

VOLUME II OF II

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CLARENDON COUNTY
Court of Common Pleas

The Honorable Grace Gilchrist Knie

Appellate Case No. 2025-000405
Lower Case No. 2018-CP-14-00233

RECEIVED

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S.C. SUPREME COURT

Jonathan Cody Newman #362601,

Petitioner,

v.

State of South Carolina,

Respondent.

APPENDIX

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INDEX

RECORD ON APPEAL	1
FILED MAY 27, 2016	
NOTICE OF INTENT TO APPEAL	573
FILED JANUARY 20, 2015	
OPINION NO. 2017-UP-140.....	575
APRIL 5, 2017	
REMITTITUR	577
FILED APRIL 28, 2017	
APPLICATION FOR POST-CONVICTION RELIEF	578
FILED JUNE 11, 2018	
AMENDED APPLICATION FOR POST-CONVICTION RELIEF	588
FILED JULY 5, 2019	
MOTION FOR LEAVE TO OBTAIN DISCOVERY IN A PCR ACTION.....	632
FILED FEBRUARY 6, 2020	
RETURN AND MOTION TO DISMISS AND RETURN TO APPLICANT’S MOTION FOR LEAVE TO OBTAIN DISCOVERY IN A PCR ACTION	637
FILED FEBRUARY 12, 2020	
APPLICANT’S REPLY AND MOTION TO DENY RESPONDENT’S PROPOSED ORDERS OF DISMISSAL	645
FILED MARCH 5, 2020	
ORDER FOR LIMITED HEARING.....	704
FILED MARCH 19, 2020	
CONSENT ORDER FOR DISCOVERY	705
FILED MARCH 7, 2023	
SECOND AMENDED APPLICATION FOR POST-CONVICTION RELIEF	708
FILED OCTOBER 24, 2023	
TRANSCRIPT OF PETITIONER’S PCR HEARING.....	718
DATED JULY 25, 2024	
ORDER OF DISMISSAL.....	848
FILED OCTOBER 7, 2024	

MOTION TO ALTER OR AMEND PURSUANT TO RULE 59(E), SCRCP.....	881
DATED OCTOBER 11, 2024	
MOTION HEARING TRANSCRIPT	918
DATED JANUARY 31, 2025	
ORDER REGARDING MOTION FOR RECONSIDERATION	
FILED FEBRUARY 14, 2025	931
NOTICE OF APPEAL.....	934
DATED MARCH 3, 2025	

Sentencing

498

1 determination. And I want you to go out of here when
2 you leave your service this week and think of yourselves
3 as the individual threats that make up the great ideals
4 that this American and South Carolina flag contain for
5 its citizens. Now, Ladies and Gentlemen, you have
6 reached your verdict concerning the defendant Newman.
7 In approximately thirty minutes I am going to sentence
8 the defendant in accordance with your verdict. You've
9 been here all week. You are certainly allowed to be
10 present for the sentencing but you don't have to be.
11 You can go do what you want to do from this point
12 forward. All along I told you that you couldn't talk
13 about the case. Well, you can talk about it to anybody
14 you want to, as much as you want to or as little as you
15 want to. So, if somebody is persistent and wants to talk
16 with you about this let one of the Bailiffs know who
17 will let me know and I will make sure that it doesn't
18 happen anymore.

19 Ladies and Gentlemen, as you leave or stay around,
20 I'd like to have the opportunity to shake your hand for
21 doing the job that you have done for the State of South
22 Carolina and Clarendon County.

23 **(Jurors excused for the week 2:23 p.m.)**

24 The Court: Mr. Devoe, would you have your client
25 please stand.

1 **(Mr. Samuels stands)**

2 The Court: All right. Mr. Samuels, the jury has
3 heard the evidence. They have deliberated. They have
4 found you not guilty of the charges. Unless there is
5 something else holding Mr. Samuels he is a free man.

6 I will sentence Mr. Newman in thirty minutes.

7 Mr. Finney: And we are asking law enforcement to
8 bring Mr. Montag Webb over so that he can be sentenced at
9 the same time.

10 The Court: Okay. We can do that. Mr. Newman will
11 be taken into custody. Of course, you'll have an
12 opportunity to meet with him. Thank you.

13 **(There was a court break)**

14 **(Back on)**

15 The Court: All right. Solicitor, who do you want
16 first?

17 Mr. Durant: Newman first.

18 The Court: Come forward. Solicitor any statements
19 on behalf of the victim? Any family members?

20 Mr. Durant: Your Honor, we had been in constant
21 contact with the family of Mr. Wimberly throughout this
22 process. His next of kin, he's got a couple of brothers
23 and a sister I believe that live out of state. They live
24 in New York and they've been aware of this trial. We've
25 communicated throughout the week but financially they

Sentencing

500

1 just weren't able to make it down here today. They are
2 very interested in what's going on but we have been
3 communicating with them.

4 As far as Mr. Newman's record, Your Honor, his adult
5 record he has several pending charges including breaking
6 into a motor vehicle. Possession of a controlled
7 substance, possession of marijuana, illegal distribution
8 of recordings. He also has a pending assault charge from
9 Sumter County on a correctional officer which he was
10 charged with while incarcerated for this crime. All of
11 those charges are pending, no convictions yet.

12 The Court: Mr. Carter, any mitigation?

13 Mr. Carter: Well, Your Honor, as you know, a charge
14 isn't a charge until you're actually convicted of it.

15 The Court: Right.

16 Mr. Carter: It amounts to almost nothing.

17 The Court: That's right.

18 Mr. Carter: Judge, Jonathan is a 21 year old male.
19 He has two children. He stands here before you with this
20 father, his mother and his grandmother. As the State has
21 already indicated other than, he has no adult convictions
22 of any crimes. Prior to this arrest, as I indicated, he
23 was working with his father. His second child was born
24 while he was incarcerated. Of course, he loves her and
25 really would like, really would have liked to have been

1 around during her years of growing. He's really, I mean,
2 other than this incident Judge and we have to take the
3 facts as having been the facts because the jury has found
4 them, has made its finding and found him to be guilty of
5 it, but the Court now looks at the facts and if it is
6 that he struck the individual and he's been convicted now
7 of having done that, if the Court looks at the facts, I
8 don't believe that the juries finding of the facts of
9 finding that this murder was intentional, and they did
10 find that it was an intentional act, I don't believe that
11 he intended to actually --- that there end up being a
12 death from this incident. If there is a striking, I
13 don't believe that he intended that and I've talked with
14 him over and over from that and that's not something that
15 they intended or ever wanted to ever, ever happen.

16 The fact that the man, the victim ended up dying, I
17 mean, it is an awful thing but it isn't something that he
18 would have wanted. And, of course, with regards to
19 burglary, the State, the law creates what burglary is and
20 it states what burglary is, but as the court is well
21 aware burglary tends to be something a little bit
22 different from, you know what the law creates to be the
23 basis for a burglary.

24 The Court: This was more of a home evasion.

25 Mr. Carter: Yes, sir. Well, even looking from the

VOLUME II OF II

STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM CLARENDON COUNTY

William Jeffrey Young, Circuit Court Judge

RECEIVED
MAY 27 2016
SC Court of Appeals

THE STATE,

RESPONDENT,

V.

JONATHAN CODY NEWMAN,

APPELLANT

APPELLATE CASE NO. 2015-000091

RECORD ON APPEAL

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INDEX

INDEX i

TRIAL TRANSCRIPT (dated January 6-9, 2015) 1

OPENING BY THE COURT 5

OPENING STATEMENT BY MR. DURANT 14

OPENING STATEMENT BY MR. CARTER 17

OPENING STATEMENT BY MR. DEVOE 21

TESTIMONY

 JASON THOMPSON 24

 LEON COLEMAN.....39

 MONTAG WEBB.....55

 KEVIN SLATER.....150

 AMY DURSO 190

 SONIA DANIELS 207

 ERIC ROSDALL.....260

 MARK ALLEN JONES.....286

EXPLANANTION OF FIFTH AMENDMENT RIGHTS TO MR. NEWMAN 297

EXPLANANTION OF FIFTH AMENDMENT RIGHTS TO MR. SAMUELS 299

MOTION FOR A DIRECTED VERDICT ON ISSUE OF BURGLARY BY MR. CARTER 302

RESPONSE BY MR. FINNEY 304

RESPONSE BY MR. CARTER.....304

RULING BY THE COURT	306
MOTION FOR A DIRECTED VERDICT ON MURDER CHARGE BY MR. CARTER	306
RESPONSE BY MR. FINNEY	308
RESPONSE BY MR. CARTER	309
RULING BY THE COURT	309
RESPONSE BY MR. DEVOE	310
RESPONSE BY MR. FINNEY	311
RULING BY THE COURT	311
TESTIMONY	
JONATHAN CODY NEWMAN	312
TESTIMONY	
LETROY SAMUELS	372
SONIA DANIELS	418
MOTION BY MR. CARTER	422
RESPONSE BY MR. FINNEY	422
RULING BY THE COURT	423
RENEWED MOTIONS BY MR. CARTER	423
RULING BY THE COURT	423
CHARGE CONFERENCE	424
CLOSING ARGUMENT BY MR. DURANT	427
CLOSING ARGUMENT BY MR. CARTER	435
CLOSING ARGUMENT BY MR. DEVOE	464
REPLY CLOSING BY MR. FINNEY	468
JURY CHARGE	479

VERDICT	495
RESPONSE BY MR. DURANT	498
RESPONSE BY MR. CARTER.....	499
STATEMENT FROM CHRISTOPHER JOHN NEWMAN	502
RESPONSE BY MR. FINNEY	503
SENTENCING OF JONATHAN CODY NEWMAN	504
PRE-TRIAL TRANSCRIPT (dated January 5, 2015).....	507
JURY QUALIFICATION	509
STRIKING OF THE JURY	522
<u>JACKSON V. DENNO</u> HEARING.....	536
TESTIMONY	
SONIA DANIELS	536
INDICTMENT	562
CERTIFICATE OF COUNSEL.....	564

1 point of an expectation of a home evasion would be, you
2 know, there just wasn't, and however, the jury found they
3 planned to go in and rob this man out of his house and
4 home, rob him of his money. If the Court believes there
5 was a plan to rob him of a gun or take a gun from him,
6 again, the traditional sense of a burglary, the
7 traditional sense of somebody plotting and planning and
8 actually killing and committing a murder. That just
9 wasn't the plan. That's not even what they expected to
10 happen. That's not --- I mean it is what happened but
11 we'd ask the Court to give that some consideration. They
12 are bound by the results of their action. But it just
13 wasn't something that they plotted and planned. As the
14 Court received the testimony, His Honor, heard the
15 testimony, you know, he was breathing at all times and if
16 the court believes that he was there they left him
17 breathing knowing he was breathing. If you take the
18 testimony of Mr. Slater, who says that he was gargling a
19 little bit and if they were trying to kill him they would
20 not have allowed that actually be what was left. I'd ask
21 the Court to look at what kind of murder this is. What
22 kind of a burglary that it is and consider the fact that
23 he has no prior records. No prior convictions in his
24 adult life. He really was just getting started out in
25 life because he was 19 years old when he went to jail and

1 he's been there almost 2 years now and I'd ask the Court
2 to give that consideration. Thank you, sir.

3 The Court: Would any of his family members like to
4 speak?

5 Mr. Newman: I would, sir.

6 The Court: State your name for the record.

7 Mr. Newman: My name is Christopher John Newman. I'm
8 Jonathan's father. I was stationed here many years ago.
9 I left her in PCS to the Air Force Base and Jonathan
10 accompanying me there. I sent him here when he was 15
11 years old to live with his mother. I took the approach
12 raising Jonathan just as my father took with me. If you
13 can't help someone by all means don't hurt them. I think
14 Jonathan always practiced that. He always lived by that
15 means. The night in question, I don't --- I can only
16 speculate what happened. I wasn't there. I don't know.
17 But I can tell you that the Jonathan that I know, the
18 Jonathan that I raised wouldn't just go and hurt someone
19 like that. He would do anything in his power to help
20 them. I would just ask the Court to have mercy in
21 sentencing him. Thank you for your time, sir.

22 The Court: Thank you. Would your client like to say
23 anything?

24 Mr. (Jonathan) Newman: No, sir.

25 The Court: Anything further from the Solicitor?

Sentencing

504

1 Mr. Finney: Judge, Chris and I have spoken together
2 a minute ago about recommending. On behalf of the State
3 we worked very hard to resolve this case with Mr. Newman
4 and his lawyer before trial at a lower level than murder
5 and we were not able to do that. Obviously, once we
6 tried the case and got everything we were on the record,
7 we were very acceptable that Mr. Webb and Mr. Newman
8 planned this event, went in the house and that the
9 consequences were that Mr. Wimberly died. I don't, I
10 don't object to the Court giving him some leniency
11 because of his age and his lack of prior record. I
12 certainly would think that with a minimum of thirty years
13 on the murder and a minimum of fifteen on the burglary
14 he's looking at consecutive time for that because there
15 were two distinct acts because he could have broken in
16 without hurting the man, he could have hurt the man
17 without breaking in, he did both. We are not objecting
18 to that but we do feel that since the jury has found him
19 guilty of murder, he had an opportunity to resolve it on
20 a lower level that he should be given a substantial ...

21 The Court: Well, the Court does not punish someone
22 for exercising their constitutional right to go to trial.

23 Mr. Finney: No, sir. That's right.

24 The Court: All right. Anything further?

25 Mr. Finney: No, sir.

1 The Court: I've listened to the testimony over this
2 last five days and it's a been a long and hard trial.
3 Again, I've done a lot of murder trials but this was just
4 the inhumanity of everybody involved. It's just
5 horrible. For the neighbors who new this man was
6 unconscious, to not do anything. There's no law that
7 makes them do something but it certainly bothers me that
8 we have humans in our society who walk around who even
9 wouldn't pick up the telephone to call to help this man.
10 Had it happened, there's a possibility that this may have
11 been an attempted murder situation, but that in no way
12 lessens what the jury has found this defendant guilty of.
13 No question that what the jury found was that he threw
14 the punch and it put the man unconscious to the point
15 that he died two months later. And nobody was forcing.
16 This was certainly appeared to be a common scheme and
17 plan between these two defendants and the jury found that
18 Mr. Samuels was really kind of where he shouldn't have
19 been. In this situation I certainly don't think this
20 warrants the maximum sentence of life but it certainly
21 does not warrant the minimum sentence of thirty years.

22 I find that this defendant shall be sentenced to the
23 State Department of Corrections for a period of thirty-
24 five (35) years on the Murder charge and on the Burglary
25 charge he shall be sentenced to the State Department of

Sentencing

506

1 Corrections for a period of thirty (30) years. So,
2 that's thirty-five and thirty. Because they all happened
3 within probably a two to three minute time frame I'm
4 going to run the sentences concurrent. That's the
5 sentence of the Court on Mr. Jonathan Cody Newman.

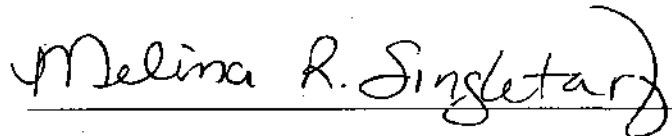
6 **(This ends this hearing for the week)**
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CERTIFICATE

This is to certify that the transcript in the matter of Jonathan Cody Newman vs. The State of South Carolina, consisting of Five Hundred Six (506) pages is a true and correct transcript; said hearing was reported by the method of Stenomask with Backup.

I further certify that I am not employed by any of the parties in this matter or their counsel; nor do I have any interest, financial or otherwise, in the outcome of same.

IN WITNESS WHEREOF I have hereunto set my hand and seal this 23rd day of August, 2015.



Melissa R. Singletary
Certified Court Reporter

STATE OF SOUTH CAROLINA)
COUNTY OF CLARENDON)

IN THE COURT OF
GENERAL SESSIONS

STATE OF SOUTH CAROLINA)
STATE,)

v.)

TRANSCRIPT OF RECORD
13-GS-14-0293

JONATHAN C. NEWMAN,)
AND LETROY SAMUELS)

DEFENDANT.)

January 5, 2015
Manning, South Carolina

B E F O R E :

THE HONORABLE W. JEFFREY YOUNG, JUDGE;
AND JURY

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

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INDEX

	Page
Qualifying of jury panel	3
Striking of the jury	16
Jackson v. Denno hearing	30
Sonia Daniels	30

EXHIBITS

COURT'S:

No.	Description	Page
1	Interview transcript of Samuels	47

1 THE COURT: All right, Solicitor.

2 MR. FINNEY: Your Honor, the State of
3 South Carolina calls the State versus Jonathan Cody
4 Newman and Letroy Samuels, indictment number
5 2013-GS-14-293, and both defendants are charged with
6 murder and burglary in the first degree.

7 THE COURT: All right, thank you.

8 Ladies and gentlemen, I'm sorry for the
9 delay but we had to do some preliminary things and I
10 just -- we're ready to take on this case of Jonathan
11 Cody Newman and Letroy Samuels. They are charged
12 with murder and burglary in the first degree and the
13 indictment reads as follows: That Jonathan Cody
14 Newman and Letroy Samuels did in Clarendon County on
15 or about May 26th, 2013, willfully and feloniously
16 and intentionally kill the victim Anthony Wimberly
17 with malice aforethought, either expressed or
18 implied, by severely beating the victim and the
19 victim did die as a proximate result of the injuries
20 then and there sustained on or about July 29th,
21 2013, in Clarendon County in violation of Section
22 16-3-10 of the South Carolina Code of Laws. Count
23 two reads that Jonathan Cody Newman and Letroy
24 Samuels did in Clarendon County on or about
25 May 26th, 2013, enter the dwelling of Anthony

1 Wimberly located at
2 Manning, South Carolina, without consent and with
3 the intent to commit a crime therein and the
4 entering or remaining in the dwelling occurred in
5 the night time or when effecting entry or while in
6 the dwelling or any immediate flight the defendants
7 caused physical injury to a nonparticipant in the
8 crime and/or were armed with a deadly weapon or did
9 use or threaten the use of a dangerous instrument
10 all in violation of Section 16-11-311(a) of the
11 South Carolina Code of Laws. Now Ladies and
12 Gentlemen, let me remind you, the fact that the
13 defendants were arrested, charged, and indicted in
14 no way is indicative that they are guilty of these
15 charges. Ladies and gentlemen, the defendants have
16 pled not guilty; and therefore, the State has the
17 burden of proving each and every allegation of each
18 charge beyond a reasonable doubt.

19 Now ladies and gentlemen, one of the
20 reasons I'm gonna remind you that you are still
21 under oath and one of the reasons that you're under
22 oath as I ask these questions is because this is
23 such a crucial stage of the trial. You know, just
24 like a building must have a firm foundation to be
25 strong and protective of those who live in it, so

1 must a jury be strong as the basis of a fair and
2 impartial trial for those who participate, the
3 solicitor for the State and the defendants who are
4 on trial. And your answers to these questions will
5 be the foundation by which these attorneys build a
6 jury and they're relying on your truthful answers to
7 these questions to help them strike an unbiased jury
8 who will diligently and listen to the facts and
9 deliver a just verdict. So ladies and gentlemen,
10 thank you again for your complete and truthfulness
11 as I ask you these questions.

12 The first question is, has any member of
13 the jury panel ever been related by blood or
14 marriage or had a close personal or business
15 relationship with the defendant Jonathan Cody Newman
16 would you please stand, or Letroy Samuels, please
17 stand, or the alleged victim Anthony Wimberly, if so
18 please stand.

19 Y'all may be seated now.

20 (There was no response.)

21 THE COURT: All right, thank you, no one
22 is standing. Ladies and gentlemen, this is a list
23 of possible witnesses in this case and I'll go
24 through the whole list and then I'll ask you some
25 questions. Lieutenant Sonia Daniels of the Manning

1 Police Department, Corporal Jason Thompson of the
2 Manning Police Department, Investigator Eric Rosdail
3 of the Clarendon County Sheriff's Office, Lester
4 Lemon, Yolanda Torres, Kevin Slater, Montag Webb,
5 Doctor Mark Jones, Doctor Amy Durso, and Leon -- is
6 that Olderman?

7 MR. FINNEY: Coleman.

8 THE COURT: Leon Coleman. Has any member
9 of the jury panel ever been related by blood or
10 marriage or have a close personal or business
11 relationship with any of these potential witnesses,
12 if so, please stand.

13 (There was no response.)

14 THE COURT: Thank you, no one is standing.
15 Ladies and gentlemen, the attorneys who will be
16 handling this case will be Solicitor Chip Finney and
17 Mr. Chris Durant.

18 Mr. Finney, would you like to introduce
19 your staff?

20 MR. FINNEY: Thank you, Your Honor. My
21 name is Chip Finney, I'm the Solicitor. My main
22 office is in Sumter although we also have an office
23 in Clarendon. Chris Durant runs the office in
24 Clarendon. He's also a part-time lawyer with
25 William Johnson in a private law firm.

