exhibit No. 2, is that
25 correct?

Thomas Burgess-direct by Land

1 A Well that is actually the second page that
2 has the names on it.

3 Q So the first one does not have name under
4 the picture?

5 A Correct.

6 Q And obviously what is that? Why is that?

7 A We have the anonymity of the suspects on
8 the page.

9 Q So you show the victims and witnesses, the
10 one that does not have the name under it?

11 A That's correct.

12 Q Did you have the opportunity when you came
13 back, to show one to Ms. Tasha Cannon Black?

14 A I did.

15 Q Is this the lineup that you showed her?

16 A This is the lineup. You can see her
17 initials, and the date underneath the picture.
18 She identified the suspect.

19 MS. LAND: Your Honor, I would like to
20 put this in as State's No. 3.

21 THE COURT: What says the defense?

22 MR. DEVOE: No objection, Your Honor.

23 THE COURT: Okay, entered without
24 objection.

25 (Photo lineup marked State's Exhibit No. 3

Thomas Burgess-direct by Land

- (1 into evidence.)
- 2 Q How did you present this to Ms. Black?
- 3 A What I do is, I approach her.
- 4 Q And you can come down, if you don't mind,
- 5 and show the jury how you approached her. What
- 6 you say and what she identified.
- 7 A Generally we use driver's license photos.
- 8 I show them different photos. They may not be
- 9 current. They look at features, hair styles or
- 10 things like hair color. Look at features, the
- 11 eyes, nose, face and possibly goes before I show
- 12 them the lineup. Then I hold the lineup out in
- 13 front of them and say, "Do you see the person?"
- 14 And, you know, they can identify when I asked her.
- 15 Q And again do you give any sort of leading
- 16 questions that point to which one may be the
- 17 person?
- 18 A We cannot do that.
- 19 Q When you showed her that, did she pick the
- 20 person that shot her husband?
- 21 A She identified No. 6, who I knew to be
- 22 George Arsenio Smith, a/k/a Chips.
- 23 Q And she initialed it and dated it?
- 24 A Yes, ma'am.
- 25 Q And she did say that in your presence?

Thomas Burgess-direct by Land

1 A Yes, ma'am. In the yard way.

2 Q Okay, thank you.

3 (Whereupon, the witness resumes the
4 witness stand.)

5 Q Did you have the opportunity to speak with
6 Mr. Black again?

7 A Yes, I did.

8 Q And did you also show him a photo lineup?

9 A Yes, ma'am.

10 Q And if I may, I will show you that.

11 document. Do you recognize that?

12 A Yes, ma'am, I had it marked with a paper
13 clip in my file.

14 Q Okay.

15 A You can see the paper clip removed. But
16 this is the one I showed him. I kept both of
17 these in file.

18 MS. LAND: Your Honor, I would like this
19 admitted into evidence as State's Exhibit No. 4.

20 MR. DEVOE: No objection.

21 THE COURT: In without objection.

22 (Photo lineup marked State's Exhibit No. 4
23 into evidence.)

24 Q Investigator Burgess, this has been put in
25 to evidence as State's Exhibit No. 4 and has no

Thomas Burgess-direct by Land

1 markings of any sort. But you say this is the one
2 you showed to Mr. Black.

3 A That's correct.

4 Q And can you tell me why there are no
5 markings on this?

6 A He was laying in the trauma room on his
7 side. When I went in first of all, I showed him
8 the lineup. He was laying on his -- he was laying
9 horizontally. I was holding the picture
10 vertically and he said, I can't see it. So I
11 turned it 90 degrees for him to be able to see it.
12 And that's when he held his hand. And I actually
13 pulled it back, because he still had blood on his
14 hands. So I didn't let him touch it. But he was
15 able to touch it. I just pulled it back so he
16 didn't touch it. But he pointed to Chips.

17 Q Okay. So he identified in your presence
18 suspect No. 6, who is George Arsenio Smith, or
19 Chips.

20 A Yes, ma'am.

21 Q After you completed the photo lineup, what
22 did you do?

23 A I went down to Summerton and joined
24 Investigator Ham at the scene.

25 Q And was Investigator Ham still there?

Thomas Burgess-direct by Land

1 A Yes, he was.

2 Q if you would, describe the scene to the
3 jury.

4 A I arrived at Meadowfield Apartments. I
5 parked on, and I know exactly where everything
6 was. I parked on the parking lot side. You are
7 coming off what's called Mile Road, Purvis Road.
8 It's a horse shoe type driveway. The apartment
9 buildings surrounding it. There are street
10 lights. It's got a little complex in the middle.
11 The manager's office. And I pulled in and I
12 parked over, they actually had the scene taped off
13 near the mailboxes in the front. And I parked if
14 I remember correctly, I parked on the opposite
15 side of the manager's building.

16 Q Were you able to locate Investigator Ham
17 and look over the crime scene?

18 A Yes, ma'am. He had, still had the markers
19 out. And actually we walked around together, we
20 actually found another item that we marked.

21 Q Tell the jury what time of day or night
22 you arrived?

23 A Probably about 4:30, 4:40. Somewhere in
24 that time frame.

25 Q So outside it was still dark?

Thomas Burgess-direct by Land

1 A Yes, ma'am.

2 Q Tell the jury the lighting conditions in
3 the crime scene.

4 A You could see it clearly, walk around,
5 manipulate and move around.

6 Q What sort of light is there?

7 A There is the street lights. I call them
8 sodium lighting. Kind of an orange flow. It's
9 well lit.

10 Q This picture has been put into evidence as
11 State's Exhibit No. 1.

12 A Yes, ma'am.

13 Q Explain to the jury, I am going -- if you
14 will take a look at it, then I want to show it to
15 the jury again.

16 A This is from the back gate where the
17 sidewalk leads to Warsaw Street, I think it is.

18 Q Uh-huh. (Affirmative.) And You had no
19 problem without assistance of your own seeing in
20 that area?

21 A When we took some more pictures, I did
22 have to put my light on this item. I could use my
23 lighting---

24 Q Okay.

25 A ---and use my camera with the flash on.

Thomas Burgess-direct by Land

1 If it's a real dark scene, I have to light it up,
2 and still lights it in the camera.

3 Q And you all have a marker there that says
4 No. 2?

5 A Yes, ma'am.

6 Q Tell the jury what that marker.

7 A No. 2 is a spent 9 millimeter shell
8 casing.

9 Q And why did you photograph that item?

10 A We had a shooting incident. We had other
11 shell casings further up. They all matched from,
12 that I was getting from my officers at the scene
13 where the suspect -- where the victim had come
14 from. We figured that's the first -- one of the
15 first points the victim was shot at.

16 Q And after you took pictures, you marked it
17 and took the pictures, did you collect that item
18 for evidence?

19 A Yes.

20 Q If we do not have a gun that has been
21 collected, sled will not take the item for further
22 analysis.

23 Q So if you had a gun you could have made
24 sure the casing and the gun matched. But there
25 never was a gun apprehended.

Thomas Burgess-direct by Land

1 A No, ma'am. We did not apprehend the
2 suspect for 2 months.

3 Q So to this day, the gun that was used has
4 not been found by law enforcement.

5 A Yes, ma'am.

6 Q If you recall that picture, further in the
7 background there are two other markers.

8 A Yes, ma'am.

9 Q What are those markers denoting?

10 A No. 3 is another spent shell casing. No.
11 4 is a live round.

12 Q So there were casings that you believe
13 were involved in this crime, but they never were
14 sent off and never analyzed. So you're not sure.

15 A Correct.

16 Q Did they match each other as far as what
17 sort of gun they would have come from?

18 A They were all 9 millimeters.

19 Q Can you say to this jury that they all
20 came from the same gun?

21 A Without the gun being found, no, ma'am.

22 Q So you really can't say whether Chips
23 shot one, two shots, three shots, because these
24 casings may have been laying there from some other
25 incident, some other gun.

Thomas Burgess-direct by Land

1 A My professional opinion is they were not
2 from another incident. But I can't say for
3 certain.

4 Q Tell the jury if you would, about the
5 blood around the scene.

6 A If you follow that sidewalk in, it
7 actually sits---

8 Q Uh-huh. (Affirmative.)

9 A ---to the right. There is another marker.
10 And No. 5 is where we first found the first spots
11 of blood. It's up closer to the corner of the
12 building. There was blood around the mailbox.
13 The mailbox is a podium of mailboxes for a lack of
14 a better term. And there was blood around it.
15 There's blood on the mailbox. There is blood on
16 the fence. And there was blood in the hallway of
17 the house.

18 Q To your knowledge, was it fresh blood?

19 A You had blood touching. You had wet blood
20 drops.

21 Q Okay.

22 A And spots.

23 Q Is this an accurate representation of what
24 you saw around the mailbox?

25 A Yes, ma'am.

Thomas Burgess-direct by Land

1 MS. LAND: Your Honor, I would like these
2 admitted as State's 5 and 6, I believe?

3 THE COURT: What says the defense?

4 MR. DEVOE: No objection, Your Honor.

5 THE COURT: State's 5 and admitted without
6 objection.

7 (Photographs marked State's Exhibit Nos. 5
8 and 6 into evidence.)

9 Q Was the blood path consistent with a
10 later version of events that you collected from
11 the victim?

12 A Yes, ma'am.

13 Q The path of the blood did it lead from the
14 mailbox to the front door?

15 A Yes, ma'am.

16 Q And what does that picture that I've just
17 handed you depict?

18 A The bottom picture is H. And the
19 apartment number belonging to the victim. And the
20 marker No. 8 is on the front stoop area of
21 Apartment No. 8.

22 MS. LAND: Your Honor, I would like to put
23 this in to evidence as State's No. 8.

24 THE COURT: What about 7?

25 MS. LAND: Yeah, it's 7.

Thomas Burgess-direct by Land

1 MR. DEVOE: No objection.

2 (Photograph marked State's Exhibit No. 7
3 into evidence.)

4 Q When you were speaking with Investigator
5 Ham or any of the other road officers who were at
6 that scene, did you have to have a flashlight to
7 see them to identify their face?

8 A No, ma'am.

9 Q They were clearly seen?

10 A Yes, ma'am.

11 Q What if you had been as far away as you
12 are from me?

13 A The lighting was very sufficient.

14 Q Are there -- what has been called city
15 lights or streetlights?

16 A Yes, ma'am, all the way around that horse
17 shoe back towards Warsaw Street.

18 Q Do you recall if the porch light in the
19 Black home was on?

20 A I do not recall.

21 Q I beg the court's indulgence for one
22 moment. And you do know, you've testified that
23 Ms. Black did not ride to the hospital with Mr.
24 Black?

25 A That's correct.

Thomas Burgess-direct by Land

1 MS. LAND: Thank you. That's all the
2 questions I have.

3 THE COURT: Mr. Devoe.

4 MR. DEVOE: Thank you, Your Honor.

5 Cross Examination by Mr. Devoe:

6 Q How are you today?

7 A I am here.

8 Q At 4:30 in the morning on April 6th, what
9 time of first light?

10 A In early April, I have to refer to the
11 moon rising and sunset to know exact. In April,
12 the current time change, I would guess around,
13 5:30 quarter till 6.

14 Q Did you measure the distances from the
15 mailbox to the front door of Apartment H?

16 A I did not.

17 Q Did you measure the distances from the
18 mailbox to the streetlight as you face out from
19 the house to the far right?

20 A I did not.

21 Q Did you measure the distances from the
22 mailbox to the streetlight in the front left?

23 A I did not measure.

24 Q And were the leaves out at that time of
25 year on the tree to the far left?

Tasha Cannon-cross by Devoe

1 A I can't remember, Harry.

2 Q I think you also said there was bad
3 weather so the life lights couldn't take off.

4 A Uh-huh. (Affirmative.)

5 Q Is that correct?

6 A The fog had rolled in in Columbia. We
7 were clear here.

8 Q There was no bad -- the weather here was
9 fine.

10 A The weather here was fine. The fog had
11 rolled in to Columbia was the explanation I had
12 been given. Because I did not expect him to be at
13 the hospital when I got there.

14 Q Were you aware there was a video camera on
15 one of those light poles?

16 A I was not.

17 Q If you had been aware of that, would you
18 have had -- see if it worked?

19 A Yeah, because we would love to have that
20 information.

21 Q And no one ever tell you there was a --
22 had been a light video camera at that light pole?

23 A I am good friends with the apartment
24 manager. I did not know there was a video
25 available. That would have been a wonderful tool

Tasha Cannon-cross by Devoe

1 for us to have.

2 Q For everybody.

3 A Yes.

4 Q You also mention at the very end, you say
5 there were no suspects for two months.

6 A No, I do not say no suspects.

7 Q I thought you said that.

8 A I said we did not take him in to custody
9 for 2 months. We were looking for him. And I had
10 to actually have the assistance of marshal
11 services to take him in to custody.

12 Q So you misspoke when you said no. You
13 meant looking for the suspect.

14 A I never said we had no suspect, no.

15 Q You never talked to the individuals
16 involved there about who Chips was, did you? Did
17 you hear the name Chips from anybody other than
18 from the victim?

19 A Oh, yeah. I was already aware of who
20 Chips was.

21 Q Who told you that though? It wasn't
22 anybody, did somebody have to tell you that?

23 MS. LAND: Your Honor, may we approach?

24 (Whereupon, the attorneys approach the
25 bench and confer with judge.)

Tasha Cannon-cross by Devoe

1 Q I think on the report you had on this
2 whole situation, you said that the victim when you
3 talked to him, was a little groggy, but he was
4 okay.

5 A He was in pain. At the time when I talked
6 to him, his situation like I said, I was
7 monitoring the vitals on EMS, his belly was
8 beginning to swell. The bullet had gone up, and
9 he was beginning to swell. He was in a lot of
10 pain. I checked about medications with the nurse.
11 As a matter of fact, the nurses were in the room
12 when I showed him the lineup.

13 Q So he had no medication at that time?

14 A He did not because of the extent of the
15 injuries he had, he could not.

16 Q But he was in a lot of pain, you believe?

17 A Yes, sir.

18 Q So you say you could see people there at
19 the apartment complex. Like other people
20 investigating the situation. You could see their
21 body. Could you actually see their faces and
22 identify them if you didn't know who they were?

23 A I would say yes.

24 Q From what distance could you do that from?

25 A I hate to say. I guess at least from here

Tasha Cannon-cross by Devoe

1 to the back of the courtroom, if not further. It
2 is not that dark there.

3 Q Was all the lighting working at the
4 apartment complex?

5 A I didn't physically look up and look at
6 each light.

7 Q So you didn't know whether or not the
8 front door light was on, do you?

9 A I just don't recall. That wasn't one of
10 the things I was paying attention to. My focus
11 was on looking for shell casings, blood and other
12 possible evidence.

13 Q So but you didn't take any pictures or
14 diagram this whole situation, the distance from
15 the back gate to the building, to the length of
16 the building, from the building to the mailbox, or
17 anything like that, did you?

18 A We did not.

19 Q Or from the mailbox to any of these
20 streetlights?

21 A We did not.

22 Q Did anybody tell you what kind of
23 clothing, or do you have any report that you saw
24 what kind of clothing the suspect had on?

25 A No.

Tasha Cannon-cross by Devoe

1 Q You didn't mention a hood for example?

2 A No.

3 Q You said this took place at 2:30 in the
4 morning?

5 A The call came in to my residence about
6 2:30, I guess. The actual report would show the
7 dispatch time as when the calls came in.

8 Q What time?

9 A I have to refer to the report to know
10 exactly what time dispatch shows.

11 Q Because your report says it occurred
12 approximately 2:30.

13 A Approximately, yes, sir.

14 MR. DEVOE: No further questions Your
15 Honor.

16 MS. LAND: No further questions, Your
17 Honor. Your Honor, that's the State's case.

18 THE COURT: Ladies and gentlemen, I have
19 got to take up some matters of law. This probably
20 would be a good time to just let you all go to
21 dinner, to lunch. So I'll ask you be back in the
22 jury room at 1:30. That will give you about an
23 hour and a half. I remind you, please don't
24 discuss this case among yourselves or allow anyone
25 to discuss it with you. You have a nice lunch,

1 and come straight back here. And I'll see you at
2 1:30.

3 (Whereupon, the jury is dismissed for
4 lunch at 12 o'clock p.m.)

5 (Whereupon, the following takes place
6 outside the presence of the jury.)

7 THE COURT: Are there matters or motions
8 for me to decide?

9 MR. DEVOE: I would make a Motion for a
10 Directed Verdict at this time.

11 THE COURT: Okay. And I think there is a
12 sufficient evidence in the record of this case
13 that it should go to the jury. Not for the weight
14 of the evidence, but the existence of the
15 evidence. I think there is sufficient evidence on
16 all three counts of the indictment, as far as,
17 assault and battery with intent to kill, armed
18 robbery, and possession of a weapon during a
19 violent crime. I will deny your motion. Anything
20 else?

21 MR. DEVOE: Nothing else.

22 THE COURT: Okay. We will reconvene at
23 1:30.

24 THE COURT: Mr. Smith, if you will stand
25 up please, sir.

(1 (Whereupon, the defendant is sworn.)

2 THE COURT: Mr. Smith, do you understand
3 we have reached the point in the trial where you
4 have the right to put up evidence, and you have a
5 right to testify. You don't have to put up any
6 evidence. And you do not have to testify. You
7 have a constitutional right under the 5th
8 Amendment not to incriminate yourself.

9 So if you choose not to testify, I will
10 instruct the jury that they cannot hold that
11 against you in any way. They can't even discuss
12 it in the jury room the fact you didn't testify.
13 However if you do decide to testify, you will be
14 treated like any other witness. You will be
15 subject to cross examination by Ms. Land. If you
16 have a prior criminal record that qualifies under
17 our statute that deals with crimes of dishonesty
18 of more than one year in the last 10 years, that
19 may be brought out against you and impeach you.
20 And the decision to testify is your decision. You
21 certainly have the right to talk to your lawyer
22 about that whether to testify or not testify.
23 Have you had a chance to talk to Mr. Devoe about
24 whether you want to testify or not?

(25 THE DEFENDANT: Yes, sir.

1 THE COURT: And so like I said, that's
2 certainly up to you as to whether you testify or
3 not testify. But you have a right to testify and
4 you have the right not to testify. If you choose
5 not to testify, I will instruct the jury they
6 can't hold that against you. Do you understand?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: Do you have any questions you
9 want to ask me or your attorney concerning your
10 right to testify?

11 THE DEFENDANT: No, sir.

12 THE COURT: Mr. Devoe, do you have
13 anything else?

14 MR. DEVOE: Yes, we choose not to put a
15 defense up, Your Honor.

16 THE COURT: Okay. So you are not going to
17 call any witnesses at all.

18 MR. DEVOE: That's correct.

19 THE COURT: So we will bring the jury out
20 and do the closing arguments, and I will charge
21 them.

22 MR. DEVOE: That is correct.

23 THE COURT: Any request for charges other
24 than the standard? I was going to charge my
25 standard plus the law on assault and battery with

(1 intent to kill, armed robbery, and possession of a
2 weapon during a violent crime.

3 MS. LAND: I don't have any additional
4 charges judge.

5 MR. DEVOE: Well I have one. In your
6 charge, do you have a charge to the fact that if
7 you don't put a defense up, it should not be held
8 against them?

9 THE COURT: Most certainly. I will
10 instruct them the fact that he did not testify
11 that will be in there. Okay. Bring the jury.

(12 (Whereupon, the following takes place
13 within the presence of the jury.)

14 THE COURT: Ladies and Gentlemen, I
15 apologize. I know you don't think I have a watch,
16 but I had some matters I had to deal with that
17 took about 30 minutes. But we are ready to
18 proceed and finish this trial. Mr. Devoe.

19 MR. DEVOE: The defense rests, Your Honor.

(20 THE COURT: Ladies and gentlemen, what
21 that means is, you have heard all of the evidence
22 that you are going to hear in this case. Now we
23 have reached the point in the trial where the
24 attorneys are going to give their closing
25 arguments to you. And explain to you what they

(1 think the evidence said or didn't say. And after
2 they finish their closing arguments, then I will
3 charge you on the law and give you this case to
4 decide. So if you will pay close attention to the
5 attorneys, they will give you their closing
6 arguments.

7 MS. LAND: Thank you, judge. Good
8 afternoon, Ladies and Gentlemen. As I told you
9 during my opening, I didn't think it would be a
10 long case. But nonetheless, it is no less
11 important. This is a very, very serious case.
12 And a case in which a man almost lost his life.
(13 That man is Kelvin Black. You heard from that man
14 from the witness stand. And you have heard from
15 three people from the witness stand. All of whom
16 was there and had pieces of information to offer
17 from what occurred April 6th of 2008.

18 We were not there. We didn't see what
19 happened. You were not there. You did not see
20 what happened. But the people who were there,
21 have spoken to you now. And those are the bits of
22 evidence that you are to consider when you judge
23 the facts. And the judge will tell you, that when
(24 you consider that evidence, you can consider what
25 they said. How they said it. What bias or

1 prejudice that they may have. Or anything that
2 you think is important in judging their testimony.

3 And I think that is one of most important
4 charges that he will give you. Because basically
5 what the law is saying is when you go back there
6 and you talk about the facts in this case, use
7 your common sense. Common sense is something that
8 a lot of jurors forget about once they go back
9 there. But each and every one of you was chosen
10 for a specific reason. And part of that was
11 because we believe that your every day experiences
12 would come in to play in this trial, and would
13 help you find the truth. And help you reach the
14 correct verdict in this case.

15 Now I am going to talk to you about what
16 we did here from the witness stand. But let me
17 comment first on what we didn't hear. Because I
18 am sure that Mr. Devoe is going to get up there
19 and say, well there weren't any TV cameras from
20 Meadowfield Apartments. There weren't any
21 diagrams. Remember when he asked Investigator
22 Burgess if there were any diagrams. There was no
23 medical evidence.

24 But, Ladies and gentlemen, think about it
25 this way. When you are teaching your child how to

1 use the dishwasher, you don't take them outside
2 and show them the trash can. Because the two are
3 unrelated. You teach them over what is important
4 about the dishwasher. And that you have to wipe
5 the dishes off first. And then you put the dishes
6 in. And you have put the soap in, and then you
7 close it. And to tell them anything unrelated is
8 unnecessary. And it is not needed. And I want
9 you to think about that when Mr. Devoe comes up
10 here and tells you the things we didn't show. And
11 think about is that necessary. Would that have
12 made any difference.

13 And I also especially want you to remember
14 what you did see, and what you didn't hear. The
15 first person that you talked to was Kelvin Black
16 who said he had known Chips his whole life. He
17 knew him by his name, and he knew him as Chips.
18 He called him Chips. And I want you to think
19 about how he told you that when Chips came up
20 behind him and he heard the pull of the Trigger.
21 Or the cock of the gun, I guess it was. He turned
22 around and he looked at him and thought what are
23 you doing. And he walked on around.

24 And I want you to think, that night he
25 said, I haven't seen Chips that night. If he

1 didn't have every reason in this world to be
2 positive that it was Chips that shot him, he would
3 not have told the investigators that that night.
4 He would not have come back here all the way from
5 Connecticut 13 and a half hours in a car, with
6 three children, to tell you something he wasn't
7 sure about.

8 You also heard from Kelvin's wife. And I
9 will be the first person to admit that in many,
10 many cases, a wife would to be biased towards her
11 husband. She would want to get up here and tell
12 you what my husband said was absolutely true. And
13 I want you to believe him. And that's a very
14 national reaction. But remember, this is very,
15 very important. She told those law enforcement
16 officers that it was Chips before she knew that
17 her husband said it was Chips.

18 If you remember he was shot. He went to
19 the door, he fell. Law enforcement officers
20 responded. The ambulance took him to the
21 hospital. Investigator Burgess met him in the
22 ambulance and said: "Who shot you. It was
23 Chips." Meanwhile Investigator Burgess already
24 knew that. Because Tasha Cannon told the officers
25 that were at the scene. Why? Because she saw

1 him. She saw him with her own two eyes. She saw
2 him shoot her husband.

3 And, Ladies and gentlemen, these pictures
4 simply show you what happened. Where this
5 incident happened. There was lighting. You had
6 three people tell you that this lighting was
7 adequate; that you can see in this apartment
8 complex. And I want you to use that common sense
9 that we talked about earlier. And think about
10 being in a complex, in about apartment complex at
11 night. They have a well lit common areas for
12 their own liability. They don't want anyone
13 falling in their common area. It is a typical
14 practice and one that you can draw on from your
15 every day experiences.

16 And then Investigator Burgess instead of
17 saying, okay I know it's Chips, and going on with
18 his day. He did exactly what a good investigator
19 would do. He brought these pictures of 6 men that
20 look a great deal alike, and showed it first to
21 Tasha Cannon who was in the waiting room. Who had
22 not seen her husband yet. Said, which one of
23 these is the one that shot your husband. No. 6.
24 And she told you too, I have no reason to be
25 biased or prejudiced to him.

(1 We were in a bar one time and I bought him
2 drinks. I bought him drinks. They not arch
3 enemies. They don't have any beef with one
4 another. He told you how he took this same
5 lineup, he had to tilt it sideways as Kelvin Black
6 lay in this bed, which one of these shot you.
7 No. 6. No. 6. Assault and battery with intent to
8 kill is an unlawful touching that has all of the
9 elements of murder except for death. And the
10 judge will tell you about that. If Mr. Black had
11 died, we would be sitting here in a murder trial.
12 But thank goodness he survived. So we are here.
13 And Mr. Smith is facing charges of assault and
14 battery with intent to kill.

(15 It's unlawful touching when you have the
16 intent to kill someone. And like I told you in
17 the opening, no rational, logical person, would
18 shoot somebody else at close blank range, and not
19 expect for that person to live. You would
20 absolutely expect that that person would die.

(21 The second thing that he is charged with
22 is armed robbery. That is, taking something from
23 someone else while you are armed with a deadly
24 weapon. Like he said, both Mr. and Mrs. Black
25 both testified to you that Chips had a gun during

(1 this incident. And that he pointed it down at
2 Mr. Black, and he reaches down and he took his
3 necklaces. And he wanted money, but Mr. Black
4 didn't have any money. The third item that Mr.
5 Smith is charged with is possession of a weapon
6 during a violent crime. And that is, committing a
7 violent crime which is assault and battery with
8 intent to kill while you are armed with a weapon.

9 Ladies and Gentlemen, the evidence that
10 has been presented from this witness stand should
11 be crystal clear to you. We have two of the very,
12 very few people who were there that day -- that
(13 night, who actually saw, heard and felt what
14 happened. And they have come to you free of any
15 bias and free of any prejudice today and told you
16 their story. After Mr. Devoe talks to you, go
17 back there and come back with a verdict of guilty.
18 Thank you.

19 THE COURT: Mr. Devoe.

20 MR. DEVOE: I love the way Amy Land tells
21 you what I am going to be saying. Because I am
22 not always sure what I am going to be saying until
23 I hear what has been said, and what the facts are.
(24 You have heard the case that my client decided not
25 to come up and testify because he has already said

1 he is not guilty. What else can he say? He is
2 not guilty. In other words, he is saying that he
3 didn't do the crime. Pretty simple.

4 When you go back to the testimony in this
5 case, the testimony you heard, or even testimony
6 you didn't hear for example, where was the
7 investigating officer here to testify? I think he
8 mentioned Lieutenant Ham was the investigating
9 officer, where was he? You know the officer who
10 testified, Lieutenant Burgess testified he got
11 there 2 hours later to the scene of the crime. A
12 lot can happen in 2 hours at the scene of a crime.
13 So why wasn't Lieutenant Ham here so I could cross
14 examine him and ask certain things about the case?
15 Things to refresh your memory right now. It's
16 amazing how quickly your memory fades if you don't
17 talk with people.

18 Think about that. Why wasn't he here?
19 Then you have the case itself of a busy apartment
20 complex. I don't whether he testified how many
21 buildings there are. But he testified there were
22 8 units in a building. And there are certainly a
23 lot more than 2 or 3 buildings. This is a pretty
24 tense situation. Supposedly there were gunshots
25 all over the place. Screaming and yelling what

1 have you. Where are any inhabitants of that
2 apartment building? Are they all hiding?

3 If you know the apartment complex in the
4 area, you can certainly tell a lot of people
5 hanging around and moving around an apartment
6 complex on a Saturday night. So where were they?
7 Why don't they testify to it? Why don't they ask
8 questions? Did they all disappear, and you
9 couldn't find them to ask questions? I mean where
10 did the gunshots start? In other words, what
11 happened? The whole sequence of things. You have
12 two people testifying. Remember they said three
13 people. There were only 2 people testifying what
14 happened at the scene at the time. And one is
15 Mr. Black and the other is his wife. That's it.

16 And so the question really is, and no one
17 can tell you the distances from here, there or
18 anywhere. And you may think it is something
19 critical, but I think it is sloppy police work.
20 You know to measure certain things out. You show
21 where the light pole is. You don't measure the
22 lumines which is the long light you have actually
23 at 2 o'clock, 2:30 in the morning, to make sure
24 what lights were on and off in the whole place.
25 In one place he said the front porch light was on.

1 And the front door was on. Somebody else said
2 they didn't notice it. Didn't notice it.

3 Was it a dark night, or was there a moon
4 out? I don't know. And they don't seem to know
5 either. They are not telling you about that.
6 With a moon you see a lot more than you do on a
7 dark night. I did ask Burgess about the weather.
8 It turns out the weather in Columbia was bad
9 weather and the weather here was okay. But we
10 didn't get in to the fact about stars or what have
11 you. You remember I was asking questions about
12 how far away the mailbox was? You've got a
13 picture of it now. It's on a stand. And there is
14 8 mailboxes in this stand. And it shows the
15 entire 8-unit apartment complex. Do you remember
16 that? Why are they trying to hide the front way,
17 the way to the front door? But it is certainly,
18 it's the evidence is what it is. But certainly
19 the 8 units are not right on top of one person's
20 front door and not the other people's front door.

21 There is no question that Mr. Black was
22 shot. The question is, who did it? Whose gun did
23 it? Once again, we don't have the gun. He says
24 his gold chains were stolen. Where are the gold
25 chains? Did he find them? Did they look for

(1 them? Did he find them in Mr. Smith's position?
2 Did they find a gun in his possession? No. No,
3 to everything. Are there fingerprints showing he
4 was there? No. What is there to see? There is
5 only 2 people who testified that -- the fact that
6 Chips was there. And He testified that to Mr.
7 Burgess.

8 Remember he testified earlier that he had
9 only two drinks. And was getting home at 11:30.
10 And it turns out that he drink until he ran out of
11 money. He was snockered. I think he was getting
12 home about 2 o'clock. Then all of sudden 2 hours
(13 later, Sergeant -- Lieutenant Burgess, here he is
14 groggy, unable to talk. Where did the alcohol go?
15 Where did it go? I know where it went. It didn't
16 go anywhere. It's still in him. Did they test
17 him for alcohol? No. Why not? Why bother? Why
18 bother? Why not bother? I think it's another
19 situation of sloppy police work.

20 His wife testified the only way she saw
21 anybody was peaking through the window of the
22 utility room which is a high window, narrow, maybe
23 it's 18 inches high. I am not quite sure how high
24 from the ground. Nobody seemed to measure it. We
(25 have the evidence how high it is. But she said

1 she could see through it. I am assuming she can.
2 Still 2:00 o'clock, 2:30 in the morning. Still
3 dark. And then the whole thing, nobody else
4 around. That post office box. Which is where you
5 see the blood. Did something happen there? No
6 question. But who was the other person? There
7 is no physical evidence that my client was there.
8 Once again, no fingerprints. Not his blood. No
9 clothing. Nothing.

10 There is no description anywhere of what
11 he was wearing that night. And that is strange.
12 No one is saying what he was wearing. Was he
13 wearing a tee shirt? A long shirt? A hooded
14 shirt? I asked Mr. Burgess about a hooded shirt
15 and he said he hadn't heard one way or the other.
16 So you are now being asked basically to make a
17 very solemn decision of what I consider to be very
18 poor evidence. The evidence being was Mr. Black
19 and his wife, there is some evidence in there that
20 he almost didn't know him. You all recall that?
21 They had drinks together one night at a club. And
22 all of Mr. Smith's 20 years, he had drinks with
23 him once in a club.

24 And I think Mr. Burgess stated there was
25 some kind of history between the two.

1 MS. LAND: Your Honor, I object to the
2 mischaracterization of the evidence. There was no
3 such thing said.

4 THE COURT: The jury will recall what the
5 evidence was. They remember it, Mr. Devoe. Stay
6 with the task.

7 MR. DEVOE: So the question is, how can
8 you convict somebody on such weak evidence? Think
9 about it. Two or 2:30 in the morning. Mr. Black
10 on his way back. His wife is on the cot sleeping.
11 Wakes up when she hears gunshots. She looks
12 outside the little window. He says he crawled to
13 the door and he passed out. And she says he
14 asked, "Let me see the baby." Now which is the
15 truth? I think those two are about as truthful
16 as anything else you heard. Two contradicting
17 statements all the way through.

18 I would suggest to you that the state has
19 not meet its burden of proving of Mr. Smith guilty
20 of anything. You can't even prove he was there.
21 So I would ask you when you go back to the jury
22 room to find that my client was not guilty for the
23 crimes he is charged. Thank you for your
24 attention.

25 THE COURT: Now, Ladies and gentlemen, I

1 need you to do one thing for me before I give you
2 the charge on the law. I need you to go back to
3 the jury room and select a foreperson. I found
4 out that juries do a whole lot better when they
5 select their own foreperson than when I do that.
6 You all have been here for a few hours now. The
7 foreperson doesn't have any more vote than anyone
8 else. They simply will be the person who signs
9 the verdict form.

10 So if you will go back and select who you
11 want to serve as the foreperson, then let the
12 bailiff know. When you all are ready, I will
13 bring you back out and charge you on the law.
14 Thank you. And it could be anybody of the
15 original 12, except the alternate. It looks like
16 all of you all are going to make it.

17 (Whereupon, the following takes place
18 Outside the presence of the jury.)

19 THE BAILIFF: Judge, they have the
20 foreman.

21 THE COURT: Hold on one second. Do you
22 all want to look at the verdict form?

23 MS. LAND: You just want to know, you can
24 find not guilty. You know kind of give them
25 directions.

1 THE COURT: I am going to tell them you
2 can---

3 MS. LAND: Okay.

4 THE COURT: ---find him guilty or not
5 guilty.

6 MS. LAND: Okay.

7 THE COURT: Are we ready for the jury?

8 MS. LAND: Yes, sir, the State's ready.

9 THE COURT: No objections to the verdict
10 form on behalf of the state or defense?

11 MS. LAND: None from the State.

12 THE COURT: Mr. Devoe?

13 MR. DEVOE: No, objection, Your Honor.

14 THE COURT: Okay, bring us the jury.

15 (Whereupon, the following takes place
16 within the presence of the jury.)

17 THE COURT: Did you all select the
18 foreperson? Mr. Jackson, you are in the hot seat?

19 THE FOREPERSON: Yes, sir.

20 THE COURT: Now that have heard the
21 evidence in the case as well as the arguments of
22 both of the attorneys, I am going to explain to
23 you the law that applies to this case. And under
24 our constitution and code of laws, only the jury
25 can make a finding of facts in this case. As I

(1 told you, I am not permitted to indicate to you
2 how I might feel about the facts in this case.
3 Whether I have said anything or done anything
4 throughout this trial to indicate that I may have
5 an opinion about the facts, you are to disregard
6 that. Because under our system, you the jury must
7 independently weigh the evidence in this case, and
8 render a verdict based on that evidence. And not
9 any indication that you may have from me, because
10 I don't have an opinion about the facts.

(11 And under our constitution and the Code of
12 Laws that makes you the exclusive judges of the
13 facts, makes me the exclusive judge of the law.
14 And so you must take the law as I now give it to
15 and apply it to the facts in this case even if you
16 disagree with it.

17 Now the defendant was arrested, charged
18 and indicted in this case. And that fact is not
19 evidence in this case. It cannot be considered by
20 you as evidence of guilt. Nor does it create any
21 presumption or inference of guilt. The indictment
22 is simply an instrument which contains the charges
23 against the defendant, which brings this case to
24 Court.

(25 To this indictment, the defendant has

1 entered a plea of not guilty. That casts a burden
2 upon the state to prove him guilty beyond a
3 reasonable doubt. A person charged with
4 committing a criminal offense in South Carolina is
5 never required to prove himself or herself
6 innocent. And I instruct you and emphasize to you
7 the fact that the defendant did not testify is
8 not a factor to be considered by you in your
9 deliberations. Or in any consideration whatsoever
10 in your determination of guilt or innocence of
11 this defendant. It must not be considered by you
12 in any manner whatsoever. A defendant has a
13 constitutional right to remain silent. And the
14 assertion of this right must not be considered in
15 your deliberations. You are to draw no
16 conclusions whatsoever from the fact that he did
17 not testify. In fact you can't even discuss that
18 in the jury room. It is an important rule of law
19 in this country that a Defendant in criminal trial
20 will always be presumed innocent of the crime for
21 which he or she is indicted, unless and until his
22 guilt has been proven by evidence that satisfies
23 you the jury of that guilt beyond a reasonable
24 doubt.

25 The presumption of innocence is not a mere

1 legal theory. It is not just a legal phrase. It
2 is a substantial constitutional right to which
3 every defendant is entitled. The presumption of
4 innocence comes to the defendant from the time of
5 his charge and throughout the trial and until you
6 reach a verdict based on the evidence that
7 satisfies you of that guilt beyond a reasonable
8 doubt.

9 A reasonable doubt is a doubt which makes
10 an honest, sincere, conscientious juror in search
11 of the truth to hesitant to act. Proof beyond a
12 reasonable doubt must therefore be proof of such a
13 convincing character that a reasonable person
14 would not hesitate to rely upon it and to act upon
15 it in the most important of his or her own
16 affairs. Proof beyond a reasonable doubt can also
17 be described as proof that leaves you firmly
18 convinced of the defendant's guilt.

19 There are very few things in this world
20 that we know with absolute certainty. And in a
21 criminal case the law does not require proof that
22 overcomes every possible doubt. And if based on
23 your consideration of the evidence you are firmly
24 convinced that the defendant is guilty of the
25 crime charged you must find him guilty. If on the

1 other hand there is a real possibility that he is
2 not guilty, you must give him the benefit of that
3 doubt and find him not guilty.

4 In determinating the facts in the case,
5 you must necessarily pass upon the credibility,
6 which simply means the believability of the
7 witnesses. And you give the weight and value to
8 that testimony that you think is appropriate. You
9 alone must decide the force and effect of that
10 testimony. In making these decisions there are
11 many things you may consider; such as, the
12 appearance and the manner of the witness on the
13 witness stand. Sometimes refers to as the
14 demeanor of the witness. Was the witness
15 forthright or hesitant. Was the witness'
16 testimony consistent or did it contain
17 discrepancies. What was the ability of the
18 witness to know the facts about which he or she
19 testified. Did the witness have a cause or reason
20 to be biased and prejudice in favor of his or her
21 testimony. Was the testimony of a witness
22 corroborated and made stronger by other testimony
23 and evidence or was it made weaker or impeached by
24 such other testimony or evidence.

25 And as jurors you have right to believe a

(1 small portion of a witness' testimony and
2 disregard the larger or vice versa. You may
3 believe all of a witness' testimony or none.
4 You may believe the testimony of a single witness
5 against that of many or the other way around. But
6 there are two types of evidence that are generally
7 presented in a trial. Direct evidence and
8 circumstantial evidence. Direct evidence is
9 testimony of a person who asserts or claims to
10 have actual knowledge of a fact; such as, an eye
11 witness. Circumstantial evidence is proof or a
12 chain of facts and circumstances indicating the
(13 existence of a fact. The law makes absolutely no
14 distinction between direct evidence and
15 circumstantial evidence or which one you should
16 give the greater weight.

17 I gave you an example of circumstantial
18 evidence. We have been sitting in this courtroom,
19 and we go out this afternoon and the ground was
20 covered in water. We may not have looked out the
21 window and paid any attention and not seen it
22 rain, we can assume some time in this trial it
23 rained, because the ground is covered in water.
24 That's circumstantial evidence. If you would have
(25 looked out the window and seen it rain, that's

1 direct evidence. And as I told you, the law makes
2 no distinction in the way that you should give one
3 any greater weight than the other. You should
4 treat it like all evidence. And you are to give
5 that evidence whatever weight you deem appropriate
6 in determining guilt or innocence in this case.

7 Now criminal intent is a necessary element
8 of each crime. It must be proven by the state
9 beyond a reasonable doubt. Criminal intent is
10 always a matter that must be determined by the
11 jury from the circumstances surrounding the
12 situation. There is no way to prove intent to a
13 mathematical certainty. There is no way medical
14 Science can dissect a person's brain and determine
15 what he or she had in mind. So the law states
16 that criminal intent may be inferred from the
17 circumstances shown to exist before and after the
18 fact. This is how you the jury make a
19 determination of whether or not the elements of
20 intent were present.

21 Criminal intent is a state of mind that
22 operates jointly with an act, or omission in the
23 commission of a crime. Criminal intent is a
24 mental state or conscious wrongdoing. So it is up to
25 you the jury to determine what the defendant

1 intended to do, based on the circumstances shown
2 to have existed. And I tell you the State must
3 prove criminal intent beyond a reasonable doubt,
4 just like the state must prove every element
5 beyond a reasonable doubt.

6 The issue in this case is the
7 identification of the defendant as the person who
8 committed the crime. The State has the burden of
9 proving identity beyond a reasonable doubt. You
10 must be satisfied beyond a reasonable doubt of the
11 accuracy of the defendant before you can convict
12 the defendant. Identification testimony is an
13 expression or belief or impression by which you
14 must determine the accuracy of the identification
15 of the defendant. You must consider the
16 believability of each identification witness in
17 the same way as any other witness.

18 You may consider whether the witness had
19 an adequate opportunity to observe the offender at
20 the time of the offense. This will be effected
21 by things; such as, how long or how short a time
22 was available, how far or how close the witness
23 was. The lighting condition, whether the witness
24 had the chance to see or know the person in the
25 past. Once again, I instruct you, the burden of

1 proof is on the state, as in every element to
2 prove identification beyond a reasonable doubt.

3 Now the defendant has been charged with
4 assault and battery with intent to kill. In order
5 to prove assault and battery with intent to kill,
6 the State must prove beyond a reasonable doubt
7 that the defendant committed an unlawful act of a
8 violent nature to the person of another with
9 malice aforethought. An assault occurs when a
10 person unlawfully attempts or offers to commit a
11 violent injury upon another person and had the
12 present ability to complete the attempted injury.

13 An assault is an intentional creation of a
14 reasonable fear of immediate bodily harm. It is
15 not necessary that an attempted injury or harm
16 actually took place. For example, if I walk up to
17 you and we are within arms' reach and I draw back
18 to hit you, that is an assault.

19 A battery is the unlawful touching of
20 another person by a person who has committed the
21 assault. An unlawful touching can be caused by a
22 part of the accused body or by any object the
23 accused puts in motion. A battery is the
24 completion of the assault by using or implying
25 force to another person however slight, in a rude,

1 . angry or resentful manner without legal
2 justification for doing so.

3 Using my earlier example if I carry
4 through the assault by hitting you then that is
5 the battery. Malice is hatred, ill will or
6 hostility towards another person. It is the
7 intentional doing of a wrongful act without just
8 cause or excuse and with the intent to inflict an
9 injury and under circumstances that the law will
10 infer an evil intent. Malice aforethought does
11 not require that malice exists for any particular
12 time before the act is committed. Malice must
13 exist in the mind of the Defendant just before and
14 at the time the act is committed.

15 Therefore, there must be a combination of
16 the previous ill -- of the previous evil intent
17 and the act. Malice aforethought may be expressed
18 or inferred. These terms express and infer do not
19 mean different kinds of malice, but merely the
20 manner in which malice may be shown to exist; that
21 is, either by direct evidence or by inference from
22 the facts and circumstances which are proved.
23 Express malice is shown when a person speaks words
24 which express hatred, or ill will for another. Or
25 when the person prepared beforehand to do the act

1 which was later accomplished. For example, lying
2 in wait for a person, or in other acts or
3 preparation going to show that the deed was within
4 the defendant's mind would be express malice.

5 Malice may be inferred from conduct
6 showing a total disregard for human life.
7 Inferred malice may also arise when the deed is
8 done with a deadly weapon. A deadly weapon is any
9 article, instrument or substance, which is likely
10 to cause death or great bodily harm. The
11 following are instruments which may be a deadly
12 weapon, a pistol, a shotgun, a rifle, a dirk, a
13 dagger, a knife, a slingshot, metal knuckles, a
14 razor, gasoline, a fire bomb, mai tai cocktail,
15 and lighter fluid. A gun may be a deadly weapon
16 even if it is not operating.

17 If the facts prove beyond a reasonable
18 doubt sufficient to raise an inference of malice
19 to your satisfaction, this inference may -- this
20 inference would be simply another part of the
21 evidence.

22 Now the defendant is also charged with the
23 crime of armed robbery. In order to prove this
24 offense, the state must proof first beyond a
25 reasonable doubt that the defendant took property

1 from another person or from the presence of
2 another person. This property is in the presence
3 of another person or a person if it is within the
4 person's reach, inspection, observation or control
5 so that the person could if not overcome with
6 violence or prevented by fear, keep possession of
7 the property. The State must prove beyond a
8 reasonable doubt that the defendant carried the
9 property away intending to permanently deprive the
10 owner of the property. And to keep the property
11 from the defendant's own use. The slightest
12 removal or the completion -- or complete
13 possession of the property even for an instance by
14 the defendant is sufficient to show a taking and
15 carrying away of the property.

16 The taking and carrying away of the
17 property must have been done with violence or by
18 putting the owner of the property in fear of
19 violence. Finally, the state must prove beyond a
20 reasonable doubt that the defendant was armed with
21 a deadly weapon during the robbery. A deadly
22 weapon is an article or instrument or substance
23 which is likely to cause death or great bodily
24 harm. Whether an instrument has been used as a
25 deadly weapon depends on the facts and

1 circumstances of each case. And I have given you
2 examples just briefly of a deadly weapon, and so I
3 won't repeat all those again.

4 And I have got one of these pages out of
5 order. Let me, going back to assault with intent
6 to kill, one the other elements that I didn't
7 explain to you was specific intent to kill is not
8 an element of assault and battery with intent to
9 kill. But there must be a general intent to
10 commit serious bodily harm. Intent means
11 intending the result which actually occurred, not
12 accidentally or involuntary. Intent may be shown
13 by acts and conduct of the defendant and other
14 circumstances which you may naturally and
15 reasonably infer intent. Evidence of the
16 character of the assault and the character of the
17 instrument used and the manner for which it was
18 used and the purpose to be accomplished and the
19 resulting wounds may be considered in determining
20 intent for which the assault was committed.

21 Intent may be inferred when it
22 demonstrates that the defendant voluntarily and
23 willfully committed and the natural tendency of
24 which is to destroy another's life. Now the
25 defendant is also charged with the crime of

1 possession of a weapon during a violent crime.
2 The State must proof beyond a reasonable doubt
3 that the defendant possessed a firearm or visibly
4 displayed what appeared to be a firearm during the
5 commission of a violent crime. And as I explained
6 to you earlier, a firearm means any machine gun,
7 automatic rifle, revolver, pistol, any weapon
8 which will or is designed or may readily convert
9 to expel a projectile.

10 In order to find the defendant guilty of
11 possession of a possession of a weapon during the
12 commission of a violent crime, you must first find
13 the defendant guilty of a violent crime. And I
14 instruct you that assault and battery with intent
15 to kill is a violent crime under our law. And
16 armed robbery is a violent crime under our law.
17 So if you feel that the State has proven beyond a
18 reasonable doubt that the defendant is guilty of
19 either one or both of those crimes, then you my go
20 to the third option in determining whether he
21 possessed a firearm during the commission of a
22 violent crime.

23 Now Ladies and gentlemen, you are not
24 partisans for the State of South Carolina or
25 advocates for this defendant. You were selected -

1 you are not here reward your friends or punish
2 enemies. Obviously that system of justice just
3 simply would not be tolerated. You have been
4 selected by both the state and this defendant to
5 be fair and impartial jurors. It is your duty
6 then by your joint deliberations to determine the
7 truth in this case, giving to this defendant the
8 benefit of every doubt on each and every issue.
9 Giving to this defendant every reasonable doubt on
10 each and every issue. And then to the facts as
11 you to be determine you are to apply the law that
12 I am now giving to you and reach a verdict that
13 speaks the truth.

14 When you have accomplished this you will
15 have satisfied your oath to this court. Now I
16 have had my law clerk type the verdict form. In
17 this corner is simply the caption of the case.
18 And the order that he has put it down you should
19 draw no conclusions from it whatsoever. You have
20 to put it in some order.

21 But the verdict form basically reads No.
22 1, we the jury unanimously find the defendant
23 George Arsenio Smith, a/k/a Chips guilty of
24 assault and battery with intent to kill. Or not
25 guilty of assault and battery with intent to kill.

1 And No. 2, we the jury unanimously find the
2 defendant George Arsenio Smith a/k/a Chips guilty
3 of armed robbery or not guilty of armed robbery.

4 And No. 3, we the jury unanimously find the
5 defendant a/k/a Chips, guilty of possession of a
6 weapon during a violent crime or not guilty or
7 possession of a weapon during a violent crime.

8 Mr. Foreman, when you have reached a
9 verdict on each one of these counts and it must be
10 a unanimous verdict, you are to check the
11 appropriate block and sign the back and date it.
12 And then knock on the door and we will bring you
13 out and receive your verdict. And you can't sign
14 this until all 12 of you agree on the verdict.
15 Now before you can go to No. 3, you must have
16 found him guilty of one or two or both. But if
17 based on your deliberations you feel the State has
18 not proved him guilty of assault and battery with
19 intent to kill, or has not proved him guilty of
20 armed robbery, then you can't consider No. 3.
21 Because you can't be guilty of a possessing a gun
22 during a violent crime if he hadn't committed a
23 violent crime. So you will only go to No. 3 if
24 you find him guilty of either both or one of the
25 prior two.

1 Now, I am going to send you back to the
2 jury room for a few minutes. I've got to be sure
3 I have covered everything with the attorneys. If
4 I forgot something, I will bring you back out and
5 charge your further on the law. If I have covered
6 everything then I will send this verdict form in
7 the jury room along with the exhibits that have
8 been introduced in this trial. When you get this,
9 this will be your indication to start your
10 deliberations. And when you reached a verdict
11 just simply knock on the door and we will bring
12 you back out and receive your verdict. If you will
13 go to your jury room now, I'll either send this
14 in, or bring you back out. You stay with me, Mr.
15 Alternate. Everybody else go, but the alternate
16 needs to stay with. I believe the rest of you all
17 look pretty healthy.

18 (Whereupon, the following takes place
19 outside the presence of the jury.)

20 THE COURT: Any additions or at least any
21 exceptions?

22 MS. LAND: No, sir.

23 THE COURT: From the defense?

24 MR. DEVOE: None from the defense, Your
25 Honor?

1 THE COURT: Okay.

2 MR. DEVOE: We need to see the---

3 THE COURT: If you all would look at the
4 exhibits and be sure that they are correct. And
5 here is the verdict form.

6 (Whereupon, at 2:55 p.m. jury commences
7 deliberations.)

8 (Whereupon, the alternate is excused.)

9 (Whereupon, At 3:33 p.m. jury reached
10 verdict.)

11 THE COURT: Mr. Devoe, I understand we
12 have a verdict. Is there anything before we bring
13 the jury from either side.

14 MS. LAND: There is not from the State.

15 MR. DEVOE: Nothing from the Defense.

16 THE COURT: Bring us the jury please, sir.

17 (Whereupon, the following takes place
18 within the presence of the jury.)

19 THE COURT: Okay, you may publish the
20 verdict.

21 THE CLERK: On Indictment No.

22 2008-GS-14-352 the State versus George Arensio
23 Smith, we the jury unanimously find the defendant,
24 George Arsenio Smith a/k/a, Chips, guilty of
25 assault and battery with intent to kill. No. 2;

1 we the jury unanimously find the defendant George
2 Arsenio Smith, a/k/a Chips, guilty of armed
3 robbery. No. 3, we the jury unanimously find the
4 defendant George Arsenio Smith a/k/a Chips guilty
5 of possession of a firearm during the commission
6 of a violent crime. Signed Scott H. Jackson
7 foreperson. December 8th 2009.

8 THE COURT: Anything from the State before
9 I dismiss the jury?

10 MS. LAND: There is not anything from the
11 State, judge.

12 THE COURT: Anything from the Defense?

13 MR. DEVOE: Nothing from the Defense.

14 THE COURT: All right.

15 MR. DEVOE: I would ask you to poll the
16 jury.

17 THE COURT: All right, Madam Clerk.

18 THE CLERK: Ladies and gentlemen of the
19 jury, I am going to ask you two questions. I need
20 you to answer. I am going to call you by your
21 name and you just stand right in place and answer
22 as I ask you the question. Starting with our
23 foreperson, Mr. Scott Jackson, Jr. Is this your
24 verdict?

25 MR. JACKSON: Yes, ma'am.

1 THE COURT: And still your verdict?

2 MR. JACKSON: Yes, ma'am.

3 THE CLERK: Kenneth E. Rast, is this your
4 verdict?

5 MR. RAST: Yes, ma'am.

6 THE CLERK: And still your verdict?

7 MR. RAST: Yes.

8 THE CLERK: Deborah M. Ferrell, is this
9 your verdict?

10 MS. FERRELL: Yes, ma'am.

11 THE CLERK: And still your verdict?

12 MS. FERRELL: Yes, ma'am.

13 THE CLERK: Thank you. Ida Reid Campbell,
14 is this your verdict?

15 MS. CAMPBELL: Yes.

16 THE CLERK: And still your verdict?

17 MS. CAMPBELL: Yes.

18 THE CLERK: Mazie T. Pringle, is this your
19 verdict?

20 MS. PRINGLE: Yes, ma'am.

21 THE CLERK: And still your verdict?

22 MS. PRINGLE: Yes.

23 THE CLERK: Thank you. Willie J. Nelson,
24 is this your verdict?

25 MR. NELSON: Yes, ma'am.

1 THE CLERK: And still your verdict?
2 MR. NELSON: Yes, ma'am.
3 THE CLERK: Thank you, sir. Leroy Pugh,
4 is this your verdict?
5 MR. PUGH: Yes.
6 THE CLERK: And still your verdict?
7 MR. PUGH: Yes.
8 THE CLERK: Valerie C. Oliver, is this
9 your verdict?
10 MS. OLIVER: Yes.
11 THE CLERK: And still your verdict?
12 MS. OLIVER: Yes.
13 THE CLERK: Stephanie C. McLaughlin, is
14 this your verdict?
15 MS. MCLAUGHLIN: Yes.
16 THE CLERK: And still your verdict.
17 MS. MCLAUGHLIN: Yes.
18 THE CLERK: Maretha Lee, is this your
19 verdict?
20 MS. LEE: Yes.
21 THE CLERK: And still your verdict?
22 MS. LEE: Yes.
23 THE CLERK: Thank you, ma'am. Albert W.
24 Butler, is this your verdict?
25 MR. BUTLER: Yes.

1 THE CLERK: And still your verdict?

2 MR. BUTLER: Yes.

3 THE CLERK: Margaret Eggerton, is this
4 your verdict?

5 MS. EGGERTON: Yes.

6 THE CLERK: And still your verdict?

7 MS. EGGERTON: Yes.

8 THE CLERK: Your Honor, the jury has been
9 polled.

10 THE COURT: Ladies and Gentlemen, I
11 appreciate your service in this case. Ms. Land,
12 what do you want me to tell them to do about
13 tomorrow?

14 MS. LAND: They can call back after six.
15 That would be great.

16 THE COURT: You have got to call that
17 number back after six as I indicated, whether you
18 will be needed tomorrow. I have been telling you
19 the whole time you were in the case you couldn't
20 discuss this case with anyone. You can go home
21 and tell your family what you did if you want to.
22 You don't have to if you don't want to. But if
23 somebody approaches you and wants to talk about
24 it, and you don't want to, you just simply tell
25 them I don't want to discuss it. But you are free

1 now to discuss it if you want to. And you all are
2 free to go. If you would call back after six. Or
3 you can hang around in the courtroom. It's
4 whatever you want to do.

5 But I am going to sentence Mr. Smith if
6 you want to wait. If you want to hang around
7 until sentencing, fine. If not, you can go home
8 and call back after six. I may see you tomorrow,
9 I don't know. Thank you.

10 (Whereupon, the following takes place
11 outside the presence of the jury.)

12 THE COURT: Did the victims leave?

13 MS. LAND: They did, Your Honor. I will
14 talk about that in a minute. Your Honor, I did
15 want to speak on behalf of the victim at the
16 appropriate times.

17 THE COURT: Okay. Tell me a little bit.
18 Does he have a prior record?

19 MS. LAND: Your Honor, he does not have a
20 prior record, but keep in mind that he is only
21 20-years-old. Your Honor, the victims did leave
22 and that was not because they didn't want to stay.
23 They were actually very scared of what would
24 happen after this trial. Mr. Black kept looking
25 around saying, "I don't know who these people are.

1 I don't know what their connection is to him."

2 And I actually asked them if they had to
3 get back, and they said, really it was because
4 they didn't know who these people were. This was
5 obviously a very, very traumatic experience for
6 both of them. They are a fine young couple.

7 Although he has a prior criminal record. They are
8 raising those three children together, doing a
9 fine job. He has moved to Connecticut, cleaned
10 his life up. And they are -- they really are on
11 the right track. I believe that they were on the
12 right tract at that point when Mr. Smith shot him
13 for no apparent reason except to get those chains.
14 We would ask that you sentence him to the maximum
15 on all charges.

16 THE COURT: Okay.

17 MR. DEVOE: Your Honor, I disagree
18 completely with what Amy Land is telling you about
19 that couple. He has a long record. He has 5
20 charges. He is 28-years-old. I understand they
21 are in Connecticut now. I don't know what the
22 record is now. They went there about 4 or 5
23 months ago. He stayed here until then. He
24 admitted he was drinking; had too much too drink.
25 So obviously has a right to be -- he was a victim

1 in the case, and they won their case. At the same
2 time, I don't consider it necessarily consider
3 them the salt of the earth kind of couple. My
4 client has no record. He had no other charges.

5 MS. LAND: Your Honor, he does have a
6 record.

7 MR. DEVOE You just said he didn't.

8 MS. LAND: Well I know I did. The record
9 that I have, as you know, is not always completely
10 accurate. Ms. Rucker just came up and said that
11 he was on probation from 2007, for resisting
12 arrest.

13 THE COURT: Okay.

14 MR. DEVOE: I was going to say he does
15 have some other charges, but no convictions on
16 those charges at this point. So at this point, he
17 is he 20-years-old. His mother and daughter. His
18 mother and his cousin are standing by him. Have
19 been very supportive. He does have family that
20 unfortunately didn't take -- took place over
21 several days, came together to try to help him
22 out. And try to find witnesses and they come not
23 find them. They started too late in the day to do
24 it.

25 Jury was out for an hour, hour and a half,

1 I guess. It was a fairly short deliberation, but
2 not a slam dunk deliberation. I would ask Your
3 Honor to not give him the max, but give him some
4 concurrent sentences and make it less than the
5 maximum. Amy forget to tell you, she had made an
6 offer to me which was a pretty decent offer, which
7 he turned down.

8 THE COURT: You know, this is about as
9 serious a crime as you can commit short of murder,
10 as you know. Anyway on Count 1, assault and
11 battery with intent to kill, the defendant is
12 committed to the State Department of Corrections
13 for a term of 26 years. Count 2, is armed
14 robbery, 25 years to run concurrent to Count 1.
15 And Count 3, is 5 years to run concurrent. He
16 can have credit for whatever time he has served.

17 MR. DEVOE: He has served since June 10th
18 2008.

19 THE COURT: Do you know agree with that?

20 MS. LAND: I do, yes.

21 THE COURT: Okay.

22 MR. DEVOE: That would be exactly 10
23 months.

24 THE COURT: Okay. Good luck.

25 MR. DEVOE: Your Honor, could we make a

1 motion to consider reducing the 26 years to match
2 up the armed robbery of 25 years?

3 THE COURT: No, I deny. He shot that man
4 and but for the gun, he would have killed him. He
5 could have robbed him without shooting him. But
6 for the gun misfiring, he would have killed that
7 man. And the fact he doesn't -- didn't have a
8 significant record and he is that young, is the
9 only reason I didn't max him.

10 --End of Requested Transcript of Record--

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

CERTIFICATE

State of South Carolina

County of Clarendon

I, Margaret T. Sullivan, Official Court Reporter
for the Third Judicial Circuit of the State of South
Carolina, do hereby certify that the foregoing is a true,
accurate and complete Transcript of Record of the
proceedings had and evidence introduced in the above
captioned case, relative to appeal, in Common Pleas
nonjury, on December 7th and 8th 2009, for Clarendon
County, Manning, South Carolina.

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

April 5, 2010
Date

Margaret T. Sullivan

Margaret T. Sullivan, Court Reporter
My commission expires October 3, 2011

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Clarendon County

R. Ferrell Cothran, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

GEORGE SMITH,

APPELLANT

FINAL BRIEF OF APPELLANT

ELIZABETH A. FRANKLIN-BEST
Appellate Defender

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

ATTORNEY FOR APPELLANT.

TABLE OF CONTENTS

TABLE OF CONTENTS.....	1
TABLE OF AUTHORITIES	2
STATEMENT OF ISSUES ON APPEAL	3
STATEMENT OF THE CASE	4
ARGUMENT	5
CONCLUSION	6
CERTIFICATE OF COUNSEL	7

TABLE OF AUTHORITIES

Cases

<u>S. Bell Tel. & Tel. Co. v. Hamm</u> , 306 S.C. 70, 409 S.E.2d 775 (1991)	5
<u>State v. Vick</u> , 384 S.C. 189, 682 S.E.2d 275 (Ct. App. 2009).....	5

Statutes

South Carolina Code Ann. §16-3-620	5

STATEMENT OF ISSUES ON APPEAL

Did the trial court judge err when he sentenced appellant to 26 years for assault and battery with intent to kill when the crime only carries a maximum sentence of 20 years?

STATEMENT OF THE CASE

George A. Smith was indicted by the Clarendon County grand jury of assault and battery with intent to kill, armed robbery, and possession of a weapon during the commission of a violent crime. He was tried before the Hon. R. Farrell Cothran, and a jury on December 8, 2009. He was represented by Harry Devoe, Esquire. He was convicted, and sentenced to 26 years for assault and battery with intent to kill, 25 years for armed robbery, and 5 years for the weapons charge.

This appeal timely follows.

ARGUMENT

The trial court judge erred when he sentenced appellant to 26 years for assault and battery with intent to kill when the crime only carries a maximum sentence of 20 years.

Appellant was convicted after trial of assault with intent to kill, armed robbery, and possession of a weapon during the commission of a crime. ROA p. 88-87. The state alleged that appellant shot the victim as he left a club in Summerton, South Carolina. The State further alleged that appellant and the victim knew one another, and that appellant shot the victim in the leg and took his money. Appellant was identified as the victim's assailant by the victim, and the victim's wife, who observed the shooting from her apartment. ROA p. 4-5; ROA p. 6-60. According to the lead investigator on the case, Thomas Burgess, the victim informed law enforcement that appellant shot him. Tr. 60-86.

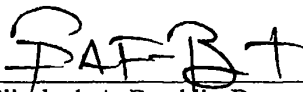
During sentencing, the judge sentenced appellant to 26 years for assault and battery with intent to kill. The judge then sentenced appellant to 25 years for armed robbery and 5 years for possession of a weapon. He ordered that all these sentences be run concurrently. ROA p. 95-96. Respectfully, appellant's sentence for assault and battery with intent to kill is illegal because it exceeds the statutory maximum for that offense.

Assault and battery with intent to kill is a Class C felony proscribed by South Carolina Code Ann. §16-3-620 (1976). The maximum sentence allowed for this offense is 20 years. Appellant's sentence, therefore, is illegal. Respectfully, and in the interests of judicial economy, appellant asks this court to vacate the sentence and remand for the imposition of a legal sentence. State v. Vick, 384 S.C. 189, 682 S.E.2d 275 (Ct. App. 2009); S. Bell Tel. & Tel. Co. v. Hamm, 306 S.C. 70, 409 S.E.2d 775 (1991).

CONCLUSION

For the preceding reason, appellant respectfully asks this Court to vacate his conviction for assault and battery with intent to kill and remand for the imposition of a legal sentence for that conviction.

Respectfully submitted,


Elizabeth A. Franklin-Best
Appellate Defender

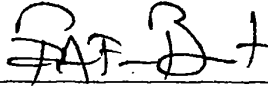
ATTORNEY FOR APPELLANT.

This 15th day of March, 2011.

CERTIFICATE OF COUNSEL

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

March 15, 2011



ELIZABETH A. FRANKLIN-BEST
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Clarendon County

R. Ferrell Cothran, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

GEORGE SMITH,

APPELLANT

CERTIFICATE OF SERVICE

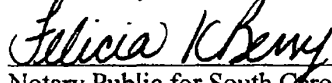
The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Harold M. Coombs, Jr., Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 15th day of March, 2011.



Elizabeth A. Franklin-Best
Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 15th day of March, 2011.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: June 21, 2020.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Clarendon County
R. Ferrell Cothran, Judge

THE STATE

Respondent,

vs.

GEORGE SMITH,

Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

JOHN W. McINTOSH.
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

HAROLD M. COOMBS, JR.
Senior Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ERNEST A. FINNEY, III
Solicitor, Third Judicial Circuit

Sumter County Courthouse
141 N. Main Street
Sumter, SC 29150
(803) 436-2185

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUES ON APPEAL	1
STATEMENT OF THE CASE	2
ARGUMENT	
<u>The want of a contemporaneous objection to the sentence preserves no issue for appellate review.</u>	3
CONCLUSION	5

TABLE OF AUTHORITIES**Cases:**

State v. Johnston, 333 S.C. 459, 510 S.E.2d 423 (1999) 4

State v. Passmore, 363 S.C. 568, 611 S.E.2d 273 (Ct. App. 2005) 4

State v. Vick, 384 S.C. 189, 682 S.E.2d 275 (Ct. App. 2009) 4

Other Authorities:

S.C. Code Ann. §§ 16-3-620, 16-1-90(C), and 16-1-20(A) (Westlaw SC-STANN09) ... 3

STATEMENT OF ISSUES ON APPEAL

1. The defendant says the offense of assault and battery with intent to kill has a maximum sentence of 20 years and asks whether the court erred imposing sentence for that offense.

(Appellant's Statement of Issues on Appeal).

2. The want of a contemporaneous objection to the sentence preserves no issue for appellate review.

STATEMENT OF THE CASE

The Clarendon County Grand Jury charged the defendant with assault and battery with intent to kill, armed robbery, and possession of a weapon during a violent crime. (2008-GS-14-0352). The defendant and his counsel came to trial December 8, 2009 before the Honorable R. Ferrell Cothran, Judge, and a jury. The jury found the defendant guilty of the three offenses. The court imposed concurrent imprisonment terms of 26 years (ABWIK), 25 years (armed robbery), and 5 years (possession of a weapon during a violent crime). The defendant served opposing counsel a timely notice of appeal.