1 THE COURT: Mr. Devoe, would you like to
2 introduce yourself?

3 MR. DEVOE: Thank you, Your Honor. My
4 name is Harry Devoe; I'm a private attorney. You
5 can tell from my accent I'm not from here
6 originally. My wife is from Clarendon County. I
7 went to law school in Virginia went so I don't think
8 so that on my Clements tried Samuels innocent
9 charges and happy to have this trial. Thank you.

10 THE COURT: Mr. Carter, would you like to
11 introduce yourself?

12 MR. CARTER: Thank you, Your Honor. My
13 name is Eleazer Carter. I'm from right here in
14 Manning, South Carolina. I'm actually from
15 Summerton, South Carolina, but I practice here,
16 right here in town, Manning, South Carolina, and I'm
17 representing Mr. Jonathan Cody here and we really
18 appreciate having the opportunity to present our
19 case to you so that you can review it and make a
20 correct decision. Thank you very much.

21 THE COURT: Thank you.

22 Ladies and gentlemen, has any member of
23 the jury panel ever been related by blood or
24 marriage or had a close, personal, or business
25 relationship or ever been represented by any of

1 these attorneys, if so, please stand.

2 (There was no response.)

3 THE COURT: Thank you, no one is standing.
4 Has any member of the jury formed or expressed an
5 opinion about any issue or matter involved in this
6 case or anybody who knows anything about this case,
7 please stand at this time.

8 (There was no response.)

9 THE COURT: Thank you. No one is
10 standing. Has any member of the jury panel ever
11 been the victim of or charged with a violent crime,
12 if so, please stand.

13 (There was no response.)

14 THE COURT: Thank you. No one is
15 standing. Is any member of the jury panel aware of
16 any bias or prejudice towards either the State or
17 any of the defendants in this case, if so, please
18 stand.

19 (There was no response.)

20 THE COURT: Thank you. No one is
21 standing. Is there any member of the jury panel who
22 is also a member of the grand jury that indicted
23 this case, if so, please stand.

24 (There was no response.)

25 THE COURT: Thank you. No one is

1 standing. Is there any member of the jury panel who
2 is a member of or a contributor to any group which
3 has as its primary concern the promotion of law
4 enforcement, and these groups would include but
5 certainly would not be limited to, Mother's Against
6 Drunk Drivers, Students Against Drunk Drivers, or
7 Citizens Against Violent Crime. If so, please
8 stand.

9 (There was no response.)

10 THE COURT: Thank you. No one is
11 standing. Does any member of the jury panel know of
12 any reason whatsoever why he or she should not serve
13 as a juror in this case with particular emphasis
14 being placed on your ability to be fair and
15 impartial to both the State and the Defendant, if
16 so, please stand.

17 (There was no response.)

18 THE COURT: Yes, ma'am, come forward
19 please.

20 (Potential juror approached the Bench for an
21 on-the-record discussion.)

22 THE BAILIFF: Juror number 139.

23 THE POTENTIAL JUROR: I know that King
24 Cutter has been working on this case and he is
25 working on this case as a public defender, and he is

1 a client and good friend of mine.

2 THE COURT: Okay, but he's not on this
3 particular case.

4 THE POTENTIAL JUROR: Oh, I thought he
5 was.

6 THE COURT: Well, I mean, he's not on this
7 trial.

8 THE POTENTIAL JUROR: Okay. Okay.

9 THE COURT: You think you can be fair and
10 impartial?

11 THE POTENTIAL JUROR: Oh, yeah.

12 MR. CARTER: What's the juror number?

13 THE COURT: What's your juror number?

14 THE POTENTIAL JUROR: 139.

15 (End of on-the-record Bench conference.)

16 THE BAILIFF: Juror number 3.

17 THE COURT: Yes, ma'am, state your name
18 and number for the court reporter.

19 THE POTENTIAL JUROR: Angela Aguirre,
20 number 3.

21 THE COURT: Yes, ma'am.

22 THE POTENTIAL JUROR: I do know the
23 defendant and also one of the witnesses.

24 THE COURT: You know one of the
25 defendant's? Why didn't you say something earlier?

1 THE POTENTIAL JUROR: Well, I don't
2 personally know him or have a relation, but I do
3 know him as high school friends so I just wanted to
4 run that by you.

5 THE COURT: Do you think you can -- you
6 knew him in high school, you still think you can be
7 fair and impartial and listen to the evidence in
8 this case?

9 THE POTENTIAL JUROR: Well, that's the
10 thing, I know his father to be a friend's child. I
11 don't know if my emotions or sentiments would be
12 involved in that.

13 THE COURT: You don't think you can be
14 fair and impartial?

15 THE POTENTIAL JUROR: I don't think so.

16 THE COURT: I'll strike her for cause
17 then. Thank you.

18 THE POTENTIAL JUROR: Thank you.

19 (End of on-the-bench discussion.)

20 THE BAILIFF: Juror number 25.

21 (Potential juror approached the Bench for an
22 on-the-record discussion.)

23 THE COURT: Good morning. What's your
24 name?

25 THE POTENTIAL JUROR: My name is Joyce

1 Conyers, number 25.

2 THE COURT: Joyce Conyers, yes, ma'am.

3 THE POTENTIAL JUROR: I went to school
4 with him and stuff.

5 THE COURT: The fact you went to school
6 with the defendant, one of the defendants, make it
7 so that you can't be fair and impartial to the State
8 or the Defendant in this case?

9 THE POTENTIAL JUROR: No, that doesn't
10 make it.

11 THE COURT: You think you can be fair and
12 impartial and listen to the evidence?

13 THE POTENTIAL JUROR: Yes.

14 THE COURT: Okay, very good. Thank you,
15 ma'am.

16 (End of on-the-record Bench discussion.)

17 THE BAILIFF: Juror 106.

18 (Potential juror approached for an on-the-record
19 discussion.)

20 THE COURT: Yes, sir, what's your name
21 again?

22 THE POTENTIAL JUROR: My name is Amin
23 Paumilbhai.

24 THE COURT: Yes, sir.

25 THE POTENTIAL JUROR: I know the boy but I

1 don't know his name. His momma, she was my regular
2 customer coming to my gas station and I know them
3 that way.

4 THE COURT: By the fact that you've seen
5 them around town, know him, or know him as a
6 customer, could you still be fair and impartial,
7 listen to the evidence, and make your decision based
8 upon the evidence?

9 THE POTENTIAL JUROR: Actually, I'm not
10 sure what I -- two things, because I know why the
11 boy is here, and I don't want to do like, you know,
12 might be, you know ---

13 THE COURT: He says he can't be fair and
14 impartial so I'm gonna let you sit this one out and
15 we may call you for another one. Thank you.

16 (End of on-the-record Bench discussion.)

17 THE BAILIFF: Juror number 92.

18 (Potential juror approached the Bench for an
19 on-the-record Bench discussion.)

20 THE COURT: Yes, ma'am, what's your name?

21 THE POTENTIAL JUROR: Janice McFadden.

22 THE COURT: Ms. McFaddin, yes, ma'am.

23 THE POTENTIAL JUROR: I just want to make
24 sure that it would be okay to serve as a juror
25 because I used to be with child protective service

1 as supervisor for Clarendon DSS and certainly in the
2 past I've heard cases of a different nature in front
3 of you.

4 THE COURT: But could you listen to the
5 evidence in this case and make your decision solely
6 on the evidence that's presented in this case?

7 THE POTENTIAL JUROR: Yes, sir, I could do
8 that.

9 THE COURT: All right, then you're
10 qualified.

11 (End of on-the-record Bench discussion.)

12 THE BAILIFF: Juror 101.

13 (Potential juror approached the Bench for an
14 on-the-record discussion.)

15 THE COURT: Good morning, what's your
16 name, sir?

17 THE POTENTIAL JUROR: Eddie Myers. I
18 heard y'all mention Montag Webb and I've known his
19 family and sisters, went to school together for a
20 while.

21 THE COURT: He's a potential witness.

22 THE POTENTIAL JUROR: He is a potential
23 witness so.

24 THE COURT: But could you listen to the
25 evidence in this case and make your decision based

1 upon the evidence?

2 THE POTENTIAL JUROR: I'd do my best, yes,
3 sir.

4 THE COURT: So that will be a yes?

5 THE POTENTIAL JUROR: Yes, sir.

6 THE COURT: Thank you.

7 THE POTENTIAL JUROR: 101.

8 THE COURT: Thank you, Mr. Myers.

9 Does the State have additional questions
10 that would like for me to ask?

11 MR. FINNEY: No, sir, Your Honor.

12 THE COURT: Does Defense have any
13 additional questions you'd like for me to ask?

14 MR. CARTER: None, Judge.

15 THE COURT: Mr. Devoe?

16 MR. DEVOE: None, Your Honor..

17 THE COURT: Ladies and gentlemen, what's
18 gonna happen now is the computer is going to
19 generate a list of names. If your name is called
20 please come forward, stand up here by the podium and
21 face the other jurors. The State and the Defense
22 will have an opportunity to strike you. Please
23 don't take it personally if you're stricken from
24 this case. Each side has an idea as to what would
25 be the best jury for them, and they can strike you

1 for any reason or no reason except for they can't
2 strike you for your gender or your race. And when
3 you come forward please bring your personal items in
4 case you're selected as a juror, then you'll go
5 straight to the jury box. All right.

6 MR. CARTER: Your Honor...

7 THE COURT: Yes.

8 (WHEREUPON, counsel approached the Bench for an
9 off-the-record discussion.)

10 THE CLERK OF COURT: Ladies and gentlemen
11 of the jury, as I call your name come through the
12 aisle here, walk up to the desk, turn around and
13 face the tables and I'll tell you what to do. Okay.
14 All right, number 103, Tina M. Ocasio (white
15 female). Turn around and face those tables. Stand
16 there till I tell you what to do.

17 What saith the State?

18 MR. FINNEY: Please swear the juror.

19 THE CLERK OF COURT: What say the Defense?

20 THE COURT: Be specific as to which.

21 THE CLERK OF COURT: Defendant Newman.

22 MR. CARTER: Seat the juror.

23 MR. DEVOE: Please swear this juror for
24 this trial.

25 THE CLERK OF COURT: You may have a seat

1 in the jury box, ma'am.

2 Number 92, Janice McFaddin (white female).

3 What say the State?

4 MR. FINNEY: Please swear the juror.

5 THE CLERK OF COURT: What say Defendant
6 Newman?

7 MR. CARTER: Defendant Newman strikes the
8 juror.

9 THE CLERK OF COURT: Okay, have a seat
10 back in the jury panel.

11 MR. CARTER: That was number 91?

12 THE CLERK OF COURT: Number 92.

13 Number 105, Timothy P. Oliver (white
14 male).

15 MR. CARTER: What number?

16 THE CLERK OF COURT: 105. What say the
17 State?

18 MR. FINNEY: Please swear the juror.

19 THE CLERK OF COURT: Defendant Newman?

20 MR. CARTER: Seat the juror.

21 THE CLERK OF COURT: Defendant Samuels.

22 MR. CARTER: Please strike this juror for
23 trial.

24 THE CLERK OF COURT: You may have a seat
25 back with the jury panel.

1 Number 46, Christen N. Floyd (white
2 female). What says the State?

3 MR. FINNEY: Please swear the juror.

4 THE CLERK OF COURT: Defendant Newman?

5 MR. CARTER: Swear the juror. Seat the
6 juror.

7 THE CLERK OF COURT: Samuels?

8 MR. DEVOE: Please strike this juror from
9 this trial.

10 THE CLERK OF COURT: Have a seat back in
11 the jury pool, thank you.

12 Number 84, Kerri A. Mankin (white female).
13 Number 84, what say the State?

14 MR. FINNEY: Please swear the juror.

15 THE CLERK OF COURT: What says Newman?

16 MR. CARTER: Yes, swear the juror.

17 THE CLERK OF COURT: Samuels?

18 MR. DEVOE: Please swear the juror.

19 THE CLERK OF COURT: Number 43, Nicholas
20 Erickson (white male). What say the State?

21 MR. FINNEY: Please swear the juror.

22 THE CLERK OF COURT: Defendant Newman?

23 MR. CARTER: Strike the juror.

24 THE CLERK OF COURT: You may have a seat
25 back in the jury pool, sir.

1 Number 135, Steven Walls (white male),
2 135. What says the State?

3 MR. FINNEY: Please swear the juror.

4 THE CLERK OF COURT: Defendant Newman?

5 MR. CARTER: Seat the juror.

6 THE CLERK OF COURT: Defendant Samuel?

7 MR. DEVOE: Please swear this juror.

8 THE CLERK OF COURT: Have a seat in the
9 jury box.

10 Number 121, Joanne Simpson (white female).
11 What say the State?

12 MR. FINNEY: Please swear the juror.

13 THE CLERK OF COURT: Defendant Newman?

14 MR. CARTER: Please seat the juror.

15 THE CLERK OF COURT: Have a seat in the
16 jury box.

17 Number 51, Lonnie W. Freeman (white male).
18 What says the State?

19 MR. FINNEY: Please swear the juror.

20 THE CLERK OF COURT: Defendant Newman?

21 MR. FINNEY: What number was that,
22 Ms. Roberts?

23 THE CLERK OF COURT: That's number 51.

24 MR. CARTER: Strike the juror.

25 THE CLERK OF COURT: You may have a seat

1 back in the jury pool.

2 Number 61, Krishauna D. Hart (black
3 female). What says the State?

4 MR. FINNEY: Please swear the juror.

5 THE CLERK OF COURT: Defendant Newman?

6 MR. CARTER: Swear the juror.

7 THE CLERK OF COURT: Samuels?

8 MR. DEVOE: Please swear this juror for
9 this trial.

10 THE CLERK OF COURT: You may have a seat
11 in the jury box.

12 Number 143, Belinda L. York (black
13 female). What says the State?

14 MR. FINNEY: Please swear the juror.

15 THE CLERK OF COURT: Defendant Newman?

16 MR. CARTER: Seat the juror.

17 THE CLERK OF COURT: Defendant Samuels?

18 MR. DEVOE: Please swear the juror for
19 this trial.

20 THE CLERK OF COURT: You may a seat in the
21 jury box.

22 Number 48, Helen Floyd (white female).
23 What says the State?

24 MR. FINNEY: Please swear the juror.

25 THE CLERK OF COURT: Defendant Newman?

1 MR. CARTER: Seat the juror.

2 THE CLERK OF COURT: Defendant Samuel?

3 MR. DEVOE: Please swear this juror for
4 this trial.

5 THE CLERK OF COURT: Have a seat in the
6 juror box.

7 Number 112, Earl E. Richardson (black
8 male). What says the State?

9 MR. FINNEY: Please swear the juror.

10 THE CLERK OF COURT: Defendant Newman?

11 MR. CARTER: Please strike the juror.

12 THE CLERK OF COURT: All right, have a
13 back in the jury pool, please, ma'am.

14 Number 17, Michael S. Brunson (white
15 male). What say the State?

16 MR. FINNEY: Please swear the juror.

17 THE CLERK OF COURT: Defendant Newman?

18 MR. CARTER: Strike the juror.

19 THE CLERK OF COURT: Have a seat back in
20 the jury pool. Thank you.

21 Number 14, Anthony Briggs (black male).
22 What says the State?

23 MR. FINNEY: Please swear the juror.

24 THE CLERK OF COURT: Defendant Newman?

25 MR. CARTER: What number was that?

1 THE CLERK OF COURT: Number 14.

2 MR. CARTER: Please strike the juror.

3 THE CLERK OF COURT: You said strike?

4 MR. CARTER: Strike.

5 THE CLERK OF COURT: Okay, have a seat
6 back in the jury pool.

7 Number 101, Eddie G. Myers (black male).
8 What say the State?

9 MR. FINNEY: Please swear the juror.

10 THE CLERK OF COURT: Defendant Newman?

11 MR. CARTER: Seat the juror.

12 THE CLERK OF COURT: Samuel?

13 MR. CARTER: Please seat the juror, sir.

14 THE CLERK OF COURT: Have a seat in the
15 jury box, sir.

16 Number 76, Mark C. Lee (white male). What
17 say the State?

18 MR. FINNEY: Please swear the juror.

19 THE CLERK OF COURT: The defendant Newman?

20 MR. CARTER: Swear the juror.

21 THE CLERK OF COURT: Samuel?

22 MR. DEVOE: Please swear this juror.

23 THE CLERK OF COURT: Have a seat in the
24 jury box. Thank you, sir.

25 Number 136, Edna M. Walters (black

1 female).

2 MR. CARTER: What number?

3 THE CLERK OF COURT: 136. What say the
4 State?

5 MR. FINNEY: Please swear the juror.

6 THE CLERK OF COURT: Defendant Newman?

7 MR. CARTER: Please strike this juror.

8 THE CLERK OF COURT: Have a seat back in
9 the juror pool. Thank you.

10 Number 133, Donna S. Vanwynsberghe (white
11 female). What says the State?

12 MR. FINNEY: Please swear the juror.

13 THE CLERK OF COURT: Defendant Newman?

14 MR. CARTER: Seat the juror.

15 THE CLERK OF COURT: Defendant Samuel?

16 MR. DEVOE: Please strike this juror.

17 THE CLERK OF COURT: Have a seat back in
18 the jury pool.

19 Number 37, Ann Drago (white female).

20 MR. CARTER: That's 137?

21 THE CLERK OF COURT: No, 37. What say the
22 State?

23 MR. FINNEY: Please swear the juror.

24 THE CLERK OF COURT: Defendant Newman?

25 MR. CARTER: Seat the juror please.

1 THE CLERK OF COURT: Defendant Samuel?

2 MR. DEVOE: Please strike this juror.

3 THE CLERK OF COURT: Have a seat -- you
4 said strike, right? I didn't hear you.

5 MR. DEVOE: Yes.

6 THE CLERK OF COURT: Number 122, Norma T.
7 Sinkler (black male).

8 MR. CARTER: 72?

9 THE CLERK OF COURT: 122. What say the
10 State?

11 MR. FINNEY: Please swear the juror.

12 THE CLERK OF COURT: Defendant Newman?

13 MR. CARTER: That was 72?

14 THE CLERK OF COURT: 122.

15 MR. CARTER: Strike the juror.

16 THE CLERK OF COURT: You can have a seat
17 back in the jury pool. Thank you.

18 Number 55, Shanequa C. Green (black
19 female). What says the State?

20 MR. FINNEY: Please swear the juror.

21 THE CLERK OF COURT: Defendant Newman?

22 MR. CARTER: Seat the juror.

23 THE CLERK OF COURT: Defendant Samuel?

24 MR. DEVOE: Please swear this juror.

25 THE CLERK OF COURT: Have a seat in the

1 jury box. Thank you.

2 Number 25, Joyce Conyers (black female).

3 What says the State?

4 MR. FINNEY: Please swear the juror.

5 THE CLERK OF COURT: Defendant Newman?

6 MR. CARTER: Seat the juror.

7 MR. DEVOE: Please swear this juror.

8 THE CLERK OF COURT: Have a seat in the
9 jury box, ma'am. Thank you.

10 Number 72, Latasha L. Kennedy (black
11 female). What says the State?

12 MR. FINNEY: Please swear the juror.

13 THE CLERK OF COURT: Defendant Newman?

14 MR. CARTER: Seat the juror.

15 THE CLERK OF COURT: Defendant Samuel?

16 MR. DEVOE: Please swear this juror.

17 THE CLERK OF COURT: Have a seat in the
18 jury box.

19 Number 79, Phillip Lovelady (white male).

20 What says the State?

21 MR. FINNEY: Please swear the juror.

22 THE CLERK OF COURT: Defendant Newman?

23 MR. CARTER: Seat the juror.

24 THE CLERK OF COURT: Samuel?

25 MR. DEVOE: Please swear this juror.

1 THE CLERK OF COURT: Have a seat in the
2 jury box.

3 THE COURT: Two alternates.

4 THE CLERK OF COURT: Number 90, Dustin
5 C. McElveen (white male).

6 MR. CARTER: Number?

7 THE CLERK OF COURT: 90, Number 90. What
8 says the State?

9 MR. FINNEY: Please swear the juror.

10 THE CLERK OF COURT: Defendant Newman?

11 MR. CARTER: Seat the juror.

12 THE CLERK OF COURT: Samuel?

13 MR. DEVOE: Please strike this juror.

14 THE CLERK OF COURT: Number 59, Kenneth L.
15 Hampton (black male). What says the State?

16 MR. FINNEY: Please excuse the juror from
17 this trial.

18 THE CLERK OF COURT: You can have a seat
19 back in the jury pool.

20 Number 108, Ella M. Prince (black female).

21 MR. CARTER: 108?

22 THE CLERK OF COURT: 108. What says the
23 State?

24 MR. FINNEY: Please swear the juror.

25 THE CLERK OF COURT: Defendant Newman?

1 MR. CARTER: Please excuse the juror.

2 THE CLERK OF COURT: Have a seat back in
3 the jury pool.

4 Number 73, Alvin H. Koenig, III (white
5 male). What says the State?

6 MR. FINNEY: Please swear the juror.

7 MR. CARTER: Seat the juror.

8 THE CLERK OF COURT: Samuel?

9 MR. DEVOE: Please swear this juror.

10 THE CLERK OF COURT: Go over there, sir.

11 Number 139, Savanna E. Welch (white
12 female). What say the State?

13 MR. FINNEY: Please swear the juror.

14 THE CLERK OF COURT: Defendant Newman?

15 MR. CARTER: Swear the juror.

16 MR. DEVOE: Please seat this juror for
17 this trial.

18 THE CLERK OF COURT: Have a seat, thank
19 you.

20 THE COURT: Please call out the names of
21 all the jurors.

22 THE CLERK OF COURT: As I call your name
23 please raise your hand for me. Tina Ocasio, Steven
24 Welch, Kerri Ann Mankin, Krishuana D. Hart, Belinda
25 York, Helen Floyd, Eddie G. Myers, Mark C. Lee,

1 Shanequa Green, Joyce Conyers, Latasha Kennedy,
2 Phillip Lovelady. Alternates are Alvin H. Koenig,
3 III, and Savanna Welch.

4 THE COURT: Let me see the attorneys up
5 here real quick.

6 (WHEREUPON, counsel approached the Bench for an
7 off-the-record discussion.)

8 THE COURT: Any objection to the manner in
9 which the jury has been selected or the manner which
10 they've been selected? By the State?

11 MR. FINNEY: No, not from the State.

12 THE COURT: From Defendant Newman?

13 MR. CARTER: Nothing from Defendant
14 Newman, Judge.

15 THE COURT: Defendant Samuels?

16 MR. DEVOE: Nothing from Defendant
17 Samuels.

18 THE COURT: Then y'all will be our jury.
19 Y'all have been selected as jurors in this case. We
20 don't anticipate that the trial will begin before
21 tomorrow morning so we have some other things that
22 we need to take care of this afternoon so I'm gonna
23 release you for the afternoon with instructions that
24 you not speak to anyone about this case at all.
25 Don't go out asking any questions, do not do any

1 research. And what I tell people when they are on
2 juries like this is don't go out and tell everybody
3 you run into that you got jury duty because then
4 they're gonna say, well, you know, I was on a jury
5 one name and this is what happened in our case.
6 Well, you don't need to hear all that. You need to
7 keep your mind clear so the evidence that you hear
8 from this courtroom will be the only thing that you
9 consider.

10 So ladies and gentlemen, have a nice
11 evening and I'll see y'all back here at 9:30
12 tomorrow morning. All right, thank you.

13 (Whereupon, the jury was removed from the courtroom
14 at 12:25 p.m.)

15 THE COURT: Is there anything that we need
16 to take up, any pre-trial motions, gentlemen?

17 MR. DURANT: Judge, I assume we need to
18 have a Batson hearing -- I'm sorry, a Jackson v.
19 Denno hearing, in regards to defendant Letroy
20 Samuels' statement to law enforcement which we would
21 potentially like to use.

22 THE COURT: Okay. Why don't we take a 15
23 minute recess and then we'll come back and do that
24 hearing. Y'all have any other motions that you want
25 to take up?

1 MR. DURANT: The other thing that I would
2 ask these two lawyers to consider, Your Honor, it's
3 no secret this is a case of who done it; and the
4 issue is going to be who inflicted the injuries that
5 caused the victim's death. I would ask the two
6 lawyers to stipulate to some medical testimony so I
7 don't have to bring a doctor from the trauma unit in
8 Columbia to come here and testify.

9 THE COURT: That will be up to them.

10 MR. DURANT: Thank you, Your Honor.

11 THE COURT: All right, let's take a 15
12 minute recess and then we'll do our Jackson versus
13 Denno.

14 (WHEREUPON, a recess was taken from the
15 proceedings.)

16 THE COURT: The State ready to proceed?

17 MR. DURANT: Yes, sir, Your Honor.

18 THE COURT: All right.

19 MR. DURANT: The State calls Detective
20 Sonia Daniels.

21 THE CLERK OF COURT: Raise your right
22 hand, place your left hand on the Bible. State your
23 name.

24 THE WITNESS: Sonia Daniels.

25 WHEREUPON,

Jackson v. Denno

1 **SONIA DANIELS,**
2 having been duly sworn by the Clerk of Court,
3 testified as follows:

4 **DIRECT EXAMINATION**

5 BY MR. DURANT:

6 Q Detective Daniels, where do you work?

7 A Manning Police Department.

8 Q How long have you worked there?

9 A Ten years.

10 Q And what is your job title at the police
11 department?

12 A I'm a detective.

13 Q How long have you served in that capacity?

14 A Five years.

15 Q Okay. And as part of your job as detective are
16 you assigned to investigate criminal matters here in
17 Clarendon County?

18 A That's correct.

19 Q Did you have occasion to investigate an assault
20 that occurred at back on May
21 the 26th of 2013?

22 A That's correct.

23 Q And how did that investigation come about?

24 A Officers responded to that location in reference
25 to an assault. Once the officers, responding

Jackson v. Denno

1 officers arrived, they noticed that it was more than
2 just a simple assault and at that time they called
3 for investigators to also respond to that scene.

4 Q And you responded to the scene that evening?

5 A That's correct.

6 Q And during the course of your investigation did
7 you develop Letroy Samuels as a person of interest
8 in that case?

9 A That's correct.

10 Q And as part of your investigation did you have
11 occasion to sit down and interview Mr. Letroy
12 Samuels?

13 A Yes, I did.

14 Q Do you remember when that took place?

15 A I spoke with him a couple of times I believe the
16 20-- I'm not sure, that date was what again? The
17 20---

18 Q The 26th.

19 A 26th. I spoke with him -- the incident actually
20 happened early morning, late night, early morning,
21 so we were out that next day all day so I think I
22 might have spoken with him that day, the 28th. It
23 was a couple of different times I spoke with him.

24 Q Do you remember speaking to him on the 28th, a
25 couple of days later?

Jackson v. Denno

1 A That's correct.

2 Q And do you remember whether or not investigator,
3 or Detective Rosdail, was involved in that
4 interview?

5 A He was present in that interview.

6 Q And where did that interview take place?

7 A The Manning Police Department in my office.

8 Q In your office?

9 A Yes, sir.

10 Q And at this point you had already spoken to Mr.
11 Samuels?

12 A That's correct.

13 Q When you brought Mr. Samuels into your office
14 that day, was anybody there besides you or
15 Investigator Eric Rosdail?

16 A Not present during the interview, no.

17 Q And was the defendant Mr. Samuels in custody
18 during that interview?

19 A I think at that time he had been placed into
20 custody, yes, sir.

21 Q Okay. He was under arrest?

22 A Yes, sir.

23 Q All right. When you brought him in to question
24 that day did you read him what is commonly referred
25 to as his Miranda right?

Jackson v. Denno

1 A I did not read him his Miranda warnings; however,
2 Detective Rosdail did.

3 Q Was it in your presence?

4 A It was in my presence.

5 Q You actually saw and heard him ask, ---

6 A Yes, sir.

7 Q ---advise the defendant? Do you know whether or
8 not Investigator Rosdail advised Mr. Samuels that he
9 had the right to remain silent?

10 A He did.

11 Q Did he tell him that anything he said could and
12 would be used against him in court?

13 A He did.

14 Q Do you recall whether or not Detective Rosdail
15 told Mr. Samuels he had a right to talk to an
16 attorney and to have that attorney present with him
17 during questioning if he so desired?

18 A He did.

19 Q Did you -- do you recall whether or not Detective
20 Rosdail told Mr. Samuels that if he couldn't afford
21 to hire an attorney that one would be appointed to
22 represent him during questioning?

23 A Yes, sir, he did.

24 Q All right. And do you recall whether or not he
25 was advised that he could choose to exercise those

Jackson v. Denno

1 rights at any time and to not make any statements or
2 answer any further questions?

3 A That's correct.

4 Q Did he indicate that he understood those rights?

5 A He indicated that he understood those rights, and
6 he would wish to talk to us.

7 Q And after advising him of those rights and did
8 you and Detective Rosdail take a statement from Mr.
9 Samuels?

10 A We did.

11 Q And that was recorded by audio ---

12 A It was audio recorded.

13 Q And do you know whether or not that statement has
14 been transcribed?

15 A It has been.

16 Q Have you had an opportunity to review it?

17 A I have.

18 Q And based upon your review, do you confirm those
19 Miranda warnings were given to the defendant?

20 A That's correct.

21 Q During the course of that interview did Mr.
22 Samuels implicate himself as being at the scene of
23 this crime that evening?

24 A He did.

25 Q Okay. Did he tell you who the other players

Jackson v. Denno

1 were, who else was there?

2 A He did.

3 Q Okay. Did he indicate himself as being involved
4 in this incident?

5 A He did.

6 Q Okay. And I don't need to tender right now what
7 he told you did; but based upon the statement you
8 got from Mr. Samuels, he was arrested and charged in
9 this case?

10 A That's correct.

11 Q What was he charged with?

12 A Originally he was charged with attempted murder
13 and burglary first.

14 Q Okay. Why attempted murder at that time?

15 A The victim was still alive.

16 Q Okay. And the victim ---

17 A Has since ---

18 Q ---passed away ---

19 A That's correct.

20 Q ---from those injuries?

21 A Uh-huh.

22 MR. DURANT: Beg the Court's indulgence.
23 Your Honor, I don't have any further questions for
24 Detective Daniels.

25 THE COURT: Mr. Carter, do you have any

Jackson v. Denno

1 questions?

2 MR. CARTER: I don't, Judge.

3 THE COURT: Mr. Devoe?

4 MR. DEVOE: A couple of questions, Your
5 Honor.

6 **CROSS-EXAMINATION**

7 BY MR. DEVOE:

8 Q Today you testified or you talked to my client
9 Letroy Samuels, I think the solicitor was asking you
10 whether or not you read the rights, gave him
11 warnings about having an attorney present; is that
12 correct?

13 A Yes, sir.

14 Q And I have a copy, I believe, of the first audio
15 recorded interview of Letroy Samuels. I take it
16 that that interview, his warnings were given at that
17 time before the first interview?

18 A You said the first interview?

19 Q Any interview that took place on May 27th, 2013.

20 A No, his Miranda warning may not have been read to
21 him on that day.

22 Q I thought you just testified they were given to
23 him?

24 A On the 28th.

25 Q So you told ---

Jackson v. Denno

1 A I spoke with Mr. Samuels on more than one
2 occasion.

3 Q All right. Well, the occasion on the 21st then
4 which I have a copy of, the 27th, I'm sorry, the
5 rights were not given as far as I could tell from,
6 if that's a word for word transcribed statement.
7 You talked at length without giving his rights; is
8 that correct?

9 A During one of the interviews, yes, sir.

10 Q Well, how many interviews did you have with him?

11 A I'd spoken with Mr. Samuels on more than one
12 occasion.

13 Q Were all these interviews transcribed?

14 A They should have been, yes, sir.

15 Q You know which dates they were?

16 A I don't have them right in front of me, but they
17 were on different occasions and the transcribed does
18 have the dates on there.

19 Q We're doing a murder trial here, not just a
20 casual break-in or more obvious, something like
21 that. In my discovery from the State I have a
22 straight transcription of what happened, the first
23 audio recorded interview, the first, May 27th.

24 A Okay.

25 Q And there's nothing here that he's told that has

Jackson v. Denno

1 his rights to have an attorney, and have attorney
2 present, he has the right to talk, and all that,
3 right?

4 A I don't have one in front of me.

5 Q You don't have it. You're testifying to
6 something?

7 A You're asking me about the 27th. I believe that
8 the interview that his Miranda warning was read was
9 on the 28th.

10 Q So you talked at length on the 27th? Now this
11 is, the transcription I have is 25 pages of casual
12 conversation.

13 A If I'm correct, I think on the 27th he came in
14 voluntarily to speak with me.

15 Q It's 41 pages actually, 41 pages of casual
16 conversation. He asked to talk to you. You talked
17 to him about giving his rights first; is that right?

18 A That's correct.

19 Q You then told him his right to have an attorney
20 before ---

21 A It was a casual conversation.

22 Q Well, I don't think 41 pages of conversation is
23 exactly what I would call casual. I don't think you
24 do either. Did you ever read him his rights ever?

25 A I did not read him his Miranda warning; but

Jackson v. Denno

1 however, Detective Rosdail did.

2 Q Well, aren't you a team?

3 A We are, but —

4 Q Aren't you a team at that point?

5 A We were.

6 Q So when did he read the rights?

7 A I believe it's gonna be on the 28th, second
8 interview.

9 Q So the first interview of 45 pages no rights, 41
10 pages. You take that as being the jumping off point
11 of the next interview the next day?

12 A Did I take it as what, sir?

13 Q You take that as being the jumping point for the
14 next interview of the next day?

15 A I'm not sure I understand what you're saying.

16 Q I think -- as far as I understand your training,
17 law enforcement training, when you talk to a suspect
18 you give him his rights, his right to have attorney
19 present and so on, and then ---

20 THE COURT: Hold on one second. Would you
21 please go tell the people who are talking back there
22 to please zip it.

23 THE WITNESS: Can you repeat the question?

24 BY MR. DEVOE:

25 Q I'm saying, you came, went to the jail on the

Jackson v. Denno

1 27th of May and you talked to my client at length
2 and it was recorded.

3 A I never spoke with your client at the jail.

4 Q You brought him from the jail to your office on
5 the 27th of May, and you talked to him at length.
6 And you had it transcribed and that was -- and that
7 was 41 pages of interview without reading him his
8 rights. You didn't show you read them in the
9 transcription which I assume is a word for word
10 accurate transcription of what happened in your
11 office. Nothing was done with the lights off before
12 or afterwards at some point in there; is that
13 correct?

14 A That's correct.

15 Q All right. Now you're saying that the next day
16 he was brought up and maybe the trans-- maybe his
17 rights are read at that point? I don't know. You
18 have a copy of that?

19 A I do, but I don't have it in front of me, sir.

20 Q But you're testifying to something right now,
21 right?

22 A I am.

23 Q Well, which -- from which transcription, the
24 first or the second was ---

25 THE COURT: Mr. Durant, hold on.

Jackson v. Denno

1 MR. DURANT: May I provide the witness a
2 copy?

3 THE COURT: You can, certainly.

4 (Document tendered to the witness.)

5 THE COURT: He's questioning her and she
6 doesn't have anything in front of her.

7 MR. CARTER: I understand.

8 THE WITNESS: Okay. What I have in front
9 of me is the interview on the 28th.

10 BY MR. DEVOE:

11 Q 28th?

12 A Uh-huh.

13 Q The question is, do I have that interview?
14 Court's indulgence.

15 THE COURT: I wouldn't know.

16 BY MR. DEVOE:

17 Q Well, I also have a copy of the 28th interview.
18 Did you at that point, did you or Mr. Rosdail give
19 him his Miranda rights?

20 A That's correct.

21 Q Well what page was that?

22 A It should be the first page. It states interview
23 by Mr. Rosdail.

24 Q It does, first paragraph.

25 A Uh-huh.

Jackson v. Denno

1 Q But you didn't use anything on the first
2 interview to use on the second interview the next
3 day?

4 A You mean anything he had said to me?

5 Q Yes.

6 A I think on the 27th, if I'm correct, I
7 interviewed him alone. I didn't interview him with
8 my partner. My partner was not there at that time.
9 If I could have the copy of 27th in front of me.

10 (Document tendered to the witness.

11 THE WITNESS: If I can recall, on the date
12 that Detective Rosdail assisted me in interviewing
13 Mr. Samuels, again, I stated that I previously
14 interviewed him it looks like alone. Mr. -- excuse
15 me, Detective Rosdail came in and he did an
16 interview. I assisted him on the date that he read
17 him his Miranda warning so it was almost like a new
18 interview but it was conducted by Detective Rosdail
19 so at that time he did not have what I had in front
20 of me 'cause those were previous interviews.

21 Q Did he have the opportunity to review what my
22 client had said the day before to you?

23 A He did not.

24 Q Was it available for him to interview before he
25 talked?

Jackson v. Denno

1 A It was.

2 Q Are you basically saying that the first interview
3 was just meaningless and ---

4 A The first interview that I interviewed ---

5 Q Let me finish my question.

6 A Okay, sorry, sir.

7 Q You're basically saying that the first interview
8 was meaningless as you just sort of went over it
9 again from scratch the next day?

10 A No, sir, I'm not saying it was meaningless.

11 Q Did you have a chance to talk to Mr. Rosdail
12 before you talked to my client?

13 A I did.

14 Q Based upon what you talked about the day before?

15 A What I gave Mr. Rosdail was a rundown of what we
16 had prior to him returning to work.

17 Q And a rundown what you talked to him about?

18 A I gave him a rundown of everybody that I'd spoken
19 with prior to him returning to work.

20 Q Well, I'm talking specifically on my client.

21 A Not on your client.

22 Q Did you give him a rundown what when you talked
23 to my client about on the 27th?

24 A I can't recall exactly what our conversation was
25 on that day.

Jackson v. Denno

1 Q Well, did you take notes?

2 A Yes, sir, I did.

3 Q Did you supply the notes to Mr. Rosdail before he
4 started talking to my client?

5 A I don't believe I did.

6 Q You're saying Mr. Rosdail's interview lasted 45
7 pages -- I'm sorry, 65 pages. And you're saying
8 that he didn't use anything from the day before?

9 A He might -- again, I can't recall what I
10 specifically told him about my interview with
11 Mr. Samuels; however, I did explain to him
12 everything we had up until that point, witnesses,
13 suspects, so it wasn't just Mr. Samuels'
14 information.

15 Q All right. Did Mr. Samuels waive his rights for
16 an attorney for interview with Mr. Rosdail?

17 A No, he indicated that he didn't -- he would like
18 to speak with us.

19 Q Where did he say that in this interview
20 transcript?

21 A If you read after the first it says interviewed
22 by Mr. Rosdail. He reads him his Miranda warning
23 and asked him did he understand, he says yes, sir.

24 Q Where do you see that on the transcript?

25 A It would be on line 14.

Jackson v. Denno

1 Q Well, to be exact I think, I think what he said
2 was, Mr. Rosdail in his questions at my client said,
3 you can decide at any time to exercise those rights
4 and not answer any questions or make any statements.
5 Did you understand that? Yes, sir. In case you
6 tell me something off the wall you're supposed to
7 come and see us. No where you said, and that's all.
8 He never exactly waived his rights, did he?

9 A Yes, sir, I see the same thing that you see.
10 Yes, sir.

11 Q So you said so sort of roll through it and
12 continuing questioning?

13 A I'm sorry, can you repeat that.

14 Q I'm saying he just sort of rolled through it. I
15 mean, he said, you do not have to answer any
16 questions or make any statements, did you understand
17 that?

18 A That's correct.

19 Q But he just never got the answer so he rolled
20 through it. And this is part of the record so
21 everyone can make up their own mind about it but.
22 But it seems to me it wasn't -- we made an offer
23 that an attorney would be gotten for him.

24 A Yes, sir.

25 Q I'm not trying to misstate this but that's my ---

Jackson v. Denno

1 A I have the same transcript, yes, sir.

2 Q This is part of the record, this transcript?

3 A It is.

4 Q Your Honor, is this made part of the record, this
5 transcript?

6 MR. DURANT: I have the original I'll
7 provide the Court.

8 THE COURT: Okay. It will be -- this will
9 be a Court exhibit for this hearing.

10 MR. DEVOE: Just for this hearing?

11 THE COURT: Just for this hearing.

12 MR. DEVOE: All right.

13 (Court's Exhibit Number 1 was marked
14 and made a part of the record.)

15 BY MR. DEVOE:

16 Q Don't you normally ask the client suspect if he
17 wants to have an attorney, say wait, we can get one
18 for you?

19 A Yes, sir, he was advised of that, yes, sir.

20 Q I don't see any place in that transcript where
21 ---

22 THE COURT: Please answer the question,
23 Mr. Devoe. You don't get to testify. If you got a
24 question to ask you can ask it.

25 BY MR. DEVOE:

Jackson v. Denno

1 Q Did my client specifically tell you he wanted an
2 attorney or did not want an attorney either way?

3 A I just remember your client stating that he would
4 like to speak with us ---

5 Q All right.

6 A ---after being read Miranda warnings, sir.

7 MR. DEVOE: I have no further questions.

8 Thank you.

9 THE COURT: Any redirect, Mr. Durant?

10 MR. DURANT: Just briefly.

11 **REDIRECT EXAMINATION**

12 BY MR. DURANT:

13 Q Detective Daniels, did Mr. Samuels respond that
14 he understood his rights after they were read to him
15 by Detective Rosdail?

16 A He did.

17 Q And he proceeded with the interview after those
18 rights were advised to him?

19 A Yes, sir.

20 Q Okay.

21 MR. DURANT: Your Honor, I don't have any
22 further questions.

23 THE COURT: Any redirect?

24 MR. DEVOE: Yes, Your Honor.

25 **RECROSS-EXAMINATION**

Jackson v. Denno

1 BY MR. DEVOE:

2 Q The Solicitor just asked you whether or not
3 Mr. Samuels informed you he didn't want to have an
4 attorney; is that correct?