ARGUMENT

The want of a contemporaneous objection to the sentence preserves no issue for appellate review.

The victim had known the defendant ("Chips") for a long time. The victim was walking home from a bar in the very early morning. He heard a gun click. He looked and saw the defendant behind him. The defendant shot him in the leg, and demanded and took his silver and gold neck chains. He also demanded the victim's money. The defendant aimed the gun at the victim's face; it clicked but didn't fire. Finally, the defendant said, "Tell the police this is what I do." (ROA. pp. 6-32).

The jury found the defendant guilty of assault and battery with intent to kill, armed robbery, and possession of a weapon during a violent crime. The court imposed concurrent imprisonment terms of 26 years (ABWIK), 25 years (armed robbery), and 5 years (possession of a weapon during a violent crime). The trial judge noted the gravity of the assault and battery with intent to kill and observed that but for the misfiring of the gun, the defendant would have killed his hapless victim. The defendant did not object to the sentence of twenty-six (26) years for assault and battery with intent to kill on the ground that it was in excess of the statute. (ROA. pp. 87-88; pp. 95-96).

At the time of the offense (April 6, 2008) and sentencing (Dec. 8, 2009), assault and battery with intent to kill was punishable by imprisonment not to exceed twenty years. (Indictment 2008-GS-14-0352, ROA p. 99; Sentencing sheet 2008-GS-14-0352 for ABWIK dated 12/8/2009, ROA p. 97; ROA. pp. 1 and 95). S.C. Code Ann. §§ 16-3-620, 16-1-90(C), and 16-1-20(A) (Westlaw SC-STANN09).

A challenge to sentencing must be raised at trial. Without a contemporaneous objection - at the time of the imposition of sentence - on the ground that a sentence exceeds the trial court's sentencing authority, the defendant must seek redress through post-conviction relief. State v. Johnston, 333 S.C. 459, 510 S.E.2d 423 (1999); State v. Passmore, 363 S.C. 568, 611 S.E.2d 273 (Ct. App. 2005)(where defendant suffered violation of right to jury trial but not threat of incarceration beyond legal sentence); State v. Vick, 384 S.C. 189, 682 S.E.2d 275 (Ct. App. 2009)(noting that sentence for murder precludes sentence for kidnaping of the same victim and summarily *vacating* clearly erroneous kidnaping sentence). The assignment of error has not been preserved for appellate review, and the appellate court should decline to review the matter that is raised for the first time on appeal.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

HAROLD M. COOMBS, JR.
Senior Assistant Attorney General

ERNEST A. FINNEY, III
Solicitor, Third Judicial Circuit

BY: Harold M. Coombs, Jr.
Harold M. Coombs, Jr.

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

March 11, 2011

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Clarendon County
R. Ferrell Cothran, Judge

THE STATE,

Respondent,

vs.

GEORGE SMITH,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule
211(b), SCACR.

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

HAROLD M. COOMBS, JR.
Senior Assistant Attorney General

ERNEST A. FINNEY, III
Solicitor, Third Judicial Circuit

By: Harold M. Coombs, Jr.
Harold M. Coombs, Jr.

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

March 11, 2011

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Clarendon County
R. Ferrell Cothran, Judge

THE STATE,

Respondent,

vs.

GEORGE SMITH,

Appellant.

PROOF OF SERVICE

I, Harold M. Coombs, Jr., certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, Elizabeth A. Franklin-Best, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, SC 29211.

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

This 11th day of March, 2011.

Harold M. Coombs, Jr.
HAROLD M. COOMBS, JR.

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEY FOR RESPONDENT

2012 WL 10844350

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK
COURT RULES BEFORE CITING.

Court of Appeals of South Carolina.

The STATE, Respondent,

v.

George Arsenio SMITH, Appellant.

No. 2012-UP-350.

|

Submitted April 2, 2012.

|

Decided June 6, 2012.

Appeal from Clarendon County; R. Ferrell Cothran Jr.,
Circuit Court Judge.**Attorneys and Law Firms**Appellate Defender Elizabeth A. Franklin-Best, of
Columbia, for Appellant.Attorney General Alan Wilson, Chief Deputy Attorney
General John W. McIntosh, Senior Assistant Deputy
Attorney General Salley W. Elliott, and Senior Assistant
Attorney General Harold M. Coombs Jr., all of
Columbia; and Solicitor Ernest A. Finney III, of Sumter,
for Respondent.**Footnotes**

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

Opinion

PER CURIAM.

*1 George Arsenio Smith appeals his twenty-year sentence for a conviction of assault and battery with intent to kill, arguing the sentence exceeded the maximum sentence allowed by law. We affirm¹ pursuant to Rule 220(b)(1), SCACR, and the following authorities: S.C.Code Ann. § 16-3-620 (2003) ("The crime of assault and battery with intent to kill shall ... be punished by imprisonment not to exceed twenty years."); Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."); *Tant v. S.C. Dep't of Corr.*, 395 S.C. 446, 449, 718 S.E.2d 753, 755 (Ct.App.2011) ("Under ordinary circumstances, [the Department of Corrections] must determinè the sentence imposed by the [circuit] court from the sentencing sheets.").

AFFIRMED.

FEW, C.J., HUFF and SHORT, JJ., concur.

All Citations

Not Reported in S.E.2d, 2012 WL 10844350

**RECEIVED**

JUN 27 2012

*clerk***The South Carolina Court of Appeals**JENNY ABBOTT KITCHINGS
CLERKV. CLAIRE ALLEN
DEPUTY CLERKPOST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

June 25, 2012

The Honorable Beulah G. Roberts
PO Box 136
Manning SC 29102-0136**REMITTITUR**Re: The State v. Smith, George
Lower Court Case No. 2008GS1400352
Appellate Case No. 2009-147888

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

A handwritten signature in cursive script that reads "Jenny A. Kitchens / kg".

CLERK

cc: Amy Anders Land
Harold M. Coombs, Jr.
Elizabeth Anne Franklin-Best

FORM 5

STATE OF SOUTH CAROLINA)

COUNTY OF CLARENDON)

George A. Smith, #329531,
Full name and prison number (if any) of Applicant.)

v.)

State of South Carolina)

CASE # 2012-CP-14-392
IN THE COURT OF COMMON PLEAS

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 of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

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

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

1. Place of detention Lee Correctional Institution, 990 Wisacky Hwy, Bishopville, SC 29010
2. Name and location of Court which imposed sentence Clarendon County Court of General Sessions.
3. Name(s) of co-defendant(s) (if any) _____
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2009-GS-14-69: Assault and Battery with Intent to Kill, Armed Robbery, Possession of a Weapon during a Violent Crime

(b) _____

(c) _____

CERTIFIED TRUE COPY
OF ORIGINAL FILED IN THIS OFFICEDATE 8/22/2012Bertha M. Roberts

Revised 3/2003

CLERK OF COURT
CLARENDON COUNTY, SC

5. The date upon which sentence was imposed and the terms of the sentence
 - (a) December 8, 2009: 26 years, 25 years, and 5 years concurrent
 - (b) _____
 - (c) _____
6. Check whether a finding of guilty was made:
 - (a) after a plea of guilty _____
 - (b) after a plea of not guilty X
 - (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence? Yes.
8. If you answered "yes" to (7), list:
 - (a) the name of each Court to which you appealed:
 - i. South Carolina Court of Appeals
 - ii. _____
 - iii. _____
 - (b) the result in each such Court to which you appealed:
 - i. Conviction affirmed.
 - ii. _____
 - iii. _____
 - (c) the date of each such result:
 - i. June 6, 2012
 - ii. _____
 - iii. _____
 - (d) if known, citations of any written opinion or orders entered pursuant to the appeal:
 - i. 2012-UP-350
 - ii. _____
 - iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
 - (a) _____
 - (b) _____
 - (c) _____

5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) December 8, 2009: 26 years, 25 years, and 5 years concurrent
 - (b) _____
 - (c) _____
6. Check whether a finding of guilty was made:
 - (a) after a plea of guilty _____
 - (b) after a plea of not guilty X
 - (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes.
8. If you answered "yes" to (7), list:
 - (a) the name of each Court to which you appealed:
 - i. South Carolina Court of Appeals
 - ii. _____
 - iii. _____
 - (b) the result in each such Court to which you appealed:
 - i. Conviction affirmed.
 - ii. _____
 - iii. _____
 - (c) the date of each such result:
 - i. June 6, 2012
 - ii. _____
 - iii. _____
 - (d) if known, citations of any written opinion or orders entered pursuant to such results:
 - i. 2012-UP-350
 - ii. _____
 - iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
 - (a) _____
 - (b) _____
 - (c) _____

Revised 3/2003

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Ineffective Assistance of Trial Counsel.
 - (b) Ineffective Assistance of Appellate Counsel.
 - (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) Failure to prepare and investigate.
 - (b) Failure to utilize witnesses.
 - (c) Failure to raise all meritorious issues on appeal.
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? No.
 - (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No.
 - (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No.
 - (d) any other petitions, motions or applications in this or any other Court? No.
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
 - i. _____
 - ii. _____
 - iii. _____
 - iv. _____
 - (b) the name and location of the Court in which each was filed:
 - i. _____
 - ii. _____
 - iii. _____
 - iv. _____
 - (c) the disposition thereof:
 - i. _____
 - ii. _____

Revised 3/2003

iii. _____

iv. _____

(d) the date of each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

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

i. _____

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No.

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

(a) which grounds have been presented:

i. _____

ii. _____

iii. _____

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

i. _____

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) PCR is the proper forum.

(b) _____

(c) _____

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

Revised 3/2003

- (a) your arraignment and plea? Yes.
- (b) your trial, if any? Yes.
- (c) your sentencing? Yes.
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes.
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? _____

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

- (a) the name and address of each attorney who represented you:
 - i. Harry Devoe, 7411 Black River Road, New Zion, SC 29111
 - ii. Elizabeth A. Franklin-Best, Office of Appellate Defense, PO Box 11589,

Columbia, SC 29211

- iii. _____
- (b) the proceedings at which each such attorney represented you:
 - i. Trial.
 - ii. Direct Appeal.
 - iii. _____

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

A new trial.

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

No.

STATE OF SOUTH CAROLINA)

County of Lee)

VERIFICATION

I, George A. Smith, 329531, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

George Smith

SWORN to and subscribed before me this 20
day of Aug, 2012.

Debra Sise (L.S.)
Notary Public

My Commission Expires: 11-4-2015

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

I, George A. Smith, #329531, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

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

George Smith
Applicant

SWORN or affirmed to and subscribed before me this
20 day of Aug, 2012

Debra Suris
Notary Public

My Commission Expires: 11-4-2015

STATE OF SOUTH CAROLINA
COUNTY OF CLARENDON

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

George A. Smith, #329531,

) Case No. 2012-CP-14-0392
)

) Applicant,
)

) v.
)

) **RETURN**
)

) State of South Carolina,
)

) Respondent.
)

The Respondent, making its Return to the application for post-conviction relief, filed August 22, 2012, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clarendon County Clerk of Court. The Applicant was true bill indicted at the August 2008 term of the Clarendon County Grand Jury for Assault and Battery With Intent to Kill, Armed Robbery, and Possession of a Weapon During a Violent Crime (2008-GS-14-0352). Harry Devoe, Esquire, represented him. Applicant proceeded to a jury trial before the Honorable R. Ferrell Cothran, Jr. On December 8, 2009, Applicant was found guilty of Assault and Battery With Intent to Kill, Armed Robbery, and Possession of a Weapon During a Violent Crime. Judge Cothran sentenced Applicant to twenty years imprisonment for Assault and Battery With Intent to Kill, twenty-five years for Armed Robbery, and five years for Possession of a Weapon During a Violent Crime; with the sentences to be served concurrently.

A timely notice of appeal was filed. The South Carolina Court of Appeals affirmed the lower court's conviction. State v. George Arsenio Smith, Op. No. 2012-UP-350 (S.C. Ct. App. filed June 6, 2012). The Remittitur was sent on June 25, 2012.

Attached herewith and incorporated herein are the records of the Clarendon County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, Applicant's appellate records, and the trial transcript. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

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

1. Ineffective assistance of counsel; and
 - a. Failure to prepare and investigate.
 - b. Failure to utilize witnesses.
2. Ineffective assistance of appellate counsel.
 - a. Failure to raise all meritorious issues on appeal.

Any claims not specifically enumerated in the post-conviction application or amendments will be opposed by the State at an evidentiary hearing, and the State will seek summary dismissal of vague or general claims at an evidentiary hearing. S.C. Code §17-27-50. All amendments should be made well in advance of an evidentiary hearing by counsel of record. Rule 11, SCRCP.

III.

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel 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.

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. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, the Respondent requests an evidentiary hearing to fully resolve this issue. See 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 the 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.

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

V.

Each and every allegation contained within the application not hereinbefore either expressly admitted, qualified or explained is hereby denied.

V.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

MEGAN E. HARRIGAN
Assistant Attorney General

By: Megan E. Harrigan
ATTORNEYS FOR RESPONDENT
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
Telephone: (803) 734-3737

February 12 2013.

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CLARENDON	)	
	)	
GEORGE A. SMITH, 329531,	)	2012-CP-14-0392
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
	)	

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

Shaun Kent, Esquire
Kent Law Firm, LLC
Post Office Box 117
Manning, SC 29102-1292

DATED this 12th day of February, 2013.


 Lauren Meara, Legal Assistant
 For Respondent

State of South Carolina)
)
 County of Clarendon)

In the Court of Common Pleas
 Third Judicial Circuit
 2012-CP-14-0392

George A. Smith,)
)
 Applicant,)
)
 vs.)
)
 State of South Carolina,)
)
 Respondent.)

Transcript of Record

September 10, 2014
 Sumter, South Carolina

B E F O R E:

The Honorable Clifton B. Newman, Judge

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

Tricia A. Blanchette, Esquire
 Attorney for the Applicant

Daniel F. Gourley, II, Esquire, Assistant Attorney General
 Attorney for the Respondent

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

I N D E X

<u>Witness/Description</u>	<u>Page No.</u>

Applicant's Case in Chief

George A. Smith

Direct Examination by Ms. Blanchette 9

Cross-examination by Mr. Gourley 39

Peter Skidmore

Direct Examination by Ms. Blanchette 44

Respondent's Case in Chief

Harry L. Devoe, Jr.

Direct Examination by Mr. Gourley. 61

Cross-examination by Ms. Blanchette. 68

Redirect Examination by Mr. Gourley. 76

Examination by the Court 78

Applicant's Case in Reply

George A. Smith

Direct Examination by Ms. Blanchette 79

Certificate Page. 87

			3
1	<u>E X H I B I T S</u>		
2			
3	<u>No.</u>	<u>Description</u>	<u>Page No.</u>
4	A-1	Copy of Case History.	21
5		(Original is substituted later.)	
6	A-2	Sworn Statement	28
7	A-3	Motion.	75
8			
9	C-1	Affidavit	59
10			
11			
12			
13			
14			
15			
16			
17			
18			
19			
20			
21			
22			
23			
24			
25			

1 THE COURT: All right. Yes, sir.

2 MR. GOURLEY: May it please the court? This is *George*
3 *Smith vs. The State of South Carolina*, docket number
4 2012-CP-14-0392. He is presently confined in the South
5 Carolina Department of Corrections pursuant to his
6 commitment by the Clarendon County clerk of court. He was
7 true-bill indicted at the August 2008 term of the Clarendon
8 County grand jury for assault and battery with intent to
9 kill, armed robbery, and possession of a weapon during a
10 violent crime. Mr. Harry Devoe represented him.

11 He proceeded to a jury trial before the Honorable R.
12 Ferrell Cothran, Jr., and on December 8, 2009, he was found
13 guilty of assault and battery with intent to kill, armed
14 robbery, and possession of a weapon during a violent crime.
15 Judge Cothran sentenced the applicant to twenty years of
16 imprisonment for the assault and battery with intent to
17 kill, twenty-five years imprisonment for the armed robbery,
18 and five years imprisonment for possession of a weapon
19 during a violent crime. Those sentences were to be served
20 concurrently.

21 A timely notice of appeal was filed; the South
22 Carolina Court of Appeals affirmed the lower court's
23 conviction. A remittitur was issued on June 25, 2012. He
24 subsequently filed an application for postconviction relief
25 on August 22, 2012, alleging that he was being held in

1 custody unlawfully based on an ineffective assistance of
2 counsel claim, ineffective assistance of appellate counsel.
3 PCR counsel, Ms. Tricia Blanchette, filed an amendment to
4 the application on September 4, 2014, and, Your Honor, he's
5 represented here today by Ms. Blanchette. I will turn it
6 over to Ms. Blanchette.

7 THE COURT: Ms. Blanchette.

8 MS. BLANCHETTE: Thank you, Your Honor. May it please
9 the court?

10 THE COURT: Yes, ma'am.

11 MS. BLANCHETTE: My name is Tricia Blanchette. I'm
12 here on behalf of George Smith.

13 Your Honor, since I recently filed the amendment, I
14 was not sure if it was in your packet or not, but I do have
15 a copy if you, if you need that.

16 MR. GOURLEY: I believe it's in your packet, Your
17 Honor.

18 (A PAUSE.)

19 THE COURT: I do have it. Dated September 4th?

20 MS. BLANCHETTE: That's correct, Your Honor. I wanted
21 to make sure you had that in front of you. I also have two
22 cases that I would like to submit to the court. Would you
23 like to see these now or at the close of the case?

24 THE COURT: Now is good.

25 MS. BLANCHETTE: Okay, and for the record, I'm

1 submitting a copy of *Lounds vs. State*, which is spelled
2 L-O-U-N-D-S, and *Jordan vs. State*.

3 THE COURT: Can you highlight it, or are you going to
4 tell me later?

5 MS. BLANCHETTE: I would prefer to do it at the
6 conclusion of the case if that would be fine, Your Honor.

7 THE COURT: Good. Okay.

8 MS. BLANCHETTE: And, Your Honor, just some additional
9 procedural history in this case, I was originally retained
10 by Mr. Smith's family. Unfortunately through the housing
11 crisis, they lost their home and his family has
12 subsequently relocated to New York. So, both the financial
13 resources and the assistance in putting this case together
14 that his family could have provided me was greatly
15 diminished at that point.

16 I filed a motion in January of this year for indigent
17 funding for a private investigator. We had a hearing in
18 March, and an order was signed giving us funds for Pete
19 Skidmore to assist in the investigation. He's here today
20 and will be one of our witnesses, but I just wanted to
21 provide that additional procedural history to Your Honor.

22 THE COURT: Thank you.

23 MS. BLANCHETTE: And unless you would like an opening
24 statement, I'm prepared to call my first witness.

25 THE COURT: Opening statements are always helpful to

1 me.

2 MS. BLANCHETTE: I will be happy to do so, Your Honor.

3 In this case, it simply boils down to my client's over
4 -- his umbrella allegation, I guess I would say a failure
5 to investigate and properly prepare his case for trial.
6 This case had very serious charges. We were looking at an
7 assault and battery with intent to kill and an armed
8 robbery charge. There was no defense put up, and it was a
9 150 page transcript. I would submit that that is not
10 typical.

11 Today we will be going into a number allegations,
12 starting with how many times they met and what they did to
13 prepare; then going into witnesses that were available and
14 unfortunately are unavailable today that he wanted to
15 utilize; the fact that he was not utilized as a witness;
16 that absolutely no investigation was done and what it could
17 have turned up; and then I want to go through the
18 transcript somewhat into some trial errors.

19 One interesting thing that brings us all the way to
20 the end of this case is he was sentenced to twenty-six
21 years on his assault and battery with intent to kill
22 charge. That is an illegal sentence. Mr. Devoe did make a
23 motion to reconsider, but he asked that it be dropped down
24 to twenty-five years, which was still an illegal sentence.
25 That issue was raised on appeal, and the state properly

1 argued that Mr. Devoe failed to preserve that.

2 Fortunately for Mr. Smith, his sentence was
3 subsequently dropped down to twenty years, but I speak to
4 that issue as to just one trial error that I wanted to
5 point out at the outset because it just, I think, shows the
6 lack of understanding or the lack of familiarity or
7 whatever it may be, lack of preparation that Mr. Devoe had
8 in this case that he didn't even realize that his sentence
9 was illegal, and then asked the sentence be considered and
10 another illegal sentence be given.

11 We also have another interesting issue that deals with
12 appellate counsel. It's my understanding, and I was
13 agreeable to the fact that Ms. Franklin-Best could not be
14 here today, so she did an affidavit. But we are alleging
15 she should have obtained a motion transcript that was
16 actually heard pretrial when my client attempted to relieve
17 Mr. Devoe. That transcript was not obtained unfortunately.
18 I have tried and not been able to locate that transcript.
19 I can continue to do so but I have not at this point, but
20 she did not obtain that transcript at a time period when it
21 still would have been available, and she did not raise that
22 issue on appeal, and I think her affidavit speaks for
23 itself. I believe it indicates -- and I'll let the state
24 submit that to you -- that she should have raised that
25 issue.

G. SMITH - DIRECT EXAMINATION BY MS. BLANCHETTE

9

1 Your Honor, that's just a brief overview, but I would
2 like to call my client as my first witness if the court
3 doesn't have any questions.

4 THE COURT: Very good. You may proceed.

5 MS. BLANCHETTE: I would call George Smith to the
6 stand.

7 GEORGE SMITH, BEING DULY SWORN,
8 TESTIFIES AS FOLLOWS:

9 BAILIFF: Please state your full name. Spell your
10 name for the record.

11 WITNESS: George Smith, S-M-I-T-H.

12 DIRECT EXAMINATION BY MS. BLANCHETTE:

13 Q. Mr. Smith, where are you currently incarcerated?

14 A. Lee Correctional.

15 Q. Okay, and we are here today about an incident that
16 took place on, April 6, 2008. Is that correct?

17 A. Yes, ma'am.

18 Q. Okay, and do you recall going to trial December 8,
19 2009?

20 A. Yes, ma'am.

21 Q. Okay, and who was the attorney that represented you?

22 A. Harry Devoe.

23 Q. And what was the victim's name in this case?

24 A. Kelvin Black.

25 Q. Now when you went to trial, you were facing a

G. SMITH - DIRECT EXAMINATION BY MS. BLANCHETTE

10

1 three-count indictment. That was to assault and battery
2 with intent to kill, armed robbery, and possession of a
3 weapon. Is that correct?

4 A. Yes, ma'am.

5 Q. Okay, and what sentence did you originally receive on
6 the assault and battery with intent to kill?

7 A. Twenty-six years.

8 Q. And what, what is your sentence at this time?

9 A. Twenty years.

10 Q. And what sentence did you receive on the armed
11 robbery?

12 A. Twenty-five years.

13 Q. And on the possession of a weapon charge?

14 A. Five years.

15 Q. Now, you indicated that Mr. Devoe represented you.
16 Was he appointed or retained?

17 A. Appointed.

18 Q. Do you remember approximately how many times you met
19 with Mr. Devoe?

20 A. Say about two times.

21 Q. And for those meetings, were you at the county
22 facility or were you out on bond?

23 A. County.

24 Q. Okay. So, those took place at the county jail?

25 A. Yes, ma'am.

G. SMITH - DIRECT EXAMINATION BY MS. BLANCHETTE

11

1 Q. Tell me what happened during those two meetings.

2 A. He been trying to get me to plead both meetings.

3 Q. Okay. What was the plea offer that he gave you?

4 A. Twenty years.

5 Q. Okay, and what did you tell him about that plea offer?

6 A. I didn't want to take it.

7 Q. Okay. Did you all ever go over the discovery or the
8 Rule 5 documents on his visits to the jail?

9 A. No, ma'am.

10 Q. Did you discuss witnesses that could be called on your
11 behalf?

12 A. Yes, ma'am.

13 Q. Okay, and did you give him who those witnesses were?

14 A. Yeah, my uncle Levi Lang.

15 Q. Okay, and why did you want your uncle Levi Lang
16 called?

17 A. Because I was staying at his house during the time of
18 the crime.

19 Q. Okay, and could you spell his last name for us?

20 A. L-A-N-G.

21 Q. Okay, and were there other witnesses that you had
22 wanted him to maybe try to locate or speak to?

23 A. Yes, ma'am, but I don't know the name at the time.
24 They stay around the apartment complex.

25 Q. Okay, and this incident was a shooting that you

G. SMITH - DIRECT EXAMINATION BY MS. BLANCHETTE

12

1 allegedly did at night outside in the parking complex. Is
2 that correct?

3 A. Yes, ma'am.

4 Q. Okay. So, you wanted him to go to the apartment
5 complex and do some type of investigation?

6 A. Yes, ma'am.

7 Q. Okay. Besides talking to people at the apartment
8 complex, what else did you want him to do at the apartment
9 complex?

10 A. Subpoena my uncle.

11 Q. Okay. Was there anything else specifically at the
12 apartment complex ---

13 A. Yeah.

14 Q. --- that you asked him to look into?

15 A. Video cameras.

16 Q. Okay, and, Mr. Smith, you're a quiet talker. You're
17 doing a great job, but also make sure you wait for me to
18 finish my question, and then you talk so the court reporter
19 can get both of us, okay?

20 A. All right.

21 Q. Now, what about these video cameras did you tell Mr.
22 Devoe?

23 A. They was, they was located around the apartments.

24 Q. Okay.

25 MS. BLANCHETTE: And, Your Honor, may I approach the

G. SMITH - DIRECT EXAMINATION BY MS. BLANCHETTE

13

1 witness with a copy of the transcript?

2 THE COURT: Yes.

3 BY MS. BLANCHETTE:

4 Q. Mr. Smith, if you could turn to page 98 and 99 of the
5 transcript there? There Investigator Burgess is on the
6 stand.

7 MS. BLANCHETTE: I apologize. That is the wrong
8 citation. Your Honor, I can come back and give the correct
9 citation.

10 BY MS. BLANCHETTE:

11 Q. But when Investigator Burgess was on the stand, your
12 attorney asked him why he didn't obtain the video that was
13 on the pole. Is that something that you wanted your
14 attorney to obtain?

15 A. Yes, ma'am.

16 Q. And did he do that on your behalf?

17 A. No, ma'am.

18 Q. Okay. He simply asked the investigator why he didn't
19 get it. Is that correct?

20 A. Yes, ma'am.

21 Q. Now, you, you made a brief reference to this, that
22 you turned down a plea offer to twenty years. Is that
23 correct?

24 A. Yes, ma'am.

25 Q. Okay. If you could turn to page 145 of your

G. SMITH - DIRECT EXAMINATION BY MS. BLANCHETTE

14

1 transcript. Mr. Devoe is giving his statement in
2 mitigation or his statement in your favor prior to your
3 sentence, and if you turn to page 146, line 5, he informs
4 the court that you'd turned down a decent offer. Did you
5 find that to be favorable, that your attorney was telling
6 the court that you turned down an offer?

7 A. No, ma'am.

8 Q. Okay. Now prior to proceeding to trial, did you ever
9 attempt to have Mr. Devoe relieved?

10 A. Yes, ma'am.

11 Q. Explain what happened or what you did.

12 A. I went in front of Judge Ferrell Cothran and tell him
13 I wanted Harry Roe [sic] relieved off my case.

14 Q. Okay, and did Judge Cothran make a ruling on that?

15 A. He said no. He going to keep Larry Roe appointed my
16 case.

17 Q. So, he denied your request to have him relieved. Is
18 that correct?

19 A. Yes, ma'am.

20 Q. Okay. Were you in a courtroom like this, or were you
21 in the -- were you in the old courthouse, I assume?

22 A. In the courtroom.

23 Q. Okay, and you went in front of Judge Cothran and
24 everything was on the record as far as you know?

25 A. Yes, ma'am.

G. SMITH - DIRECT EXAMINATION BY MS. BLANCHETTE

15

1 Q. Okay. Now as part of my representation, you asked
2 that I look into obtaining that transcript, and we've been
3 unable to identify the date that that occurred. Is that
4 correct?

5 A. Yes, ma'am.

6 Q. Okay. Did you ever receive a copy of a written order
7 from that?

8 A. No, ma'am.

9 Q. And as part of my representation, I requested a
10 complete copy of Mr. Devoe's file. Was anything in that
11 file that indicated what date that could have occurred?
12 Did we see anything regarding that motion to relieve?

13 A. No, ma'am.

14 Q. Okay. Mr. Smith, is that an issue that you would have
15 wanted raised on your appeal?

16 A. Yes, ma'am.

17 Q. And was that raised by your appellate defender?

18 A. No, ma'am.

19 Q. Now, when you were in the county jail, did you see Mr.
20 Devoe visiting with other inmates?

21 A. Yeah. Kelvin Black brother, Broadus Black.

22 Q. Okay, and remind me who Kelvin Black was again?

23 A. The victim in my case.

24 Q. Okay. So, you saw him in a meeting with Broadus
25 Black. Did you raise a questions about that to Mr. Devoe?

G. SMITH - DIRECT EXAMINATION BY MS. BLANCHETTE

16

1 A. Yeah, about being Kelvin Black brother.

2 Q. Okay, and did he ever talk with you about that being a
3 potential conflict or there being a problem there or asking
4 you if you were okay with him representing both of you
5 concurrently?

6 A. No, ma'am.

7 Q. Now, is this your understanding that Mr. Devoe may
8 have also represented the victim, Kelvin Black, at some
9 point in time?

10 A. Yes, ma'am.

11 Q. How did you obtain information on that, regarding
12 that, that he represented Kelvin Black? How did you find
13 out about that?

14 A. Kelvin, Kelvin Black was in the county, county jail
15 during the same time, too, when I got lock up.

16 Q. Okay, and subsequently did you receive information
17 from an attorney that had taken over representation for
18 Kelvin Black?

19 A. Yes. Steve McKenzie.

20 Q. Okay, and did you ask me to contact Steve McKenzie
21 about that?

22 A. Yes, ma'am.

23 Q. And as a result of contacting him, we were informed
24 that he did, in fact, take over representation for Mr.
25 Black on two drug charges that were disposed of in 2009,

G. SMITH - DIRECT EXAMINATION BY MS. BLANCHETTE

17

1 but he couldn't provide us any verification that Mr. Devoe
2 was the prior attorney on that charge. Is that correct?

3 A. Yes, ma'am.

4 Q. And was the clerk of court's office for Clarendon
5 County able to provide us any verification that Mr. Devoe
6 represented Kelvin Black?

7 A. No, ma'am.

8 Q. But it was your understanding that Mr. Devoe had
9 represented both Kelvin Black and his brother, Broadus. Is
10 that correct?

11 A. Yes, ma'am.

12 Q. Did he ever discuss with you his representation of
13 Kelvin Black, the victim in this case?

14 A. No, ma'am.

15 Q. Did he ever explain to you that that could present a
16 conflict and make sure you were okay with him being your
17 attorney?

18 A. No, ma'am.

19 Q. If you would have known and had it confirmed that he
20 did represent Broadus and Kelvin, would you have wanted him
21 to proceed as your attorney?

22 A. No, ma'am.

23 Q. And, in fact, you actually tried to relieve him at one
24 point, did you not?

25 A. Yes, ma'am.

G. SMITH - DIRECT EXAMINATION BY MS. BLANCHETTE

18

1 Q. Okay. When you tried to relieve him, were you aware
2 that you could have raised that conflict issue to Judge
3 Cothran?

4 A. No, ma'am.

5 Q. Is it something that Mr. Devoe ever told the court or
6 made them aware as far as you know?

7 A. No, ma'am.

8 Q. Now, you said there were witnesses you wanted called.
9 Could you turn to page 10 of your transcript, please?
10 About line 5, Mr. Devoe indicates that he hasn't talked to
11 you yet this morning -- I'm sorry, beginning on line 1. He
12 indicates that he does have witnesses, but he hadn't had a
13 chance yet to talk to you that morning about who the
14 witnesses were. Did you expect that your attorney would
15 have ironed out who the witness were prior to the morning
16 of trial?

17 A. Yes, ma'am.

18 Q. Did you want him to speak with your uncle prior to the
19 morning of trial?

20 A. Yes, ma'am.

21 Q. Did you want him to go out to the apartment complexes
22 and speak to witnesses prior to the morning of trial?

23 A. Yes, ma'am.

24 Q. Did you want him to attempt to speak with both the
25 victim's wife and his sister-in-law that were present in

G. SMITH - DIRECT EXAMINATION BY MS. BLANCHETTE

19

1 the home prior to trial?

2 A. Yes, ma'am.

3 Q. And as far as you know, did he do any of those things
4 on your behalf?

5 A. No, ma'am.

6 Q. Now, could you turn to page 145 the transcript,
7 please? Line 19, he does indicate that you have family
8 that's supportive, and they've tried to help you out, but
9 they couldn't find your witnesses. It was too late in the
10 day to do it. Again, locating witnesses, was that
11 something you wanted him to do prior to trial?

12 A. Yes, ma'am.

13 Q. And was that something you were expecting your
14 attorney, not your family, to have to do on your behalf?

15 A. Yes, ma'am.

16 Q. Mr. Smith, before I move on to what took place at
17 trial, is there anything else regarding your attorney's
18 preparation and investigation into your case that you would
19 like to explain or address today in court?

20 A. No, ma'am.

21 Q. Now going into trial, did you want to testify?

22 A. Yes, ma'am.

23 Q. What was the advice you received from counsel about
24 testifying in your case?

25 A. I have pending charges. They would have been brought

G. SMITH - DIRECT EXAMINATION BY MS. BLANCHETTE

20

1 up if I would have got on the stand.