5 A He stated that he would speak with us without an
6 attorney, yes, sir.

7 Q And my question then in this transcript that you
8 have on page 2, where in that, the page 2 part of
9 the transcript, where does that show that he gave up
10 his rights to have an attorney?

11 A He was read the Miranda warnings and asked did he
12 understand his rights and he stated yes.

13 Q When he said yes was he -- where on page 2 that
14 does it say that he gave up his rights to have an
15 attorney?

16 MR. DEVOE: Your Honor, these questions
17 have been asked and answered.

18 THE COURT: Sustained. You've already
19 gone over that. This is redirect -- or re-cross.

20 MR. DEVOE: All right, I have no further
21 questions. Thank you.

22 THE COURT: Thank you. You may step down.

23 MR. DEVOE: Your Honor, I have a condensed
24 copy of that transcript. The original is in my
25 office. I'd be happy to provide the Court with it.

1 It's under seal. Would you like to see a condensed
2 version at this time or just ---

3 THE COURT: The condensed version will be
4 fine. My eyes aren't that bad yet. Anything
5 further?

6 MR. DURANT: Not from the State, Your
7 Honor.

8 THE COURT: Mr. Carter?

9 MR. CARTER: Your Honor, I didn't have any
10 questions for him; but I just wanted to add in that
11 as the Court is well aware that understanding your
12 rights is something totally different from waiving
13 your rights. And from this transcript and according
14 to the court questions Mr. Devoe just asked, he made
15 it clear that the officer only asked him do you
16 understand your rights and there's a yes, sir, I
17 understand what you're saying. It's not that, okay,
18 I waive them, I understand it and waive them 'cause
19 most officers always ask and do you waive your
20 rights and wish to talk to us and that never
21 happened here.

22 THE COURT: Mr. Devoe?

23 MR. DEVOE: Your Honor, what Mr. Carter
24 says is what I was going to be saying. I don't
25 believe he waived his rights. He may have

1 understood them, but not waived the rights
2 specifically. I think it's a very important
3 distinction.

4 THE COURT: Thank you.

5 Mr. Durant.

6 MR. DURANT: Your Honor, I, of course,
7 would argue his participation in interview and
8 willingness to answer questions further after having
9 been thoroughly advised of his rights was a knowing
10 and voluntarily waiver of his rights.

11 THE COURT: Yeah, I don't think the law
12 says you actually have to express it. I mean, you
13 can express it by your actions specifically. I
14 mean, he was read his rights. He was asked did he
15 understand them and then he proceeded for 65 pages
16 later to discuss it with him and he could have
17 stopped at any particular time that he wanted to so
18 I find that the proper foundation is laid, that this
19 statement will come into evidence.

20 MR. DURANT: Thank you, Your Honor.

21 THE COURT: Thank you. Anything else?

22 MR. DURANT: Not from the State, Judge.

23 MR. CARTER: Beg the Court's indulgence,
24 Your Honor.

25 THE COURT: Yes, sir.

1 (Pause.)

2 MR. DEVOE: Your Honor, I just want to add
3 one thing to that. I don't think that my client was
4 ever sworn in or while that procedure was ---

5 THE COURT: I don't know if he has to be
6 sworn in. He just has to be sworn in here. He
7 doesn't have to be sworn in front of the officers.
8 Most of the time officers don't have the power to
9 swear somebody in.

10 MR. CARTER: Judge, isn't that even more
11 reason that the statement is not a statement sworn
12 to under oath? I mean, they're asking you to let
13 them present this and put it in evidence.

14 THE COURT: Well, I mean, at the proper
15 time it comes in. It's a statement against his
16 interest. This is his statement. All they have to
17 do, the law requires that they give him his Miranda
18 rights. He says he got them, no question about
19 that, and he says he understood them. That's all
20 that's necessary. And then he proceeded to talk
21 with them for 60 something pages.

22 MR. CARTER: All right, I understand what
23 you're saying, Your Honor, but just for
24 clarification. So as I understand it, if this
25 statement is allowed in it will be allowed in if and

1 if this witness, if this defendant testifies?

2 THE COURT: It depends on how they present
3 it. I mean, there's other issues that could come
4 up. But right now this statement, as it is
5 presented in this hearing, I don't know what is
6 gonna happen during the trial; but as it's stated
7 right now, if the proper foundation is laid, the
8 statement has been made freely, voluntarily,
9 knowingly and intelligently after having been given
10 his Miranda rights, okay. Thank you.

11 MR. CARTER: Judge, and I do apologize to
12 you. Just for clarification again, so the State
13 will not be able to pick the statement up, put it
14 into evidence, hand it to a jury, without something
15 more?

16 THE COURT: Without -- with the right
17 foundation laid may be able to do that.

18 MR. CARTER: With the right foundation?

19 THE COURT: Correct.

20 MR. CARTER: Very good.

21 THE COURT: That's with every piece of
22 evidence.

23 MR. CARTER: Yes, sir.

24 THE COURT: You always have to have the
25 right foundation laid.

1 MR. CARTER: Yes, sir.

2 THE COURT: Thank you. Court is adjourned
3 until 9:30 tomorrow morning.

4

5 * * * END OF REQUESTED TRANSCRIPT OF RECORD * * *

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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 FLORENCE)

I, FRANCES B. RAY, Registered Professional Reporter (RPR), 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 7th day of June, 2015.

S/Frances B. Ray

FRANCES B. RAY, RPR

WITNESSES

Sonia Daniels Manning Police Department

ARREST WARRANT NUMBER

2013A1420100230 2013A1420100232
2013A1420100156

2013A1420100194 2013A1420100157

2013A1420100231

ACTION OF GRAND JURY

True Bill

Cabbanitic
Foreperson of Grand Jury
Date: 2/27/14

VERDICT

DOCKET NO. 2013-GS-14-0293

The State of South Carolina

County of CLARENDON

COURT OF GENERAL SESSIONS

February TERM 2014

THE STATE

vs.

JONATHAN CODY NEWMAN

LETROY SAMUELS

MONTAG LAMALL WEBB

(AMENDED) Indictment for

MURDER

BURGLARY, 1ST DEGREE

Ernest A. Finney III

ERNEST A. FINNEY, III, SOLICITOR

APR 570
562
Foreperson of Petit Jury
Date:

STATE OF SOUTH CAROLINA)
)
COUNTY OF CLARENDON)

(AMENDED) INDICTMENT FOR

MURDER

BURGLARY, 1ST DEGREE

At a Court of General Sessions convened on February 27, 2014, the Grand Jurors of
CLARENDON County present upon their oath:

COUNT ONE - MURDER

That Jonathan Cody Newman, Letroy Samuels and Montag Lamall Webb did in Clarendon County, on or about May 26, 2013, willfully, feloniously, and intentionally kill the victim, Anthony Wimberly, with malice aforethought, either express or implied, by severely beating the victim, and the victim did die as a proximate result of the injuries then and there sustained on or about July 29, 2013 in Clarendon County, in violation of Section 16-03-0010, S.C. Code of Laws (1976), as amended.

COUNT TWO - BURGLARY, 1ST DEGREE

That Jonathan Cody Newman, Letroy Samuels and Montag Lamall Webb, did in Clarendon County on or about May 26, 2013 enter the dwelling of Anthony Wimberly located at _____, Manning, South Carolina, without consent and with the intent to commit a crime therein and the entering or remaining in the dwelling occurred in the nighttime and/or when, in effecting entry or while in the dwelling or in immediate flight, the defendants caused physical injury to a non-participant in the crime and/or were armed with a deadly weapon and/or did use or threaten use of a dangerous instrument, all in violation of Section 16-11-0311(A), S.C. Code of Laws (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made
and provided.

Solicitor

Ernest A. Finney III

RECEIVED

MAY 27 2016

SC Court of Appeals

564

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability with the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

May 27th, 2016



Robert M. Dudek
Chief Appellate Defender

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

ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA
IN THE COURT OF GENERAL SESSIONS

STATE OF SOUTH CAROLINA

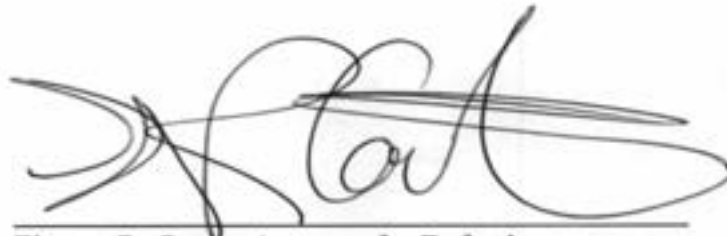
v.

JONATHAN CODY NEWMAN

CASE NUMBER: 2013-GS-14-0293

NOTICE OF INTENT TO APPEAL

YOU WILL PLEASE TAKE NOTICE that the Defendant intends to Appeal the Jury Verdict and sentencing of the General Sessions Court before William Jeffrey Young.



Eleazer R. Carter, Attorney for Defendant
The Carter Law Firm
Post Office Box 187
Manning, South Carolina 29102
Telephone: (803) 435-0550
Facsimile: (803) 435-0551

Manning, South Carolina
January 16, 2015

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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF GENERAL SESSIONS

STATE OF SOUTH CAROLINA

v.

JONATHAN CODY NEWMAN

CASE NUMBER: 2013-GS-14-0293

CERTIFICATE OF SERVICE

I, Brittany N. Bell, Legal Assistant of The Carter Law Firm, hereby certify that I have served a copy of the **Notice of Intent to Appeal on behalf of the Appellant** to the Respondent by delivering and depositing the same in the United States Post Office box to:

Ernest, A. Finney, III, Solicitor
215 North Harvin Street
Sumter, South Carolina 29150

Ms. Beulah Roberts
Clerk of Court
Post Office Box 136
Manning, South Carolina 29102

Chris Durant, Assistant Solicitor
Post Office Drawer 70
Manning, South Carolina 29102

Office of Appellate Defense
1330 Lady Street
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Columbia, South Carolina 29211-1433

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Manning, South Carolina
January 16, 2015

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SC Court of Appeals

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

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Jonathan Cody Newman, Appellant.

Appellate Case No. 2015-000091

Appeal From Clarendon County
W. Jeffrey Young, Circuit Court Judge

Unpublished Opinion No. 2017-UP-140
Submitted January 1, 2017 – Filed April 5, 2017

APPEAL DISMISSED

Chief Appellate Defender Robert Michael Dudek, of
Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Senior
Assistant Deputy Attorney General Donald J. Zelenka,
both of Columbia; and Solicitor Ernest A. Finney, III, of
Sumter, for Respondent.

PER CURIAM: Dismissed after review pursuant to *Anders v. California*, 386 U.S. 738 (1967). Counsel's motion to be relieved is granted.¹

APPEAL DISMISSED.

LOCKEMY, C.J., and KONDUROS and MCDONALD, JJ., concur.

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



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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April 28, 2017

The Honorable Beulah G. Roberts
PO Box 136
Manning SC 29102-0136

REMITTITUR

Re: The State v. Jonathan C. Newman
Lower Court Case No. 2013GS1400293
Appellate Case No. 2015-000091

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

V. Claire Allen, Deputy

CLERK

Enclosure

cc: Alan McCrory Wilson, Esquire
Robert Michael Dudek, Esquire
Ernest Adolphus Finney, III, Esquire
Donald J. Zelenka, Esquire
The Honorable W. Jeffrey Young

CLERK OF COURT
CLERK OF COURT, SC

2018 JUN 11 PM 2:20

CASE # 2018-CP-14-00233
In the Court of Common Pleas

STATE OF SOUTH CAROLINA

County of Clarendon

Jonathan Cody Newman 362601
Full name and prison number (if any) of Applicant,

vs.

State of South Carolina
Name of Respondent.

**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 it clear to which question any such continued answer refers.

Since every application must be sworn to 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 applicant was convicted.

1. Place of detention Clarendon County, Manning SC
Clarendon County Detention Center/Broadriver Ct, Columbia SC
2. Name and location of Court which imposed sentence General Sessions, Clarendon County, Manning SC
3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:
 - (a) Murder: 2013-GS-14-0293
 - (b) Burglary 1st: 2013-GS-14-0293
 - (c) _____
4. The date upon which sentence was imposed and the terms of the sentence:
 - (a) Murder-35 years concurrent with all charges
 - (b) Burglary-30 years concurrent with all charges
 - (c) _____

5. Check whether a finding of guilty was made

- (a) after a plea of guilty _____
 (b) after a plea of not guilty yes found guilty ✓
 (c) after a plea of nolo contendere _____

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

yes

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

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

i. South Carolina Court of Appeals

ii. _____

iii. _____

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

i. Appeal Dismissed

ii. _____

iii. _____

(c) the date of each such result:

i. April 5th 2017

ii. _____

iii. _____

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

i. _____

ii. _____

iii. _____

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

(a) _____

(b) _____

(c) _____

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

(a) My constitutional right to effective counsel was violated

(b) _____

(c) _____

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

(a) counsel failed to conduct adequate investigation and prepare for trial

(b) _____

(c) _____

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

- (a) any petition in a State Court under South Carolina Law? _____
- (b) any petitions in State or Federal Courts for habeas corpus or post-convictions relief? _____
- (c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (7)? _____
- (d) any other petitions, motions or applications in this or any other Court? _____

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

(a) the specific nature thereof:

- i. _____
- ii. _____
- 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. _____
- 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. _____

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

NO

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

(a) which grounds have been presented:

- i. _____
- ii. _____
- iii. _____

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

- i. _____
- ii. _____
- iii. _____

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

- (a) I was unfamiliar with the procedures of law
- (b) _____
- (c) _____

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

- (a) your arraignment and plea? _____
- (b) your trial, if any? yes: Eleazar Carter
- (c) your sentencing? yes: Eleazar Carter
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? yes: Robert Dudek
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? _____

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

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

- i. Eleazar Carter, 105 South Brooks Street, PO Box 187, Manning SC 29102
- ii. Robert Dudek, 1330 Lady Street, Suite 401, Columbia SC
- iii. _____

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

- i. Mr. Carter: during my trial and sentencing
- ii. Mr. Dudek: during my direct appeal
- iii. _____

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

New trial or time reconsideration/sentence reconsideration

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

NO

Attached Pages / PCR 3-1

10. Facts supporting grounds for Relief

10(a)(1) Counsel was ineffective for failing to properly investigate, interview witnesses, review discovery, and adequately prepare for trial.

10(a)(2) Counsel was ineffective for failing to request severance from applicant and Co-Defendant Samuels.

10(a)(3) Counsel was ineffective for failing to convey plea negotiation information and failed to properly pursue plea negotiations as requested by Applicant.

10(a)(4) Counsel was ineffective for failing to remove for cause potential juror #101 Eddie G. Myers, or use peremptory strike to remove juror.

10(a)(5) Counsel was ineffective for not properly objecting or otherwise preserving for appellate review the prosecution's objection to defense Counsel's questioning of key witness Leon Coleman about applicant having an affair with Coleman's wife.

10(a)(6) Counsel was ineffective for failing to object to prosecutor asking state witness Lt. Daniels to bolster credibility of prosecution witnesses, and Samuels' statements.

Newman vs. State

Attached Pages/PCB 3-2

10(a)(7) Counsel was ineffective for not properly cross examining State Witness Montag Webb about prior inconsistent statements. Additionally, counsel failed to properly cross examine Samuels about inconsistent statements.

10(a)(8) Counsel was ineffective for not objecting to, moving for mistrial and/or requesting curative instruction regarding applicants assertion of right to counsel when questioned by Police.

10(a)(9) Counsel was ineffective for not properly cross examining Cooperating witness Webb about perceived promises in exchange for his testimony.

10(a)(10) Counsel was ineffective for not making a Bruton objection or moving for severance when Lt. Daniels and Investigator Rosdall relayed to the jury applicants Co-Defendants statements to the jury that incriminated applicant.

10(a)(11) Counsel was ineffective for failing to properly advise applicant with respect to applicants decision to testify.

Attached Pages/PCB 3-3

10(a)(12) Counsel was ineffective for failing to handle, prepare, for and object to Co-Defendants Samuels testimony which incriminated applicant substantially.

10(a)(13) Counsel was ineffective for failing to object or move for mistrial when Co-Defendants Samuels testified that the applicant had assaulted him (Samuels) and others, was a violent person, "was a fighter" and that Samuels was afraid of him. (Applicant)

10(a)(14) Counsel was ineffective for failing to properly object and prepare for Co-Defendants testimony and present rebuttal case and response to such testimony incriminating applicant.

10(a)(15) Counsel was ineffective for failing to object or preserve for appellate review prosecutions pitting appellates review prosecutions pitting appellates testimony and creditability against other witnesses.

10(a)(16) Counsel was ineffective for failing to properly impeach Co-Defendant Samuels ~~and~~ trial testimony with his numerous inconsistent statements.

10(a)(17) Counsel was ineffective for failing to object to the courts "Inferred Malice" instruction. The court instructed the jury that it could infer malice based on use of brutal force on victim.

Attached Pages/PCR 3-4

10(a)(8) Counsel was ineffective for failing to request "mere presence" instruction be charged to the jury.

10(b)(1) Appellate Counsel was ineffective for failing to brief and argue on appeal the following issues:

A. Court erred restricting cross-examination of witness Leon Coleman related to bias Coleman had against Applicant due to Applicant having an affair with Colemans wife. (Tr. pg. 53-54)

B. Court erred restricting cross-examination of cooperating witness Montag Webb related to the witness's tattoos (Tr. pg. 87)

C. Court erred denying attorney for applicant request to do Recross cooperating witness Montag Webb about prior inconsistent statements. (Tr. pg. 147)

D. Court erred by refusing to allow the Applicant to present rebuttal testimony/evidence in response to co-defendants Samuel's testimony and the prosecutions rebuttal case (Tr. pg. 422-25)

Newman vs. StateAttached Pages / PCB 3-510 (b)(1) (cont'd)

F. Court erred in denying Applicants request for "self-defense" instruction (Tr. pg. 425). There was evidence that victim had firearm and threatened applicant and others prior to incident.

11(c)(1) Applicant alleges that he was deprived a fair and impartial trial and Due Process of law based on the cumulative effect of multiple trial errors, ineffective assistance of trial counsel and completely inadequate appellate counsel filing Anders Brief.

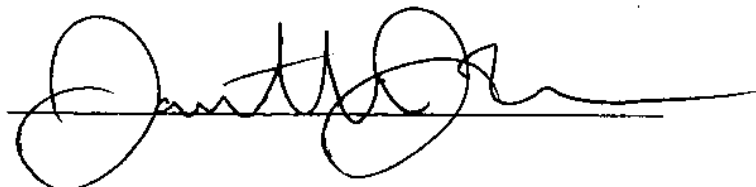
Additionally, Applicant has reason to believe that the prosecution failed to turn over favorable material evidence prior to trial, or else counsel for applicant for Applicant failed to apprise Applicant with respect to the states discovery materials.

STATE OF SOUTH CAROLINA

County of Clarendon

VERIFICATION

I, Jonathan Cody Newman, 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.


SWORN to and subscribed before me this 8day of June, 19 2018

Jennifer Wadsworth (L.S.)
Notary Public

My Commission Expires: March 8, 2028

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

I, Jonathan Cody Newman, 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 therefor.



Applicant

SWORN or affirmed to and subscribed before me this

8 day of June, 19 2018
Jennifer Wadsworth
Notary Public

My Commission Expires March 8, 2028

COUNTY OF CLARENDON

Jonathan Cody Newman,

Plaintiff,

vs.

State of South Carolina,

Defendant.

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2018 - CP - 14 - 00233

AMENDED APPLICATION FOR
POST-CONVICTION RELIEF

Submitted By: Dayne C. Phillips, Esq.