2 Q. Okay, and what was that pending charge? Who did that
3 involve?

4 A. First degree burglary, Tasha Cannon.

5 Q. And Tasha Cannon is who in this case?

6 A. It's the victim's wife.

7 Q. Okay. So, you had previously been charged with a
8 burglary of Tasha Cannon's home. Is that correct?

9 A. Yes, ma'am.

10 Q. Okay.

11 MS. BLANCHETTE: Your Honor, may I approach the
12 witness?

13 THE COURT: Sure.

14 BY MS. BLANCHETTE:

15 Q. Mr. Smith, did you obtain any court records that were
16 available regarding that prior burglary charge?

17 A. Yes, ma'am.

18 Q. Could you identify what you have there in your hands,
19 please?

20 A. A burglary first charge and the record.

21 Q. Okay, and is this a general sessions case history out
22 of Clarendon County?

23 A. Yes, ma'am.

24 MS. BLANCHETTE: Your Honor, at this time I would move
25 this general sessions case history for case J124620 in as

G. SMITH - DIRECT EXAMINATION BY MS. BLANCHETTE

21

1 Applicant's Number 1.

2 THE COURT: Mr. Gourley?

3 MR. GOURLEY: No objection, Your Honor.

4 THE COURT: It's admitted.

5 (COPY OF CASE HISTORY MARKED INTO EVIDENCE AS
6 APPLICANT'S EXHIBIT NUMBER 1. ORIGINAL IS LATER SUBSTITUTED
7 AS APPLICANT'S EXHIBIT NUMBER 1.)
8 BY MS. BLANCHETTE:

9 Q. Now, Mr. Smith, could you read the disposition date on
10 there? It's approximately in the middle of the page.

11 A. Seventh month, 8th, 2008.

12 Q. Okay, and you went to trial on December 8th of 2009.
13 Is that correct?

14 A. Yes, ma'am.

15 Q. And, Mr. Smith, did you actually want Mr. Devoe to get
16 into this charge at your trial?

17 A. Yes, ma'am.

18 Q. What, what did you want him to present or talk about
19 regarding this charge at your trial?

20 A. That Tasha Cannon was testifying against me, and I had
21 prior charges that she brought against me.

22 Q. Okay. Did you have some concern that this could be
23 the motive for the current charge or for the charge that
24 you were going to trial on?

25 A. Yes, ma'am.

G. SMITH - DIRECT EXAMINATION BY MS. BLANCHETTE

22

1 Q. And did you want the jury to be aware that the victim
2 and his wife may have a motive for naming you as this
3 unknown shooter in this case?

4 A. Yes, ma'am.

5 Q. Now if you could turn to page 112, the state's closing
6 argument? Beginning at the top of the page, the state is
7 arguing that you all would buy each other drinks, and they
8 on to say: They don't have any beef with one another. Did
9 you agree with that, that you and the victim didn't have
10 any beef or that you liked each other?

11 A. No, ma'am.

12 Q. Did you, in fact, want your attorney to produce
13 evidence or ask you about this prior charge to show that
14 they would have a reason for bringing this charge against
15 you?

16 A. Yes, ma'am.

17 Q. Now, Mr. Devoe in his closing on pages 118 through 119
18 attempts to argue that Investigator Burgess testified that
19 there was an issue between the two of you, and the state
20 objects and indicates that was not in evidence. Do you
21 agree Mr. Devoe put the issue between the two of you into
22 evidence like you wanted him to?

23 As. Yes, ma'am.

24 Q. Now, you already indicated -- and let me jump back.
25 I'm sorry. On page 17 of the transcript, the state

G. SMITH - DIRECT EXAMINATION BY MS. BLANCHETTE

23

1 indicates at opening that this was all based upon
2 eyewitness testimony. Who were those eyewitnesses?

3 A. Tasha Cannon and Kelvin Black.

4 Q. Okay, and was his sister-in-law also in the house?

5 A. Sherelle Campbell?

6 Q. Yes.

7 A. Yeah.

8 Q. Okay. So, it was three eyewitnesses that alleged that
9 you were the one that committed this crime. Is that
10 correct?

11 A. Yes, ma'am.

12 Q. Did they find any DNA evidence?

13 A. No, ma'am.

14 Q. Any trace evidence, any fingerprints or gun residue or
15 anything of that matter?

16 A. No, ma'am.

17 Q. Did they recover the weapon in this case?

18 A. No, ma'am.

19 Q. Okay, and the state admitted all they had were these
20 eyewitnesses?

21 A. Yes, ma'am.

22 Q. Also during opening remarks of the state, if you could
23 turn to page 21? I'm sorry, during your attorney's opening
24 remarks on page 21, line 13, if you could turn there?

25 Where does your attorney indicate that you'd been sitting?

G. SMITH - DIRECT EXAMINATION BY MS. BLANCHETTE

24

1 A. In jail.

2 Q. So, he tells the jury that you are currently
3 incarcerated. Is that correct?

4 A. Yes, ma'am.

5 Q. This that something you wanted him to inform the jury
6 of?

7 A. No, ma'am.

8 Q. If you could turn to page 67 of the transcript,
9 please?

10 THE COURT: What page?

11 MS. BLANCHETTE: 67, Your Honor.

12 BY MS. BLANCHETTE:

13 Q. The state introduces the statement of Tasha Cannon
14 during her direct testimony. Did your attorney object to
15 the introduction of that statement?

16 A. No, ma'am.

17 Q. Actually, George, if you look at the bottom of the
18 page there, what does it indicate? Is he going to make an
19 objection on line 17?

20 A. Yeah. He said: I would object.

21 Q. Okay, and on line 19, what's his reason for not
22 objecting?

23 A. It's not a dated statement.

24 Q. Okay.

25 MS. BLANCHETTE: Your Honor, may I approach the

G. SMITH - DIRECT EXAMINATION BY MS. BLANCHETTE

25

1 witness?

2 Q. As part of my representation, did we request a
3 complete copy of Mr. Devoe's file?

4 A. No, ma'am.

5 Q. As a part of my representation, did we request that
6 Mr. Devoe send us his file?

7 A. Yeah, you request it.

8 Q. Okay, and did we get approximately ten pages from Mr.
9 Devoe?

10 A. No.

11 Q. Did we get a small number of pages from Mr. Devoe that
12 he said were his file?

13 THE COURT: Hold on a moment, please.

14 WITNESS: Hold on.

15 THE COURT: Mr. Devoe stepped out. Let's make sure
16 everything is okay.

17 (A PAUSE.)

18 MR. KENNETH YOUNG: Your Honor, can we have a moment?

19 CHIEF BAILIFF: Judge, he's refused to come back in.
20 I told him to come back in twice, and he's refusing to.

21 THE COURT: Mr. Devoe, are you okay?

22 MR. DEVOE: No, I'm not, Your Honor.

23 THE COURT: I mean, you feel okay?

24 MR. DEVOE: I guess.

25 CHIEF BAILIFF: Yes, he feels okay, Judge.

G. SMITH - DIRECT EXAMINATION BY MS. BLANCHETTE

26

1 (OFF-THE-RECORD BENCH CONFERENCE WITH CHIEF BAILIFF.)

2 THE COURT: All right, you may proceed.

3 MR. KENNETH YOUNG: Please the court?

4 THE COURT: Yes, sir.

5 MR. KENNETH YOUNG: I don't mean to interject to this,
6 but I was sitting right next to Mr. Devoe, and I think your
7 bailiff has overreacted to this thing. He did make a
8 comment, but it was very quiet. If you have to have
9 absolute silence in here and nobody says anything, that's
10 one thing. But he just made a slight comment, and I didn't
11 see him come over here and talk to him before. He did come
12 over after one comment but it wasn't that loud, and I think
13 the bailiff is overreacting.

14 CHIEF BAILIFF: Can I say something?

15 THE COURT: All right. Yes, sir.

16 CHIEF BAILIFF: I've also seen Mr. Brown go a couple
17 of times during this morning to talk to Mr. Devoe about
18 being quiet, and that was not the first time. It's not
19 that he can hear, but if everybody talks, then we'll just
20 have a hum. We have to have complete silence in the back
21 when court's in, in session, and that was not the first
22 time he had to talk to Mr. Devoe this morning.

23 THE COURT: All right. Yes, sir.

24 BAILIFF BROWN: Your Honor, I was instructed that part
25 belong to me. If anybody's continuing to talk -- either

G. SMITH - DIRECT EXAMINATION BY MS. BLANCHETTE

27

1 they're going to be quiet or to get out of courtroom, one
2 or the other.

3 THE COURT: All right. Thank you very much. I
4 appreciate it. It's all been said on the record.

5 You may proceed, Ms. Sutherland -- I mean, Blanchette.

6 MS. BLANCHETTE: Thank you, Your Honor.

7 THE COURT: All right.

8 MS. BLANCHETTE: Your Honor, I may go back just a
9 little bit.

10 THE COURT: Sure.

11 MS. BLANCHETTE: Because there was some confusion
12 right there.

13 BY MS. BLANCHETTE:

14 Q. Mr. Smith, I've handed you the statement of Tasha
15 Cannon. Was that an item that we received when Mr. Devoe
16 provided us a complete copy of his file?

17 A. No. I -- this file came from appellate counsel.

18 Q. Okay. So, you received that from your ---

19 A. Appellate ---

20 Q. --- appellate defender?

21 A. Yeah.

22 Q. Okay. Thank you. Could you identify what that
23 document is, though, that we're talking about?

24 A. Sworn statement of Tasha Cannon.

25 Q. Okay.

G. SMITH - DIRECT EXAMINATION BY MS. BLANCHETTE

28

1 MS. BLANCHETTE: Your Honor, at this time I'd move
2 this statement in as Applicant's Number 2.

3 MR. GOURLEY: No objection, Your Honor.

4 THE COURT: Admitted without objection.

5 (SWORN STATEMENT MARKED INTO EVIDENCE AS APPLICANT'S
6 EXHIBIT NUMBER 2.)

7 MS. BLANCHETTE: Your Honor, if I could just beg the
8 court's indulgence one moment?

9 (A PAUSE.)

10 MS. BLANCHETTE: Your Honor, regarding Applicant's
11 Number 1, I have an original from the clerk of court, and
12 it appears I forgot to hand that to the court reporter.
13 So, if it would be okay, I would like to provide the
14 original document as Number 1 instead of a copy, and she
15 just asked that I put that on the record.

16 THE COURT: All right, and is this Tasha Cannon's?

17 MS. BLANCHETTE: That would be Applicant's Number 2,
18 Your Honor.

19 THE COURT: Number 1 was the ---

20 MS. BLANCHETTE: The case disposition.

21 THE COURT: --- the case disposition, yes.

22 MS. BLANCHETTE: I just realized it was a copy sitting
23 here.

24 THE COURT: All right.

25 (A PAUSE.)

G. SMITH - DIRECT EXAMINATION BY MS. BLANCHETTE

29

1 BY MS. BLANCHETTE:

2 Q. Mr. Smith, what did you point out to Mr. Devoe about
3 the statement?

4 A. It never was notored [sic] or dated.

5 Q. And that's the objection that he made. Is that
6 correct?

7 A. Yes, ma'am.

8 Q. Now here on page 67, did Mr. Devoe ever object -- and
9 these are going to be some lawyer words -- but under Rule
10 613 of the Rules of Evidence?

11 A. I didn't understand that.

12 Q. Do you see here on page 67 where he says: I object
13 under Rule 613 of the South Carolina Rules of Evidence?

14 A. Yes.

15 (A PAUSE.)

16 Q. I'll move on. I can ask Mr. Devoe about that.

17 Now in the course of the trial, both Kelvin Black and
18 his wife, Tasha Cannon, identified you. Is that correct?

19 A. Yes, ma'am.

20 Q. Okay, and Kelvin Black in court identified you on
21 pages 28 and 35. Prior to your trial or on those pages
22 where he identified you, did Mr. Devoe object to him being
23 able to identify you?

24 A. No, ma'am.

25 Q. Now Tasha Cannon, his wife, did a photo

G. SMITH - DIRECT EXAMINATION BY MS. BLANCHETTE

30

1 identification, and if you could turn to pages 60 through
2 69 where her testimony is, she discusses that photo
3 identification. Did your attorney make a pretrial
4 objection regarding that photo identification?

5 A. No, ma'am.

6 Q. Could you turn to page 86 of your transcript, please?
7 About the middle of the page, line 12, Investigator Burgess
8 discusses that photo identification that Tasha Cannon did.
9 Did your attorney object to his testimony about that photo
10 identification?

11 A. No, ma'am.

12 Q. If you could turn to page 89, line 6 through 16?
13 Investigator Burgess summarizes how the victim identified
14 you and pointed to your picture with his bloody finger.
15 Did your attorney object to that testimony either pretrial
16 or during your trial?

17 A. No, ma'am.

18 Q. Mr. Smith, could you flip over, please, to page 93?
19 Line 1 and 2, Investigator Burgess says: We did not
20 apprehend the suspect for two months. And that would be
21 speaking of you. Is that correct?

22 A. Yes, ma'am.

23 Q. All right. If you would flip over to page 99, which
24 is your attorney's cross-examination? I'm sorry, I gave
25 you the wrong page number there.

G. SMITH - DIRECT EXAMINATION BY MS. BLANCHETTE

31

1 (A PAUSE.)

2 Q. You know, it's mismarked on my transcript. It's
3 actually not the cross-examination of Tasha Cannon. It's
4 of Investigator Burgess on page 99. He asks him about the
5 fact that there were no suspects for two months beginning
6 on line 4. In response on line 8, Investigator Burgess, as
7 a result of your attorney's question, says that they had to
8 look for you for two months and had the assistance of the
9 Marshal services take you into custody. Prior to your
10 attorney's question on cross-examination that misstated
11 Investigator Burgess's testimony on direct, was there any
12 evidence put in at your trial of your flight?

13 A. No, ma'am.

14 Q. And your attorney was, in fact, the person that put in
15 the evidence of your flight for two months. Is that
16 correct?

17 A. Yes, ma'am.

18 Q. Do you feel that was favorable on your behalf?

19 A. No, ma'am.

20 Q. If the state would have done that, is that something
21 you would have wanted him to address?

22 A. Yes, ma'am.

23 Q. You wouldn't have wanted him to go into flight. Is
24 that correct?

25 THE COURT: What line are you referring to there?

G. SMITH - DIRECT EXAMINATION BY MS. BLANCHETTE

32

1 MS. BLANCHETTE: I was on 99, lines 4 through 11.

2 THE COURT: Thank you.

3 BY MS. BLANCHETTE:

4 Q. Mr. Smith, can you flip back to page 50 for me? There
5 the state is discussing a picture that shows the sidewalk
6 and using that picture to establish where you allegedly
7 shot the victim and how he moved and how you pursued him.
8 At the bottom of that page, does Mr. Devoe attempt to
9 object to that picture?

10 A. Yes, ma'am.

11 Q. And at that point, is it established that that picture
12 was already in evidence?

13 A. Yes, ma'am.

14 Q. Okay. So, he objected too late to that image that the
15 state was utilizing to help the victim establish the
16 sequence of events that took place?

17 A. Yes, ma'am.

18 Q. Mr. Smith, you indicated earlier that you wanted your
19 attorney to speak to Tasha Cannon, and you, in fact, asked
20 me to do that as well. Is that correct?

21 A. Yes, ma'am.

22 Q. And we were given indigent funding for the services of
23 Peter Skidmore to attempt to locate Ms. Cannon. Is that
24 correct?

25 A. Yes, ma'am.

G. SMITH - DIRECT EXAMINATION BY MS. BLANCHETTE

33

1 Q. And is it your understanding -- or what's your
2 understanding as to whether or not Mr. Skidmore was able to
3 locate her for today?

4 A. Couldn't locate her.

5 Q. Okay, and at the time of your trial, where was she
6 living?

7 A. Connecticut.

8 Q. Okay, and did you have a family member that thought
9 she may have some information for where Ms. Cannon was?

10 A. Yes, ma'am.

11 Q. Okay. Did that information pan out? Were you able to
12 find her here in South Carolina?

13 A. No, ma'am.

14 Q. Why did you want her spoken to at the time of your
15 trial, and why did you want it done for your PCR?

16 A. Because she said she was going to recant her
17 statement.

18 MR. GOURLEY: Your Honor, I would object to this
19 hearsay testimony.

20 THE COURT: He objects that what she says is ---

21 MS. BLANCHETTE: I can rephrase ---

22 THE COURT: --- is hearsay testimony.

23 MS. BLANCHETTE: --- my question, Your Honor.

24 THE COURT: All right.

25 BY MS. BLANCHETTE:

G. SMITH - DIRECT EXAMINATION BY MS. BLANCHETTE

34

1 Q. Mr. Smith, you can't say what she said, but there was
2 a reason why you wanted Mr. Devoe to talk to her, and there
3 was a reason why you wanted me to talk to her. Why was
4 that? Just tell me your reason. You don't have to say
5 what she supposedly said.

6 A. Recanting the statement.

7 Q. Okay. So, did you have some information that she may
8 want to make recant her statement in this case?

9 A. Yes, ma'am.

10 Q. And you asked both Mr. Devoe and myself to investigate
11 that?

12 A. Yes, ma'am.

13 Q. Okay. Now let's talk about your uncle again, Uncle
14 Levi. You asked Mr. Devoe to speak with him regarding
15 alibi?

16 A. Yes, ma'am.

17 Q. Did Mr. Devoe ever file a notice of an alibi in your
18 case?

19 A. No, ma'am.

20 Q. Do you know if he ever spoke with him?

21 A. No, ma'am.

22 Q. What is the medical condition of your uncle Levi
23 currently?

24 A. He's a paralytic. He in a wheelchair.

25 Q. Okay, and did we, in fact, send Pete Skidmore out to

G. SMITH - DIRECT EXAMINATION BY MS. BLANCHETTE

35

1 speak with him to try to obtain a statement?

2 A. Yes, ma'am.

3 Q. Okay, and do you know the reason that your uncle Levi
4 is not here today?

5 A. I'm not quite sure why he ain't here today.

6 Q. Okay, but you wanted him here today?

7 A. Yeah.

8 MS. BLANCHETTE: And, Your Honor, if I may as an
9 officer of the court? Due to some of the changing in the
10 scheduling of this term, we scrambled a little bit to get
11 our witnesses together, but I did tell the state we would
12 have him prepared for today. Mr. Skidmore is going to
13 testify about the work he did, but it's my understanding
14 that due to his medical condition, that his uncle Levi
15 could not be present today. But that is information I
16 received, not information Mr. Smith received.

17 THE COURT: Okay.

18 BY MS. BLANCHETTE:

19 Q. What was it that you wanted your uncle Levi to testify
20 to?

21 A. That he was to ---

22 MR. GOURLEY: Your Honor, that's hearsay again.

23 THE COURT: Rephrase the question, please.

24 BY MS. BLANCHETTE:

25 Q. You asked your trial counsel to speak to your uncle

G. SMITH - DIRECT EXAMINATION BY MS. BLANCHETTE

36

1 Levi, and you asked me to either obtain his statement or
2 try to get him here today. For what reason did you want us
3 to go speak to him and try to get him to court?

4 A. To testify on my behalf.

5 Q. Okay, and what was it that you thought he could
6 testify to?

7 MR. GOURLEY: Your Honor, that would be hearsay again.

8 THE COURT: I overrule the objection.

9 BY MS. BLANCHETTE:

10 Q. You can testify, Mr. Smith; you can answer.

11 A. He was going give a statement saying that I was at his
12 house. I was staying with him during the time of the
13 crime.

14 Q. And, Mr. Smith, you've already indicated that you
15 wanted to testify. What would you have said about the time
16 of the crime? What did you want to tell the jury?

17 A. That I was, I was, I was not at the crime scene, and I
18 was staying with my uncle at the time.

19 Q. Okay, and did you tell that to your attorney?

20 A. Yes, ma'am.

21 Q. Now, George, I'm going to talk with you just a little
22 bit about the verdict and sentencing. Is there anything
23 else regarding the trial that you would like to explain or
24 address to the court today?

25 A. No, ma'am.

G. SMITH - DIRECT EXAMINATION BY MS. BLANCHETTE

37

1 Q. Okay. Could you turn for me one last time in the
2 transcript here? We're going to look at pages 145 at 146.
3 On page 145, beginning on line 14, Mr. Devoe gives his
4 statements in mitigation or in your favor prior to your
5 sentencing, and he says beginning at the bottom of page
6 145: The jury was out for an hour, an hour and a half. I
7 guess it was a fairly short deliberation. Was it actually
8 about forty minutes that they were out? Was it very brief
9 that the jury was out?

10 A. Yes, ma'am.

11 Q. Okay, but yet that's something that he's bringing up
12 supposedly in your favor. Do you feel that was in your
13 favor, pointing out how short the jury deliberations were?

14 A. No, ma'am.

15 Q. Now, you indicated before that you'd gotten part of
16 your file from your appellate defender. Did you ever
17 receive a copy of your Rule 5 or discovery in this case?

18 A. No, ma'am.

19 Q. Okay, and at my request, Mr. Devoe did provide us
20 approximately ten pages that he indicated was your file.
21 Is that correct?

22 A. Yes, ma'am.

23 Q. Now, we already -- I already mentioned to the judge
24 briefly this issue of an illegal sentence. On page 146,
25 you were sentenced to twenty-six years on the assault and

G. SMITH - DIRECT EXAMINATION BY MS. BLANCHETTE

38

1 battery with intent to kill. At any point, did your
2 attorney object and say that was an illegal sentence?

3 A. No, ma'am.

4 Q. On page 147, he actually asked that that be dropped
5 down to twenty-five years. So, at that point does it
6 appear that he then realizes you've been given an illegal
7 sentence?

8 A. No, ma'am.

9 Q. I just want to make sure we fully address this issue.
10 I asked at the beginning. You had made a motion to relieve
11 your counsel, and that is an issue you wanted raised on
12 appeal?

13 A. Yes, ma'am.

14 Q. Are you asking the court to grant you relief because
15 your appellate defender was also ineffective?

16 A. Yes, ma'am.

17 Q. Okay, and, Mr. Smith, I apologize. I usually do this
18 at the beginning. You filed this application, and what is
19 the relief that you're asking this court to give you, both
20 on your allegations of ineffective assistance of trial
21 counsel and ineffective assistance of appellate counsel?
22 What relief do you want from this court?

23 A. A new trial.

24 Q. And you understand that that means that your current
25 conviction and sentences would be set aside. You'd be put

G. SMITH - DIRECT EXAMINATION / CROSS-EXAMINATION

39

1 back in the position as if you had not been convicted, and
2 you would face these charges all over again?

3 A. Yes, ma'am.

4 Q. And knowing that, you want the judge to give you that
5 relief. Is that correct?

6 A. Yes, ma'am.

7 Q. Mr. Smith, is there anything else regarding Mr.
8 Devoe's representation that I've either failed to ask you
9 about or that you would like to tell the court about today?

10 A. No, ma'am.

11 MS. BLANCHETTE: Your Honor, if I could just beg the
12 court's indulgence one moment?

13 THE COURT: Sure.

14 (A PAUSE.)

15 MS. BLANCHETTE: Your Honor, I have no further
16 questions for this witness.

17 THE COURT: Yes, sir.

18 MR. GOURLEY: Please the court, Your Honor?

19 CROSS-EXAMINATION BY MR. GOURLEY:

20 Q. Mr. Smith, you said you met with Mr. Devoe two times
21 before going to trial?

22 A. Yes, sir.

23 Q. Okay, and did y'all ever go any -- go over any
24 discovery material, any kind of evidence or anything like
25 that?

G. SMITH - CROSS-EXAMINATION BY MR. GOURLEY

40

1 A. No.

2 Q. Did y'all discuss possible defenses, any possible
3 defenses? Did y'all talk about anything like that or how
4 you were going to attack the charges?

5 A. No, sir.

6 Q. And what, what were the witnesses that you gave Mr.
7 Devoe to look into? Your uncle Levi?

8 A. Levi.

9 Q. Okay, and, and then you wanted them to look into Tasha
10 Cannon as well?

11 A. Yes, sir.

12 Q. And Tasha Cannon testified at trial, right?

13 A. Yes, sir.

14 Q. And she testified against you?

15 A. Yes, sir.

16 Q. Okay, and your uncle Levi is not here today to
17 testify, is he?

18 A. No, sir.

19 Q. Okay. You're claiming that your counsel was
20 ineffective for failing to investigate your case, correct?

21 A. Yes, sir.

22 Q. And, and, in your opinion, what else should he have
23 done on your behalf?

24 A. I feel like he should subpoena the witnesses.

25 Q. Okay, and who were those witnesses?

G. SMITH - CROSS-EXAMINATION BY MR. GOURLEY

41

1 A. My uncle Levi and there were witnesses around the
2 apartment.

3 Q. Okay. Do you have any names?

4 A. No, I don't have any names.

5 Q. Did you have any names at the time prior to your
6 trial?

7 A. Yeah, I had names at the time.

8 Q. Okay, but you don't have any names now?

9 A. No.

10 Q. Okay. What else?

11 A. I feel like he should -- because he tried to get me to
12 plead the whole time.

13 Q. Okay.

14 A. So, I feel like he wasn't even -- he wasn't in my best
15 interest.

16 Q. And so you proceeded to trial and didn't want to,
17 didn't want to plead guilty. You wanted to fight the
18 charges. Is there anything else that you feel like he
19 should have done on your behalf to better prepare for this
20 case outside of the witnesses?

21 A. Investigate the crime scene, the cameras because there
22 were video cameras around in there during the time.

23 Q. Okay. Do you have copies of those videos today?

24 A. No, because it's six years now.

25 Q. Yeah, and your uncle Levi was an, was an alibi

G. SMITH - CROSS-EXAMINATION BY MR. GOURLEY

42

1 witness?

2 A. Yes, sir.

3 Q. And do you recall when you told Mr. Devoe about your
4 uncle?

5 A. I didn't understand you just now.

6 Q. Do you recall when you told Mr. Devoe about your
7 uncle, about a potential alibi defense?

8 A. Yes, sir.

9 Q. When? When was that? How many -- how long before
10 your trial?

11 A. That was, say, about a week before the trial.

12 Q. A week before the trial? Okay.

13 MR. GOURLEY: Beg the court's indulgence, Your Honor.

14 (A PAUSE.)

15 BY MR. GOURLEY:

16 Q. Now, you stated that Mr. -- in your opinion, Mr. Devoe
17 was representing Kelvin Black and his brother, Broadus
18 Black?

19 A. Yeah, Broadus Black.

20 Q. Do you have any documentation to show that he was
21 representing either one of those people?

22 A. No, sir.

23 Q. Okay, and you also stated that you had a pending
24 charge stemming from Tasha -- or Tasha Cannon had alleged
25 that you had broken into her house, correct?

G. SMITH - CROSS-EXAMINATION BY MR. GOURLEY

43

1 A. Yes, sir.

2 Q. Do you have any documentation that shows that she
3 filed a report against you or named you as a suspect in
4 that crime?

5 A. The paperwork.

6 Q. Disposition sheet?

7 A. Dispo -- sheet, yeah.

8 Q. Okay, outside of that, do you have any other
9 documentation?

10 A. I had the warrants one time before, but I don't have
11 them now.

12 Q. Okay.

13 A. Because, I mean, they served me the warrants.

14 Q. Okay. Now, you also stated your appellate counsel
15 should have filed a allegation that Judge Cothran erred in
16 denying your motion to dismiss Mr. Devoe as your attorney?

17 A. Yes, sir.

18 Q. Okay. Do you have a copy of that transcript here
19 today?

20 A. No, sir.

21 Q. And just to clarify, Mr. Smith, you are currently
22 serving twenty years for ABWIK, correct?

23 A. Yes, sir.

24 Q. And Kelvin Black and his wife, Tasha Cannon, both
25 identified you as the shooter, correct?

P. SKIDMORE - DIRECT EXAMINATION BY MS. BLANCHETTE

44

1 A. Yes, sir.

2 MR. GOURLEY: Your Honor, I have no other questions.

3 Thank you, Mr. Smith.

4 MS. BLANCHETTE: Your Honor, I have nothing on
5 redirect.

6 THE COURT: Sir, you may step down.

7 (THE WITNESS EXITS THE STAND.)

8 MS. BLANCHETTE: Your Honor, I would call Pete
9 Skidmore to the stand.

10 THE COURT: All right.

11 PETE SKIDMORE, BEING DULY SWORN,
12 TESTIFIES AS FOLLOWS:

13 BAILIFF: State your name. Spell your last for the
14 record.

15 THE WITNESS: Peter G Skidmore, S-K-I-D-M-O-R-E.

16 DIRECT EXAMINATION BY MS. BLANCHETTE:

17 Q. Mr. Skidmore, could you please explain how you became
18 connected to this case?

19 A. I was contacted probably the latter part of last year
20 by the family through you, and they wanted to retain my
21 services, but at some point in time they were not able to
22 do that.

23 Q. And do you recall coming to a motion hearing in March
24 of this year where you were appointed and given indigent
25 funds to act as an investigator in this case?

P. SKIDMORE - DIRECT EXAMINATION BY MS. BLANCHETTE

45

1 A. Yes.

2 Q. Okay, and as a result of that, did you look into a
3 number of requests I and both Mr. Smith made on you to do
4 in this case?

5 A. I did.

6 Q. Okay. Now, one of the requests that Mr. Smith has
7 said that he made of his original trial counsel was to go
8 out and canvass the scene, to talk to witnesses, and to try
9 to obtain the videotape. Is that something you would
10 typically do if you were retained to assist in a criminal
11 trial?

12 A. Yes.

13 Q. So if you were retained, say, back in 2008, that's an
14 action that you would have taken in helping defense counsel
15 this case?

16 A. Absolutely.

17 Q. And how many years have you been doing this, Mr.
18 Skidmore?

19 A. Right at twenty-one.

20 Q. And how many criminal trials would you say that you
21 have helped prepare and investigate?

22 A. In excess of a hundred murder investigations and
23 probably in excess of thirty-five death penalty cases.

24 Q. And in your experience, is that something you would
25 regularly do is going out and canvass the area and try to

P. SKIDMORE - DIRECT EXAMINATION BY MS. BLANCHETTE 46

1 talk to witnesses and find any footage that would be
2 available?

3 A. Absolutely.

4 Q. And is that something that you have found to be
5 helpful in a case?

6 A. Yes, very helpful.

7 Q. Now let's zoom forward to 2014. Were you able to find
8 helpful information for us at the apartment complex?

9 A. No. A lot of the people that were living there now
10 were not living there back then.

11 Q. Was there any footage available as far as you know?

12 A. As far as I know, there was not. Even back then, it
13 would have been probably only held thirty days.

14 Q. So, that is not information or witnesses that you were
15 able to obtain at this point in preparation for the PCR.

16 Is that correct?

17 A. That's correct.

18 Q. But that is information and witnesses that you would
19 have wanted to look into if you were working on this prior
20 to trial?

21 A. Absolutely.

22 Q. Now, as part of your investigation for Mr. Smith's
23 PCR, did you also try to locate Tasha Cannon?

24 A. I did.

25 Q. Okay, and were you successful in locating Ms. Cannon?

P. SKIDMORE - DIRECT EXAMINATION BY MS. BLANCHETTE

47

1 A. I have not spoken to Ms. Cannon. I believe that she's
2 either in Connecticut or Virginia.

3 Q. And what did you do? Did you talk to people? If you
4 could just explain how you came to that conclusion.

5 A. I did. I did canvass some of the area, and through
6 that I was trying to locate Ms. Cannon, and people
7 indicated that she was in Connecticut. And then I did with
8 resources that I have and -- appears to have located her
9 either in Connecticut or Virginia through those resources.

10 Q. And as a result of the incident report and her
11 statement, you had some identifying information to work
12 from. Is that correct?

13 A. That's correct.

14 Q. But the phone numbers and the address given on her
15 statement, were those any longer good ---

16 A. No.

17 Q. --- information for her?

18 A. No.

19 Q. If you had been asked to do that prior to trial, is
20 that something you typically go out and do?

21 A. Yes.

22 Q. Okay, and would you have used the information that was
23 available then to try to locate her?

24 A. Yes.

25 Q. And she, in fact, testified for the state. Is that

P. SKIDMORE - DIRECT EXAMINATION BY MS. BLANCHETTE

48

1 correct?

2 A. That's my understanding, yes.

3 Q. So, she was present at the trial?

4 A. Yes.

5 Q. Have you in your experience tried to speak to state
6 witnesses or someone that the state had planned to utilize?

7 A. Quite often.

8 Q. Okay, and what can be the outcome of that?

9 A. Sometimes the information that possibly a police
10 officer has taken down has been misinterpreted in the
11 statement, and I have been able to go and get a different
12 statement, and they've ended up testifying the way that it
13 was given to be versus the way that the officer took it
14 down.

15 Q. And as the attorney pointed out in this case, her
16 statement was not signed or notarized. Is that correct?

17 A. That's my understanding, yes.

18 Q. And finally let me ask you about Levi, Uncle Levi that
19 has been discussed.

20 A. Yes.

21 Q. Did you just recently find and locate Levi?

22 A. I did. Located him. The first time, he was around
23 the block from his residence under a oak tree with several
24 other individuals, and I did try to speak to him st that
25 point in time.

P. SKIDMORE - DIRECT EXAMINATION BY MS. BLANCHETTE

49

1 Q. What was his reaction to you? Did he seem as though
2 he was trusting and wanted to speak with you, or what was
3 that outcome of that first meeting with Levi?

4 A. Even though I explained who I was working for, you and
5 George, he did not feel very comfortable, and I could tell
6 that. I think he thought more -- even though I explained I
7 was a private investigator, I was not the police, he felt
8 very antsy about me being there and trying to talk to him,
9 and I think it had to do with the environment that was
10 there and the people that were there as well. There were
11 probably anywhere from six to nine people in, in that area.

12 Q. And did you have a second occasion to speak with him?

13 A. Yes. Because of the first encounter, I felt that it
14 would be worthwhile to try come back and talk to him
15 earlier in the day and at his residence.

16 Q. And what was the result of that meeting?

17 A. Well, when I arrived, the home healthcare nurse was
18 there, and I had to wait out on the porch until she was
19 finished with Mr. Levi, or Mr. Lang rather. And after
20 that, he came out several minutes later on to the porch in
21 his wheelchair. Both his legs have been amputated, and we
22 talked and he told me that he was uneasy.

23 MR. GOURLEY: Objection, Your Honor. That's hearsay.

24 THE WITNESS: I'm sorry.

25 THE COURT: Objection is sustained as to -- I'll

P. SKIDMORE - DIRECT EXAMINATION BY MS. BLANCHETTE

50

1 overrule your objection. You're seeking to explain why
2 he's not here, I guess.

3 BY MS. BLANCHETTE:

4 Q. You can continue.

5 A. And, and he did say that he was uneasy the day before
6 when I was over there, and that he did not want to say
7 anything that was not truthful and that, that was the
8 extent of it.

9 Q. Did he appear scared to speak with you or have
10 anything to do with this case at that point?

11 A. He did. He wanted to verify that I was who I said I
12 was either through George or another family member.

13 Q. And, Mr. Skidmore, you went out to the prison to meet
14 with myself and George Smith recently. Is that correct?

15 A. I did.

16 Q. And you, you are aware of the fact that George -- his
17 hen list is what they call it. His ability to call out of
18 the prison has not been working until recently. So, he
19 wasn't able to call and communicate with you or anyone
20 else. Is that correct?

21 A. That is correct.

22 Q. Did you give Uncle Levi my information to contact me
23 if he wanted to speak with me?

24 A. I did, but unfortunately your telephones have been out
25 for the last week, week and a half.

P. SKIDMORE - DIRECT EXAMINATION BY MS. BLANCHETTE 51

1 Q. And I was going to ask you that, Mr. Skidmore. Thanks
2 to AT&T, have you been able to reach my office since last
3 Wednesday?

4 A. No, I have not.

5 Q. Okay, and you did not provide him my cell phone number
6 because at that time, you weren't aware that I was having
7 that problem, were you?

8 A. That's correct.

9 Q. Okay.

10 MS. BLANCHETTE: Your Honor, if I could just beg the
11 court's indulgence one moment?

12 THE COURT: Okay.

13 (A PAUSE.)

14 BY MS. BLANCHETTE:

15 Q. Mr. Skidmore, I'm going to ask the court for
16 permission for you to go back out one more time to attempt
17 to get a statement from Levi because he is unable to be
18 here today due to his medical condition. Is that something
19 that you are willing to do on Mr. Smith's behalf?

20 A. Yes, I am. I've talked to a family member that is
21 going to help with that process where he feels more
22 comfortable with me.

23 Q. And that is something that you could do in a timely
24 manner, Mr. Skidmore?

25 A. Yes.

P. SKIDMORE - DIRECT EXAMINATION BY MS. BLANCHETTE

52

1 MS. BLANCHETTE: Your Honor, I have no further
2 questions ---

3 A. Can, can ---

4 MS. BLANCHETTE: --- of this witness.

5 Q. Oh, I'm so sorry.

6 A. Can I ---

7 Q. Mr. Skidmore, please finish.

8 A. Going back to the Connecticut and Virginia issues, in,
9 in the past -- years ago we were able to use our discretion
10 whether to go and try to find witnesses out of state. It's
11 been my experience recently without the last three to five
12 years that the Office of Indigent Defense usually,
13 typically likes to have some form of hearing before I am
14 able to do that and be compensated for that, and that is
15 why I did not go to Connecticut or Virginia because Mr.
16 Ryan of the Office of Indigent Defense usually likes to
17 have some type of hearing.

18 Q. And, and just as a follow up, when did you discover
19 that she was located in Virginia or Connecticut? Was that
20 back in March when you were appointed, or was that
21 recently?

22 A. That was last week.

23 Q. Mr. Skidmore, is there anything else regarding your
24 investigation or the work that you did on this PCR that you
25 would like to inform the court about?

1 A. Not at this time.

2 MS. BLANCHETTE: Your Honor, I have no further
3 questions.

4 THE COURT: Yes, sir.

5 MR. GOURLEY: Your Honor, I have no questions for this
6 witness.

7 THE COURT: All right. Thank you.

8 THE WITNESS: Thank you.

9 (THE WITNESS EXITS THE STAND.)

10 MS. BLANCHETTE: Your Honor, I have no further
11 witnesses, but as I have already alluded to in my
12 questioning, I would ask the court to leave the record
13 open. I honestly think we can do it in ten days, based on
14 information that Mr. Skidmore just testified, to provide
15 that statement. It's a situation where we're dealing with
16 a double amputee. It was my understanding he could be here
17 today, but he's run into some medical issues.

18 He also -- there was a problem where he couldn't
19 communicate with myself or Mr. Smith to, quote, give him
20 some assurance that Mr. Skidmore was, in fact, working for
21 us. I believe he was uneasy to give him a statement. It's
22 not that we're trying to coerce him or put words into his
23 mouth. We just want to be given the opportunity, now that
24 he has communicated with George and is able to communicate
25 with myself now that my phone lines are back working as of

1 yesterday afternoon, what our intentions are.

2 So, I would ask -- I understand -- I argue *Banister*
3 vs. State. As I heard the case -- state argue earlier, it
4 is our duty to have the witnesses here, and I understand
5 that, and you can't make a ruling based purely upon
6 speculation, but I would say this is a rare situation. I
7 believe the first time I've ever asked in doing for this a
8 number of years to leave the record open. I tried, I tried
9 my best to have him here today and make sure I had all the
10 evidence that the court could consider here today.

11 THE COURT: All right.

12 MR. GOURLEY: And, Your Honor, we would strongly
13 object to any kind of motion to leave the record open. Ms.
14 Blanchette's been appointed since August of 2013. Mr.
15 Skidmore has been retained since March of this year. You
16 know, two weeks ago, she could, she could have gotten an
17 affidavit. She could have done a deposition or something
18 other than -- I certainly sympathize with Ms. Blanchette
19 about her telephone situation, but there are other means to
20 get something in here to provide this court today for this
21 hearing. For those reasons ---

22 THE COURT: Is an affidavit acceptable in PCR hearings
23 or no?

24 MS. BLANCHETTE: The state intends to introduce one
25 for one of their witnesses. I understand that the other

1 party can oppose it because there is a right to
2 cross-examination.

3 My argument would be that he is unavailable due to his
4 medical condition. That was the issue today. They could
5 not transport him due to his medical condition. I can get
6 verification of that as well if needed.

7 THE COURT: Well, I've left the record open in PCRs to
8 allow for depositions of people before but never for an
9 affidavit.

10 MS. BLANCHETTE: And, Your Honor, I would be happy to
11 depose. I would just need indigent money to do that
12 because I am currently not charging for my services in this
13 case, but I did get indigent funding for Mr. Skidmore. So,
14 I am doing this, you know, on my own dollar at this point.
15 So, I just don't have the resources to pay for a
16 deposition. I want to afford Mr. Smith every opportunity
17 to properly present his PCR.

18 THE COURT: Well, we have the possibility of a
19 deposition, and we have PCRs rolling around here again in a
20 couple of weeks. Thursday, Thursday and Friday October
21 2nd, 1st, and 2nd, something like that.

22 MR. GOURLEY: 2nd and 3rd, Your Honor.

23 THE COURT: 2nd and 3rd.

24 MS. BLANCHETTE: Your Honor, could I just confer with
25 the family member that was supposed to bring him today to

1 see if that would be a possibility to transport him on
2 those days before I respond to the court?

3 THE COURT: Okay.

4 (A PAUSE.)

5 THE COURT: Yes.

6 MS. BLANCHETTE: Your Honor, and I apologize because
7 this is an issue that I just didn't foresee happening this
8 morning. I just spoke with George Smith's brother. He
9 indicated that Levi typically gets home healthcare
10 treatment every day, and it goes through approximately
11 noon. So, he could be available in the afternoon, but he
12 has to confirm that he doesn't have any medical
13 appointments on those days, the 2nd and 3rd, and we could
14 arrange to bring him up here.

15 THE COURT: Okay. Well, if you bring him on those
16 days, we'll be here, won't we?

17 MR. GOURLEY: Yes, sir.

18 MS. BLANCHETTE: Your Honor, I'd be happy to work with
19 the state if we could set a specific time that he could be
20 heard, assuming we could work around his medical
21 obligations.

22 THE COURT: Okay.

23 MS. BLANCHETTE: And if not, Your Honor, is this an
24 issue that we would revisit or -- as far as me being able
25 to provide an affidavit or do a deposition in lieu of

1 testimony?

2 THE COURT: Well, if the state opposes an affidavit, I
3 would not permit an affidavit.

4 MS. BLANCHETTE: Okay.

5 THE COURT: I only permit affidavits if the parties
6 agree. If they don't, then we don't operate in court by
7 affidavit.

8 MS. BLANCHETTE: Your Honor, if I can check with the
9 Office of Indigent Defense and they would give funding for
10 a deposition, is that a matter that I could bring to Your
11 Honor's attention?

12 THE COURT: Yes.

13 MS. BLANCHETTE: Thank you.

14 THE COURT: So, I'll wait for you tell me what you all
15 have worked out.

16 MS. BLANCHETTE: Okay. I'll be happy to do that.

17 THE COURT: Okay.

18 MS. BLANCHETTE: And communicate that to you.

19 Your Honor, if I could just beg the court's indulgence
20 one moment?

21 THE COURT: Sure.

22 (A PAUSE.)

23 MS. BLANCHETTE: Your Honor, I've referenced the
24 affidavit of appellate counsel so many times, I figured
25 before I rested my case it may be best to introduce that at

1 this point.

2 THE COURT: Okay.

3 MR. GOURLEY: You want to introduce it, Court's
4 Exhibit Number 1, Your Honor?

5 THE COURT: Okay, and there's no objection to this
6 affidavit by the state, Mr. Gourley?

7 MR. GOURLEY: No, Your Honor.

8 THE COURT: All right, admitted without objection.

9 (AFFIDAVIT MARKED INTO EVIDENCE AS COURT'S EXHIBIT
10 NUMBER 1.)

11 MS. BLANCHETTE: Your Honor, before I conclude my
12 case, since we will not have Ms. Franklin-Best here to
13 testify, I would just like to point out that it does
14 indicate, it appears in this affidavit that she said she
15 did not have the transcript. If she would have had the
16 transcript, it is an issue she would have briefed, and it
17 was her responsibility to obtain it. If it exists, then
18 her performance was substandard under prevailing
19 professional norms.

20 I know this affidavit is in evidence, but I just
21 wanted to point that out to Your Honor that she did make
22 that statement.

23 THE COURT: And is that a transcript of an in-court
24 hearing?

25 MS. BLANCHETTE: It is, Your Honor. It's my

1 understanding there was a motion to relieve in front of
2 Judge Cothran pretrial. Unfortunately from the documents I
3 received from Mr. Devoe and my communication with the
4 Clarendon County clerk of court, we could not identify that
5 pretrial date. That is not the first time that has
6 happened. Court Administration also is not helpful, and
7 they don't keep or compile those dates. If the county
8 clerk doesn't have it and the attorneys don't have it, I
9 typically can't find it.

10 Now, I know that would go to whether or not Ms.
11 Franklin-Best could have gotten it, but she would have been
12 dealing with that issue back in 2009. I was trying to find
13 the transcript in 2014. So, I think that's something, you
14 know, even maybe Judge Cothran's chambers would have
15 remembered when that pretrial motion was heard. But I have
16 tried to exercise all due diligence in locating it, but I
17 think my failure to locate it does not speak to her failure
18 to even look into obtaining it. I think that's two
19 different situations.

20 I also, Your Honor, before I rest, I know I've been
21 doing a lot of speaking, but the state did ask my client
22 about our failure to provide an arrest warrant regarding
23 the 2008 burglary charge. If I may, for the record, I
24 contacted the Clarendon County clerk of court's office. I
25 asked that they provide me all documents that they had

1 pertaining to it. It's my understanding the Clarendon
2 County courthouse is under some type of renovation. They
3 only have access to the documents that are on their
4 computer, and they provided me with this disposition sheet
5 because that could be printed off of their computer. If at
6 a later date I could supplement the record with the arrest
7 warrant, I'd be happy to, but it's not something they could
8 provide to me at this time. So, I just did not want that
9 to be seen a lack of diligence on my client's behalf. I
10 did attempt to get that.

11 THE COURT: I understand the courthouse has been
12 declared structurally unsound and ordered ---

13 MS. BLANCHETTE: Yes, and the document I needed was in
14 there.

15 THE COURT: They ordered everyone to vacate until they
16 can do major renovations and stabilize the building to be
17 sound, and I think that's been going on for over a year
18 now.

19 MS. BLANCHETTE: I could imagine the headache they
20 described to me, but they were only able to give me this
21 because it was available via computer printout. I could
22 not get the arrest warrant, but it's something I can
23 continue to try to get if the court takes this matter under
24 advisement.

25 Your Honor, with all of that said, I have no further

H. DEVOE - DIRECT EXAMINATION BY MR. GOURLEY

61

1 witnesses.

2 THE COURT: Okay, Mr. Gourley.

3 MR. GOURLEY: Your Honor, I will be calling Mr. Devoe
4 as a witness. However, if Mr. Levi comes and it's on
5 October 2nd, I would like to reserve the right to recall
6 Mr. Devoe after Mr. Levi's testimony.

7 THE COURT: Any objection to that?

8 MS. BLANCHETTE: Absolutely not, Your Honor.

9 THE COURT: Okay.

10 MR. GOURLEY: All right. I will call Mr. Devoe to the
11 stand.

12 HARRY L. DEVOE, JR., BEING DULY
13 SWORN, TESTIFIES AS FOLLOWS:

14 BAILIFF: State your name and spell your last for the
15 record.

16 WITNESS: Harry Leslie Devoe, Jr., D-E-V-O-E.

17 DIRECT EXAMINATION BY MR. GOURLEY:

18 Q. Mr. Devoe, how long have you been the practicing law?

19 A. I've been a lawyer for fifty years; I've been a lawyer
20 in South Carolina for twenty-three years.

21 Q. Were you appointed or retained in this case?

22 A. I was a public defender in Clarendon County. I was
23 appointed to this particular case.

24 Q. Do you recall how many times you met with Mr. Smith
25 prior to his trial?

H. DEVOE - DIRECT EXAMINATION BY MR. GOURLEY

62

1 A. Well my notes, I show I met with him five or six
2 times.

3 Q. Okay, and during those, during those meetings, did
4 y'all review the discovery and the Brady material?

5 A. Pardon me?

6 Q. Did, did you review the Brady material, the Rule 5
7 material with Mr. Smith prior to his trial?

8 A. I did.

9 Q. Okay. Did y'all discuss the charges and what the
10 state was required to prove?

11 A. I believe I did, yes. I always do.

12 Q. And did y'all discuss his version of the facts?

13 A. I did.

14 Q. Do you recall what they were?

15 A. Yes. He told me initially when I talked to him that,
16 that someone, Kelvin Black, who was the victim, said that I
17 robbed him. He said he didn't rob him, but rather he
18 threatened him. He, he shot me several months earlier in
19 the hand, and so there some bad blood between the two of
20 them.

21 Q. Okay, I think you just need to speak up a little bit
22 for Madame Court Reporter.

23 So, you said that there was some bad, bad blood
24 between the victim and Mr. Smith?

25 A. Yes.

H. DEVOE - DIRECT EXAMINATION BY MR. GOURLEY

63

1 Q. Do you recall what the circumstances were that led to
2 that bad ---

3 A. I, I ---

4 Q. --- bad blood?

5 A. I have no idea. It was just some months earlier.

6 Q. Okay.

7 THE COURT: Mr. Gourley, if you maybe stand on this
8 side ---

9 MR. GOURLEY: Okay.

10 THE COURT: --- he'll be facing this way.

11 MR. GOURLEY: I gotcha. Yes, sir, Your Honor.

12 THE COURT: It will be easier for the court reporter.

13 MR. GOURLEY: Makes a little more sense.

14 BY MR. GOURLEY:

15 Q. Okay, did he ever tell you about a potential alibi
16 witness and his uncle Levi?

17 A. The first time I ever heard of Levi, uncle, is today.

18 Q. Okay. So, he never discussed any of his -- any Uncle
19 Levi whatsoever prior to ---

20 A. Not with -- not Levi, no. He did mention some other
21 people, not Uncle Levi.

22 Q. Who were those other people that he mentioned?

23 A. Let's see if I find my -- I'll have to check my notes
24 to see that because I don't remember them offhand, but they
25 weren't -- didn't seem to be important people as far as

H. DEVOE - DIRECT EXAMINATION BY MR. GOURLEY

64

1 being credible, credible witness.

2 Q. Did you investigate into the witnesses that he
3 provided?

4 A. I talked to him. I talked to his parents or his
5 mother and along -- who else was in his home, and I tried
6 to -- about this case, yes.

7 Q. Can you, can you briefly describe your type of
8 investigation in this case?

9 A. Well, I got this case appointed to me several months
10 after he got arrested.

11 Q. Right.

12 A. And I talked to him at that time what the case was all
13 about. I talked to his mother later on, and unfortunately
14 the mother I talked to just before the trial started. We
15 went over to the apartments together to check the layout of
16 the apartments where the, where the shooting took place,
17 the lighting and the layout of the paths we talked about
18 and the mailbox, for example, and they were going to get
19 some witnesses for me, and it just didn't happen.

20 Q. Okay. Do you recall why those witnesses didn't show
21 up for trial?

22 A. I have no idea. The trial, the trial was, was called
23 by Amy Land, the solicitor, with no notice. We had a week
24 of court and out of many cases that week, and all of a
25 sudden she called this case and pulled the jury December

H. DEVOE - DIRECT EXAMINATION BY MR. GOURLEY

65

1 7th. We started the trial the morning of December 8th.

2 Q. Okay.

3 A. Which ironically was my birthday.

4 Q. Can you briefly describe the state's evidence against
5 the applicant?

6 A. State's evidence basically was, was the victim's wife
7 and his wife's sister who lived in the apartments, and
8 they're the ones who testified or were going to testify
9 that they looked out the window and saw him chasing her
10 husband around the mailbox six or seven times and being
11 shot at all the time, and they're the ones who called the
12 police.

13 Q. And the victim's wife positively ID'd ---

14 A. She ---

15 Q. --- Mr. Smith?

16 A. She did.

17 Q. She has actually known him from past meetings?

18 A. A long time.

19 Q. And also the victim in the case had known Mr. Smith
20 for quite a while as well?

21 A. They all knew each other.

22 Q. Okay. Did you feel there was any basis to challenge
23 the photo lineup in this case?

24 A. No, I didn't.

25 Q. Do you feel like you were prepared for trial?

H. DEVOE - DIRECT EXAMINATION BY MR. GOURLEY

66

1 A. I thought I was prepared enough to go to trial. I
2 always like to have more time, but unfortunately being a
3 public defender, you don't get a lot of time sometimes.

4 Q. Okay. If you weren't prepared for trial, would you
5 have requested a continuance?

6 A. Yeah, I would have.

7 Q. What was your trial strategy in this case?

8 A. Trial, trial strategy would have been to try to impugn
9 the ability of the witnesses to see the victim outside. It
10 was nighttime, 2:00 in the morning, 2:30 in the morning. I
11 thought -- I went to see the apartment house or the
12 apartment and the windows is a tall -- small window, a
13 little bit dirty. I never could -- I didn't have the
14 ability to check the lumens of the light in the parking
15 area or the walking area, but I was going to -- I did sort
16 of mention that I thought the lights were fairly dim.

17 Q. Okay. So, it was more so to attack the identification
18 that ---

19 A. Yes.

20 Q. --- the two witnesses were providing?

21 A. Yes.

22 Q. Okay. Did you know anything about the videos of the
23 apartment complex?

24 A. I knew there was a video camera because I asked that
25 question, I think, in the, in the trial.

H. DEVOE - DIRECT EXAMINATION BY MR. GOURLEY

67

1 Q. Okay.

2 A. I think the videotapes weren't kept. They were -- I
3 think they were all threw -- and the, and the police never
4 knew about it, never tried to collect those tapes.

5 Q. When did you learn about the videos?

6 A. I think I learned about it when I, when I went to the
7 apartment complex.

8 Q. Okay, and that was obviously a point that you wanted
9 to attack the police with for failure to properly
10 investigate ---

11 A. Yes.

12 Q. --- the case?

13 A. Yes.

14 MR. GOURLEY: Beg the court's indulgence, Your Honor.

15 (A PAUSE.)

16 BY MR. GOURLEY:

17 Q. Mr. Devoe, have you ever represented Kelvin Black or
18 Broadus Black?

19 A. Never heard the name Broadus before today, and Kelvin
20 Black, no, I never represented him.

21 Q. Regarding the possible pending charges against Mr.
22 Smith, were you aware that Tasha Cannon had allegedly filed
23 a charge against Mr. Smith?

24 A. No.

25 Q. Did he ever tell you about Tasha Cannon filing a

H. DEVOE - DIRECT EXAMINATION / CROSS-EXAMINATION

68

1 charge?

2 A. He did not.

3 Q. If he told you about a potential charge against him,
4 would you have investigated that?

5 A. I would have.

6 Q. Now during the course of trial, you pointed out that
7 there was no DNA evidence, that were no fingerprints, there
8 were no trace evidence, correct?

9 A. That's correct.

10 Q. That was one of the main points of defense, correct?

11 A. That's correct. Eyewitness evidence was everything.

12 Q. Right. Regarding the evidence of flight, the question
13 that you asked Investigator Burgess, was that intended to
14 elicit the fact that the applicant had fled for two months?

15 A. No.

16 Q. Okay. So, that wasn't in response to your question?

17 A. No, it was not.

18 MR. GOURLEY: Your Honor, I don't have any other
19 questions at this time. Thank you.

20 Thank you, Mr. Devoe.

21 THE COURT: Okay.

22 MS. BLANCHETTE: Very briefly, Your Honor.

23 CROSS-EXAMINATION BY MS. BLANCHETTE:

24 Q. Mr. Devoe, would it help if I come up here?

25 A. It's fine.

H. DEVOE - CROSS-EXAMINATION BY MS. BLANCHETTE

69

1 Q. I'm loud, so.

2 A. And I'm soft. I've lost was my voice.

3 Q. Mr. Devoe, you indicated that you were -- were you the
4 chief public defender at the time you handled this trial?

5 A. I wasn't their -- we didn't have a chief public
6 defender. I guess I was a senior public defender. So, I
7 was the public defender for fifteen years, and other public
8 defenders came and they went. They came back again. So, I
9 didn't control the other ones; they didn't control. We get
10 our -- all our appointments through the clerk of court.

11 Q. And being part of the public defender's office, did
12 you have the resources to utilize an investigator, an
13 expert if you needed one?

14 A. The public defender's office consisted of me and maybe
15 the other public defender. We had no secretary; we had no
16 investigator. We had really nothing.

17 Q. If you needed an investigator, could you -- would you
18 then have to go to the court and ask for funding? Is that
19 how it worked?

20 A. We'd have to go to court to ask for funding to get an
21 investigator, that's correct.

22 Q. And, and did you -- do you recall if you did that in
23 this case?

24 A. I didn't do it in any case.

25 Q. Okay. So, was it typical, then, that it would be the

H. DEVOE - CROSS-EXAMINATION BY MS. BLANCHETTE

70

1 family's duty to locate these witnesses for you? Is that
2 how you typically got witnesses?

3 A. No. I think if, if the family would tell us about a
4 witness, I, I'd try to find out from them if they knew the
5 address and the phone number so I could try to contact them
6 myself.

7 Q. Okay.

8 A. If I couldn't do that, I'd tell, I'd tell the family
9 that.

10 Q. Now, I heard you say on direct that you didn't have
11 notice of this trial. That Amy Land, the solicitor, just
12 kind of put it on the docket without giving you notice.

13 A. I had no notice of this trial until December 7th. All
14 of a sudden, she called the trial.

15 Q. Why didn't you tell the judge that or put that on the
16 record?

17 A. Well, Judge Cothran knows that because he used to be a
18 solicitor. So, he did also.

19 Q. Okay, but if you would have put that on the record,
20 wouldn't it have been preserved potentially for appellate
21 review?

22 A. I think so but, you know, I've never done it on the
23 record because I never thought that it was that important.
24 So, I didn't preserve it

25 Q. But is that part of your basis for why you didn't have

H. DEVOE - CROSS-EXAMINATION BY MS. BLANCHETTE

71

1 witnesses and those type of things at this trial was
2 because you didn't have notice? Did that factor into it?

3 A. Well, one, I -- it was late in the week of a one day,
4 one -- a one-week term. It's almost like the term was over
5 with, and all of a sudden Amy Land seemed to pull this one
6 out of the bucket, decided to take this one to trial. That
7 was her notice.

8 Q. Okay, and did that lack of notice hinder the defense
9 that you were able to put up ---

10 A. Oh, yeah. I think if ---

11 Q. --- for Mr. Smith?

12 A. --- I had had a week's notice or a few days' notice, I
13 could have done a bit more in that kind of situation, yes.

14 Q. Okay.

15 A. Because the day, the day that we called and pulled the
16 jury -- so, I talked to the client's mother, and we went
17 down to the apartment complex looking for what was it all
18 about.

19 Q. And that's what I was going to ask. So, that's when
20 you learned that there was a video is when you went to the
21 apartment complex with his mother?

22 A. Yes.

23 Q. And why weren't you able to get that for trial?

24 A. Because I think the video would -- there was no video
25 left.

H. DEVOE - CROSS-EXAMINATION BY MS. BLANCHETTE

72

1 Q. Okay. So, by the time you got to it, it wasn't even
2 available?

3 A. It was a year and a half later.

4 Q. Okay. Now in the presentation of our case, we raised
5 the issue that you should have gone into motive, that there
6 was a prior case with Tasha Cannon where Mr. Smith had been
7 accused of an armed robbery, and I believe just when you
8 were on direct, you said Mr. Smith didn't tell you about
9 that case. You had no knowledge of that potential motive.
10 Is that correct?

11 A. That's correct.

12 Q. Okay.

13 MS. BLANCHETTE: If I could beg the court's indulgence
14 one moment? I'm sorry.

15 (A PAUSE.)

16 BY MS. BLANCHETTE:

17 Q. Mr. Devoe, when I was trying to locate records about
18 that case that Mr. Smith was saying could be the motive, he
19 had one document for me. There was a motion for discovery
20 and inspection that he had from the case that had warrant
21 number J124620.

22 MS. BLANCHETTE: Your Honor, may I approach the
23 witness?

24 THE COURT: Yes.

25 BY MS. BLANCHETTE:

H. DEVOE - CROSS-EXAMINATION BY MS. BLANCHETTE

73

1 Q. I'm handing you a copy of that motion for discovery
2 for arrest warrant J124620.

3 A. Yes, my Rule 5.

4 Q. And could you look and see who the attorney was that
5 was handling that case, the case that could be the motive
6 argument? Who signed that?

7 A. I signed the Rule 5 for, for George Smith, yes.

8 Q. Okay. So, does it appear from the document that you
9 actually represented him on the burglary charge, the prior
10 burglary charge?

11 A. For George, George Smith?

12 Q. Yes.

13 A. Right now? The one we're talking about right now?

14 Q. No. The one that ---

15 A. Yes, I ---

16 Q. --- I had previously -- and I'll show you this.

17 A. Yes.

18 Q. This is Applicant's Number 1, and it's for case number

19 ---

20 A. I remember ---

21 Q. --- J14 ---

22 A. I remember the case, yes. Okay.

23 Q. The earlier case that we were saying served as the
24 motive. Does it appear from that motion for discovery that
25 you actually represented him at some point on that charge?

H. DEVOE - CROSS-EXAMINATION BY MS. BLANCHETTE

74

1 A. It shows I represented him. It doesn't show that
2 anything happened with that particular case either, does
3 it?

4 Q. Okay, but if you represented him, wouldn't you have
5 been aware that that case existed?

6 A. I might have been. I've had so many cases between
7 those cases, to keep track of, it's -- that way is
8 possible.

9 MS. BLANCHETTE: Your Honor, at this time I -- and I
10 apologize. I only have one copy of this that Mr. Smith
11 gave me, but I would move this motion for discovery in as
12 Applicant's Number 3.

13 THE COURT: Any objection?

14 MR. GOURLEY: No objection, Your Honor.

15 THE COURT: It's admitted.

16 (MOTION MARKED INTO EVIDENCE AS APPLICANT'S EXHIBIT
17 NUMBER 3.)

18 BY MS. BLANCHETTE:

19 Q. Mr. Devoe, since it appears that you may have
20 represented him on that charge, is there any reason why you
21 didn't bring that up at trial, that there was this prior
22 charge and potential motive?

23 A. I don't know the case, frankly, offhand. I don't know
24 who the victim was in that case from -- just from what you
25 show me or what even happened to the case.

H. DEVOE - CROSS-EXAMINATION BY MS. BLANCHETTE

75

1 Q. Okay, but you can't remember a specific reason as to
2 why you wouldn't have gone into that?

3 A. No, no reason at all particularly.

4 Q. And I apologize if the state asked you about this, but
5 were you aware that when Mr. Smith was sentenced to
6 twenty-six years, that wasn't a legal sentence?

7 A. Well, I should have, and I obviously tried to get it
8 down to twenty-five even because it was the same thing as
9 the other twenty-five. Then it turns out he cut down to
10 twenty later because of the, as you've already said, it was
11 an illegal sentence.

12 Q. Okay, but you didn't make a contemporaneous objection
13 to the sentence ---

14 A. No, I didn't.

15 Q. --- at trial? And, Mr. Devoe, I received a copy of
16 your file, and I didn't see any indication of a date or any
17 memos or anything. Do you recall if there was a pretrial
18 hearing where Mr. Smith moved to relieve you?

19 A. No, I don't.

20 Q. Okay. So, you ---

21 A. But it ---

22 Q. --- wouldn't be able to provide us that date to obtain
23 the transcript?

24 A. That's right. If he did, I don't -- I'm not aware of
25 it one way or the other, frankly.

H. DEVOE - CROSS-EXAMINATION / REDIRECT EXAMINATION

76

1 Q. Okay.

2 MS. BLANCHETTE: Your Honor, if I could just beg the
3 court's indulgence one moment?

4 THE COURT: All right.

5 BY MS. BLANCHETTE:

6 Q. Just briefly, Mr. Devoe, if you would have had an
7 alibi witness, is that something that would have been
8 helpful in this case that all boiled down to eyewitnesses?

9 A. It's always helpful to have an alibi witness.

10 Q. Okay, and if Tasha Cannon was interested in recanting
11 and that was something you could have investigated and
12 discovered, is that something you would have explored at
13 trial?

14 A. I certainly would have.

15 MS. BLANCHETTE: Your Honor, I have no further
16 questions of this witness.

17 THE COURT: Mr. Gourley.

18 REDIRECT EXAMINATION BY MR. GOURLEY:

19 Q. Mr. Devoe, do you recall the rules of alibi or notice
20 for alibi? Do you, do you recall how many days you have to
21 provide a notice for alibi?

22 A. No, I don't.

23 Q. If it's a minimum of ten days, would you dispute that?

24 A. I wouldn't dispute it.

25 Q. Okay, and I don't know if you recall, but Mr. Smith's

H. DEVOE - REDIRECT EXAMINATION BY MR. GOURLEY

77

1 testimony was that he provided you or alleged to provide
2 you his uncle's name as an alibi about a week before trial.
3 That wouldn't be a sufficient time to provide a alibi
4 notice, would it not?

5 A. No, and since we didn't know when we're going to
6 trial, I don't know he had -- just when -- just before
7 trial. I never heard about this uncle.

8 Q. Right.

9 A. Until today.

10 Q. Right, and again you, you, you weren't aware of Uncle
11 Levi?

12 A. No.

13 Q. Okay, and you provide your representation based off
14 what Mr. Smith tells you, correct?

15 A. That's right.

16 Q. Okay. Regarding the illegal sentence, Mr. Smith is
17 currently serving twenty years, correct?

18 A. Yes.

19 Q. Okay, and regarding the motion for discovery that you
20 apparently represented Mr. Smith on back in 2008, you don't
21 recall who the victim was in that case?

22 A. No, I don't.

23 Q. Okay, and Mr. Smith never brought it to your attention
24 that Tasha Cannon had allegedly ---

25 A. No.

H. DEVOE - REDIRECT EXAMINATION / EXAMINATION BY THE COURT 78

1 Q. --- claimed that he burglarized her house?

2 A. No. The problem is that Mr. Smith told me that, you
3 know, that, that he didn't steal anything. He didn't take
4 any -- he didn't rob them. He did hit, hit them up but
5 didn't rob them.

6 Q. Okay, but he did assault him?

7 A. He assaulted him.

8 Q. Okay.

9 MR. GOURLEY: Your Honor, I have no other questions.

10 Thank you, Mr. Devoe.

11 WITNESS: Thank you.

12 THE COURT: Anything further?

13 MS. BLANCHETTE: No, Your Honor.

14 THE COURT: All right. Thank you. You may step down.

15 WITNESS: Thank you, Your Honor.

16 THE COURT: Just one question.

17 EXAMINATION BY THE COURT:

18 Q. In view of your last statement, Mr. Devoe, are you
19 saying that Mr. Smith confessed to being guilty of being at
20 the scene of the apartment complex and robbing or
21 assaulting the victim in this case?

22 A. Yes.

23 Q. All right.

24 THE COURT: Any other additional questions?

25 MS. BLANCHETTE: None of Mr. Devoe, Your Honor.

G. SMITH - DIRECT EXAMINATION BY MS. BLANCHETTE

79

1 THE COURT: All right. Thank you.

2 (THE WITNESS EXITS THE STAND.)