Address: 1614 Taylor Street, Ste. D.,
Columbia, SC 29201

SC Bar #: 77712

Telephone #: (803) 807-0234

Fax #: (803) 380-8035

Other: 803-272-4503

E-mail: dayne@pricebenowitz.com

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☐ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

Contracts ☐ Constructions (100) ☐ Debt Collection (110) ☐ General (130) ☐ Breach of Contract (140) ☐ Fraud/Bad Faith (150) ☐ Failure to Deliver/ Warranty (160) ☐ Employment Discrim (170) ☐ Employment (180) ☐ Other (199) _____	Torts - Professional Malpractice ☐ Dental Malpractice (200) ☐ Legal Malpractice (210) ☐ Medical Malpractice (220) Previous Notice of Intent Case # 20 -NI- _____ ☐ Notice/ File Med Mal (230) ☐ Other (299) _____	Torts - Personal Injury ☐ Conversion (310) ☐ Motor Vehicle Accident (320) ☐ Premises Liability (330) ☐ Products Liability (340) ☐ Personal Injury (350) ☐ Wrongful Death (360) ☐ Assault/Battery (370) ☐ Slander/Libel (380) ☐ Other (399) _____	Real Property ☐ Claim & Delivery (400) ☐ Condemnation (410) ☐ Foreclosure (420) ☐ Mechanic's Lien (430) ☐ Partition (440) ☐ Possession (450) ☐ Building Code Violation (460) ☐ Other (499) _____
Inmate Petitions ☒ PCR (500) ☐ Mandamus (520) ☐ Habeas Corpus (530) ☐ Other (599) _____	Administrative Law/Relief ☐ Reinstate Drv. License (800) ☐ Judicial Review (810) ☐ Relief (820) ☐ Permanent Injunction (830) ☐ Forfeiture-Petition (840) ☐ Forfeiture-Consent Order (850) ☐ Other (899) _____	Judgments/Settlements ☐ Death Settlement (700) ☐ Foreign Judgment (710) ☐ Magistrate's Judgment (720) ☐ Minor Settlement (730) ☐ Transcript Judgment (740) ☐ Lis Pendens (750) ☐ Transfer of Structured Settlement Payment Rights Application (760) ☐ Confession of Judgment (770) ☐ Petition for Workers Compensation Settlement Approval (780) ☐ Other (799) _____	Appeals ☐ Arbitration (900) ☐ Magistrate-Civil (910) ☐ Magistrate-Criminal (920) ☐ Municipal (930) ☐ Probate Court (940) ☐ SCDOT (950) ☐ Worker's Comp (960) ☐ Zoning Board (970) ☐ Public Service Comm. (990) ☐ Employment Security Comm (991) ☐ Other (999) _____
Special/Complex /Other ☐ Environmental (600) ☐ Automobile Arb. (610) ☐ Medical (620) ☐ Other (699) _____ ☐ Sexual Predator (510) ☐ Permanent Restraining Order (680)	☐ Pharmaceuticals (630) ☐ Unfair Trade Practices (640) ☐ Out-of State Depositions (650) ☐ Motion to Quash Subpoena in an Out-of-County Action (660) ☐ Pre-Suit Discovery (670)	CERTIFIED TRUE COPY OF ORIGINAL FILED IN THIS OFFICE DATE <u>7/5/19</u> <u>Beulah B. Roberts</u> CLARENDON COUNTY, SC Date of Filing <u>June 26, 2019</u> <u>6/26/19</u>	

Submitting Party Signature: Dayne C. Phillips

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CLARENDON	)	THIRD JUDICIAL CIRCUIT
	)	
Jonathan Cody Newman,	)	Case No. 2018-CP-14-00233
	)	
Applicant,	)	
	)	AMENDED APPLICATION FOR
v.	)	POST-CONVICTION RELIEF
	)	
State of South Carolina.	)	
	)	
Defendant.	)	

As required by Rule 71.1(b), SCRCF, this application is in conformity with Form 5 of the SCRCF Appendix of Forms.

1. Place of Detention: Applicant is detained in the South Carolina Department of Corrections at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210.
2. Name and location of Court which imposed sentence: Clarendon County Court of General Sessions, 3 Keitt Street, SC 29102.
3. Name(s) of co-defendant(s) (if any): Letroy Samuels (joint trial).
4. The indictment number(s) upon which and the offenses for which sentence was imposed:
 - (a) 2013-GS-14-0293 (Murder).
 - (b) 2013-GS-14-0293 (Burglary, First Degree).
5. The date upon which the sentence was imposed and the terms of the sentence:
 - (a) January 9, 2015.
 - (b) Thirty-five (35) years imprisonment for the Murder conviction.
 - (c) Thirty (30) years imprisonment for the Burglary, First Degree, conviction.
 - (d) Concurrent sentences.
6. A finding of guilty was made:
 - (a) After a jury trial before the Honorable W. Jeffrey Young.

CERTIFIED TRUE COPY
OF ORIGINAL FILED IN THIS OFFICE
DATE 7/5/19

Brenda L. Roberts

CLERK OF COURT
CLARENDON COUNTY, SC

7. Did you appeal from the judgment of conviction and/or the imposition of the sentence? Yes.
8. If you answered “yes” to number (7), list:
 - (a) The name of each Court to which you appealed:
 - i. South Carolina Court of Appeals.
 - (b) The result in each Court to which you appealed:
 - i. Appeal Dismissed (“Dismissed after review pursuant to *Anders v. California*, 386 U.S. 738 (1967)”).
 - (c) The date of each result:
 - i. April 5, 2017 (Unpublished opinion filed by the S.C. Court of Appeals).
 - (d) If known, citations of any written opinions or ordered entered pursuant to such result:
 - i. *State v. Newman*, Op. No. 2017-UP-140 (S.C. Ct. App. filed April 5, 2017).
9. If you answered “no” to number (7), state your reasons for not appealing:
 - (a) Not applicable. Applicant filed a Direct Appeal of his convictions and sentences.
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
 - (a) Trial Counsel denied Applicant's right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 3 and 14 of the South Carolina Constitution. See S.C. Code § 17-27-20(A)(1), (4), and (6). Specifically, Trial Counsel's unreasonably deficient performance prejudiced Applicant because there is a reasonable probability that, but for Trial Counsel's errors, the result of the proceeding would have been different. See *Strickland v. Washington*, 466 U.S. 668 (1984).
 - (b) Appellate Counsel denied Applicant's right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States

Constitution and Article I, Sections 3 and 14 of the South Carolina Constitution. Specifically, Appellate Counsel's unreasonably deficient performance prejudiced Applicant because there is a reasonable probability that, but for Trial Counsel's errors, the result of the proceeding would have been different. See *Strickland v. Washington*, 466 U.S. 668 (1984); *Evitts v. Lucey*, 469 U.S. 387 (1985); *Simpkins v. State*, 303 S.C. 364, 401 S.E.2d 142 (1991).

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

- (a) Trial Counsel's acts or omissions of ineffective assistance of counsel include but are not limited to the following allegations:
 - (i) Trial Counsel failed to conduct a reasonable investigation and to develop all available, relevant, and admissible or mitigating evidence in preparation of Applicant's defense. See *Wiggins v. Smith*, 539 U.S. 510 (2003).
 - (ii) Trial Counsel failed to interview critical witnesses who could have challenged the credibility of the State's witnesses and could have undermined the State's evidence when it was reasonable and necessary to do so in preparation for trial. See *Lounds v. State*, 380 S.C. 454, 670 S.E.2d 646 (2008); *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008); *Von Dohlen v. State*, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004); *Reeves v. State*, 415 S.C. 366, 782 S.E.2d 747 (Ct. App. 2015).
 - (iii) Trial Counsel failed to convey a plea offer to Applicant and failed to pursue plea negotiations as requested by Applicant.
 - (iv) Trial Counsel failed to move for severance pursuant to *Bruton v. United States*, 391 U.S. 123 (1968) because admission of Applicant's co-defendant's statements violated the Confrontation Clause.

- (v) Trial Counsel failed to move to strike potential jury #101 Eddie G. Myers for cause or use a peremptory strike to remove juror when it was reasonable and necessary.
- (vi) Trial Counsel failed to object to inadmissible and unduly prejudicial evidence during Applicant's trial, thereby failing to preserve these issues for appellate review and denying Applicant a fair trial.
- (vii) Trial Counsel failed to object the Prosecution's bolstering of the State's witnesses.
- (viii) Trial Counsel failed to properly cross-examine the State's witnesses, including but not limited to Montag Webb and Letroy Samuels, regarding inconsistent statements and impeachment evidence.
- (ix) Trial Counsel failed to properly cross-examine the State's witness, Montag Webb, regarding possible bias and motives for testifying against Applicant. Specifically, questioning Montag Webb about promises in exchange for his testimony.
- (x) Trial Counsel failed to object and move for a mistrial and/or request for a curative instruction regarding Applicant's assertion of his right to counsel when interrogated by law enforcement.
- (xi) Trial Counsel failed to properly argue against and preserve for appellate review the Prosecutor's objection for relevance during Trial Counsel's cross-examination of witness Leon Coleman related to the witness's possible bias against Applicant for having an affair with his wife.
- (xii) Trial Counsel failed to properly argue against and preserve for appellate review the Prosecutor's objection for asked and answered during Trial Counsel's cross-examination of witness Montag Webb related to the meaning of his tear-drop tattoos.

- (xiii) Trial Counsel failed to properly advise Applicant regarding his right/decision to testify at trial.
 - (xiv) Trial Counsel failed to move for a mistrial and/or a curative instruction when Applicant's co-defendant testified that Applicant was violent, had assaulted him and other people, and that he was afraid of Applicant.
 - (xv) Trial Counsel failed to object to and move to strike the Prosecutor's pitting of Applicant's testimony and credibility of other witnesses.
 - (xvi) Trial Counsel failed to properly object to the Trial Court's improper "inferred malice" instruction to the jury.
 - (xvii) Trial Counsel failed to request a jury instruction for "mere presence".
 - (xviii) Trial Counsel failed to adequately prepare for trial by not interviewing witness(es) who could have testified regarding Applicant's good character and reputation when it was reasonable and necessary to present this evidence at trial and request a jury instruction on good character and reputation. See *State v. Harrison*, 343 S.C. 165, 539 S.E.2d 71 (Ct. App. 2000); *Cf. Stalk v. State*, 383 S.C. 559, 681 S.E.2d 592 (2009).
- (b) Appellate Counsel's acts or omissions of ineffective assistance of counsel include but are not limited to the following allegations:
- (i) Appellate Counsel failed to raise the issue of whether the Trial Court erred in refusing Trial Counsel to call and present rebuttal testimony in response to the Prosecution's rebuttal testimony and his co-defendant's testimony.
 - (ii) If found preserved for appellate review, Appellate Counsel failed to raise the issue of whether the Trial Court erred in instructing the jury that "excessive brutal force"

is an inference of malice.

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 Federal Habeas Corpus or Post-Conviction Relief? No. Applicant has not previously filed an application for Post-Conviction Relief or Petition for Writ of Habeas Corpus in either state or federal court.
 - (c) Any petition in the Supreme Court of the United States for certiorari other than petitions, if any, already specified in number (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 number (12), list with respect to each petition, motion, or application:
- (a) The specific nature thereof: Not applicable.
 - (b) The name and location of the Court in which each was filed: Not applicable.
 - (c) The disposition thereof: Not applicable.
 - (d) The date of each such disposition: Not applicable.
14. Has any ground set forth in number (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 number (14), identify:
- (a) The grounds which have been presented: Not applicable.
 - (b) The proceedings in which each ground was raised: Not applicable.
16. If any ground set forth in number (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) Post-Conviction Relief is the proper forum and remedy for these allegations because the grounds for relief presented in this application are evidence of ineffective assistance of counsel, issues not preserved for appellate review, and/or

were not appropriate to raise or were not properly raised on Direct Appeal. Applicant is requesting an evidentiary hearing to present evidence in support of his claims of ineffective assistance of counsel. See *Pelzer v. State*, 378 S.C. 516, 662 S.E.2d 618 (Ct. App. 2008); *Mose v. State*, 420 S.C. 500, 803 S.E.2d 718 (2017).

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

(a) Your plea hearing? Not applicable.

(b) Your trial? Yes.

(c) Your sentencing? Yes.

(d) Your appeal, if any, from the judgment of conviction and/or imposition of the sentence?
Yes.

(e) Preparation, presentation or consideration of any petitions, motions, or application with respect to this conviction, which you filed? Yes.

18. If you answered “yes” to one or more parts of number (17), list:

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

(i) Eleazer Carter, Esq., 105 South Brooks Street, Manning, SC 29102.

(ii) Robert Dudek, Esq., PO Box 11589, Columbia, SC 29211.

(iii) Dayne C. Phillips, 1614 Taylor Street, Ste D., Columbia, SC 29201.

(b) The proceedings at which each attorney represented you:

(i) Eleazor Carter represented Applicant at trial.

(ii) Robert Dudek represented Applicant on appeal.

(iii) Dayne C. Phillips is currently representing Applicant on this application for Post-Conviction Relief.

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

Applicant seeks Post-Conviction Relief by vacating his convictions and sentences and

remanding the indictments for a new trial based on ineffective assistance of counsel.

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

No. Applicant is not under sentence from any other court.

ATTACHMENTS

ARREST WARRANT
2013A1420100230

STATE OF SOUTH CAROLINA
☐ County/ ☒ Municipality of
MANNING

THE STATE
against



JONATHAN CODY NEWMAN

Address: [REDACTED]
MA
Phone: [REDACTED] SSN: [REDACTED]
Sex: M Race: W Height: 6-1 Weight: 195
DL State: SC DL #: [REDACTED]
DOB: [REDACTED] Agency ORI#: SC0140100
Prosecuting Agency: MANNING POLICE DEPARTMENT
Prosecuting Officer: LT. S. K. DANIELS
Offense: MURDER
Offense Code: 0116
Code/Ordinance Sec. 16-03-0010, 16-03-0020

This warrant is CERTIFIED FOR SERVICE in the
☐ County/ ☒ Municipality of
MANNING. The accused
is to be arrested and brought before me to be
dealt with according to law.

Signature of Judge

Date: 08/05/2013

RETURN

A copy of this arrest warrant was delivered to
defendant JONATHAN CODY NEWMAN
on 08.06.13 1519

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:
MANNING MUNICIPAL COURT
36 WEST BOYCE STREET
MANNING, SC 29102

STATE OF SOUTH CAROLINA

☐ County/ ☒ Municipality of
MANNING

AFFIDAVIT

Form Approved by
S.C. Attorney General
April 13, 2003
SCCA 518

Personally appeared before me the affiant LT. S. K. DANIELS
being duly sworn deposes and says that defendant JONATHAN CODY NEWMAN
did within this county and state on 05/26/2013 violate the criminal laws of the
State of South Carolina (or ordinance of ☐ County/ ☒ Municipality of MANNING
in the following particulars:
DESCRIPTION OF OFFENSE: 16-03-0010, 16-03-0020 / MURDER

I further state that there is probable cause to believe that the defendant named above did commit
the crime set forth and that probable cause is based on the following facts:

THAT ON MAY 26, 2013 THE DEFENDANT ALONG WITH TWO CO-DEFENDANTS DID COMMIT THE OFFENSE OF MURDER.
THE DEFENDANT ALONG WITH THE CO-DEFENDANTS DID KILL THE VICTIM WITH MALICE AFORETHOUGHT. THE
DEFENDANT ALONG WITH THE CO-DEFENDANTS DID SEVERELY BEAT THE VICTIM ULTIMATELY CAUSING HIS DEATH ON
JULY 29, 2013. PROBABLE CAUSE IS BASED ON STATEMENTS MADE BY CO-DEFENDANTS AND THE PRELIMINARY
AUTOPSY THAT STATES BLUNT FORCE INJURY TO THE HEAD. THIS INCIDENT OCCURRED IN THE CITY OF MANNING,
CLARENDON COUNTY, SC. THE AFFIANT ALONG WITH WITNESSES WILL PROVE THE SAME

Signature of Affiant

Affiant's Address 42 WEST BOYCE STREET
MANNING SC 29102
Affiant's Telephone (803) 435-8859

STATE OF SOUTH CAROLINA

☐ County/ ☒ Municipality of
MANNING

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER IN THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that
on 05/26/2013 defendant JONATHAN CODY NEWMAN
did violate the criminal laws of the State of South Carolina (or ordinance of
☐ County/ ☒ Municipality of MANNING) as set forth below:
DESCRIPTION OF OFFENSE: MURDER / MURDER

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said
defendant and bring him or her before me forthwith to be dealt with according to the law. A copy of this Arrest Warrant shall be delivered
to the defendant at the time of its execution, or as soon thereafter as is practicable.

Sworn to and subscribed before me

on 08/05/2013
JAMES DINGLE (L.S.)

Judge Code: 200

Judge's Address 36 WEST BOYCE ST
MANNING SC 29102

Judge's Telephone 803-433-0050

Issuing Court: ☐ Magistrate ☒ Municipal ☐ Circuit

Case: 13-2843

ORIGINAL

App. 598

ARREST WARRANT
2013A1420100156

STATE OF SOUTH CAROLINA
☐ County/ ☒ Municipality of
MANNING

THE STATE
against



JONATHAN CODY NEWMAN

Address: [REDACTED]
Phone: [REDACTED] SSN: [REDACTED]
Sex: M Race: W Height: 6-1 Weight: 195
DL State: [REDACTED] DL#: [REDACTED]
DOB: [REDACTED] Agency ORI#: SC0140100
Prosecuting Agency: MANNING POLICE DEPARTMENT
Prosecuting Officer: LT. S. K. DANIELS
Offense: BURGLARY 1ST
Offense Code: 0079
Code/Ordinance Sec. 16-11-0311

This warrant is CERTIFIED FOR SERVICE in the
☐ County/ ☒ Municipality of
MANNING. The accused
is to be arrested and brought before me to be
dealt with according to law.

Signature of Judge

Date: 05/28/2013

RETURN

A copy of this arrest warrant was delivered to
defendant JONATHAN CODY NEWMAN
on 6/5/2013

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:
MANNING MUNICIPAL COURT
36 WEST BOYCE STREET
MANNING, SC 29102

STATE OF SOUTH CAROLINA
☐ County/ ☒ Municipality of
MANNING

AFFIDAVIT

Form Approved by
S.C. Attorney General
April 13, 2003
SCCA 518

Personally appeared before me the affiant LT. S. K. DANIELS who
being duly sworn deposes and says that defendant JONATHAN CODY NEWMAN
did within this county and state on 05/26/2013 violate the criminal laws of the
State of South Carolina (or ordinance of ☐ County/ ☒ Municipality of MANNING)
in the following particulars:
DESCRIPTION OF OFFENSE: 16-11-0311 / BURGLARY 1ST

I further state that there is probable cause to believe that the defendant named above did commit
the crime set forth and that probable cause is based on the following facts:

THAT ON MAY 26, 2013 THE DEFENDANT DID COMMIT THE OFFENSE OF BURGLARY FIRST DEGREE. THE DEFENDANT
ALONG WITH A CO-DEFENDANT DID ENTER THE RESIDENCE OF THE VICTIM IN THE NIGHT TIME WITH THE INTENT TO
COMMIT A CRIME THEREIN. WHILE INSIDE THE DEFENDANT AND CO-DEFENDANT DID ASSAULT THE VICTIM AND TOOK A
HANDGUN FROM THE RESIDENCE. THIS INCIDENT OCCURRED IN THE CITY OF MANNING, CLARENDON COUNTY, SC. THE
AFFIANT ALONG WITH WITNESSES WILL PROVE THE SAME.

Signature of Affiant

STATE OF SOUTH CAROLINA
☐ County/ ☒ Municipality of
MANNING

Affiant's Address 42 WEST BOYCE STREET
MANNING SC 29102
Affiant's Telephone (803) 435-8859

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER IN THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that
on 05/26/2013 defendant JONATHAN CODY NEWMAN
did violate the criminal laws of the State of South Carolina (or ordinance of
☐ County/ ☒ Municipality of MANNING) as set forth below:

DESCRIPTION OF OFFENSE: BURGLARY / BURGLARY (AFTER JUNE 20, 1985) - FIRST DEGREE

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said
defendant and bring him or her before me forthwith to be dealt with according to the law. A copy of this Arrest Warrant shall be delivered
to the defendant at the time of its execution, or as soon thereafter as is practicable.

Sworn to and subscribed before me

on 05/28/2013
JAMES DINGLE (U.S.)
Judge Code: 200

Judge's Address 36 WEST BOYCE ST
MANNING SC 29102
Judge's Telephone 803-433-0050

Issuing Court: ☐ Magistrate ☒ Municipal ☐ Circuit

Case: 13-2843

ORIGINAL

App. 599

WITNESSES

Sonia Daniels Manning Police Department

ARREST WARRANT NUMBER

2013A1420100230✓

2013A1420100156

2013A1420100157

✓ 2013A1420100231

ACTION OF GRAND JURY

True Bill

Cabban Titic
Foreperson of Grand Jury
Date: 2/27/14

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2013-GS-14-0293

The State of South Carolina

County of CLARENDON

COURT OF GENERAL SESSIONS

February

TERM

2014

THE STATE

vs.

JONATHAN CODY NEWMAN

LETROY SAMUELS

MONTAG LAMALL WEBB

(AMENDED) Indictment for

MURDER

BURGLARY, 1ST DEGREE

Ernest A. Finney III

ERNEST A. FINNEY, III, SOLICITOR

STATE OF SOUTH CAROLINA)
COUNTY OF CLARENDON)

(AMENDED) INDICTMENT FOR

MURDER

BURGLARY, 1ST DEGREE

At a Court of General Sessions convened on February 27, 2014, the Grand Jurors of CLARENDON County present upon their oath:

COUNT ONE - MURDER

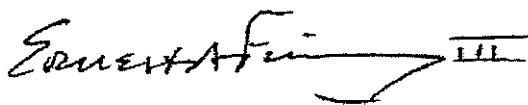
That Jonathan Cody Newman, *Defendant* and Montag Lamall Webb did in Clarendon County, on or about May 26, 2013, willfully, feloniously, and intentionally kill the victim, Anthony Wimberly, with malice aforethought, either express or implied, by severely beating the victim, and the victim did die as a proximate result of the injuries then and there sustained on or about July 29, 2013 in Clarendon County, in violation of Section 16-03-0010, S. C. Code of Laws (1976), as amended.