3 THE COURT: Any other witnesses?

4 MR. GOURLEY: No, Your Honor, not today.

5 THE COURT: All right, you want to argue now or wait
6 until you have the opportunity to bring someone else in?

7 MS. BLANCHETTE: Your Honor, if I could just briefly
8 call Mr. Smith in reply? I have two questions for him.

9 THE COURT: All right.

10 MS. BLANCHETTE: It will be very brief.

11 THE COURT: You can stay right there.

12 DIRECT EXAMINATION BY MS. BLANCHETTE:

13 Q. Mr. Smith, you're still under oath. I just had a
14 couple of follow-up questions for you.

15 There's been some discussion ---

16 COURT REPORTER: Could I have him stand so I can see
17 and hear him, please?

18 THE COURT: Talk loud from right there.

19 BY MS. BLANCHETTE:

20 Q. There's been some discussion of the charge that you
21 received in 2007. It was an armed robbery charge -- I'm
22 sorry, a burglary charge, and we introduced the disposition
23 sheet as Applicant's Number 1. And then during Mr. Devoe's
24 testimony we introduced a motion for discovery and
25 inspection that was signed by Mr. Devoe on that arrest

G. SMITH - DIRECT EXAMINATION BY MS. BLANCHETTE

80

1 warrant number. Who represented you on that charge?

2 A. Harry Devoe.

3 Q. And who was the victim in that case?

4 A. Tasha Cannon.

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

7 THE COURT: Anything further, Mr. Gourley?

8 MR. GOURLEY: No, Your Honor.

9 THE COURT: All right. Thank you.

10 Any additional witnesses?

11 MS. BLANCHETTE: Your Honor, we would just ask to
12 leave the record open as we've previously discussed.

13 THE COURT: All right, we'll leave the record open as
14 we previously discussed.

15 Any argument for today?

16 MS. BLANCHETTE: Your Honor, just briefly. Since I
17 provided you two cases, I figured I could touch base as to
18 why I gave those to you.

19 I provided *Lounds vs. State*, which goes to an
20 attorney's failure to prepare and investigate. I believe
21 Mr. Devoe was very candid and honest. He said he had no
22 notice. That he attempted to, you know, go out to the
23 apartment complex once he knew the case was going to be
24 called. At no time did he say he utilized an investigator,
25 spoke to witnesses, did the things that are necessary or

1 reasonable investigation under *Lounds*.

2 And in *Lounds* it also says it can't be considered a
3 matter of trial strategy if you just fail to do it. And in
4 this case, I think it is clear from not only the record of
5 the trial but also the testimony that was given today that
6 unfortunately Mr. Devoe, even with his vast experience,
7 failed to properly investigate and prepare this case on Mr.
8 Smith's behalf.

9 I also have submitted to the court the case of *Jordan*
10 *vs. State*, and I was fortunate to be Mr. Jordan's PCR
11 counsel on that case. There it deals with the concurrent
12 representation of two codefendants, and that presented an
13 actual conflict of interest. So, therefore, our appellate
14 court gave Mr. Jordan PCR relief on that matter.

15 We have raised the issue, and unfortunately have not
16 been able to provide any court documentation to show that
17 Mr. Devoe represented both Kelvin and his brother, Broadus
18 Black. I understand that Mr. Devoe refuted that, but Mr.
19 Devoe also originally said he had no knowledge of the
20 underlying charge that goes to motive. And then we
21 provided documentation that he, in fact, represented my
22 client on that charge.

23 I understand he handled a number of cases; he was very
24 busy in his capacity. So, it is likely that his -- you
25 know, he could be incorrect on that because he was as far

1 as his representation of the other charge with Mr. Smith.
2 So, we just ask that the court review that case as to the
3 actual conflict of interest issue that we've raised.

4 Obviously there's a number of other issues in the
5 amendment, but if we're leaving the record open, I just
6 wanted to speak to the two cases I've already handed up.

7 THE COURT: Well, accepting what the case says as
8 being true, you cannot have concurrent representation of
9 codefendants or parties with antagonistic interests, which
10 you say you cannot verify that it happened.

11 MS. BLANCHETTE: I can't. The best, Your Honor, that
12 I can get is that Steve McKenzie took over representation
13 of that charge, the drug charge that Mr. Smith -- it was
14 his understanding Mr. Devoe originally had. He took over
15 representation in 2007 and that ceased in 2009. So,
16 therefore, it would not have been concurrent, and I just
17 wanted to be honest with the court, but that was
18 information I got from Mr. McKenzie's office.

19 THE COURT: Mr. Devoe previously represented the
20 victim?

21 MS. BLANCHETTE: My client's testimony was that he saw
22 him at the jail meeting with the victim's brother, and it
23 was also his understanding that he was representing the
24 victim at the same time. The charge that he gave the
25 information on, I did not find anything in the online

1 records, and I spoke with the clerk's office. Found out
2 that Mr. McKenzie may have represented him later on that
3 charge. So, I contacted his office to see if they had
4 potentially where he entered his appearance, if he was
5 substituted in for Mr. Devoe, something where I could
6 establish it. They also did not have the records. So,
7 this is kind of a broken record of me saying I cannot find
8 the record. So, I, I didn't -- I couldn't find anything to
9 establish that representation beyond my client's testimony.

10 THE COURT: And how do you get around the issue,
11 according to Mr. Devoe, that the defendant confessed to
12 being guilty of the assault?

13 MS. BLANCHETTE: Your Honor, I think that comes down
14 to a credibility matter. My client indicated that he told
15 him he was not present and asked him to investigate it and
16 asked him to call an alibi witness. My intention is to
17 call that alibi witness, and I hope that I would persuade
18 the court to find that there was a viable alibi defense in
19 this case, and both the alibi witness and my client should
20 have been utilized. So, I think that speaks to that.

21 I don't know if he was reading that from notes he had
22 or what that information came from. That was not in any
23 information that I received from Mr. Devoe, nor did my
24 client ever give a confession to law enforcement.

25 THE COURT: Okay, Mr. Gourley.

1 MR. GOURLEY: Your Honor, of course it's the
2 applicant's burden to prove their applications. I would
3 submit to the court they have not met their burden in any
4 of the allegations. They did not provide any kind of
5 documentation to support their claims.

6 In regards to the alibi of Uncle Levi, Your Honor, Mr.
7 Devoe stated that the applicant did not tell him about
8 Uncle Levi. That had he told him, he would have then gone
9 and researched it or looked into it. Mr. Devoe could not
10 go into the mind of Mr. Smith and pull out information.
11 He's going to work with what he's been told. So, I would
12 submit to the court you can't fault Mr. Devoe for not
13 knowing information or for not following up, following up
14 on information that he was never provided.

15 THE COURT: All right. Anything else?

16 MR. GOURLEY: Regarding, regarding the topic of
17 interest, Your Honor, I would just submit to the court that
18 there's been no documentation to show that Mr. Devoe ever
19 represented Kelvin or Broadus, Broadus Black and, Your
20 Honor, for those reasons I would ask -- or the record's
21 left open so we'll be back in October.

22 COURT REPORT: Could you repeat that, please, the last
23 part?

24 MR. GOURLEY: The record is left open so we'll be back
25 in October.

1 THE COURT: All right. We'll take it under
2 advisement. I look to hear from you all or see you in
3 October.

4 MS. BLANCHETTE: Thank you, Your Honor.

5 --- END OF TRANSCRIPT OF RECORD ---

CERTIFICATE

I, THE UNDERSIGNED ELIZABETH B. HARRIS, CERTIFIED
VERBATIM OFFICIAL COURT REPORTER FOR THE FIFTH
JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO
HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE
AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE
PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE HEARING
OF THE CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE
CIRCUIT COURT FOR CLARENDON COUNTY, SOUTH CAROLINA, ON
THE 10TH DAY OF SEPTEMBER, 2014.

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

/S/ELIZABETH B. HARRIS, CVR-M-CM

COLUMBIA, SOUTH CAROLINA
JULY 21ST, 2016

270

General Sessions
CASE HISTORY FOR CASE J124620

The State of South Carolina VS George Arsenio Smith

FILED DATE: 6/12/2008.

CASE TYPE: GS

STATUS: Dismissed

JUDGE: Clerk Of Court C P, G S, And Family Court

CASE PARTIES:

Defendant Smith, George Arsenio

[REDACTED], SUMMERTON, SC 29148

CERTIFIED TRUE COPY
 OF ORIGINAL FILED IN THIS OFFICE

DATE

8/18/14

Bentley S. Roberts
 CLERK OF COURT
 CLARENDON COUNTY, SC

CASE HISTORY FOR CASE J124620**Smith, George Arsenio**

Age: 25

DOB: [REDACTED]

DL#: [REDACTED]

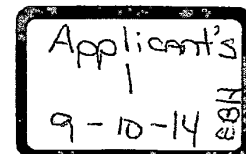
SSN: [REDACTED]

SUMMERTON, SC 29148

CHARGE	VIOL. DATE	DISPOSITION	DISP. DATE
0079 Burglary / Burglary (After June 20, 1985) - First degree	12/30/2007	Dismissed Not Indicted	7/8/2008

COST	ORIGINAL	BALANCE DUE	DISBURSED	PAY PRIORITY
Charge: Burglary / Burglary (After June 20, 1985) - First degree				
Fine to State 44%	\$0.00	\$0.00	\$0.00	999
Fine to General Fund	0.00	0.00	0.00	999
Victim Services Asm 38.0013% / 5.783	0.00	0.00	0.00	999
Victim Conviction Surcharge \$100 / \$21	0.00	0.00	0.00	999
Law Enforcement Funding Surcharge \$:	0.00	0.00	0.00	999
SC Criminal Justice Academy Training	0.00	0.00	0.00	999
State Assessment	0.00	0.00	0.00	999
Total:	\$0.00	\$0.00	\$0.00	

DATE	TIME	EVENT DESCRIPTION
7/17/2008	12:00 AM	C14BROBERT recorded the following Case Note: Dismiss - lack of prosecutorial evidence.



Print Date: 08/18/2014
 Print Time: 3:05:23PM
 Requested By: C14PJOYNER

CaseHistory.rpt V6.1

Page 1 of 1

ROA-272

SWORN STATEMENT OF

NAME Tasha CannonADDRESS [REDACTED]I, Tasha Cannon, being under Oath, do make the following statement: Summerton, SC 29148

I was laying in the bed and I heard
arguing behind the apt. and gunshots when
I ran downstairs and opened the door I
saw "Chips" running behind Kelvin shooting.
He chased him all around the mailbox shooting
him. When he fell in front of the door he
went in his pockets and ran off. After he
left. I pulled him in the house.

803-485-5026 (H) 3-15-1980

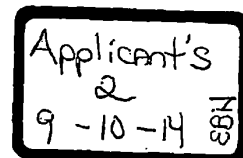
Kelvin Rashawn Black [REDACTED]

I have made the foregoing statement freely and voluntarily without fear, threat, promise of reward, or hope of reward of any kind, and the above statement was given under Oath and is the truth to the best of my knowledge.

Sworn to before me this _____ day
 of _____, 20____

_____, L.S. Signed _____
 Notary

My Comm. expires _____



BRILLANT G. ROBERTS
CLERK OF COURT
CLARENCE COUNTY, SC

STATE OF SOUTH CAROLINA)
COUNTY OF CLARENDON)
2008 JUL 10 AM 10:43)
IN THE COURT OF GENERAL SESSIONS
OF THE
THIRD JUDICIAL CIRCUIT

State of South Carolina,

Warrant Nos.: M-080241-43, J-124616, 20

vs.

MOTION FOR DISCOVERY

George Arsenio Smith,
Defendant.

CERTAIN INSPECTION
OF ORIGINAL FILED IN THIS OFFICE

DATE 7/10/08

Beulah B. Roberts

CLERK OF COURT

NOW comes Defendant, George Arsenio Smith, by and through his undersigned counsel of record, pursuant to Rule 5 of the South Carolina Rules of Criminal Procedure, and moves the prosecution to permit Defendant to inspect and copy or photograph, within thirty (30) days of service of this Motion and at least ten (10) days prior to trial, including, but not limited to, the following, with the express provision that the duty of disclosure be a continuing one in the event that any such materials come into existence or become available after the initial disclosures:

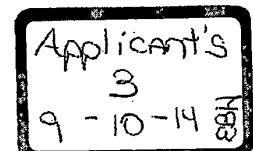
(a) Any written or recorded statements made by Defendant, or copies thereof, within the possession, custody or control of the prosecution, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the prosecution;

(b) The substance of any oral statement which the prosecution intends to offer into evidence at the trial made by Defendant, whether before or after arrest, in response to interrogation by any person then known to Defendant to be a prosecution agent;

(c) A copy of Defendant's prior criminal record, if any, as is within the possession, custody or control of the prosecution, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the prosecution;

(d) All books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the prosecution, and which are material to the defense, or are intended for use by the prosecution as evidence in chief at the trial or were obtained from or belong to Defendant;

(e) All results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, control or custody of the prosecution, the existence of which is known, or by the exercise of due diligence may become



known, to the attorney for the prosecution, and which are material to the preparation of the defense, or are intended for use by the prosecution as evidence in chief at the trial;

(f) The statement of any witness or prospective prosecution witness, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the prosecution; and

(g) The full criminal record of all witnesses the State intends to call or whom the State may call, either in their case or in rebuttal. Regardless of whether the State intends to call the victim as a witness, it is necessary that Defendant be furnished with the criminal record of the victim in this case.

Defendant further moves that compliance with the foregoing request be made within thirty (30) days from the service of this Motion, and upon failure of the prosecution to so comply, Defendant will move before the Presiding Judge of this Circuit, by Notice and Motion, for an Order prohibiting the prosecution from introducing at trial evidence not disclosed, and, if the foregoing is denied, an Order permitting the discovery and inspection requested, or a continuance of the trial or such order as the Court in its discretion deems just under the circumstances.

For purposes of this Motion, Defendant asserts that any item requested in subparagraphs (a), (b), (c), (d), (e), (f) and (g) above are material to the preparation of the defense in this case.

BY: 

HARRY L. DEVOE, JR.
Attorney for Defendant
7411 Black River Road
New Zion, South Carolina 29111
(803) 473-2026

New Zion, South Carolina
July 7, 2008

STATE OF SOUTH CAROLINA)

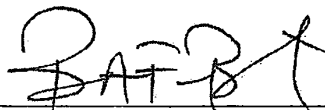
COUNTY OF RICHLAND)

AFFIDAVIT ELIZABETH FRANKLIN-BEST

My name is Elizabeth Franklin-Best, and I hereby swear and state the following:

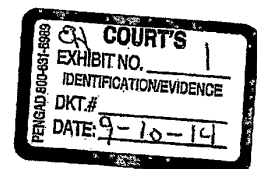
- 1) I am an attorney in good standing with the State bars of South Carolina and New York.
- 2) I am a partner in the law firm of Blume Norris & Franklin-Best, LLC. I was previously employed with the South Carolina Commission on Indigent Defense as an appellate lawyer.
- 3) In that capacity, it appears that I was appointed to represent George Smith in his direct appeal.
- 4) I have a vague recollection of working on his case, but I do recall raising the sentencing issue because, although it was not properly preserved, our appellate courts have, in the past, corrected such errors on direct appeal for the sake of judicial economy.
- 5) Generally, in reviewing a case, I will read the transcripts and make note of any errors that I may find. Although I have raised issues on appeal that are not properly preserved, I generally only do so when there are no meritorious issues that are preserved.
- 6) I brief as many issues as I believe are not patently frivolous. The fact that I only raised one issue in this brief means that there was only one error that I could identify on the face of the transcript.
- 7) Applicant has alleged that I should have secured an additional transcript involving a motion to proceed pro se. I clearly did not have that transcript in this case. If I had had a transcript with Mr. Smith requesting to proceed pro se, I would have briefed that issue as it is both a South Carolina state issue, and also a federal constitutional issue under *Faretta v. California*, 422 U.S. 806 (1975). If that transcript exists, it was my responsibility to obtain it. If it exists, then my performance was substandard under prevailing professional norms. *Strickland v. Washington*, 466 U.S. 668 (1984).

FURTHER AFFIANT SAYETH NOT.


Elizabeth A. Franklin-Best

Sworn to on this 9th day of September 2014.


Teressa L. Norris
S.C. Comm expires 1/31/15
Notary Public S.C.



STATE OF SOUTH CAROLINA
COUNTY OF CLARENDON

IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT

George Smith, #329531,

Case No. 2012-CP-14-0392

Applicant.

CERTIFIED TRUE COPY
OF ORIGINAL FILED IN THIS OFFICE

DATE

12/12/16

ORDER OF DISMISSAL

State of South Carolina,

Beverly S. Roberts

CLERK OF COURT
CLARENDON COUNTY, SC

Respondent.

2016 NOV 15 PM 12:5

RECEIVED
CLERK
CLARENDON COUNTY, SC

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on August 22, 2012. Respondent made its return on February 12, 2013. An evidentiary hearing into the matter was convened on September 10, 2014, at the Sumter County Courthouse. Applicant was present at the hearing and was represented by Tricia Blanchette, Esquire. Respondent was represented by Assistant Attorney General Daniel Gourley of the South Carolina Attorney General's Office.

PROCEDURAL HISTORY

The records before this Court indicate the Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clarendon County Clerk of Court. The Applicant was true bill indicted at the August 2008 term of the Clarendon County Grand Jury for assault and battery with intent to kill, armed robbery, and possession of a weapon during a violent crime (2008-GS-14-0352). Harry Devoe, Esquire represented him. Applicant proceeded to a jury trial before the Honorable R. Ferrell Cothran, Jr. On December 8, 2009, Applicant was found guilty of assault and battery with intent to kill, armed robbery, and possession of a weapon during a violent crime. Judge Cothran sentenced Applicant to twenty years imprisonment for assault and battery with intent to kill, twenty five years for armed

robbery, and five years for possession of a weapon during a violent crime with all sentences running concurrently.

A timely notice of appeal was filed. The South Carolina Court of Appeals affirmed the lower court's conviction. State v. George Smith, Op. No 2012-UP-350 (S.C. Ct. App. filed June 6, 2012). The remittitur was sent on June 25, 2012.

ALLEGATIONS

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

1. Ineffective assistance of counsel.
 - a. Failure to prepare and investigate.
 - b. Failure to utilize witnesses.
2. Ineffective assistance of appellate counsel
 - a. Failure to raise all meritorious issues on appeal.

Applicant filed an amendment to his post-conviction relief application on September 4, 2014. Applicant alleged he was being held unlawfully for the following reasons:

1. Ineffective assistance of trial counsel for failure to make a pretrial motion and/or trial objection to the identification of Applicant.
2. Ineffective assistance of trial counsel for failure to advise Applicant of conflict of interest due to representation of Kelvin and Broaddus Black.
3. Ineffective assistance of trial counsel for failure to raise the victim's motive in bringing the instant charges due to a prior-break in allegation against applicant.
4. Ineffective assistance of trial counsel for introducing evidence of Applicant's flight through cross-examination of Investigator Burgess.
5. Ineffective assistance of trial counsel for his comments in mitigation prior to sentencing.
6. Ineffective assistance of trial counsel for failure to object to Applicant's illegal sentence.
7. Ineffective assistance of appellate counsel for failure to obtain transcript and raise Applicant's pro-se motion to relieve counsel on appeal.

SUMMARY OF TESTIMONY PRESENTED

At the evidentiary hearing, Applicant testified on his own behalf and presented testimony from Pete Skidmore (hereinafter "Investigator Skidmore"). The State presented testimony from Harry Devoe, Esquire. (hereinafter "Trial Counsel"). This Court also had before it a copy of the trial transcript, the Clarendon County Clerk of Court records, Applicant's South Carolina Department of Correction records, the PCR application, appellate records and return. During the evidentiary hearing, various exhibits were introduced including a statement from Tasha Cannon, a case history report for case J124620, and a motion for discovery for case J124620 filed by Trial Counsel. Additionally, both parties stipulated to the introduction of a sworn affidavit by Elizabeth Franklin-Best (hereinafter "Appellate Counsel").

At the Hearing, counsel for the Defendant requested additional time to locate and present testimony of the alleged witness, Uncle Levi. After being given several months the applicant has failed to present any additional witnesses or testimony and the record is now closed.

During the evidentiary hearing Applicant testified on his own behalf. Applicant stated he is currently housed at Lee Correctional Institution. Applicant stated the incident took place on April 6, 2008 and he proceeded to trial in December 8, 2009. Applicant stated Kelvin Black (hereinafter "Victim") was shot. Applicant stated he was indicted for assault and battery with intent to kill, armed robbery and possession of a weapon during the commission of a violent crime. Applicant stated he received twenty six years for assault and battery with intent to kill, twenty five years for armed robbery, and five years for possession of a weapon during a violent crime. However, Applicant stated he is now serving a twenty year sentence for assault and battery with intent to kill.

Applicant stated Trial Counsel was appointed to represent him. Applicant stated he met with Trial Counsel twice prior to trial. Applicant stated Trial Counsel tried to convince Applicant to plead guilty. Applicant stated he did not review any discovery material with Trial Counsel. Applicant stated he did not discuss any possible defenses with Trial Counsel. Applicant stated that there was a twenty year plea offer, but Applicant rejected the offer. Applicant stated that he told Trial Counsel about various witnesses including, Uncle Levi. Applicant explained that he was staying at Uncle Levi's house at the time of the incident. Applicant further stated that he requested Trial Counsel to investigate into the residents of the apartment complex where the shooting took place, however Applicant did not know any of their names. Applicant stated he requested Trial Counsel to retrieve the video feed from the cameras located at the apartment complex.

Applicant stated he requested Trial Counsel to speak to his Uncle Levi, who could provide an alibi. Applicant stated he told Trial Counsel about Uncle Levi seven days before trial. Specifically, Applicant stated he was staying with Uncle Levi during the time the crime occurred. Applicant stated he does not know if Trial Counsel ever spoke to Uncle Levi. Applicant stated Uncle Levi is paraplegic.

Applicant stated there were three eye witnesses who positively identified him as the shooter. However, Applicant stated there was no DNA evidence, no trace evidence, and no weapon. Applicant stated that it was important to attack the credibility of the witnesses. Applicant stated Trial Counsel failed to file a pretrial motion to suppress the photo lineup identification of Applicant. Applicant stated Trial Counsel failed to object to the Investigator Burgess stating he showed the photo line up to both Victim and Cannon. Applicant further

stated Trial Counsel should have objected to Investigator Burgess summarizing Victim pointing Applicant out in the photo lineup with a "bloody finger."

Applicant stated Trial Counsel elicited testimony regarding his flight for two months. Specifically, Applicant referred to Trial Counsel cross examination of Investigator Burgess. Investigator Burgess responded to Trial Counsel's question by stating "I said we did not take him in to custody for two months. We were looking for him. And I had to actually have the assistance of marshal services to take him into custody." (Tr. t. p. 99 lines 4-11).

Applicant stated that Trial Counsel had represented Victim and Broddus Black (Victim's brother). Applicant stated he was in county lock up with Victim and saw Trial Counsel meeting with Victim. Applicant stated he was unaware that he could raise a conflict of interest claim in an attempt to relieve Trial Counsel.

Applicant stated that he wanted to testify during trial, however he would have been impeached with pending burglary—first degree charges. Applicant stated Tasha Cannon (hereinafter "Cannon") had alleged that he broke into her home. Applicant stated this was the motive for naming him in the shooting. Applicant stated he had a "beef" with Victim.

Applicant stated that he filed a motion to relieve counsel and that motion was heard before Judge Cothran. Applicant stated Judge Cothran refused to relieve Trial Counsel. Applicant stated Appellate Counsel should have retrieved the motion hearing transcript and briefed the issue on appeal.

Applicant testified Trial Counsel stated during mitigation that the jury was out for hour and a half and that they deliberate for a short period of time. Applicant felt Trial Counsel should not have brought to the trial judge's attention that the jury deliberate for such a short period of time. Applicant stated he received an illegal sentence of twenty six years for assault and battery

with intent to kill. However, Applicant stated he is now serving a twenty year sentence and the court corrected its mistake.

Following Applicant's testimony, Investigator Skidmore testified. Investigator Skidmore stated that Applicant's family retained his services. Investigator Skidmore stated that if he had been retained for the trial, he would have canvassed the area and attempted to recover the videos from the apartment complex. Investigator Skidmore stated he went to the apartment complex and attempted to retrieve any video footage, however none existed. Investigator Skidmore stated he attempted to locate Cannon, however she has moved to Connecticut. Investigator Skidmore stated that he attempted to talk with Uncle Levi on multiple occasions, however Uncle Levi refused to talk to him. Investigator Skidmore stated he first met with him outside and around multiple people. Investigator Skidmore stated Uncle Levi seemed uneasy and scared. Investigator Levi stated he met with Uncle Levi the following day at his house while he was receiving medical treatment. Investigator Skidmore stated Uncle Levi wanted to verify who he was with Applicant, however Applicant's jail pin number has been out the last few weeks and Applicant has been unable to receive calls. Investigator Skidmore stated PCR Counsel, Tricia Blanchette's phones have been out as well.

Following Investigator Skidmore's testimony, Trial Counsel was called to testify by the State. Trial Counsel stated he has been practicing law for fifty years. Trial Counsel stated he is a public defender in Clarendon County. Trial Counsel stated he was appointed to represent Applicant. Trial Counsel stated the Clarendon County public defender's office consisted of the attorney's only. Trial Counsel explained that they did not have any secretaries, investigator's, or assistants. Trial Counsel stated if he wanted to hire an investigator he would need to request funding from the court. Trial Counsel stated it was not his typical practice to hire an

investigator. Trial Counsel stated he typically talked to family members and conducted his own investigation. Trial Counsel stated he filed for all Rule 5 and Brady material. Trial Counsel stated he reviewed this material with Applicant. Trial Counsel stated he discussed the various elements of the charges and the State's burden of proof with Applicant prior to trial.

Trial Counsel stated he received notice that the trial was set on December 7, 2009. Trial Counsel stated Judge Cothran was well aware that he received only one day notice prior to trial. Trial Counsel stated that he could not recall if Applicant ever attempted to have him relieved as counsel. Trial Counsel stated Applicant did not give him any leads or witnesses to investigate. Trial Counsel stated he had never heard of Uncle Levi or any potential alibi witness. Trial Counsel stated had Applicant told him about Uncle Levi he would have investigated him and filed an alibi notice. Trial Counsel stated that he did talk to Applicant's parents. Trial Counsel stated he went out to the apartment complex and reviewed the scene, the lighting, and learned about the video cameras. Trial Counsel stated he attempted to review the film, but they had already been recorded over. Trial Counsel stated the film was available for only a seven day period. Trial Counsel stated he attempted to argue that the police investigation was bad because they failed to obtain the video tapes.

Trial Counsel stated he was prepared for trial, despite the fact that he received very short notice. Trial Counsel stated if he did not feel prepared for trial he would have made a motion for a continuance. Trial Counsel stated his trial strategy was to impeach the witnesses. Specifically, Trial Counsel referenced the fact that the incident took place in the early morning hours. Trial Counsel stated he argued that the lighting surrounding the apartment complex was very poor, which hindered the witnesses' identification of Applicant. Trial Counsel stated he saw no basis

to object to the photo lineup and had he felt there was an arguable objection to be made he would have made it.

Trial Counsel stated that he did not recall representing Victim or his brother Broddus Black. Trial Counsel stated Applicant never brought to his attention that he allegedly represented Victim or Broddus Black on previous cases. Trial Counsel stated he filed a Rule 5/Brady motion for Applicant on his 2008 burglary—first degree charges. Trial Counsel stated those charges were dismissed on July 8, 2008 and he could not recall who the victim was in that case.

Trial Counsel stated Applicant told him that he did not rob Victim only beat him up because there was “bad blood” between them. Trial Counsel characterized the evidence against the Applicant as “overwhelming.” Specifically, Trial Counsel stated both Applicant and Cannon knew Applicant prior to the crime and were able to positively identify Applicant as the shooter. Trial Counsel stated Cannon’s sister was able to positively identify Applicant as the shooter.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility, and weigh their testimony accordingly. Specifically, this Court finds Trial Counsel’s testimony credible and Applicant’s testimony not credible. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

INEFFECTIVE ASSISTANCE OF COUNSEL

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; 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, (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Ineffective assistance of trial counsel for failure to make a pretrial motion and/or trial objection to the identification of Applicant.

This Court finds Applicant's allegation that trial counsel was ineffective for failing to make a pretrial motion or trial objection to the identification of the Applicant is meritless. Trial Counsel stated Applicant was positively identified by three separate witnesses. The trial transcript reveals both Victim and Cannon made in court identification of Victim. (Tr. t. p. 28 lines 11-25; Tr. t. p. 69 lines 2-8). Additionally, Investigator Burgess discussed the process of

compiling the lineup, how he presented the lineup to both Victim and Cannon, and described who they identified out of the lineup. (Tr. t. p. 83 line 19—p. 89 line 20). During the evidentiary hearing, Trial Counsel stated that he did not see any basis to challenge or object to the lineup. This Court finds counsel's representation of Applicant well within the bounds of "professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland).

Additionally, this Court notes Applicant failed to present any evidence in support of his claim that Trial Counsel should have objected to the photo lineup. Specifically, Applicant failed to present for this Court's inspection a copy of the photo lineup, any expert testimony regarding the reliability of the lineup itself, or any witness testimony from either Victim or Cannon regarding their identification of Applicant. See Palacio v. State, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999) (holding that, since the contents of challenged documents were not presented at the PCR hearing, the Applicant could not demonstrate how the failure of counsel to obtain these documents prejudiced the defense); See Dempsev v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) (finding that, as the applicant failed to have an expert testify at the evidentiary hearing, "any finding of prejudice is merely speculative").

Furthermore, Applicant can show no resulting prejudice due to Trial Counsel's alleged deficiencies as there is clear evidence of overwhelming guilt. Where there is overwhelming evidence of guilt, a trial counsel's deficient representation will not be prejudicial. See Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of defendant's trial). This Court agrees with Trial Counsel's characterization of the State's evidence against Applicant as "overwhelming." A review of the trial transcript reveals that Applicant was positively identified by three separate witnesses. Two of those three

witnesses made in court identification of Applicant. Even more significant is Trial Counsel's testimony that Applicant admitted his guilt during the course of his representation. Based on the foregoing, this Court finds Applicant has failed to meet his burden of proof. Therefore, this Court finds this allegation should be denied and dismissed with prejudice.

*Ineffective assistance of trial counsel for failure to advise
Applicant of conflict of interest due to representation of Kelvin and
Broddus Black.*

This Court finds Applicant's allegation that he received ineffective assistance of counsel due to Trial Counsel's failure to advise him of an alleged conflict of interest to be without merit. "An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's." Staggs v. State, 372 S.C. 549, 551, 643 S.E.2d 690, 692 (2007). This Court has further stated that a conflict of interest occurs when "a defense attorney places himself in a situation inherently conducive to divided loyalties." Lomax v. State, 379 S.C. 93, 101, 665 S.E.2d 164, 168 (2008).

Until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for a claim of ineffective assistance of counsel arising from multiple representation. Langford v. State, 310 S.C. 357, 359, 426 S.E.2d 793, 795 (1993) (citing Cuyler v. Sullivan, 446 U.S. 335, 350 (1980); see also Burger v. Kemp, 483 U.S. 776, 783 (1987)). "The mere possibility defense counsel may have a conflict of interest is insufficient to impugn a criminal conviction." State v. Gregory, 364 S.C. 150, 152-53, 612 S.E.2d 449, 450 (2005). A defendant need not demonstrate prejudice if there is an actual conflict of interest." Id., 364 S.C. at 153, 612 S.E.2d at 450.

In the instant case, Applicant asserts Trial Counsel represented Victim and his brother, Broddus Black. However, Applicant has failed to present any evidence in support of his

allegation. See Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (holding applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial). Additionally, Trial Counsel stated that he did not recall representing Victim or his brother Broddus Black. Based off of the foregoing, this Court finds Applicant has failed to meet his burden of proof and denies the allegation with prejudice.

Ineffective assistance of trial counsel for failure to raise the victim's motive in bringing the instant charges due to a prior-break in allegation against applicant.

This Court finds Applicant's allegation that he received ineffective assistance of counsel for failing to raise the victim's motive in bringing the instant charges due to a prior-break in allegation against applicant is without merit. Trial Counsel stated he filed a Rule 5/Brady motion for Applicant on his 2008 burglary—first degree charges. Trial Counsel stated those charges were dismissed on July 8, 2008 and he could not recall who the victim was in that case. Trial Counsel further stated that Applicant gave him no leads or witnesses to investigate. Based on the foregoing, this Court finds Trial Counsel's actions were reasonable in the circumstances, and did not fall below professional norms of reasonableness. Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland).

This Court further finds Applicant can show no resulting prejudice due to Trial Counsel's alleged deficiencies as there is clear evidence of overwhelming guilt. Where there is overwhelming evidence of guilt, a trial counsel's deficient representation will not be prejudicial. See Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of defendant's trial). This Court agrees with Trial Counsel's

characterization of the State's evidence against Applicant as "overwhelming." A review of the trial transcript reveals that Applicant was positively identified by three separate witnesses. Two of those three witnesses made in court identification of Applicant. Even more significant is Trial Counsel's testimony that Applicant admitted his guilt during the course of his representation. Based on the foregoing, this Court finds Applicant has failed to meet his burden of proof. Therefore, this Court finds this allegation should be denied and dismissed with prejudice.

Ineffective assistance of trial counsel for introducing evidence of Applicant's flight through cross-examination of Investigator Burgess.

This Court finds Applicant's allegation that he received ineffective assistance of counsel for introducing evidence of Applicant's flight through cross-examination of Investigator Burgess to be without merit. Applicant specifically cites to the following in support of his argument:

Q: You also mention at the very end, you say there were no suspects for two months?

A: No, I do not say no suspects.

Q: I thought you said that.

A: I said we did not take him into to custody for 2 months. We were looking for him. And I had to actually have the assistance of marshal services to take him in to custody.

(p. 99 lines 4-9). This Court finds the testimony elicited on cross-examination of Investigator Burgess was cumulative in nature. Investigator Burgess had previously testified on direct that they "did not apprehend the suspect for 2 months." (p. 93 lines 1-2). This Court notes that it is clear from the record that Trial Counsel was merely attempting to clarify Investigator Burgess comments on direct. Based on the foregoing, this Court finds Trial Counsel's actions were reasonable in the circumstances, and did not fall below professional norms of reasonableness. Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland).

This Court further finds Applicant can show no resulting prejudice due to Trial Counsel's alleged deficiencies as there is clear evidence of overwhelming guilt. Where there is overwhelming evidence of guilt, a trial counsel's deficient representation will not be prejudicial. See Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of defendant's trial). This Court agrees with Trial Counsel's characterization of the State's evidence against Applicant as "overwhelming." A review of the trial transcript reveals that Applicant was positively identified by three separate witnesses. Two of those three witnesses made in court identification of Applicant. Even more significant is Trial Counsel's testimony that Applicant admitted his guilt during the course of his representation. Based on the foregoing, this Court finds Applicant has failed to meet his burden of proof. Therefore, this Court finds this allegation should be denied and dismissed with prejudice.

Ineffective assistance of trial counsel for his comments in mitigation prior to sentencing.

This Court finds Applicant's allegation that he received ineffective assistance of counsel for his comments in mitigation prior to sentencing is meritless. A trial court has broad discretion in imposing criminal sentences within the limits prescribed by law. State v. Franklin, 267 S.C. 240, 226 S.E.2d 896 (1976); Clark v. State, 259 S.C. 378, 192 S.E.2d 209 (1972). The courts normally have no jurisdiction to correct a sentence given within statutory limits. To be entitled to relief, the Applicant must prove that the alleged excessive sentence was the result of partiality, prejudice, oppression or corrupt motive, or that the sentence constitutes cruel and unusual punishment per se. Clark, Id.; State v. Cogdell, 273 S.C. 563, 257 S.E.2d 748 (1979).

Applicant argues that Trial Counsel should not have stated that the jury was out for hour and a half and that they deliberate for a short period of time to the trial court. This Court finds

nothing improper about Trial Counsel's remarks. Based on the foregoing, this Court finds Trial Counsel's actions were reasonable in the circumstances, and did not fall below professional norms of reasonableness. Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland).

This Court further finds Applicant can show no resulting prejudice due to Trial Counsel's alleged deficiencies as there is clear evidence of overwhelming guilt. Where there is overwhelming evidence of guilt, a trial counsel's deficient representation will not be prejudicial. See Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of defendant's trial). This Court agrees with Trial Counsel's characterization of the State's evidence against Applicant as "overwhelming." A review of the trial transcript reveals that Applicant was positively identified by three separate witnesses. Two of those three witnesses made in court identification of Applicant. Even more significant is Trial Counsel's testimony that Applicant admitted his guilt during the course of his representation. Based on the foregoing, this Court finds Applicant has failed to meet his burden of proof. Therefore, this Court finds this allegation should be denied and dismissed with prejudice.

Ineffective assistance of trial counsel for failure to object to Applicant's illegal sentence.

This Court finds Applicant's allegation that Trial Counsel was ineffective for failing to object to his illegal sentence is without merit. This Court notes Applicant was sentenced to twenty six year for assault and battery with intent to kill. That sentence exceeded the statutory maximum. The illegal sentence was brought to the court's attention and Applicant was resentenced to twenty years for assault and battery with intent to kill. Therefore, this Court finds Applicant can show no prejudice as he is currently serving a legal sentence.

Ineffective assistance of appellate counsel for failure to obtain transcript and raise Applicant's pro-se motion to relieve counsel on appeal.

This Court finds Applicant's allegation that appellate counsel was ineffective for failing to obtain transcript and raise Applicant's pro-se motion to relieve counsel on appeal is without merit. This Court notes Applicant failed to produce the transcript for this Court's review. See Palacio v. State, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999) (holding that, since the contents of challenged documents were not presented at the PGR hearing, the Applicant could not demonstrate how the failure of counsel to obtain these documents prejudiced the defense).

This Court notes in order to prove prejudice, Applicant must show that had Appellate Counsel raised this issue on appeal she would have been meritorious. See generally Sikes v. State, 323 S.C. 28, 30, 448 S.E.2d 560, 562 (1994) ("When the defendant claims that counsel's failure to articulate a Fourth Amendment claim was ineffective assistance, [the] defendant must show that such claim is *meritorious* and that the verdict would have been different absent the evidence that should have been excluded." (emphasis added)). This Court finds Applicant has failed to show that had Appellate Counsel raised the issue of whether the trial court erred in denying his pro-se motion to relieve counsel it would have been meritorious. Based on the foregoing, this Court finds this allegation should be denied and dismissed.

ALL OTHER ALLEGATIONS

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds the Applicant has abandoned any such allegations.

CONCLUSION

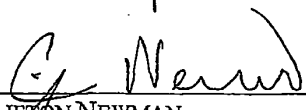
Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes that that Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRPC, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 21st day of September 2016.


CLIFTON NEWMAN
Presiding Judge

Columbia, South Carolina.

WITNESSES

Thomas Burgess-CCSO

ARREST WARRANT NUMBER

M080241

M080242

M080243

ACTION OF GRAND JURY

true Bill

Castaneda L. Hill

Foreperson of Grand Jury

Date: *08/21/08*

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2008-GS-14- *0352*

The State of South Carolina

County of CLARENDON

COURT OF GENERAL SESSIONS

AUGUST TERM 2008

THE STATE

vs.

GEORGE ARSENIO SMITH

AKA "CHIPS"

Indictment for

ASSAULT AND BATTERY WITH INTENT TO KILL

ARMED ROBBERY

POSSESSION OF A WEAPON DURING A

VIOLENT CRIME

C. KELLY JACKSON, SOLICITOR

STATE OF SOUTH CAROLINA	)	INDICTMENT FOR
	)	ASSAULT AND BATTERY WITH INTENT TO KILL
COUNTY OF CLARENDON	)	ARMED ROBBERY
	)	POSSESSION OF A WEAPON DURING A VIOLENT CRIME

At a Court of General Sessions, convened on August 21, 2008, the Grand Jurors of CLARENDON COUNTY present upon their oath:

COUNT ONE – ASSAULT AND BATTERY WITH INTENT TO KILL

That GEORGE ARSENIO SMITH AKA "CHIPS" did in Clarendon County on or about April 6, 2008, violate Section 16-3-620 of the Code of Laws of South Carolina (1976), as amended, in that he with malice aforethought, committed an assault and battery upon one Kelvin Black by shooting Kelvin Black in the back, with intent to kill the said Kelvin Black.

COUNT TWO – ARMED ROBBERY

That GEORGE ARSENIO SMITH AKA "CHIPS" did in Clarendon County on or about April 6, 2008, violate Section 16-11-330 of the Code of Laws of South Carolina (1976), as amended, while armed with a deadly weapon, to-wit: a gun, did feloniously take from Kelvin Black, by means of force or intimidation goods or monies of the said Kelvin Black, such goods or monies being described: gold chains.

COUNT THREE – POSSESSION OF A WEAPON DURING A VIOLENT CRIME

That GEORGE ARSENIO SMITH AKA "CHIPS" in Clarendon County on or about April 6, 2008, was in possession of and did visibly display a firearm during the commission of a violent crime as defined in Section 16-1-60, to-wit: Assault and Battery With Intent to Kill and Armed Robbery, in violation of Section 16-23-490, Code of Laws of South Carolina (1976), as amended.

Against the peace and dignity of the state, and contrary to the statute in such case made and provided.

C. Kelly Jackson

SOLICITOR

294

STATE OF SOUTH CAROLINA

COUNTY OF CLARENDON

STATE

VS.

GEORGE A. SMITH

AKA:

Race: Black

Sex: Male

Age: 20

DOB: [REDACTED]

SS#: [REDACTED]

Address: [REDACTED] Summerton, SC 29148

DL#

SID#

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2008-0352

AW#: M080241

Date of Offense: April 06, 2008

S.C. Code §: 16-03-0620

CDR Code #: 0014

SENTENCE SHEET

CERTIFIED TRUE COPY
OF ORIGINAL FILED IN THIS OFFICE

DATE 8/22/2012

CLERK OF COURT
CLARENDON COUNTY, SCIn disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS

TO: ABWIK

in violation of § 16-3-620 of the S.C. Code of Laws, bearing CDR Code # 010114

☐ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS (CSC w/minor 1st or Lewd Act) ☐ §17-25-45
The charge is: ☐ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (Defendant initial)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Solicitor

Defendant

Attorney for Defendant

SC Bar #

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,for a determinate term of 20 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years

and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment of \$ _____; plus

costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections. June 10, 08☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred, ☐ Defendant Waives Hearing, ☐ Ordered

PTUP

Total: \$ _____ plus 20% fee: \$ _____

_____ days/hours Public Service Employment

Payment Terms:

☐ set by SCDPPPS

Obtain GED

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning

Substance Abuse Counseling

Random Drug/Alcohol Testing

Fine may be pd. In equal, consecutive weekly/monthly

pmts. of \$ _____ beginning

\$ _____ paid to Public Defender Fund

Other: _____

Recipient:

*Fine:

\$14-1-206 (Assessments 107.5%)

\$14-1-211(A)(1) (Conv. Surcharge)

\$14-1-211(A)(2) (DUI Surcharge)

\$56-5-2995 (DUI Assessment)

\$35.13 (Public Def/Prob)

\$73.3, 1B TP (Law Enforce. Funding)

\$33.7, 1B TP (Drug Court Surcharge)

\$50-21-114(BUI Breath Test Fee)

\$56-5-2942(J) (Vehicle Assessment)

3% to County (if paid in installments)

\$90.11 TP (SCCJA Surcharge)

TOTAL

\$	\$
\$	\$
\$100	\$100.00
\$100	\$
\$12	\$
\$500	\$
\$25	\$25.00
\$100	\$
\$50	\$
\$40/ea	\$
\$	\$3.90
\$5	\$5.00
\$	\$133.90

☐ Appointed PD or appointed other counsel, \$35.13 TP Requires \$500 be paid to Clerk during probation.

PRESIDING JUDGE

Judge Code:

Sentence Date:

Clerk of Court/ Deputy Clerk

Court Reporter:

SCCA017 (10/2007)

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF CLARENDON

INDICTMENT/CASE#: 2008-GS-14-0352

STATE

VS.

GEORGE A. SMITH

AW#: M080242

AKA:

Date of Offense: April 06, 2008

Race: Black

Sex: Male

Age: 20

S.C. Code §: 16-11-0330(A)

DOB: [REDACTED]

SS#: [REDACTED]

CDR Code #: 0139

Address: [REDACTED] Summerton, SC 29148

SENTENCE SHEET

DL#

SID#

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS

TO:

Armed Robberyin violation of § 16-11-330 of the S.C. Code of Laws, bearing CDR Code # 0, 1, 1, 3, 9☐ NON-VIOLENT☐ VIOLENT☐ SERIOUS☒ MOST SERIOUS☐ Mandatory GPS (CSC
w/minor 1st or Lewd Act)☐ §17-25-45The charge is: ☐ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (Defendant initial)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Solicitor

Defendant

Attorney for Defendant

SC Bar #

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,for a determinate term of 25 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years

and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment of \$ _____; plus

costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South

Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 71☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred, ☐ Defendant Waives Hearing, ☐ Ordered

PTUP

Total: \$ _____ plus 20% fee: \$ _____

days/hours Public Service Employment

Payment Terms:

☐ set by SCDPPPS

Obtain GED

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning

Substance Abuse Counseling

Random Drug/Alcohol Testing

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ _____ beginning

\$ _____ paid to Public Defender Fund

Other:

Recipient:

*Fine:

\$14-1-206 (Assessments 107.5%)

\$14-1-211(A)(1) (Conv. Surcharge)

\$14-1-211(A)(2) (DUI Surcharge)

\$56-5-2995 (DUI Assessment)

\$35.13 (Public Def/Prob)

\$73.3, 1B TP (Law Enforce. Funding)

\$33.7, 1B TP (Drug Court Surcharge)

\$50-21-114(BUI Breath Test Fee)

\$56-5-2942(J) (Vehicle Assessment)

3% to County (if paid in installments)

\$90.11 TP (SCCJA Surcharge)

TOTAL

	\$	
\$100	\$	100.00
\$100	\$	
\$12	\$	
\$500	\$	
\$25	\$	25.00
\$100	\$	
\$50	\$	
\$40/ea	\$	
\$	\$	3.90
\$5	\$	5.00
	\$	133.90

☐ Appointed PD or appointed other counsel, \$35.13 TP
Requires \$500 be paid to Clerk during probation.

Clerk of Court/Deputy Clerk

Court Reporter:

PRESIDING JUDGE

Judge Code:

Sentence Date:

STATE OF SOUTH CAROLINA

COUNTY OF CLARENDON

STATE VS.

GEORGE A. SMITH

AKA:

Race: Black

Sex: Male

Age: 20

DOB: [REDACTED]

SS#: [REDACTED]

Address: [REDACTED] Summerton, SC 29148

DL#

SID#

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2008-GS-14-0352

A/W#: M080243

Date of Offense: April 06, 2008

S.C. Code §: 16-23-0490

CDR Code #: 0549

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS:TO: Poss. of a Weapon during a Violent CrimeIn violation of § 16-23-049 of the S.C. Code of Laws, bearing CDR Code # 0151419
☐ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS (CSC w/minor 1st or Lewd Act) ☐ §17-25-45
The charge is: ☐ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (Defendant initial)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Solicitor

Defendant

Attorney for Defendant

SC Bar #

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,for a determinate term of 5 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years

and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment of \$ _____; plus

costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South

Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 182☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred, ☐ Defendant Waives Hearing, ☐ Ordered

PTUP

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms:

☐ set by SCDPPPS

_____ days/hours Public Service Employment

Recipient:

*Fine:

\$14-1-206 (Assessments 107.5%) \$ _____

\$14-1-211(A)(1) (Conv. Surcharge) \$100 \$ 100.00

\$14-1-211(A)(2) (DUI Surcharge) \$100 \$ _____

\$56-5-2995 (DUI Assessment) \$12 \$ _____

\$35.13 (Public Def/Prob) \$500 \$ _____

\$73.3, 1B TP (Law Enforce. Funding) \$25 \$ 25.00

\$33.7, 1B TP (Drug Court Surcharge) \$100 \$ _____

\$50-21-114(BUI Breath Test Fee) \$50 \$ _____

\$56-5-2942(J) (Vehicle Assessment) \$40/ea \$ _____

3% to County (if paid in installments) \$ _____

\$90.11 TP (SCCJA Surcharge) \$5 \$ 5.00TOTAL \$ 133.90

Obtain GED

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning

Substance Abuse Counseling

Random Drug/Alcohol Testing

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ _____ beginning

\$ _____ paid to Public Defender Fund

Other:

☐ Appointed PD or appointed other counsel, \$35.13 TP Requires \$500 be paid to Clerk during probation.

Court Reporter:

B. Roberts
Clerk of Court/ Deputy Clerk

Mr. Sullivan

PRESIDING JUDGE

Judge Code:

Sentence Date:

211
12/8/09

GEORGE SMITH, 329531
LEE C.I./F4B
990 WISACKY HWY.
BISHOPVILLE, SC 29010

HON: CLERK OF COURT
CLARENDON COUNTY
PO DRAWER E, 2nd FL.,
MANNING, SC 29102

SEPTEMBER 26, 2019

RE: STATE V. GEORGE SMITH, 2008-GS-14-69, In re: MOTION FOR
NEW TRIAL BASED UPON AFTER TRIAL DISCOVERY OF EVIDENCE.

DEAR HON: CLERK OF COURT:

PLEASE FIND ENCLOSED MY MOTION FOR A NEW TRIAL BASED UPON
AFTER TRIAL DISCOVERED EVIDENCE, I HAVE PROVIDED TO YOU A
COPY TO BE RETURNED TO ME ONCE YOU HAVE PLACED YOUR OFFICE
SEALS AND CLOCKED STAMPED THEM. I ALSO HAVE PROVIDED A COPY
OF IT TO THE SOLICITOR'S OFFICE AND THE CERTIFICATE OF
SERVICE VERIFY THIS COMPLIANCE.

THANKING YOU IN THE ADVANCE FOR YOUR TIME AND
ASSISTANCE GIVEN TO ME IN THIS CRUX MATTER AND I LOOK
FORWARD IN HEARING FROM YOU IN THIS VERY NEAR FUTURE.

AGAIN THANK YOU!

SEPTEMBER 26, 2019
ENCLOSURES:

RESPECTFULLY SUBMITTED,

s/ George Smith
GEORGE SMITH
990 WISACKY HWY
BISHOPVILLE, SC 29010

cc: 3rd SOLICITOR
T. BLANCHETTE, Esq.
CHIEF JUDGE, 3rd. CIR.
FILES/gs.

JUDICIAL BRANCH
CLARENCE L. BROWN

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
COUNTY OF CLARENDON) THIRD JUDICIAL CIRCUIT
)
THE STATE,) INDICTMENT NO.: 2008-GS-14-69
RESPONDENT,)
)
VS.)- NOTICE OF MOTION AND MOTION
) FOR A NEW TRIAL BASED ON AFTER
GEORGE SMITH,) TRIAL DISCOVERED EVIDENCE, per:
DEFENDANT/PETITIONER) RULE 29(b), SCRIM.P.
_____)

TO: THE HONORABLE C. KELLY JACKSON THIRD CIRCUIT SOLICITOR.

PLEASE TAKE NOTICE THAT THE DEFENDANT WILL MOVE BEFORE THE HONORABLE COURT FOR A NEW TRIAL AS SOON AS THE COURT CAN SCHEDULE THE HEARING, TIME AND PLACE CONVENIENT FOR THE COURT, PURSUANT TO RULE 29(b), SCRIM.P, BASED UPON THE GROUND THAT DEFENDANT WAS DENIED DUE PROCESS OF LAW, AND REPRESENTED BY COUNSEL HARRY LESLIE DEVOE, Esq. WITH A CONFLICT OF INTEREST THAT DID DENIED HIM THE RIGHTS TO A FAIR TRIAL GUARANTEED BY THE U.S. CONST., 5th, 6th, AND 14th AMENDMENTS.

SEPTEMBER *De*, 2019

CLARENDON S.C.

RESPECTFULLY SUBMITTED,

s/ *George Smith*
GEORGE SMITH
990 WISACKY HWY.
BISHOPVILLE, SC 29010
DEFENDANT/PETITIONER



Clarendon County Third Judicial Circuit Public Index



[Clarendon County Home Page](#)
[South Carolina Judicial Department Home Page](#)
[SC.GOV Home Page](#)

Switch View

The State of South Carolina VS Brodtus Lamonte Black					
Case Number:	M082715	Court Agency:	General Sessions	Filed Date:	04/28/2009
Case Type:	Criminal-Clerk	Case Sub Type:			
Status:	Disposed	Assigned Judge:	Clerk Of Court C P, G S, And Family Court	Disposition Judge:	King, Howard P
Disposition:	Pled Guilty				
Disposition Date:	07/06/2009	Date Received:	04/28/2009	Arrest Date:	04/24/2009
Law Enf. Case:		True Bill Date:		No Bill Date:	
Prosecutor Case:		Indictment Number:	2009GS1400255	Waiver Date:	
Probation Case:					

Case Parties Charges Sentencing Associated Cases Actions Financials Bonds

Click the ☒ icon to show associated parties.

Name	Address	Race	Sex	Year Of Birth	Party Type	Party Status	Last Updated
☒ Black, Brodtus Lamonte	1461 Pine Bluff Sq Manning SC 29102	Black	M	1982	Defendant		03/08/2010
☒ Devoe, Harry Leslie Jr.	Attorney at Law 7411 Black River Rd. New Zion SC 29111				Defendant Attorney		07/06/2009
Drose, Donald W	Post Office Box 1289 217 Commerce Street Manning SC 29102				Officer		04/28/2009
Land, Amy Anders	Third Circuit Solicitor's Office P.O. Drawer 70 Manning SC 29102				Plaintiff Attorney		07/06/2009

STATE OF SOUTH CAROLINA	)	THE COURT OF GENERAL SESSIONS
COUNTY OF CLARENDON	)	THIRD JUDICIAL CIRCUIT
	)	INDICT.: 2088-GS-14-69
THE STATE,	)	
RESPONDENT,	)	
	)	
V.	)	- CERTIFICATE OF SERVICE
	)	
GEORGE SMITH,	)	
DEFENDANT	)	

I, CERTIFY THAT I DID SERVED A TRUE COPY OF THE NOTICE AND MOTION TO THE RESPONDENT: AS C. KELLY JACKSON , 3RD CIRCUIT SOLICITOR, BY WAY OF U.S. MAIL, POSTAGE PREPAID, ADDRESSED TO THE CLARENDON COUNTY SOLICITOR'S OFFICE BELOW LISTED, BY PERSONALLY DELIVERING IT TO THE PRISON MAIL ROOM FOR VERIFICATION OF POSTAGE, ON THIS 21 DAY OF SEPTEMBER 2019.

COUNSEL OF RECORD
HON: AMY LAND, Esq.
THIRD CIRCUIT SOLICITOR OFFICE
3 KEITT, St.
MANNING, SC 29102
CLARENDON COUNTY, SC
RESPONDENT

s/ George Smith
GEORGE SMITH
990 WISACKY HWY.
BISHOPVILLE, SC 29010
DEFENDANT by STAND-ON ATTY.

GEORGE SMITH, 319532
LEE C.I./F4B-2224
990 WISACKY HWY.
BISHOPVILLE, SC 29010

HON: R. FERRELL COTHRAN, Jr.
ADMIN. JUDGE, 3rd CIR.
PO BX. 32
MANNING, SC 29102

RE: STATE OF S.C. Vs. GEORGE SMITH, 2008-GS-14-69. SEE FILED
ENCLOSURES, AND NOTICE OF FILED MOTION TO ADMIN. JUDGE
PURSUANT TO THE APPLICABLE RULES OF THE COURT.

DEAR JUDGE COTHRAN, Jr.,:

PLEASE FIND ENCLOSED MY MOTION AND MEMORANDUM OF LAWS
SUPPORTING MY MOTION FOR A NEW TRIAL BASED UPON AFTER TRIAL
DISCOVERED EVIDENCE, PROVIDED TO YOU FOR YOUR OFFICE TO
ASSIGN A HEARING DATE FOR IT TO BE HEARD. I HAVE TAKEN THE
LIBERTY TO SERVE THE SOLICITOR'S OFFICE COUNSEL AS IS
REQUIRED. I HAVE ALSO PROVIDED A COPY OF ALL PLEADINGS AND
DOCUMENTS PROVIDED TO THE COURT THAT FACTUALLY SUPPORTS MY
MOTION TO BE GRANTED.

AS I AM ADVISED, THE ORIGINAL COURT APPOINTED COUNSEL
CAN NOT REPRESENT ME LONGER BECAUSE OF A CONFLICT OF
INTEREST ACCORDINGLY TO §17-27-30(PCR) CHARGES, etc.
HOWEVER, I AM STILL RESPONSIBLE FOR THE PLEADING BEING
CORRECTLY FILED TO THE CLERK OF COURT OFFICE SO THAT THE
CLERK CAN PROVIDE THE DOCUMENT SHOWING I FILED CHARGES OF
INEFFECTIVE ASSISTANCE OF COUNSEL AGAINST TRIAL COUNSEL AND
HE CAN NOT REPRESENT ME IN THIS MOTION CURRENTLY PENDING
BEFORE THE COURT. AS I HAVE FILED THE PROPER MOTION AND
COMPLIED TO THE COURT RULES CORRECTLY AND PROPERLY I LOOK
FORWARD IN HEARING FROM YOUR OFFICE IN THE APPROPRIATE FORMS
AND KEEPING THE EX PARTE COMMUNICATION PROHIBITED BUT TO
KEEP ME INFORM THROUGH THE RESPECTFUL CLERK OF COURT OFFICE.

THANKING YOU IN THE ADVANCE FOR YOUR TIME AND ATTENTION
GIVEN TO MY CRUX MATTERS AND I LOOK FORWARD IN HEARING FROM
YOU VERY SOON.

AGAIN THANK YOU!
ENCLOSURE:

RESPECTFULLY SUBMITTED,

s/ George Smith
GEORGE SMITH
990 WISACKY HWY.
BISHOPVILLE, SC 29010
DEFENDANT/PETITIONER

cc: CLERK OF COURT
THIRD CIR. SOLICITOR
FILES/gs

GEORGE SMITH, 329531
LEE C.I./F4-B2224
990 WISACKY HWY.
BISHOPVILLE, SC 29010

OCTOBER 17, 2019

HON: CLERK OF COURT
CLARENDON CO.
PO DRAWER B, 2nd FL.
MANNING, SC 29102

RE: STATE V. G. SMITH, 2008-GS-14-69, MEMORANDUM OF LAW TO
SUPPORT MOTION FOR TRIAL BASED UPON AFTER TRIAL
DISCOVERED EVIDENCE, etc., RULE 29(b), SCRCrim.P.

DEAR HON: CLERK,
PLEASE ALLOW MY CORRESPONDENCE TO SERVE AS MY FORMAL FILING
MEMORANDUM OF LAW SUPPORTING MY MOTION PREVIOUSLY FILED TO
YOUR RESPECTFUL OFFICE. I HAVE PROVIDED A TRUE UNFILED COPY
TO THE RESPONDENT'S OFFICE BY VERIFIED MAIL. I PROVIDED TO
YOUR OFFICE AN EXTRA COPY OF THE PLEADING SO THAT YOUR
OFFICE CAN RETURN THEM BACK TO ME ONCE YOU HAVE PLACED YOUR
OFFICE SEALS ON THEM AND CLOCK STAMP THEM.

I APPRECIATE YOUR ASSISTANCE AND TIME GIVEN TO ME IN
THIS CRUX MATTERS AND I LOOK FORWARD IN HEARING FROM YOU IN
THIS VERY NEAR FUTURE.

AGAIN THANK YOU!

ENCLOSURES:

GS/cm

RESPECTFULLY SUBMITTED,

s/ George Smith
GEORGE SMITH
990 WISACKY HWY.
BISHOPVILLE, SC 29010
DEFENDANT/PETITIONER

cc: CHIEF JUDGE, 3rd J-CIR
SOLICITOR, 3rd J-CIR
FILES/gs

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
COUNTY OF CLARENDON) THIRD JUDICIAL CIRCUIT
)
THE STATE,) INDICTMENT NO.: 2008-GS-14-69
RESPONDENT,)
)
VS.)- NOTICE OF MOTION AND MOTION
) FOR A NEW TRIAL BASED ON AFTER
GEORGE SMITH,) TRIAL DISCOVERED EVIDENCE, per:
DEFENDANT/PETITIONER) RULE 29(b), SCRCRIM.P.
_____)

TO: THE HONORABLE C. KELLY JACKSON THIRD CIRCUIT SOLICITOR.

PLEASE TAKE NOTICE THAT THE DEFENDANT WILL MOVE BEFORE THE HONORABLE COURT FOR A NEW TRIAL AS SOON AS THE COURT CAN SCHEDULE THE HEARING, TIME AND PLACE CONVENIENT FOR THE COURT, PURSUANT TO RULE 29(b), SCRCRIM.P, BASED UPON THE GROUND THAT DEFENDANT WAS DENIED DUE PROCESS OF LAW, AND REPRESENTED BY COUNSEL HARRY LESLIE DEVOE, Esq. WITH A CONFLICT OF INTEREST THAT DID DENIED HIM THE RIGHTS TO A FAIR TRIAL GUARANTEED BY THE U.S. CONST., 5th, 6th, AND 14th AMENDMENTS.

SEPTEMBER 26, 2019

RESPECTFULLY SUBMITTED,
CLARENDON S.C.

S/ George Smith
GEORGE SMITH
990 WISACKY HWY.
BISHOPVILLE, SC 29010
DEFENDANT/PETITIONER

CERTIFIED TRUE COPY
OF ORIGINAL FILED IN THIS OFFICE
DATE 10/7/2019
Berlah B. Roberts
CLERK OF COURT
CLARENDON COUNTY, SC

GEORGE SMITH, 329531
LEE C.I./F4B
990 WISACKY HWY.
BISHOPVILLE, SC 29010

2019 OCT 7 PM 3:17
LI:EW L1006107
Joseph Roberts, Clerk-Clarendon S.C.

HON: CLERK OF COURT
CLARENDON COUNTY
PO DRAWER E, 2nd FL.,
MANNING, SC 29102

SEPTEMBER 26, 2019

RE: STATE V. GEORGE SMITH, 2008-GS-14-69, In re: MOTION FOR
NEW TRIAL BASED UPON AFTER TRIAL DISCOVERY OF EVIDENCE.

DEAR HON: CLERK OF COURT:

PLEASE FIND ENCLOSED MY MOTION FOR A NEW TRIAL BASED UPON
AFTER TRIAL DISCOVERED EVIDENCE, I HAVE PROVIDED TO YOU A
COPY TO BE RETURNED TO ME ONCE YOU HAVE PLACED YOUR OFFICE
SEALS AND CLOCKED STAMPED THEM. I ALSO HAVE PROVIDED A COPY
OF IT TO THE SOLICITOR'S OFFICE AND THE CERTIFICATE OF
SERVICE VERIFY THIS COMPLIANCE.

THANKING YOU IN THE ADVANCE FOR YOUR TIME AND
ASSISTANCE GIVEN TO ME IN THIS CRUX MATTER AND I LOOK
FORWARD IN HEARING FROM YOU IN THIS VERY NEAR FUTURE.

AGAIN THANK YOU!

SEPTEMBER 26, 2019
ENCLOSURES:

RESPECTFULLY SUBMITTED.

s/ George Smith
GEORGE SMITH
990 WISACKY HWY
BISHOPVILLE, SC 29010

cc: 3rd SOLICITOR
T. BLANCHETTE, Esq.
CHIEF JUDGE, 3rd. CIR.
FILES/as.

CERTIFIED TRUE COPY
OF ORIGINAL FILED IN THIS OFFICE
DATE 10/7/2019
Beniah B. Roberts
CLERK OF COURT
CLARENDON COUNTY, SC

STATE OF SOUTH CAROLINA	)	IN THE COURT OF <u>GENERAL SESSIONS</u>
COUNTY OF: <u>CLARENDON</u>	)	<u>3rd JUDICIAL CIRCUIT</u>
GEORGE SMITH	)	
PETITIONER,	)	CASE NO.: <u>2008-GS-14-69</u>
Vs.	)	
STATE OF SOUTH CAROLINA,	)	<u>-CERTIFICATE OF SERVICE</u>
RESPONDENT.	)	

I, GEORGE SMITH, CERTIFY THAT I DID SERVED THE COPY OF MEMORANDUM OF LAW TO SUPPORT MOTION, TO THE RESPONDENT BY WAY OF U.S. MAIL, POSTAGE PREPAID, ADDRESSED TO HIS/HER OFFICE AT: HON: R. FERRELL COTHRAN, Jr. PO BX 32, MANNING SC 29102, BY PERSONALLY DELIVERING IT TO THE PRISON MAIL ROOM ON THIS 17th DAY OF OCTOBER 2019, THIS IS THE APPROPRIATE WAY TO COMMUNICATE WITH THE RESPONDENT BY MAIL.