COUNT TWO - BURGLARY, 1ST DEGREE

That Jonathan Cody Newman, *Defendant* and Montag Lamall Webb, did in Clarendon County on or about May 26, 2013 enter the dwelling of Anthony Wimberly located at [REDACTED], without consent and with the intent to commit a crime therein and the entering or remaining in the dwelling occurred in the nighttime and/or when, in effecting entry or while in the dwelling or in immediate flight, the defendants caused physical injury to a non-participant in the crime and/or were armed with a deadly weapon and/or did use or threaten use of a dangerous instrument, all in violation of Section 16-11-0311(A), S.C. Code of Laws (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

Solicitor



STATE OF SOUTH CAROLINA)

IN THE COURT OF GENERAL
SESSIONS

COUNTY OF CLARENDON)

STATE OF SOUTH CAROLINA)

INDICTMENT NOS. 2013-GS-14-0293

vs.)

VERDICT FORM

JONATHAN CODY NEWMAN,)
DEFENDANT.)

1) As to the charge of Murder, we, the jury, unanimously find the Defendant:

☐ Not Guilty

☒ Guilty

2) As to the charge of Burglary, 1st Degree, we, the jury, unanimously find the Defendant:

☐ Not Guilty

☒ Guilty

Eddie B. Myers
Foreperson

Manning, South Carolina.
January 9, 2015.

STATE OF SOUTH CAROLINA

COUNTY OF Clarendon
 STATE VS.
Jonathan Cody Newman

AKA: _____
 Race: 1 Sex: M Age: 20
 DOB: [REDACTED] SS#: [REDACTED]
 Address: [REDACTED]
 City, State, Zip: [REDACTED]
 DL#: _____ SID#: _____

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was
 TO: Murder (30 years - Life)

in violation of § 16-3-10 of the S.C. Code of Laws, bearing CDR Code # 0116
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC ☐ §17-25-45
 w/minor 1st or Lewd Act)

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)
 The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST: [Signature] 78080
Durant, Christopher Ryan SC Bar# _____ 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 35 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: W/ CT 2
☒ 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 the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
 Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered PTUP _____
 Total: \$ _____ plus 20% fee: \$ _____
 Payment Terms: _____
☐ Set by SCDPPPS _____

Recipient: _____

*Fine: _____ \$

§ 14-1-206 (Assessments 107.5 %)		\$
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ <u>100.00</u>
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ <u>25.00</u>
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114(BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCJA Surcharge)	\$5	\$ <u>5.00</u>
3% to County (if paid in installments)		\$ <u>3.90</u>
TOTAL		\$ <u>133.90</u>

IN THE COURT OF GENERAL SESSIONS

App.603

INDICTMENT/CASE#: 2013-GS-14-0293A/W#: 2013A1420100230Date of Offense: 5/26/2013S.C. Code § : 16-03-0010CDR Code #: 0116

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADS

_____ days/hours Public Service Employment

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,
 § 47.12 requires \$500 be paid to Clerk
 during probation.

Clerk of Court/ Deputy Clerk B. Roberts

Court Reporter: Melissa Singletary

SCCA/217 (03/2011)

Presiding Judge [Signature]

Judge Code: 2156

Sentence Date: 1/9/2015

COUNTY OF Clarendon
STATE VS.
Jonathan Cody Newman
AKA: _____
Race: 1 Sex: M Age: 20
DOB: SSI
Address: _____
City, State, Zip: _____
DL#: _____ SID#: _____

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was
TO: Burglary, 1st Degree (15 years - Life)

in violation of § 16-11-311 of the S.C. Code of Laws, bearing CDR Code # 0079
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC ☐ §17-25-45
w/minor 1st or Lewd Act)

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST: Ch Ryan 79080
Durant, Christopher Ryan SC Bar# _____ 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 30 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: W/ Court 1 § 24-13-40 to be calculated and applied
☒ The Defendant is to be given credit for time served pursuant to S.C. Code
by the State Department of Corrections.
☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ Set by SCDPPPS _____

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 \$ _____

§ 56-1-286 (DUI Breath Test) \$25 \$ _____

Proviso 47.9 (Public Def/Prob) \$500 \$ _____

§ 14-1-212 (Law Enforce. Funding) \$25 \$ 25.00

§ 14-1-213 (Drug Court Surcharge) \$150 \$ _____

§ 50-21-114 (BUI Breath Test Fee) \$50 \$ _____

§ 56-5-2942(J) (Vehicle Assessment) \$40/ea \$ _____

Proviso 90.5 (SCCA Surcharge) \$5 \$ 5.00

3% to County (if paid in installments) \$ 3.90

TOTAL \$ 133.90

Clerk of Court/ Deputy Clerk B. Roberts

Court Reporter: Melissa Singleton

INDICTMENT/CASE#: 2013-GS-14-0293
A/W#: 2013A1420100156
Date of Offense: 5/26/2013
S.C. Code § : 16-11-0311
CDR Code #: 0079

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADS

☐ §17-25-45
w/minor 1st or Lewd Act)

(defendant's initials)

SC Bar# _____

☐ County Detention Center,

not to exceed _____ years

probation for _____

§ 24-13-40 to be calculated and applied

§17-25-135.

(Criminal
Domestic Violence)

PTUP _____
days/hours Public Service Employment

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,

§ 47.12 requires \$500 be paid to Clerk

during probation.

Presiding Judge _____

Judge Code: _____

Sentence Date: 11/9/2015

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Clarendon County

William Jeffrey Young, Circuit Court Judge

RECEIVED

MAY 27 2016

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

JONATHAN CODY NEWMAN,

APPELLANT

APPELLATE CASE NO. 2015-000091

ANDERS BRIEF OF APPELLANT

ROBERT M. DUDEK
Chief Appellate Defender

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

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUE ON APPEAL.....	1
STATEMENT OF THE CASE.....	2
ARGUMENT	3
CONCLUSION	10
PETITION TO BE RELIEVED AS COUNSEL.....	11

TABLE OF AUTHORITIES**Cases**

<u>Pinckney v. State</u> , 368 S.C. 502, 629 S.E.2d 367 (2006)	9
<u>State v. Arnold</u> , 361 S.C. 386, 605 S.E.2d 529 (2004)	8
<u>State v. Bostick</u> , 392 S.C. 134, 708 S.E.2d 774 (2011)	8
<u>State v. Brown</u> , 103 S.C. 437, 88 S.E.2d 1916 (1916)	8
<u>State v. Hyder</u> , 242 S.C. 372, 131 S.E.2d 96 (1963)	9
<u>State v. Lollis</u> , 343 S.C. 580, 541 S.E.2d 254 (2001)	8, 9
<u>State v. Martin</u> , 340 S.C. 597, 533 S.E.2d 572 (2000)	8
<u>State v. McHoney</u> , 344 S.C. 85, 544 S.E.2d 30 (2001)	8
<u>State v. Mitchell</u> , 341 S.C. 406, 535 S.E.2d 126 (2000)	8
<u>State v. Mouzon</u> , 231 S.C. 655, 99 S.E.2d 672 (1957)	1, 3, 9
<u>State v. Muhammed</u> , 338 S.C. 22, 524 S.E.2d 637 (Ct. App. 1999)	8
<u>State v. Pinckney</u> , 339 S.C. 346, 529 S.E.2d 526 (2000)	8
<u>State v. Schrock</u> , 283 S.C. 129, 322 S.E.2d 450 (1984)	8
<u>State v. Weston</u> , 367 S.C. 279, 625 S.E.2d 641 (2006)	8

STATEMENT OF ISSUE ON APPEAL

Whether the court erred by refusing to direct a verdict on the murder and burglary charges where the only evidence was that appellant or another man punched the decedent during a party, no one came to the decedent's assistance when he fell, and the decedent tragically died from the blow to the head two months later, since there was no evidence of malice, or Mouzon malice necessary for murder, and no evidence appellant entered the home of another with the intent to commit a crime therein?

STATEMENT OF THE CASE

Appellant was indicted by the Clarendon County Grand Jury for the offenses of murder and burglary in the first degree. His case was called to trial on January 6, 2015 before the Honorable W. Jeffery Young, and a jury. Appellant was tried with co-defendant Letroy Samuels. Eleazer Carter represented appellant. Harry Devoe represented co-defendant Samuels. R. 1.

At the conclusion of the trial on January 9, 2015 the jury found appellant guilty on both charges. The jury acquitted co-defendant Samuels of both charges. R. 496, ll. 1-13. Judge Young sentenced appellant to thirty-five years for murder, and thirty years, concurrent, for burglary in the first degree. R. 505, l. 22 – 506, l. 5.

This appeal follows.

ARGUMENT

The court erred by refusing to direct a verdict on the murder and burglary charges where the only evidence was that appellant or another man punched the decedent during a party, no one came to the decedent's assistance when he fell, and the decedent tragically died from the blow to the head two months later, since there was no evidence of malice, or *Mouzon* malice necessary for murder, and no evidence appellant entered the home of another with the intent to commit a crime therein.

Relevant Facts

Appellant was only nineteen-years-old at the time the decedent tragically died from a punch to his head two months after he was hit. R. 313, ll. 2-6. The decedent was fifty-years-old, he was only 5'9 and he weighed 191 lbs. He died of a closed head injury two months after he was hit in the head. The decedent was able to open his eyes in the hospital in response to some stimulus, but he never regained consciousness in those two months. The state stressed during the trial of the fact that no one attempted to assist the decedent after he was injured during the party because they did not "want to get involved." While the morality of that attitude is certainly subject to question, it did not, as will be seen *infra*, provide evidence that the injury to the decedent was caused by the *mens rea* of malice aforethought. R. 195, l. 9 – 199, l. 14.

Appellant remembered that there was a lot of drinking going on during the party at the duplex that fatal day. Appellant remembered that a woman, Barbara, wanted him to get her another beer. Appellant said he was not able to get Barbara another beer because the decedent "stepped outside and I guess he got mad with me talking to Barbara, he was kind of drunk, told me he did not want any white people around his house." Appellant said: "I really did not know how to respond to what he said so I just sat there and tried to process it for a second . . . then I heard her [Barbara] in there saying 'you do not go out there with that gun.'" R. 325, l. 20 – 326,

1. 19. Appellant said he heard this statement because the doors "are not thick . . . my heart dropped sir, I stepped off of the porch and got to an area in the yard where if he did come outside with a gun I could run." R. 326, l. 14 – 327, l. 4.

Appellant remembered that Montag Webb, who pled guilty to voluntary manslaughter and burglary in this case, became angry with the decedent's statement that: "I do not want no white people at my house." Montag had a white father, and appellant testified that it was Montag who punched the decedent. R. 333, l. 21 – 334, l. 12.

Appellant remembered that co-defendant Samuels and Kevin Slater immediately ran when Montag hit the decedent. Appellant was in shock at the time, and he recalled that Montag dragged the decedent by his arms back into the house. Appellant remembered the door to the other side of the duplex was open but he did not enter. Appellant testified that he never touched the decedent during the party that evening. R. 335, l. 6 – 348, l. 1.

The testimony of Montag Webb, who pled guilty to voluntary manslaughter and burglary in the decedent's death, was incredible in its inconsistency, its admissions of lies to the police, and Montag's admission that he went into his "thief mode" when the decedent was knocked out by the punch. Montag admitted he ransacked the decedent's apartment looking for things to steal. In the light of his incredible testimony, Montag would find time to deny the he hit the decedent even though he pled guilty to voluntary manslaughter and burglary. App. 57, ll. 9-21.

Montag testified that appellant's nickname was "J White." He said he was "cool" with appellant. R. 76, ll. 7-23. Co-defendant Samuels' nickname was "Sin." R. 56, l. 22 – 57, l. 4. Montag admitted that he never saw appellant hit the decedent. However, he claimed appellant was in the duplex at the time the decedent fell to the floor. R. 68, l. 18 – 72, l. 24. Montag saw blood on the decedent's face but "I did not see what happened to him." R. 73, ll. 6-15.

Montag did admit that he looked through the decedent's wallet and went through his pockets as he lay helpless on the floor. R. 73, ll. 6-15. Montag then went into his "thief mode." He wanted to steal whatever he could as he ransacked the duplex -- flipping over mattresses and looking in dresser drawers. Most of all Montag remembered: "I was looking for a gun that they said he [the decedent] had and money." However, Montag said he never hit the decedent and He maintained: "I did not touch his body" while going through the decedent's pocket. R. 101, l. 10 – 103, l. 17. Montag wanted the decedent's gun once he heard the decedent was armed. R. 130, l. 23- 131, l. 21.

Montag claimed appellant said in advance that he was going to hit the decedent. However, he told defense counsel for appellant on cross-examination that appellant liked to brag and lie about being tough. R. 112, l. 19 – 113, l. 15.

Kevin Slater was also at the party on May 26, 2013 where people were drinking heavily, and were "in and out of the duplex." They also were making "beer" and liquor runs during the party. R. 150, l. 13 – 155, l. 10.

Slater remembered that the decedent was keeping to himself during the party. "He did not really mingle with us." Slater admitted the decedent got upset with the noise from the party, and told the people partying to keep the noise down. R. 155, l. 5 – 157, l. 18.

Slater maintained that Montag sat down on the steps beside him, and that appellant came up onto the porch. Slater claimed: "I heard a smacking noise . . . I looked back and the guy was laid out." Slater testified that he left immediately when he saw the decedent on the floor. He acknowledged no one assisted the decedent, and that the decedent died two months later. R. 162, ll. 1-25; R. 182, l. 2 – 184, l. 17. Slater repeatedly said he just "did not want to be

involved,” and that was also the reason no one tried to help the decedent. R. 183, l. 7 – 184, l. 25.

Co-defendant Samuels testified, and he claimed he saw appellant hit the decedent one time that evening. The decedent was knocked out with that one punch. Samuels allegedly did not see anyone drag the decedent inside the house after he was knocked out. R. 378, ll. 1-19.

Samuels testified: “I saw one punch and I left. And that is the truth.” However, Samuels claimed he saw Montag and appellant later with a gun, a wallet and a cellphone. Samuels also maintained that appellant pointed a gun at him, and told him not to tell anyone what happened. R. 400, l. 24 – 402, l. 24.

On cross-examination Samuels admitted he was an alcoholic and a heavy drug user. He acknowledged that this “event” was “the saving grace to save your life.” Samuels stuck to his story that “Jonathan struck Mr. Wimberly.” R. 403, l. 4 – 409, l. 25.

Directed verdict motion

Defense counsel earlier moved for a directed verdict on the murder and burglary counts. Defense counsel argued *even if it was assumed appellant punched the decedent during the party there was no evidence the decedent was hit with malice aforethought*. At worst, the evidence showed appellant “punched the guy one time.” Likewise, defense counsel argued there was no evidence appellant entered the home, and if he did enter the home that he did so with intent to commit a crime therein. The judge denied the directed verdict motions. R. 302, l. 15 – 311, l. 14.

Other issues that should be decided on appeal

Counsel would be remiss, for the sake of judicial economy, not to point out unpreserved errors that would have to be litigated in post-conviction relief if this Court does not reverse on

direct appeal. Witness Leon Coleman claimed that appellant said he was going to rush the decedent for money during the party. When defense counsel for appellant went to impeach Coleman for his bias against appellant -- based on the fact that appellant was having an affair with his girlfriend, and that they also had a child together -- the solicitor objected on the grounds of relevance. The judge sustained the objection and instructed Coleman not to answer the question. The answer was not proffered so the issue of this obviously relevant evidence of bias being excluded was not preserved. The fact that Montag was Coleman's brother-in-law also increased the reason for Coleman to lie about appellant being the perpetrator even though Montag had already pled guilty. R. 48, l. 5 – 51, l. 6.

On cross-examination of Montag defense counsel asked Montag to admit that the two teardrops tattoos -- and the "K" tattoo -- meant that he was a killer or a murderer. Montag lamely claimed the "K" tattoo stood for "his cousin," and the two teardrop tattoos: "They stand for my momma and daddy." The objection to the tattoos inquiry was sustained, and counsel again did not make a proffer, or otherwise attempt obvious impeachment on the teardrop tattoos at a minimum. R. 87, l. 13 – 88, l. 6.

On cross-examination by the solicitor of appellant he repeatedly pitted witnesses against appellant in the presence of the jury. He made appellant say that Leon Coleman was a liar and "Taggy" was also a liar. When the solicitor improperly asked appellant: "So everybody who came up here and said that you hit that old man is a liar?" Appellant correctly responded: "I do not think anybody [at that point during the trial before co-defendant Samuel's testimony] said that I hit him." R. 354, l. 10 – 355, l. 2.

Without objection, the solicitor also had appellant admit that he only made one statement to law enforcement, and that he refused to give another statement *because he had an attorney*.

The solicitor badgered appellant with the fact that he refused to talk to the police after he got an attorney, and he invoked his right to silence. R. 358, l. 9 – 359, l. 6.

Co-defendant Samuels also testified, without objection, that he had seen appellant *hit other people* in the past, and that “I know he [appellant] was a fighter.” R. 382, l. 8 – 383, l. 19. For the sake of judicial economy these post-conviction issues should be considered when determining if appellant received anything approaching a fair trial.

Discussion

A defendant is entitled to a directed verdict when the prosecution fails to provide evidence of the offense charged. State v. Brown, 103 S.C. 437, 88 S.E.2d 1 (1916); State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006); State v. McHoney, 344 S.C. 85, 97 S.E.2d 30, 36 (2001). “If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused,” the trial judge may deny the motion for directed verdict. State v. Lollis, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001); State v. Pinckney, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000); State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000). When the prosecution relies exclusively on circumstantial evidence, the trial judge must direct a verdict in the defendant’s favor unless there is any substantial circumstantial evidence which reasonably tends to prove the guilt of the defendant or from which his guilt may be fairly and logically deduced. State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011); State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000). Likewise, a directed verdict is appropriate when the evidence produced “merely raises a suspicion the accused is guilty.” Lollis, 343 S.C. at 584, 541 S.E.2d at 256; State v. Arnold, 361 S.C. 386, 389-390, 605 S.E.2d 529, 531 (2004); State v. Schrock, 283 S.C. 129, 132, 322 S.E.2d 450, 451-452 (1984); State v. Muhammed, 338 S.C. 22, 524 S.E.2d 637 (Ct. App. 1999). Our courts define suspicion as “a

belief or opinion as to guilt based upon facts or circumstances which do not amount to proof.”

Lollis, 343 S.C. at 584, 541 S.E.2d at 256; State v. Hyder, 242 S.C. 372, 131 S.E.2d 96 (1963).

In this case the worst evidence against appellant was if the jury believed he punched the decedent a single time. Even if the jury believed that evidence, it did not provide any evidence appellant acted with malice aforethought, or even Mouzon¹ malice (such great recklessness and wantonness as to exhibit a total disregard for the lives of the decedent or others). There was no evidence appellant killed the decedent with malice aforethought, and he was entitled to a directed verdict on the murder charge.

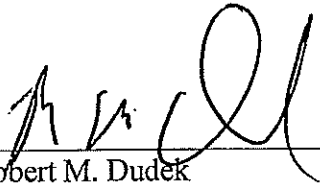
Likewise, appellant was entitled to a directed verdict motion on the burglary charge because even if the jury believed appellant entered the duplex during the party without consent, there was no evidence he did so with the intent to commit a crime therein. See Pinckney v. State, 368 S.C. 502, 629 S.E.2d 367 (2006). In short, the state failed to provide any direct or substantial circumstantial evidence that appellant killed the decedent with malice aforethought, or that he entered the decedent's home without consent **and** with the intent to commit a crime therein. Even if the jury believed appellant hit the decedent because of his racially charged statement, or because the decedent was armed with a gun and appellant was scared, it did not provide any evidence this crime was murder. The killing of another human being with malice aforethought.

¹ State v. Mouzon, 231 S.C. 655, 99 S.E.2d 672 (1957).

CONCLUSION

By reason of the foregoing arguments, this Court should issue verdicts of acquittal as to both charges.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 27th day of May, 2016.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Clarendon County
William Jeffrey Young, Circuit Court Judge

RECEIVED

MAY 27 2016

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

JONATHAN CODY NEWMAN,

APPELLANT

APPELLATE CASE NO. 2015-000091

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jonathan Cody Newman states:

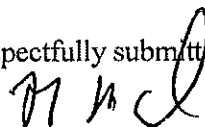
1. He is Chief Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. He has reviewed the record of appellant's trial before Judge William Jeffrey Young, which was held on January 5-9, 2015, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, he asks the Court to relieve him as counsel for Jonathan Cody Newman.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 27th day of May, 2016.

STATE OF SOUTH CAROLINA

App.619

IN THE COURT OF APPEALS

RECEIVED

MAY 27 2016

SC Court of Appeals

Appeal from Clarendon County

William Jeffrey Young, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JONATHAN CODY NEWMAN,

APPELLANT

APPELLATE CASE NO. 2015-000091

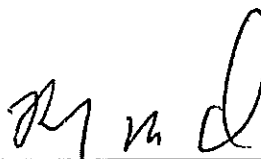
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictment;
- (2) Entire trial and pre-trial transcript.

I certify that this designation contains no matter which is irrelevant to this appeal.

May 27th, 2016



Robert M. Dudek
Chief Appellate Defender

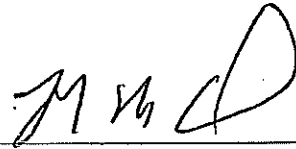
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

Attorney for Appellant

CERTIFICATE OF COUNSEL

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

May 27, 2016



Robert M. Dudek
Chief Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-158

RECEIVED
MAY 27 2016
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

MAY 27 2016

SC Court of Appeals

Appeal from Clarendon County

William Jeffrey Young, Circuit Court Judge

THE STATE,

RESPONDENT,

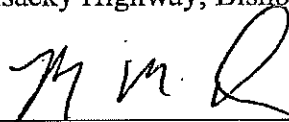
V.

JONATHAN CODY NEWMAN,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Donald J. Zelenka, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Jonathan Cody Newman, #362601 at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 27th day of May, 2016.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 27th day of May, 2016.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS

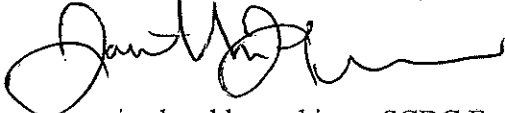
Receipt of Legal Correspondence Verification

This is to verify that legal correspondence from (Name and Address):

Legal Property:
Broadriver Correctional
Institution.

Addressed to (Inmate Name, SCDC#, and Address):

Jonathan Newman
#362601 Saluda #219
BMC1 Columbia SC 29210
4460 Broadriver rd



My legal property was with-
held from me until 6/7/18.
Reason for my PCR being
turned in late.

was received and logged in on SCDC Form 10-12, "Legal/Privileged/Certified Mail Delivery Log," at the
_____, Correctional Mailroom on (Date) _____.

On (Date) 6/7/18, the above referenced correspondence was delivered to
Inmate Jonathan Newman, SCDC # 362601, and his signature
was obtained on SCDC Form 10-12, "Legal/Privileged/Certified Mail Delivery Log".

Additional Notes:

I/m Newman didn't receive his property
until June 7 2018. That is why he wasn't on
time to PCR.

L. Bracey
Postal Director/Institution

6/14/18
Date

07-03-2017

Date

Jonathan Newman #362601
Broadriver Ct / Monticello 218
4460 Broadriver rd
Columbia SC 29210

Clerk of Court
Clarendon County Common Pleas

2013-GS-14-0293

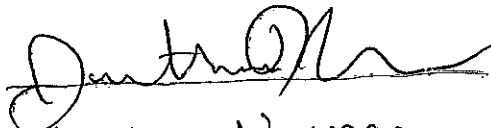
Re: Newman v. State, PCA Case

Dear Honorable Clerk:

Please find for filing and consideration my original pro-se post conviction application. Please return a clock-filed copy with civil action number for my records.

Thank you for your time & concern in this matter.

Respectfully

15/ 
Jonathan Newman

Enclosures

FORM 5

STATE OF SOUTH CAROLINA)

County of Claredon)Jonathan Newman)

Full name and prison number (if any) of Applicant)

#362601)

v.)

State of South Carolina)

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
Bishopville SC 29010 / BNCL Columbia SC 29210
2. Name and location of Court which imposed sentence Court of General Sessions Claredon County SC
3. Name(s) of co-defendant(s) (if any) Montag Webb, Letroy Samuels
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 213-GS-14-0293; 35 years
 - (b) Murder / 1st Degree Burglary

- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) January 9th 2015
- (b) _____
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty ☒ _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. South Carolina Court of Appeals
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Affirmed
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. April 5th, 2017
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. 2015-000091
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) N/A
- (b) _____

- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Ineffective Assistance of Counsel
- (b) Ineffective of Appellate Counsel
- (c) Denial due process of law
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) See attached pages marked 3-1 thru 3-6
- (b) " " "
- (c) " " "
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? No
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No
- (d) any other petitions, motions or applications in this or any other Court? No
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. N/A
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. N/A
- ii. _____
- iii. _____
- iv. _____

(c) the disposition thereof:

- i. N/A
- ii. _____
- iii. _____
- iv. _____

(d) the date of each such disposition:

- i. N/A
- ii. _____
- iii. _____
- iv. _____

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

- i. N/A
- ii. _____
- iii. _____
- iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

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

(a) which grounds have been presented:

- i. N/A
- ii. _____
- iii. _____

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

- i. N/A
- ii. _____
- iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

- (a) N/A
- (b) _____
- (c) _____

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

- (a) your arraignment and plea? _____
- (b) your trial, if any? Yes
- (c) your sentencing? Yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?
No

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

- (a) the name and address of each attorney who represented you:
 - i. Eleazar Carter 105 South Brooks Street
Manning SC 29102
 - ii. _____
 - iii. _____
- (b) the proceedings at which each such attorney represented you:
 - i. Robert Dudek PO Box 11589 Columbia SC
29211
 - ii. _____
 - iii. _____

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

Vacate Convictions and sentencing

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

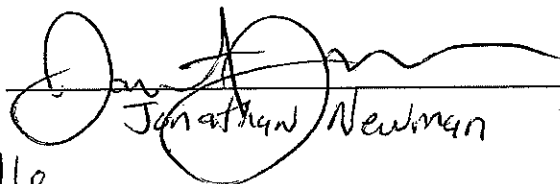
No

STATE OF SOUTH CAROLINA)

County of Lee)

VERIFICATION

I, Jonathan Newman #362601, 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.


Jonathan Newman

SWORN to and subscribed before me this 16
day of June, 2017.

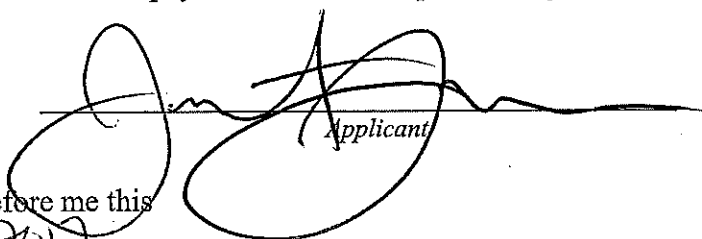
Debra Eastwood (L.S.)
Notary Public

My Commission Expires: 3/3/2024

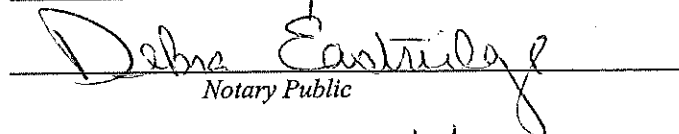
**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, Jonathan Newman[#] 362601, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

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


Applicant

SWORN or affirmed to and subscribed before me this
16 day of June, 2017.


Notary Public

My Commission Expires: 3/3/2020

CERTIFICATE OF SERVICE

I hereby certify that I have this date served the within and foregoing Amended Application for Post-Conviction Relief by depositing a true and correct copy of the same via first-class mail, postage prepaid, upon all parties as follows:

Megan Jameson, Assistant Attorney General
South Carolina Attorney General's Office
1000 Assembly Street, Room 519
Columbia, SC 29201

The Honorable Beulah G. Roberts
Clarendon County Clerk of Court
P.O. Box 136
Manning, SC 29102-0136

By: Courtney Powers
Courtney Powers
Paralegal for Dayne C. Phillips, Esq.

1614 Taylor Street, Suite D.
Columbia, SC 29201
C: (803) 216-5561
F: (803) 380-8035
courtney@pricebenowitz.com

June 26, 2019

THE STATE OF SOUTH CAROLINA) IN THE COURT OF **COMMON PLEAS**
COUNTY OF **CLARENDON**) **THIRD JUDICIAL CIRCUIT**

JONATHAN C. NEWMAN,) Case No.: **2018-CP-14-00233**

Applicant,

v.

State of South Carolina,

Respondent.

CERTIFIED TRUE COPY
OF ORIGINAL FILED IN THIS OFFICE

DATE

2/6/20

**MOTION FOR LEAVE TO OBTAIN
DISCOVERY IN A PCR ACTION**

Bonnie B. Roberts

CLERK OF COURT
CLARENDON COUNTY, SC

TO: The Honorable Kristi F. Curtis
Assistant Attorney General Megan H. Jameson

The Applicant, by and through the undersigned Counsel, moves for leave to obtain discovery in the above-referenced post-conviction relief action. See S.C. Code § 17-27-150(A) (Discovery in post-conviction relief proceeding). Specifically, the Applicant requests to obtain evidence from the State and has good cause to invoke discovery based on the following reasons:

- (1) Permitting discovery will expedite Applicant's preparation for the evidentiary hearing (e.g., judicial economy of saving time and state resources);
- (2) Permitting discovery will likely eliminate the need for Applicant to call numerous witnesses to testify at the evidentiary hearing because Applicant will have obtained evidence through discovery to determine whether the witnesses are necessary;
- (3) Permitting discovery will reduce the likelihood of a last-minute continuance at the evidentiary hearing because Applicant will be adequately prepared;
- (4) Permitting discovery will allow Applicant to obtain necessary information through means other than in-court proceedings (e.g., affidavits and documents produced

by the prosecuting and law enforcement agencies).

If discovery is not authorized, Applicant may require additional time for investigation and preparation for the evidentiary hearing after gaining access to the evidence using a subpoena to procure witnesses and obtain evidence at the hearing. Therefore, invoking discovery allows for Applicant to adequately investigate and prepare for the evidentiary hearing without any undue and unnecessary delay.

PROCEDURAL HISTORY

On February 27, 2014, the Clarendon County County Grand Jury indicted Applicant for Murder and Burglary, First Degree.

On January 6, 2015, Applicant proceeded to trial before the Honorable W. Jeffery Young and a jury. Eleazor Carter represented Applicant, and Solicitor Ernest Finney and Assistant Solicitor Christopher Durant prosecuted the case on behalf of the State. The jury returned a verdict of guilty as charged on January 9, 2015. The Trial Court sentenced Applicant to a concurrent thirty-five (35) years imprisonment for the murder conviction and thirty (30) years imprisonment for the burglary conviction.

On April 5, 2017, the South Carolina Court of Appeals affirmed Applicant's convictions and sentences. *State v. Newman*, Op. No. 2017-UP-140 (S.C. Ct. App. filed April 5, 2017). Chief Appellate Defender Robert Dudek represented Applicant, and Assistant Deputy Attorney General Donald Zelenka represented the State on Direct Appeal.

ARGUMENT

Section 17-27-150(A) of the South Carolina Code of Laws provides:

A party in a noncapital post-conviction relief proceeding shall be entitled to invoke the processes of discovery available

under the South Carolina Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise. If necessary for the effective utilization of discovery procedures, counsel may be appointed by the judge for an applicant who qualifies for appointment pursuant to Section 17-27-60 or similar applicable provisions of law.

Although the Supreme Court of the United States has not expressly recognized a right to effective assistance of counsel in first tier review of ineffective assistance of counsel claims, the Court has carved out an exception to federal *habeas corpus* procedural bars in such cases. See *Martinez v. Ryan*, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012). PCR counsel in state court cases are now on notice of their obligations for providing effective assistance of counsel. Therefore, State courts are also on notice of the potential consequences of not providing PCR counsel with adequate resources to investigate and present PCR claims.

Discussion

In this case, the undersigned Counsel requires subpoena power to conduct an independent investigation related to this evidence in preparation for the evidentiary hearing. Notably, Applicant has retained a private investigator to assist in the necessary investigation. PCR Counsel has met with Applicant, reviewed the trial transcript, and has identified that there may be additional investigation that is reasonable and necessary in preparation of challenging Applicant's conviction and sentence based on the Solicitor's discovery file and the testimony and arguments presented at trial. Applicant is unable to prove the second prong of seeking post-conviction relief (i.e., prejudice) without conducting an independent investigation into this evidence. Therefore, Applicant's request to investigate, obtain and inspect critical impeachment evidence is reasonable

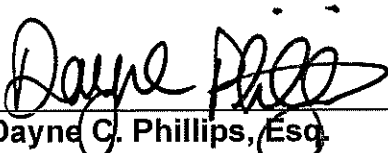
and necessary in the fair administration of justice.

CONCLUSION

Based on the foregoing reasons and for good cause shown, the undersigned Counsel moves for leave to obtain discovery in the above-referenced post-conviction relief action. See S.C. Code § 17-27-150(A); *see also Strickland v. Washington*, 466 U.S. 668 (1984); U.S. Const. amends. V, VI, XIV; S.C. Const. art. I, §§ 3 and 14; See S.C. Code § 17-27-20(A)(1), (4), and (6).

IT IS SO MOVED.

Respectfully submitted,



Dayne C. Phillips, Esq.

Price Benowitz LLP
1614 Taylor Street, Suite D.
Columbia, SC 29201
O: 803-272-4503
C: 803-807-0234
F: 803-380-8035
dayne@pricebenowitz.com

ATTORNEY FOR THE APPLICANT

January 28, 2020

CERTIFICATE OF SERVICE

I hereby certify that I have this date served the within and foregoing Motion for Leave to Obtain Discovery in a PCR Action by depositing a true and correct copy of the same via first-class mail, postage prepaid, upon all parties as follows:

The Honorable Beulah G. Roberts
Clarendon County Clerk of Court
P.O. Box 136
Manning, SC 29102-0136

Megan Jameson, Assistant Attorney General
South Carolina Attorney General's Office
1000 Assembly Street, Room 519
Columbia, SC 29201

The Honorable Kristi F. Curtis
215 North Harvin Street
Sumter, SC 29150

**CERTIFIED TRUE COPY
OF ORIGINAL FILED IN THIS OFFICE**

DATE 2/6/20
Beulah G. Roberts
CLERK OF COURT
CLARENDON COUNTY, SC

By: Courtney Powers
Courtney Powers
Paralegal for Dayne C. Phillips, Esq.

1614 Taylor Street, Suite D.
Columbia, SC 29201
C: (803) 216-5561
F: (803) 380-8035
courtney@pricebenowitz.com

January 29, 2020

2020 FEB 6 AM 11:50
Beulah Roberts, Clerk - Clarendon S.C.

STATE OF SOUTH CAROLINA
COUNTY OF CLARENDON

Jonathan Newman, #362601,
Applicant,

Y.

State of South Carolina,
Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT

Case No.: 2018-CP-14-0233

RETURN AND MOTION TO DISMISS AND RETURN TO APPLICANT'S MOTION FOR LEAVE TO OBTAIN DISCOVERY IN A PCR ACTION

Respondent, making its Return to the application for post-conviction relief (PCR) filed by Jonathan Newman (“Applicant”) on June 12, 2018, and Applicant’s motion for leave to obtain discovery, would respectfully show this Court:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clarendon County Clerk of Court. Applicant was indicted at the February 2014 term of the Clarendon County Grand Jury for murder and first-degree burglary (2013-GS-14-0293). Applicant was represented by Eleazer R. Carter, Esquire. On January 9, 2015, Applicant proceeded to a jury trial before the Honorable W. Jeffrey Young. The jury found Applicant guilty as indicted. Judge Young sentenced Applicant to thirty years imprisonment for burglary and thirty-five years for murder, to run concurrently.

A timely Notice of Appeal was filed on January 20, 2015. Chief Appellate Defender Robert M. Dudek (Appellate Counsel) of the South Carolina Office of Appellate Defense perfected the appeal in the form of an Anders¹ brief and a motion to be relieved as counsel. The

¹ *Anders v. California*, 386 U.S. 738 (1967).

South Carolina Court of Appeals dismissed the appeal and granted Appellate Counsel's motion to be relieved. State v. Newman, Op. No. 2015-UP-140 (S.C. Ct. App. filed April 5, 2017). The Remittitur was sent April 28, 2017.

II. CURRENT APPLICATION AND RELIEF SOUGHT

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

Ineffective Assistance of Counsel

1. Counsel failed to conduct adequate investigation and prepare for trial
2. Counsel was ineffective for failing to properly investigate, interview witnesses, review discovery, and adequately prepare for trial.
3. Counsel was ineffective for failing to request severance from Applicant and Co-Defendant Samuels.
4. Counsel was ineffective for failing to convey plea negotiation information and failed to properly pursue plea negotiations as requested by Applicant.
5. Counsel was ineffective for failing to remove for cause potential juror #101 Eddie G. Myers, or use preemptive strike to remove juror.
6. Counsel was ineffective for not properly objecting or otherwise preserving for appellate review the prosecution's objection to defense Counsel's questioning of key witnesses Leon Coleman about Applicant having an affair with Coleman's wife.
7. Counsel was ineffective for failing to object to prosecutor asking State witness Lt. Daniels to bolster credibility of prosecution witnesses, and Samuel's statements.
8. Counsel was ineffective for not properly cross-examining state witness Montag Webb about prior inconsistent statements. Additionally, Counsel failed to properly cross-examine Samuels about inconsistent statements.
9. Counsel was ineffective for not objecting to, moving for mistrial and/or requesting curative instruction regarding Applicant's assertion of right to counsel when questioned by police.
10. Counsel was ineffective for not making a Bruton objection or moving for severance when Lt. Daniels and Investigator Bosdall relayed to the jury Applicant's codefendant's statements to the jury that incriminated applicant.
11. Counsel was ineffective for failing to properly advise Applicant with respect to Applicant's decision to testify.
12. Counsel was ineffective for failing to handle, prepare for and object to co-defendant Samuel's testimony which incriminated Applicant substantially.
13. Counsel was ineffective for failing to object or move for mistrial when co-defendant Samuels testified that the Applicant had assaulted him (Samuels) and others, was a violent person, "was a fighter" and that Samuels was afraid of him (Applicant).

14. Counsel was ineffective for failing to properly object and prepare for Co-Defendant's testimony and present rebuttal case and response to such testimony incriminating the Applicant.
15. Counsel was ineffective for failing to object or preserve for appellate review prosecutions pitting [Applicant's] testimony and credibility against other witnesses.
16. Counsel was ineffective for failing to object to the court's "inferred malice" instruction. The Court instructed the jury that it would infer malice based on use or brutal force on victim.
17. Counsel was ineffective for failing to request "mere presence" instruction be charged to the jury.
18. [Appellate] Counsel was ineffective for failing to brief and argue on appeal the following issues:
 - i. Court erred by restricting cross-examination of witness Leon Coleman related to bias Coleman had against Applicant due to Applicant having an affair with Coleman's wife.
 - ii. Court erred restricting cross-examination of cooperating witness Montag Webb related to the witness's tattoos.
 - iii. Court erred by denying attorney for Applicant request to do recross cooperating witness Montag Webb about prior inconsistent statements. (Trial pg. 147).
 - iv. Court erred by refusing to allow the Applicant to present rebuttal testimony/evidence in response to co-defendant Samuel's testimony and the prosecutions rebuttal case. (Trial pg. 422-25).
 - v. Court erred in denying Applicants request for "self-defense" instruction (Trial. pg. 425). There was evidence that victim had a firearm and threatened applicant and others prior to incident.
19. Rule 5 / Brady violation

On June 26, 2019, Applicant, through his retained PCR attorney, Dayne Phillips, filed an amended application asserting the following claims:

Ineffective Assistance of Trial Counsel

1. Trial Counsel failed to conduct a reasonable investigation and to develop all available, relevant, and admissible or mitigating evidence in preparation of Applicant's defense.
2. Trial Counsel failed to interview critical witnesses who could have challenged the credibility of the State's witness and could have undermined the State's evidence when it was reasonable and necessary to do so in preparation for trial.
3. Trial Counsel failed to convey a plea offer to Applicant and failed to pursue a plea negotiations as requested by Applicant.
4. Trial Counsel failed to move for severance pursuant to Bruton v. United States, 391 U.S. 123 (1968) because admission of Applicant's co-defendant's statements violated the Confrontation Clause.

5. Trial Counsel failed to move to strike potential jury #101 Eddie G. Myers for cause or use a preemptory strike to remove juror when it was reasonable and necessary.
6. Trial Counsel failed to object to inadmissible and unduly prejudicial evidence during Applicant's trial, thereby failing to preserve these issues for appellate review and denying Applicant a fair trial.
7. Trial Counsel failed to object [to] the Prosecution's bolstering of the State's witnesses.
8. Trial Counsel failed to properly cross-examine the State's witness, including but not limited to Montag Webb and Letroy Samuels, regarding inconsistent statements and impeachment evidence.
9. Trial Counsel failed to properly cross-examine the State's witness, Montag Webb, regarding possible bias and motives for testifying against Applicant, specifically, questioning Montag Webb about promises in exchange for his testimony.
10. Trial Counsel failed to object and move for a mistrial and/or request for a curative instruction regarding Applicant's assertion of his right to counsel when interrogated by law enforcement.
11. Trial Counsel failed to properly argue against and preserve for appellate review the Prosecutor's objection for relevance during Trial Counsel's cross-examination of witness Leon Coleman related to the witness's possible bias against Applicant for having an affair with his wife.
12. Trial Counsel failed to properly argue against and preserve for appellate review the Prosecutor's objection for asked and answered during Trial Counsel's cross-examination of witness Montag Webb related to the meaning of his tear-drop tattoos.
13. Trial Counsel failed to properly advise Applicant regarding his right/decision to testify at trial.
14. Trial Counsel failed to move for a mistrial and/or curative instruction when Applicant's co-defendant testified that Applicant was violent, had assaulted him and other people, and that he was afraid of Applicant.
15. Trial Counsel failed to object to and move to strike the Prosecutor's pitting of Applicant's testimony and credibility of other witnesses.
16. Trial Counsel failed to properly object to the Trial Court's improper "inferred malice" instruction to the jury.
17. Trial Counsel failed to request a jury instruction for mere presence.
18. Trial Counsel failed to adequately prepare for trial by not interviewing witness(es) who could have testified regarding Applicant's good character and reputation when it was reasonable and necessary to present this evidence at trial and request a jury instruction on good character and reputation.