October 17, 2019

s/ George Smith
GEORGE SMITH
990 WISACKY HWY.
BISHOPVILLE, SC 29010

cc: FILES/gs

STATE OF SOUTH CAROLINA) IN THE GENERAL SESSIONS COURT
COUNTY OF CLARENDON) THIRD JUDICIAL CIRCUIT
) INDICTMENT NO.:2008-GS-14-69
THE STATE,)
RESPONDENT,)
) VS.)- MEMORANDUM IN SUPPORT OF MOTION
) FOR NEW TRIAL RULE 29(b), etc.
) GEORGE SMITH,)
DEFENDANT)
_____)

ON 12/08/2009, THE DEFENDANT WAS CONVICTED BY WAY OF A TRIAL, HE WAS TRIED BY THE HONORABLE: FARRELL, C., HE WAS WAS GUILTY BY A JURY, HE WAS SENTENCED TO A TERM OF 25 YRS., THE DEFENDANT WAS REPRESENTED BY: HARRY DEVOE, AND THE STATE WAS REPRESENTED BY THE THIRD CIRCUIT SOLICITOR, THE DEFENDANT WAS REPRESENTED BY HARRY L. DEVOE, A COUNSEL WITH A CONFLICT OF INTEREST, SEE DEFENDANT'S EXHIBIT #:A, THE COUNSEL FAILED TO ACKNOWLEDGE THAT HE REPRESENTED THE VICTIM FAMILY MEMBER: BRODTUS LAMONTE BLACK AND DID NOT SEE THE CONFLICT OF INTEREST EXISTED WELL BEFORE COUNSEL INDULGENCE INTO THE DEFENDANT'S CASE. THE COUNSEL EVEN DENIES TO THIS CURRENT DATE THAT HE DID NOT REPRESENTED THE VICTIM'S FAMILY MEMBER WHILE ALSO REPRESENTING THE DEFENDANT'S CASE FOR TRIAL. DEFENDANT MADE THE DISCOVERIES OF THE AFTER TRIAL EVIDENCE ON THE DATE OF: 03/07/2019 THE COURT RECORDS DISCLOSES THE FACTUAL DATE OF **THE POST** CONVICTION RELIEF HEARING PROCEEDINGS, SEE DEFENDANT'S **EXHIBIT #B-C DATED:** SEPTEMBER 10, 2014, **POST CONVICTION RELIEF TRANSCRIPT INCERTS**

Pg. 66, lines 1-6, Pg. 75, lines 15-25, DIRECT TESTIMONY OF HARRY L. DEVOE, ESQUIRE, AND CROSSED BY PCR COUNSEL, TRICIA A. BLANCHETTE, ESQUIRE. ALL AS DISCLOSED IN MEMORANDUM IN SUPPORT OF THE DEFENDANT'S MOTION FOR NEW TRIAL BASED UPON AFTER TRIAL DISCOVERED EVIDENCE, IT IS FURTHER DISCOVERED BY DOCUMENTS AUTHENTICATED THAT DEFENDANT SMITH WAS DENIED A FAIR TRIAL BASED ON AFTER DISCLOSED EVIDENCE FROM CHARGES DISMISSED BY THE TRIAL COURT DUE TO FALSE CLAIMS GIVEN BY THE VICTIM, AS IT WAS DETERMINED THAT THE VICTIM'S PAST CRIMINAL RECORDS NOT REVEALED TO THE COURT INITIALLY, ATTORNEY HARRY L. DEVOE COMMITTED PROFESSIONAL MISCONDUCT WHEN HE ENGAGED IN CONDUCT THAT HERE DEMONSTRATED PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE, AND ATTORNEY VIOLATED THE RULES OF PROFESSIONAL CONDUCT WHEN ENGAGED IN THE CONDUCT INVOLVING DISHONESTY, FRAUD, DECEIT OR MISREPRESENTATION, THE ATTORNEY REPRESENTED THE VICTIM'S INTEREST WHEN DEVOE REPRESENTED THE VICTIM'S FAMILY MEMBER AT THE SAME TIME HE HAD CONTROLS OF THE DEFENDANT'S CASE MATTERS FOR THE CRIMINAL COURT, AND THERE WAS NOT ANY LEGAL CONTROLLED PRECEDENTS THAT WOULD DEPART LEGAL STANDINGS TO THE ATTORNEY BY REPRESENTING THE VICTIM'S FAMILY MEMBER AT THE SAME TIME OF THE DEFENDANT, THE REPRESENTATION THAT DEVOE WAS GIVING FELL DIRECTLY IN ADVERSE TO THE DEFENDANT AND HE COULD NOT REASONABLY BELIEVE THAT IT WAS NOT, THE SUPREME COURT NOTED THAT UNDER CERTAIN CONDITIONS A LAWYER SHOULD NOT REPRESENT A CLIENT IF THE REPRESENTATION OF THAT CLIENT BE MATERIALLY BY THE LAWYER'S RESPONSIBILITIES TO ANOTHER CLIENT OR A THIRD PARTY. DEFENDANT TAKES THE SAME STANCES THAT PROHIBIT LAWYERS FROM COMMUNICATING WITH THE VICTIM(S) OF THE CASE IF IT NOT THROUGH THE LAWYERS, etc., RULE 407, SCACR: RULE 1.3, 1.4, 1.7, AND RULE 413, SCACR: RULE 11, RLDE, JUST BY THE

Pg. 2. Of THREE

ATTORNEY DEVOE STATING THAT HE DID NOT REPRESENTED BRODTUS L. BLACK WHEN ASKED BY THE COURT PROCEEDINGS VIOLATED ALL OF THE LISTED RULES OF THE SUPREME COURT FOR PROFESSIONAL CONDUCTS, AND VIOLATED THE DEFENDANT RIGHTS TO BE FREE OF A REPRESENTATION BY A CONFLICT OF INTEREST. THE EXHIBIT PROFFERS THAT HE KNOWINGLY KNEW THAT HE REPRESENTED THE VICTIM'S FAMILY MEMBER IN THE CRIMINAL CASE AT THE SAME TIME HE REPRESENTED THE DEFENDANT GEORGE SMITH. THE DEFENDANT MADE FIOA REQUESTS AND MADE THE AFTER DISCOVERIES INDEPENDENTLY WITHOUT COUNSELS ASSISTANCE AND THEREFORE IT BEING PROPERLY DISCLOSED AND PRESENTED TO THE COURT ON THIS 12th DAY OF OCTOBER 2019.

OCTOBER 17, 2019

ATTACHMENTS W/EXHIBITS
ENCLOSURES:

RESPECTFULLY SUBMITTED,

s/ George Smith

GEORGE SMITH

990 WISACKY HWY.

BISHOPVILLE, SC 29010

DEFENDANT/PETITIONER

Pg. 3. Of THREE



DEFENDANT'S EXHIBIT
**Clarendon County
Third Judicial Circuit
Public Index**

#A



[Clarendon County Home Page](#) [South Carolina Judicial Department Home Page](#) [SC.GOV Home Page](#)

Switch View

The State of South Carolina VS Brodtus Lamonte Black

Case Number:	M082715	Court Agency:	General Sessions	Filed Date:	04/28/2009
Case Type:	Criminal-Clerk	Case Sub Type:			
Status:	Disposed	Assigned Judge:	Clerk Of Court C P, G S, And Family Court	Disposition Judge:	King, Howard P
Disposition:	Pled Guilty				
Disposition Date:	07/06/2009	Date Received:	04/28/2009	Arrest Date:	04/24/2009
Law Enf. Case:		True Bill Date:		No Bill Date:	
Prosecutor Case:		Indictment Number:	2009GS1400255	Waiver Date:	
Probation Case:					

Case Parties Charges Sentencing Associated Cases Actions Financials Bonds

Click the ☒ icon to show associated parties.

Name	Address	Race	Sex	Year Of Birth	Party Type	Party Status	Last Updated
☒ Black, Brodtus Lamonte	1461 Pine Bluff Sq Manning SC 29102	Black	M	1982	Defendant		03/08/2010
☒ Devoe, Harry Leslie Jr.	Attorney at Law 7411 Black River Rd. New Zion SC 29111				Defendant Attorney		07/06/2009
Drose, Donald W	Post Office Box 1289 217 Commerce Street Manning SC 29102				Officer		04/28/2009
Land, Amy Anders	Third Circuit Solicitor's Office P.O. Drawer 70 Manning SC 29102				Plaintiff Attorney		07/06/2009

CHSWeb 6.1 © 2013 South Carolina Judicial Department • All rights reserved

DEFENDANT'S EXHIBIT

#B

State of South Carolina)
County of Clarendon)

In the Court of Common Pleas
Third Judicial Circuit
2012-CP-14-0392

George A. Smith,)
Applicant,)
vs.)
State of South Carolina,)
Respondent.)

Transcript of Record

September 10, 2014
Sumter, South Carolina

B E F O R E:

The Honorable Clifton B. Newman, Judge

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

Tricia A. Blanchette, Esquire
Attorney for the Applicant

Daniel F. Gourley, II, Esquire, Assistant Attorney General
Attorney for the Respondent

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

DEFENDANT'S EXHIBIT
#D

H. DEVOE - CROSS-EXAMINATION BY MS. BLANCHETTE

75

1 Q. Okay, but you can't remember a specific reason as to
2 why you wouldn't have gone into that?

3 A. No, no reason at all particularly.

4 Q. And I apologize if the state asked you about this, but
5 were you aware that when Mr. Smith was sentenced to
6 twenty-six years, that wasn't a legal sentence?

7 A. Well, I should have, and I obviously tried to get it
8 down to twenty-five even because it was the same thing as
9 the other twenty-five. Then it turns out he cut down to
10 twenty later because of the, as you've already said, it was
11 an illegal sentence.

12 Q. Okay, but you didn't make a contemporaneous objection
13 to the sentence ---

14 A. No, I didn't.

15 Q. --- at trial? And, Mr. Devoe, I received a copy of
16 your file, and I didn't see any indication of a date or any
17 memos or anything. Do you recall if there was a pretrial
18 hearing where Mr. Smith moved to relieve you?

19 A. No, I don't.

20 Q. Okay. So, you ---

21 A. But it ---

22 Q. --- wouldn't be able to provide us that date to obtain
23 the transcript?

24 A. That's right. If he did, I don't -- I'm not aware of
25 it one way or the other, frankly.

DEFENDANT'S EXHIBIT
#C

H. DEVOE - DIRECT EXAMINATION BY MR. GOURLEY

66

1 A. I thought I was prepared enough to go to trial. I
2 always like to have more time, but unfortunately being a
3 public defender, you don't get a lot of time sometimes.

4 Q. Okay. If you weren't prepared for trial, would you
5 have requested a continuance?

6 A. Yeah, I would have.

7 Q. What was your trial strategy in this case?

8 A. Trial, trial strategy would have been to try to impugn
9 the ability of the witnesses to see the victim outside. It
10 was nighttime, 2:00 in the morning, 2:30 in the morning. I
11 thought -- I went to see the apartment house or the
12 apartment and the windows is a tall -- small window, a
13 little bit dirty. I never could -- I didn't have the
14 ability to check the lumens of the light in the parking
15 area or the walking area, but I was going to -- I did sort
16 of mention that I thought the lights were fairly dim.

17 Q. Okay. So, it was more so to attack the identification
18 that ---

19 A. Yes.

20 Q. --- the two witnesses were providing?

21 A. Yes.

22 Q. Okay. Did you know anything about the videos of the
apartment complex?

- knew there was a video camera because I asked that
I think, in the, in the trial.

CERTIFICATE

I, THE UNDERSIGNED ELIZABETH B. HARRIS, CERTIFIED
VERBATIM OFFICIAL COURT REPORTER FOR THE FIFTH
JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO
HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE
AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE
PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE HEARING
OF THE CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE
CIRCUIT COURT FOR CLARENDON COUNTY, SOUTH CAROLINA, ON
THE 10TH DAY OF SEPTEMBER, 2014.

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

/S/ELIZABETH B. HARRIS, CVR-M-CM

COLUMBIA, SOUTH CAROLINA

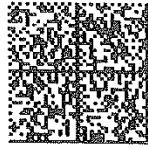
JULY 21ST, 2016

Office of Clerk of Court

CLARENDON COUNTY
BEULAH G. ROBERTS
P.O. BOX 136
MANNING, SC 29102

COLUMBIA
SC 292
84-MAR-19
PM 31

F4-2224



U.S. POSTAGE PITNEY BOWES
ZIP 29102 \$ 000.55
02 1M
0001381744

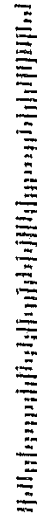
R

MAR 9 7 2019

George Smith #329531
Lee Corr Inst F-4 B2224
990 Wisacky Hwy
Bishopville, South Carolina 29010

LEE CI MAIL ROOM

29010-177550



STATE OF SOUTH CAROLINA	)	THE COURT OF GENERAL SESSIONS
COUNTY OF CLARENDON	)	THIRD JUDICIAL CIRCUIT
	)	INDICT.: 2088-GS-14-69
THE STATE,	)	
RESPONDENT,	)	
	)	
V.	)	- CERTIFICATE OF SERVICE
	)	
GEORGE SMITH,	)	
DEFENDANT	)	

I, CERTIFY THAT I DID SERVED A TRUE COPY OF THE MEMORANDUM OF LAW AND DOCUMENTS SUPPORTING MOTION FOR NEW TRIAL TO THE RESPONDENT BY WAY OF U.S. MAIL, PREPAID POSTAGE, TO THE THIRD CIRCUIT SOLICITOR OFFICE BELOW LISTED, BY PERSONALLY DELIVERING IT TO THE PRISON MAIL ROOM FOR VERIFICATION OF POSTAGE, ON THIS 27 DAY OF OCTOBER 2019.

COUNSEL OF RECORD
HON: AMY LAND, Esq.
THIRD CIRCUIT SOLICITOR OFFICE
3 KEITT, St.
MANNING, SC 29102
CLARENDON COUNTY, SC
RESPONDENT

S/_____
GEORGE SMITH
990 WISACKY HWY.
BISHOPVILLE, SC 29010
DEFENDANT by STAND-ON ATTY.

STATE OF SOUTH CAROLINA)
COUNTY OF CLARENDON)

COURT OF GENERAL SESSIONS

STATE OF SOUTH CAROLINA)
STATE,)

TRANSCRIPT OF RECORD
08-GS-14-352

v.)

GEORGE SMITH,)
DEFENDANT.)

July 28, 2023
Manning, South Carolina

B E F O R E :

THE HONORABLE R. FERRELL COTHRAN, JR., JUDGE

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

DARLA PIERCE, ESQ.
Assistant Solicitor

ELIZABETH FRANKLIN-BEST, ESQ.
Attorney for Defendant

FRANCES B. RAY, RPR
Circuit Court Reporter

I N D E X

	Page
Motion for new trial	3
George Smith:	
Direct examination by Mrs. Franklin-Best	4
Closing remarks by Ms. Franklin-Best	10
Closing remarks by Ms. Pierce	13

E X H I B I T S

DEFENDANT'S:

No.	Description	I.D./EVD
1	Clarendon County Public Index	3/8

1 (WHEREUPON, Defense Exhibit No. 1 was
2 marked for identification only.)

3 MS. PIERCE: Your Honor, this is the State of
4 South Carolina v. George Smith on indictment
5 number 2008-GS-14-352. This is Defense counsel's motion for
6 a new trial pursuant to Rule 29(b). He is represented by
7 Mrs. Elizabeth Franklin-Best.

8 THE COURT: Okay. Yes, ma'am.

9 MS. FRANKLIN-BEST: Good morning, Your Honor.

10 MS. PIERCE: Good morning.

11 MS. FRANKLIN-BEST: So we have filed, kind of
12 initially, Mr. Smith filed his own 29(b) motion in this case
13 asking for a new trial based on newly discovered evidence.
14 We subsequently filed to an amended petition for -- or
15 application for a new trial so I think that arguments sort
16 of, you know, the history of the case and everything was
17 sort of laid out in those motions. What I was hoping today
18 would be just have Mr. Smith take the stand, let me get a
19 few sort of facts out on the record, and that's kind of it.
20 I mean, then I think Your Honor can sort of take this under
21 consideration and then, you know, grant our motion, Your
22 Honor.

23 THE COURT: Okay.

24 MS. FRANKLIN-BEST: So that's how I would propose
25 to proceed, if that's acceptable to Your Honor.

1 THE COURT: Sure.

2 MS. FRANKLIN-BEST: Okay, that's fine with you.
3 Okay. Well, then, Your Honor, I would please ask Mr. George
4 Smith to take the stand.

5 THE COURT: Okay. If you will come around,
6 Mr. Smith, Ms. Beulah will swear you in.

7 THE CLERK OF COURT: I'll have you step up here
8 please. I know it's going to be difficult, but raise your
9 right hand the best you can. Place your left hand on the
10 Bible.

11 WHEREUPON,

12 **GEORGE SMITH,**
13 having been duly sworn by the Clerk of Court, testified
14 as follows:

15 **D I R E C T E X A M I N A T I O N**

16 BY MS. FRANKLIN-BEST:

17 Q All right. Mr. Smith, could you please tell the
18 Court who you are and where you currently are housed?

19 A George Smith. I was at Manning Pre-Release.

20 Q I'm sorry, you were in which prison?

21 A Manning Pre-Release in Columbia, South Carolina.

22 Q Okay, so Manning Correctional. And what is your
23 sentence?

24 A Twenty-five years.

25 Q And did -- that sentence started on December 14th

1 of 2009?

2 A Yes.

3 Q And as I understand that your current release date
4 is September 3rd of 2029?

5 A Yes.

6 Q And can you tell us who represented you at trial?

7 A Harry Devoe.

8 Q Harry Devoe. Was he appointed to you or did your
9 family retain him?

10 A He was appointed.

11 Q How many times did you meet with him in
12 preparation of your case?

13 A I'd say about -- about three times.

14 Q About three times. And did you tell him
15 everything that you knew about the case?

16 A Yes.

17 Q And did you tell him that you were not guilty of
18 these offenses?

19 A Yes.

20 Q But at some point you -- you went to trial; is
21 that accurate?

22 A Yes.

23 Q And were there any plea offers in your case?

24 A Twenty years.

25 Q Okay. And just to skip ahead a bit, I mean, you

1 were ultimately convicted?

2 A Yes.

3 Q All right. And now, to begin with you received
4 initially a 26-year sentence even though on assault and
5 battery with intent to kill, which at that point only
6 carried 20 years; is that accurate?

7 A Yes.

8 Q And your lawyer did not object to that?

9 A Yes.

10 Q That sentence ended up being corrected?

11 A Yes, ma'am.

12 Q So just to talk a little bit about some procedural
13 history here, but after that conviction you pursued a direct
14 appeal?

15 A Yes.

16 Q And then you had a PCR hearing?

17 A Yes.

18 Q And by that time at the time of your PCR hearing,
19 you believed that your attorney was also representing a
20 family member of the victim in your case; is that accurate?

21 A Yes.

22 Q But you didn't have any proof at that time, right?

23 A Not at that time.

24 Q And you were incarcerated?

25 A Yes.

1 Q So you were -- did not have access to computers.
2 You couldn't travel to the Clerk's Office to investigate on
3 your own; is that accurate?

4 A Yes.

5 Q But at some point after that first PCR hearing,
6 you discovered proof, right, that your lawyer represented
7 Brutus Lamonte Black; is that accurate?

8 A Yes.

9 Q Who is he? Who is Brutus Lamonte Black?

10 A The victim brother.

11 Q Okay. So he's the brother and -- all right, so
12 that's the relationship. Did you know Mr. Brutus Black?

13 A Yes.

14 Q Okay. And did you also know Kelvin Black who was
15 the victim in this case?

16 A Yes.

17 Q Okay. So what proof did you locate?

18 A On the public index.

19 MS. FRANKLIN-BEST: And, Your Honor, may I
20 approach the witness?

21 THE COURT: Yes, ma'am.

22 BY MS. FRANKLIN-BEST:

23 Q Okay. I'm handing you a document marked
24 Defendant's Exhibit No. 1. If you can take a look at that
25 and tell me if that is something that you recognize?

1 A Yes.

2 Q Okay. And is this a copy of the Clarendon County
3 Third Judicial Circuit public index? It is a printout of
4 that, right, of a particular conviction?

5 A Yes.

6 Q Okay.

7 MS. FRANKLIN-BEST: And, Your Honor, I've had this
8 premarked. If I could admit this into evidence as
9 Defendant's Exhibit 1. I think ---

10 THE COURT: Any objection from the State?

11 MS. PIERCE: No objection.

12 THE COURT: It's in without objection.

13 MS. FRANKLIN-BEST: Thank you, Your Honor.

14 (WHEREUPON, State Exhibit No. 1 was
15 admitted into evidence.)

16 MS. PIERCE: And I would just note really quickly
17 that this just indicates that Mr. Brutus Black was arrested
18 on April 24th of 2009, that the disposition date was July 6,
19 2009.

20 BY MS. FRANKLIN-BEST:

21 Q Now how did you come to find that entry in the
22 public index?

23 A Research through family member.

24 Q Okay. So a family member researched and brought
25 this to your attention?

1 A Yes.

2 Q Okay. And so according to that entry, your lawyer
3 Harry Devoe represented Brutus Lamonte Black in 2009?

4 A Yes.

5 Q And your trial was in December of 2009?

6 A Yes.

7 Q And you had 2008 indictment in your case. Okay.
8 So that means that the public defender who was appointed to
9 you for roughly 18 months from June of 2008 to December of
10 2009 -- I'm sorry, let me back that up, excuse me. So you
11 were appointed this public defender for roughly 18 months
12 from ---

13 A Yes.

14 Q --- June of 2008 to December of 2009; is that
15 accurate?

16 A Yes.

17 Q Okay. And so the same public defender represented
18 Mr. Black from April 24th of 2009 to arrest date until
19 July 6th of 2009?

20 A Yes.

21 Q Okay. So for that three-month period, your lawyer
22 represented the victim's family member; is that accurate?

23 A Yes.

24 Q Okay. Now had you known that, what would you have
25 done?

1 A Try to get him off my case, Harry Devoe.

2 Q Okay.

3 A Try to get him removed.

4 Q So this -- this conflict, the fact that he was
5 representing the victim's family, or you would have wanted
6 to have a new attorney at that point; ---

7 A Yes.

8 Q --- is that accurate? And is it true that you
9 were already having problems with this lawyer?

10 A Yes.

11 Q Okay. So based on this, based on this conflict,
12 are you asking the Court to grant you a new trial?

13 A Yes.

14 Q And is there anything else at this point that
15 you're asking for, you know, based on this conflict?

16 A No.

17 Q Okay, just a new trial. So this is the basis of
18 your new trial motion?

19 A Yes.

20 Q Okay. And I do not have any additional questions.

21 THE COURT: Okay.

22 MS. PIERCE: Nothing from the State.

23 MS. FRANKLIN-BEST: So just in summary, Your
24 Honor, I mean, again, I think we've laid out everything in
25 the pleadings which is what our intention was. I just

1 wanted to provide the evidence that the factual basis for
2 providing relief in this case. So I believe that the Court
3 has a full record on this particular issue and we would just
4 ask we be allowed to submit a proposed order to the Court
5 for this Court's consideration.

6 THE COURT: Okay. How -- how come this
7 information wasn't available at the PCR hearing? This is
8 something that should have been brought up at the PCR
9 hearing.

10 MS. FRANKLIN-BEST: And I do believe that this is
11 something that likely could have been discovered. I would
12 just note that under the South Carolina Supreme Court's case
13 Manigault, Curry/Manigault, that sort of empowers the Court
14 to waive certain procedural issues in order to equitably
15 reach the merits of the case. I cannot really explain why
16 this was not discovered at the appropriate time; but I do
17 believe that the South Carolina Supreme Court has sort of
18 indicated that it would like to have PCR courts or, you
19 know, courts actually reach the merits of cases in order to
20 see that justice is done.

21 THE COURT: Okay. Outside of the fact that
22 Mr. Devoe may have represented Mr. Black and that case ended
23 July the 6th of 2009 and this trial occurred December of
24 2009, any evidence that Mr. Devoe knew that there was a
25 connection and that in any way that affected his

1 representation in the trial?

2 MS. FRANKLIN-BEST: I think when you look at Mr.
3 Devoe's performance during the trial -- and this was subject
4 to the initial PCR action, was also raised in a cert
5 petition to the South Carolina Supreme Court -- that his
6 performance was much less than zealous, Your Honor. You
7 know, we've got some proof here that he was actually
8 representing a co-defendant's family member at the time.
9 Obviously Mr. Devoe is now departed so we cannot ask him
10 specifically how he felt about that, but it's pretty clear
11 that his behavior and his performance in those cases was
12 substandard.

13 THE COURT: Okay. But that -- the fact that his
14 performance was substandard was something PCR court should
15 have considered. Assuming you don't have the scenario that
16 he may have represented a member of the victim's family
17 prior to that, that's what a PCR hearing is about is
18 determine whether his performance was substandard, whether
19 he represented somebody or not, you know. I guess you're
20 going to have to imply that if it was substandard, the PCR
21 court should have picked up on it no matter what the
22 reasoning being substandard versus somehow he did not
23 perform as he normally would because he had some interest in
24 the victim's family.

25 MS. FRANKLIN-BEST: And respectfully, I completely

1 understand that argument. You know, I wish that this was
2 something that had been raised with this additional proof at
3 the time of the initial PCR. I'm hoping that in light of
4 this additional information and the fact that Manigault case
5 gives this Court discretion to sort of overlook some of
6 these procedural bars, that you can still reach the merits
7 of this claim.

8 THE COURT: Okay.

9 MS. PIERCE: Your Honor, may I be heard at some
10 point?

11 THE COURT: Sure.

12 MS. PIERCE: Thank you. I have confirmed with the
13 Public Defender's Office that they did have Defender Data in
14 2009 when this trial took place and so the information that
15 he got on public defender index was available back in 2009.
16 They could have called and found out case assignments for
17 the public defenders. Your Honor, as you've already pointed
18 out, this should have been heard on PCR to like -- that this
19 already had been settled. Going through the motion page by
20 page, I also point out that Mr. Devoe represented the
21 brother on various drug charges and it sounds like it was a
22 very short amount of time between the charges came to the
23 solicitor's office when they were pleaded. I don't -- I
24 mean, there's really -- I can't think of connection between
25 drug charges and ABWIK, armed robbery, possession of a

1 weapon during a violent crime that they would have
2 been connected other than it just being we're in a small
3 county and public defender sometimes get assigned victims
4 and defendants and family members, that kind of thing.

5 Also, the -- we would have to prove that the
6 conflict of representing the brother actually caused the
7 inefficient representation. There is no evidence of that.
8 There's no evidence that Mr. Devoe's representation was
9 intentional. When they speculate that it was due to a lack
10 of preparation and rural understanding of the issues,
11 there's no evidence that that was intentional. Your Honor,
12 I leave it up to you because you were the trial judge when
13 they allege that you should have known about the case not
14 being called and having adequate notice. They allege that
15 his lack of preparation was apparent. They point out that
16 it was based on eyewitness testimony versus DNA or
17 forensics. Not that it matters, we know that direct
18 evidence is circumstantial evidence or equally weighed; but
19 we had direct evidence testified from the witness stand in
20 that case that Mr. Smith was the assailant. Again,
21 speculation about that he failed to meaningful challenge the
22 credibility, Mr. Smith wants to point out that there were
23 charges -- or Mr. Smith wants to point out there were
24 charges pending. Pending charges do not come in to a court
25 during trial.

1 And then finally, Your Honor, I believe -- I'm not
2 going to argue. I'll leave it up to the Court about whether
3 or not your sentence was correct or not. I just do not feel
4 like this even meets the Rule 29(b) because number one, he
5 found -- the defendant found this evidence in 2019. He has
6 one year to file his motion. And then when you look at the
7 requirements, it would likely change the result if a new
8 trial is granted. I do not know how Mr. Devoe's
9 representation of the victim's brother on drug charges will
10 change the result or likely change the result. This was
11 discovered since trial; however, it could have been
12 discovered before trial. It could not have been discovered
13 prior to trial by the exercise of due diligence. We now
14 know that is not accurate. This information was available
15 at the time of trial, that the information that he brings
16 before the Court today is material to the issue of guilt or
17 innocence. A speculative conflict of interest has nothing
18 to do with his material issue of guilt or innocence because,
19 again, the PCR court has already ruled on his
20 representation.

21 And then, finally, it's not merely cumulative or
22 impeaching. Your Honor, really and truly it falls up on
23 number three about could not have been discovered prior to
24 trial. I'd exercise the due diligence it could have and it
25 could have been discovered at the PCR hearing. We do not

1 believe this is the correct rule to bring before the Court,
2 and we would ask that you deny the Defense's motion.

3 THE COURT: Okay.

4 MS. FRANKLIN-BEST: Just in response to that, Your
5 Honor, I mean, it's clear that there was an opportunity to
6 find this before the trial. I mean, but Mr. Devoe is the
7 one who actually had the conflict, okay, so he was not going
8 to raise his own conflict or he did not raise his own
9 conflict. And so that would be sort of an allegation of
10 ineffective assistance of counsel, an additional allegation
11 against him at that point. And it's true that at the time
12 of the PCR hearing this data was available. Again, we're
13 aware that it was not raised at that point. Again, rely on
14 the South Carolina Supreme Court's admonition of Manigault
15 that this Court or any other court is empowered to overlook
16 these procedural bars in addressing these issues in order to
17 see that justice is done.

18 With regards to the prejudice based on Mr. Devoe's
19 behavior, you know, if there is an actual conflict of
20 interest in this case, if we are arguing that there was,
21 Your Honor, then prejudice is presumed and that is why the
22 full conflict of interest is somewhat different than other
23 claims of ineffective assistance of counsel. In an actual
24 conflict of counsel case, then that is a structural error in
25 the whole trial that -- and that's why there's such a robust

1 remedy that's available and find these conflicts, that being
2 sort of a new trial. But I believe I've answered those
3 issues but, I mean, you know. I understand they're arguing
4 that there's no prejudice here; but there is, like, a line
5 of cases that if there is an actual conflict, then that
6 prejudice is presumed because there is a structural error,
7 Your Honor.

8 THE COURT: Okay. Who -- who was his PCR
9 attorney?

10 MS. FRANKLIN-BEST: Tricia Blanchette.

11 THE COURT: Okay. What judge?

12 MS. FRANKLIN-BEST: Judge Clifton Newman.

13 THE COURT: Okay.

14 MS. FRANKLIN-BEST: Your Honor, if you would like,
15 we could -- we're more than happy to send you a copy of the
16 order of dismissal from that initial PCR if you'd --

17 THE COURT: That'd be great.

18 MS. FRANKLIN-BEST: --- find it helpful. Okay.

19 THE COURT: Thank you. I will read these cases
20 and let y'all know.

21 MS. FRANKLIN-BEST: Okay. I appreciate it. Thank
22 you, Your Honor.

23 THE COURT: Thank you.

24 * * * END OF REQUESTED TRANSCRIPT OF RECORD * * *
25

C E R T I F I C A T E O F R E P O R T E R

STATE OF SOUTH CAROLINA))
COUNTY OF SUMTER)

I, FRANCES B. RAY, Registered Professional Reporter (RPR), retired court reporter for the State of South Carolina, Third Judicial Circuit, do hereby certify that the foregoing proceeding is a stenographic report and was transcribed through computer-aided transcription; that the foregoing transcript contains a true record of the proceedings.

I further certify that I am neither counsel for, nor related to nor employed by any of the parties connected to the action, nor am I financially interested in the action.

Witness my hand at Florence, South Carolina, this
15th day of January, 2025.

Frances B. Ray

FRANCES B. RAY, RPR

STATE OF SOUTH CAROLINA	)	IN THE GENERAL SESSIONS COURT
	)	
COUNTY OF CLARENDON	)	Indictment No: 2008-GS-14-0352
	)	
The State of South Carolina	)	
	)	
v.	)	ORDER DENYING MOTION
	)	FOR NEW TRIAL
	)	
George Smith,	)	
	)	
<u>Defendant.</u>	)	

THIS MATTER COMES BEFORE ME on a request by the Defendant for a new trial pursuant to Rule 29(b) of the South Carolina Rules of Criminal Procedure. Defendant asserts that after his conviction of Assault and Battery with the Intent to Kill, Armed Robbery, and Possession of a Weapon During a Violent Crime in 2009, he discovered his trial counsel had a conflict of interest that resulted in deficient representation. Defendant alleges his attorney, Harry Devoe, had represented the victim's brother thereby dividing Mr. Devoe's loyalty and ardor of his defense of Defendant.

"To prevail on a motion for a new trial based on after discovered evidence, a defendant must show (1) the evidence is such as will probably change the result if a new trial is granted; (2) the evidence has been discovered since the trial; (3) the evidence could not have been discovered prior to trial by the exercise of due diligence; (4) the evidence is material; and (5) the evidence is not merely cumulative or impeaching." *State v. Needs*, 333 S.C. 134, 508 S.E.2d 857, 869 (1998).

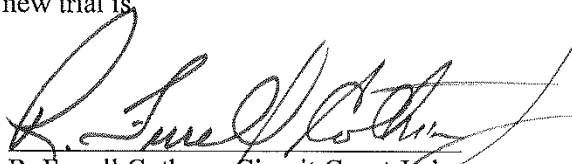
Defendant has not shown that knowing Mr. Devoe represented the victim's brother in an unrelated case would probably change the result of his conviction. Mr. Devoe represented Brodtus Black, brother of the victim in Defendant's case, on various drug charges. Mr. Black was arrested on April 28, 2009 and pleaded guilty on July 6, 2009, which is less than three

2009 APR 15 PM 2:51
CLARENCE, CLK CLARENCE, SC

months of his arrest date. Defendant was convicted on December 8, 2009. Mr. Black's drug charges are tangential and inconsequential to Defendant's case. Additionally, Defendant has not shown that the alleged conflict of interest could not have been discovered prior to trial by the exercise of due diligence. The Third Circuit Public Defender's office did have the software and capability to track case assignments in 2009. This information could have been obtained by Mr. Devoe or anyone relevant to the case by requesting said information from the public defender's office. Defendant's assertion of an alleged conflict of interest regarding his representation appears to be mere speculation.

This same issue was brought before a judge during Defendant's post-conviction relief (PCR) hearing and the court found Defendant failed to prove any conflict. Mr. Devoe testified that he had never heard of Mr. Black and PCR counsel could not locate any records evidencing a conflict of interest by Mr. Devoe in his representation of Defendant. At the time of the PCR hearing, Mr. Devoe testified that he essentially had no memory of representing the victim's brother, Mr. Black. The record indicates that Mr. Devoe represented Mr. Black for a mere two months at most, because the case was adjudicated within two months of Mr. Black's arrest on April 28, 2009. He plead guilty on July 6, 2009. It is reasonable to believe that counsel did not remember or draw a connection between the victim and Mr. Black due to the limited amount of time that he represented Mr. Black; therefore, counsel would not have had any conflict with his representation of Defendant.

Therefore, Defendant's motion for a new trial is
DENIED.AND IT IS SO ORDERED.


R. Ferrell Cothran, Circuit Court Judge

Manning, South Carolina
3-5, 2023 25

RECEIVED

Jan 07 2026

SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CLARENDON COUNTY
Court of General Sessions

Appellate Case No. 2025-000772

The Honorable R. Ferrell Cothran, Circuit Court Judge

The State of South Carolina.....Respondent,

v.

George Smith.....Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

January 7, 2026

/s/ Elizabeth Franklin-Best
Elizabeth Franklin-Best
Elizabeth Franklin-Best, P.C.
3710 Landmark Drive, Ste 113
Columbia, South Carolina 29204
(803) 445-1333