Ineffective Assistance of Appellate Counsel

1. Appellate Counsel failed to raise the issue of whether the Trial Court erred in refusing Trial Counsel to call and present rebuttal testimony in response to the Prosecution's rebuttal testimony and his co-defendant's testimony.
2. If found preserved for appellate review, Appellate Counsel failed to raise the issue of whether the Trial Court erred in instructing the jury that "excessive brutal force" is an inference of malice.

Applicant seeks Post-Conviction Relief by vacating his convictions and sentences and remanding the indictments for a new trial based on ineffective assistance of counsel.

For the purpose of this Return, Respondent incorporates the Clarendon Clerk of Court records, the records from the South Carolina Department of Corrections, the original and amended PCR application, and direct appeal records. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

III. SUMMARY DISMISSAL BASED ON STATUTE OF LIMITATIONS

Respondent submits that this application should be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. § 17-27-10 to -160. Specifically, the act requires as follows:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision on appeal, whichever is later.

S.C. Code Ann. § 17-27-45(A).

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. § 17-27-70(c) authorizes the Court to “grant a motion by either party for summary disposition of [an] application when it appears from the pleadings ... that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.”

Applicant was found guilty of burglary and murder on January 9, 2015. The Remittitur from the direct appeal was issued on April 28, 2017. The application was therefore due on April 29, 2018. This application was filed on June 12, 2018, beyond the statutory filing period. Applicant has failed to allege he is entitled to equitable tolling or any other reason that he is entitled to proceed forward with this untimely application. Therefore, the application should be summarily dismissed for failure to file within the time mandated by Uniform Post-Conviction Procedure Act.

IV. RESPONSE TO ANY AND ALL OTHER ALLEGATIONS

Each and every allegation contained within the application not hereinbefore expressly admitted, qualified or explained is hereby denied.

V. RETURN TO APPLICANT'S MOTION FOR LEAVE TO OBTAIN DISCOVERY

Applicant, through his retained post-conviction relief counsel, has filed a "Motion for Leave to Obtain Discovery" with this Court requesting court approval to initiate the discovery process. Pursuant to § 17-27-150 of the South Carolina Code of Laws, Applicant may not invoke formal discovery processes to issue subpoenas or otherwise obtain discovery materials unless granted leave from the Court upon a showing of good cause. Applicant has not set forth any particular items he wishes to obtain. Furthermore, discovery is not necessary or appropriate in this case as Applicant's application was filed after the statute of limitations expired.

Based on the above reasons, Respondent respectfully requests that this Court deny Applicant's motion as Applicant has not shown good cause to invoke discovery. Alternatively, should this Court deny Respondent's motion to dismiss Applicant's PCR action and see fit in its discretion to grant Applicant's request to invoke the discovery process, Respondent respectfully

requests this Court enter a formal order outlining and limiting the scope of the investigation to the specific, detailed items which Applicant seeks to obtain.

VI. REQUEST FOR SUMMARY DISMISSAL

WHEREFORE, Respondent moves to summarily dismiss the application because it was filed after the statute of limitations had expired.

VII. REQUEST TO DENY MOTION FOR LEAVE TO OBTAIN DISCOVERY

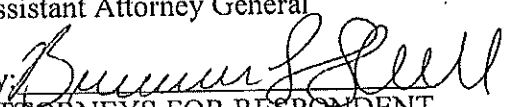
WHEREFORE, Respondent requests this Court deny Applicant's motion for leave to obtain discovery because Applicant has not shown good cause to invoke discovery as Applicant filed his PCR application after the statute of limitations had expired, and as Applicant has not identified what discovery he seeks.

Respectfully submitted,

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

BRIANNA L. SCHILL
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

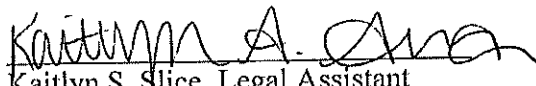
February 10th, 2020

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CLARENDON	)	
	)	
	)	2018-CP-14-0233
	)	
JONATHAN CODY NEWMAN, #362601	)	
	)	
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 and Motion to Dismiss and Return to Applicant's Motion for Leave to Obtain Discovery in a PCR Action** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Dayne C. Phillips, Esquire
Price Benowitz, LLP.
1614 Taylor Street, Suite D
Columbia, South Carolina 29201

DATED this 10th day of February 2020.


Kaitlyn S. Slice, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CLARENDON) **THIRD JUDICIAL CIRCUIT**

Jonathan Cody Newman,) Case No. **2018-CP-14-00233**
Applicant)

v.

State of South Carolina.

Defendant, **CLARENDON COUNTY, SC**

CERTIFIED TRUE COPY
OF ORIGINAL FILED IN THIS OFFICE
DATE 3/5/18
Bauleh B. Roberts
CLERK OF COURT

APPLICANT'S REPLY BRIEF AND
MOTION TO DENY RESPONDENT'S
PROPOSED ORDERS OF DISMISSAL

REQUEST FOR HEARING

TO: THE HONORABLE KRISTI F. CURTIS

The above-named Applicant, by and through the undersigned Counsel, respectfully moves to deny the Respondent's proposed Orders of Dismissal and respectfully requests an evidentiary hearing based on the following reasons:

(1) This Court should deny Respondent's request for summary dismissal of the PCR application because there is a genuine issue of material fact for the Court's consideration (e.g., whether to allow tolling of the statute of limitations, necessitating an evidentiary hearing to present evidence and arguments to the Court), and Respondent is not entitled to judgment as a matter of law. *See* S.C. Code § 17-27-70(b) and (c) (Court procedure on receipt of application); *See generally Pelzer v. State*, 378 S.C. 516, 521, 662 S.E.2d 618, 620-621 (Ct. App. 2008) (addressing the issue of whether the S.C. Court of Appeals should remand a case for a hearing to determine if the statute of limitations should be equitably tolled).

(2) "Extraordinary circumstances" prevented Applicant from filing the PCR application despite his diligence. Specifically, the State of South Carolina prevented Applicant from timely filing his original, signed and notarized PCR application for two reasons: (A) The South Carolina Department of Corrections withheld his legal documents that included his original PCR application;

and (B) SCDC kept all inmates on lockdown after the riot and gruesome murders at Lee County Correctional Institution on April 15, 2018 (i.e., Applicant was unable to obtain vital information for filing the claim). *See generally Pelzer*, 378 S.C. at 521, 662 S.E.2d at 620-621.

(3) In his Amended Application for Post-Conviction Relief, Applicant attached the **Receipt of Legal Correspondence Verification** dated June 14, 2018, noting the South Carolina Department of Corrections withheld his legal property from him until June 7, 2018, which contained his original PCR application along with the required Verification. **Notably, the required Verification form was notarized by Debra Eastridge on June 16, 2017**, which is compelling evidence that the State of South Carolina prevented Applicant from filing the original application by withholding it from him and subsequently preventing him from filing the application while on lockdown despite his efforts and intention to file within the statutory time-limits. *See generally Pelzer*, 378 S.C. at 521, 662 S.E.2d at 620-621 (summarizing the doctrine of equitable tolling: “The time requirements in lawsuits between private litigants are customarily subject to equitable tolling if **such tolling is necessary to prevent unfairness to a diligent plaintiff**. However, equitable tolling, which allows a plaintiff to initiate an action beyond the statute of limitations deadline, **is typically available only if the claimant was prevented in some extraordinary way from exercising his or her rights**, or, in other words, if the relevant facts present sufficiently rare and exceptional circumstances that would warrant application of the doctrine.”) (citations omitted) (emphasis added).

(4) In the light most favorable to Applicant, an evidentiary hearing is reasonable and necessary to develop facts and present evidence for the Court’s consideration in determining whether to toll the statute of limitations for filing the PCR application based on Applicant’s arguments of “extraordinary circumstances” and “wrongdoing by the State.” *See generally Leamon v. State*, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005) (noting the following standard of

review in determining when summary dismissal is appropriate: “Summary dismissal of a PCR application without a hearing is appropriate only when (1) it is apparent on the face of the application that there is **no need for a hearing to develop any facts** and (2) the applicant is not entitled to relief When considering the State's motion for summary dismissal of an application, **where no evidentiary hearing has been held, the circuit court must assume facts presented by an applicant are true and view those facts in the light most favorable to the applicant.** Similarly, when reviewing the propriety of a dismissal, this Court must view the facts in the same fashion. See S.C. Code Ann. § 17-27-80 (2003) (PCR actions are governed by usual rules of civil procedure).”) (citations omitted) (emphasis added); *Cf. Pelzer* , 378 S.C. at 522, 662 S.E.2d at 621.

(5) The Court must also assume the facts presented by Applicant are true because no evidentiary hearing has been held to develop a record and for the Court to weigh the credibility of the evidence. *See generally Leamon*, 363 S.C. at 434, 611 S.E.2d at 495.

(6) This Court should also deny Respondent’s Motion to Deny Applicant’s Motion for Leave to Obtain discovery without an evidentiary hearing since PCR actions are generally governed by the South Carolina Rules of Civil Procedure. Applicant has retained a private investigator to assist in the necessary investigation. Notably, Applicant is unable to prove the second prong of seeking post-conviction relief (i.e., prejudice) without conducting an independent investigation and his request to obtain and inspect critical impeachment evidence is reasonable and necessary in the fair administration of justice. *See* S.C. Code § 17-27-150(A).

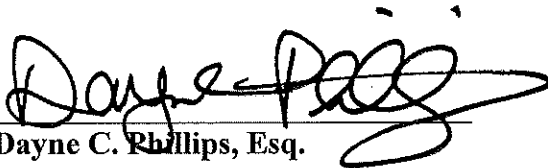
(7) Respondent also did not timely file a Return within thirty (30) days or within a further time specified by the Court as required by *See* S.C. Code § 17-27-70(b) (providing, in relevant part: “(Within thirty days after the docketing of the application, or within any further time the court may fix, the State shall respond by answer or by motion which may be supported by

affidavits.”). Notably, Applicant filed an Amended Application for Post-Conviction Relief on July 5, 2019, and a Motion for Leave to Obtain Discovery on February 6, 2020, before Respondent submitted the State’s Return and request for summary dismissal occurring 607 days (more than 1.5 years) after the filing of Applicant’s PCR application on June 12, 2018.

CONCLUSION

Based on the foregoing reasons, Applicant respectfully moves to deny the Respondent’s proposed Orders of Dismissal and respectfully requests an evidentiary hearing to present evidence and arguments in support of equitable tolling of the statute of limitations.

Sincerely,


Dayne C. Phillips, Esq.

PRICE BENOWITZ LLP
1614 Taylor Street, Suite D.
Columbia, SC 29201
O: 803-272-4503
C: 803-807-0234
F: 803-380-8035
dayne@pricebenowitz.com

Enclosures (PCR Applications)

ATTACHMENTS

**CERTIFIED TRUE COPY
OF ORIGINAL FILED IN THIS OFFICE**

DATE 6/12/2018

Bentley H. Roberts

CLERK OF COURT
CLARENDON COUNTY, SC

CLERK OF COURTS
CLARENDON COUNTY, SC

2018 JUN 11 PM 2:20

CASE #2018-CP-14-00233

STATE OF SOUTH CAROLINA

County of Clarendon

In the Court of Common Pleas

Jonathan Cody Newman 362601
Full name and prison number (if any) of Applicant,

vs.

State of South Carolina
Name of Respondent.

**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 it clear to which question any such continued answer refers.

Since every application must be sworn to 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 applicant was convicted.

1. Place of detention Clarendon County, Manning SC
Clarendon County Detention Center/Broadriver Ct, Columbia SC
2. Name and location of Court which imposed sentence General Sessions, Clarendon
County, Manning SC
3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:
 - (a) Murder: 2013-GS-14-0293
 - (b) Burglary 1st: 2013-GS-14-0293
 - (c) _____
4. The date upon which sentence was imposed and the terms of the sentence:
 - (a) Murder: 35 years concurrent with all charges
 - (b) Burglary: 30 years concurrent with all charges
 - (c) _____

5. Check whether a finding of guilty was made

(a) after a plea of guilty _____

(b) after a plea of not guilty yes found guilty ✓

(c) after a plea of nolo contendere _____

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

yes

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

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

i. South Carolina Court of Appeals

ii. _____

iii. _____

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

i. Appeal Dismissed

ii. _____

iii. _____

(c) the date of each such result:

i. April 5th 2017

ii. _____

iii. _____

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

i. _____

ii. _____

iii. _____

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

(a) _____

(b) _____

(c) _____

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

(a) My constitutional right to effective counsel was violated

(b) _____

(c) _____

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

(a) counsel failed to conduct adequate investigation and prepare for trial

(b) _____

(c) _____

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

- (a) any petition in a State Court under South Carolina Law? _____
- (b) any petitions in State or Federal Courts for habeas corpus or post-convictions relief? _____
- (c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (7)? _____
- (d) any other petitions, motions or applications in this or any other Court? _____

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

(a) the specific nature thereof:

- i. _____
- ii. _____
- 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. _____
- 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. _____

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

NO

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

(a) which grounds have been presented:

- i. _____
- ii. _____
- iii. _____

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

- i. _____
- ii. _____
- iii. _____

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

- (a) I was unfamiliar with the procedures of law
- (b) _____
- (c) _____

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

- (a) your arraignment and plea? _____
- (b) your trial, if any? yes: Eleazar Carter
- (c) your sentencing? yes: Eleazar Carter
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? yes: Robert Dudek
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? _____

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

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

- i. Eleazar Carter, 105 South Brooks Street, PO Box 187, Manning SC 29102
- ii. Robert Dudek, 1330 Lady Street, Suite 401, Columbia SC
- iii. _____

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

- i. Mr. Carter: during my trial and sentencing
- ii. Mr. Dudek: during my direct appeal
- iii. _____

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

New trial or time reconsideration/sentence reconsideration

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

NO

Newman vs. StateAttached Pages / PCR 3-110. Facts supporting grounds for Relief

10(a)(1) Counsel was ineffective for failing to properly investigate, interview witnesses, review discovery, and adequately prepare for trial.

10(a)(2) Counsel was ineffective for failing to request Severance from applicant and Co-Defendant Samuels.

10(a)(3) Counsel was ineffective for failing to convey plea negotiation information and failed to properly pursue plea negotiations as requested by Applicant.

10(a)(4) Counsel was ineffective for failing to remove for cause potential juror #101 Eddie G. Myers, or use preemptory strike to remove juror.

10(a)(5) Counsel was ineffective for not properly objecting or otherwise preserving for appellate review the prosecution's objection to defense Counsel's questioning of Key Witness Leon Coleman about applicant having an affair with Coleman's wife.

10(a)(6) Counsel was ineffective for failing to object to prosecutor asking state witness Lt. Daniels to bolster credibility of prosecution Witnesses, and Samuels statements.

Newman vs. StateAttached Pages/PCB 3-2

10(a)(7) Counsel was ineffective for not properly cross examining State Witness Montag Webb about prior inconsistent statements. Additionally, counsel failed to properly cross examine Samuels about inconsistent statements.

10(a)(8) Counsel was ineffective for not objecting to, moving for mistrial and/or requesting curative instruction regarding applicant's assertion of right to counsel when questioned by police.

10(a)(9) Counsel was ineffective for not properly cross examining cooperating witness Webb about perceived promises in exchange for his testimony.

10(a)(10) Counsel was ineffective for not making a Bruton objection or moving for severance when Lt. Daniels and investigator Rosdall relayed to the jury applicant's co-defendants statements to the jury that incriminated applicant.

10(a)(11) Counsel was ineffective for failing to properly advise applicant with respect to applicant's decision to testify.

Newman vs. StateAttached Pages/PCR 3-3

10(a)(12) Counsel was ineffective for failing to handle, prepare, for and object to Co-Defendants Samuels testimony which incriminated applicant substantially.

10(a)(13) Counsel was ineffective for failing to object or move for mistrial when Co-Defendants Samuels testified that the applicant had assaulted him (Samuels) and others, was a violent person, "was a fighter" and that Samuels was afraid of him. (Applicant)

10(a)(14) Counsel was ineffective for failing to properly object and prepare for Co-Defendants testimony and present rebuttal case and response to such testimony incriminating applicant.

10(a)(15) Counsel was ineffective for failing to object or preserve for appellate review prosecution's pitting appellates review prosecutions pitting appellates testimony and creditability against other witnesses.

10(a)(16) Counsel was ineffective for failing to properly impeach Co-Defendant Samuels ~~and~~ trial testimony with his numerous inconsistent statements.

10(a)(17) Counsel was ineffective for failing to object to the courts "Inferred Malice" instruction. The court instructed the jury that it could infer malice based on use of brutal force on victim.

Newman vs. StateAttached Pages/PCB 3-4

10(a)(8) Counsel was ineffective for failing to request "mere presence" instruction be charged to the jury.

10(b)(1) Appellate Counsel was ineffective for failing to brief and argue on appeal the following issues:

A. Court erred restricting cross-examination of witness Leon Coleman related to bias Coleman had against Applicant due to Applicant having an affair with Coleman's wife. (Tr. pg. 53-54)

B. Court erred restricting cross-examination of cooperating witness Montag Webb related to the witness's tattoos. (Tr. pg. 87)

C. Court erred denying attorney for applicant request to do Recross cooperating witness Montag Webb about prior inconsistent statements. (Tr. pg. 147)

D. Court erred by refusing to allow the Applicant to present rebuttal testimony/evidence in response to co-defendants Samuel's testimony and the prosecution's rebuttal case. (Tr. pg. 422-25)

Newman vs. StateAttached Pages / PCB 3-5

10 (b)(1) (cont'd):

F. Court erred in denying Applicant's request for "self-defense" instruction (Tr. pg. 425). There was evidence that victim had firearm and threatened applicant and others prior to incident.

11(c)(1) Applicant alleges that he was deprived a fair and impartial trial and Due Process of law based on the cumulative effect of multiple trial errors, ineffective assistance of trial counsel and completely inadequate appellate counsel filing Anders Brief.

Additionally, Applicant has reason to believe that the prosecution failed to turn over favorable material evidence prior to trial, or else counsel for applicant for Applicant failed to apprise Applicant with respect to the state's discovery materials.

STATE OF SOUTH CAROLINA

County of

Clarendon

VERIFICATION

I, Jonathan Cody Newman, 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.


SWORN to and subscribed before me this 8

day of

June

, 19

2018

Jennifer W. Washburn (L.S.)
Notary Public

My Commission Expires: March 8, 2028

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

I, Jonathan Cody Newman, 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 therefor.



Applicant

SWORN or affirmed to and subscribed before me this

day of

June

, 19

2018

Jennifer W. Washburn
Notary Public

My Commission Expires

March 8, 2028

STATE OF SOUTH CAROLINA

COUNTY OF CLARENDON

Jonathan Cody Newman,

Applicant,

v.

State of South Carolina.

Defendant.

IN THE COURT OF COMMON PLEAS

THIRD JUDICIAL CIRCUIT

Case No. 2018-CP-14-00233

AMENDED APPLICATION FOR
POST-CONVICTION RELIEF

As required by Rule 71.1(b), SCRPC, this application is in conformity with Form 5 of the SCRPC Appendix of Forms.

1. Place of Detention: Applicant is detained in the South Carolina Department of Corrections at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210.
2. Name and location of Court which imposed sentence: Clarendon County Court of General Sessions, 3 Keitt Street, SC 29102.
3. Name(s) of co-defendant(s) (if any): Letroy Samuels (joint trial).
4. The indictment number(s) upon which and the offenses for which sentence was imposed:
 - (a) 2013-GS-14-0293 (Murder).
 - (b) 2013-GS-14-0293 (Burglary, First Degree).
5. The date upon which the sentence was imposed and the terms of the sentence:
 - (a) January 9, 2015.
 - (b) Thirty-five (35) years imprisonment for the Murder conviction.
 - (c) Thirty (30) years imprisonment for the Burglary, First Degree, conviction.
 - (d) Concurrent sentences.
6. A finding of guilty was made:
 - (a) After a jury trial before the Honorable W. Jeffrey Young.

7. Did you appeal from the judgment of conviction and/or the imposition of the sentence? Yes.
8. If you answered "yes" to number (7), list:
 - (a) The name of each Court to which you appealed:
 - i. South Carolina Court of Appeals.
 - (b) The result in each Court to which you appealed:
 - i. Appeal Dismissed ("Dismissed after review pursuant to *Anders v. California*, 386 U.S. 738 (1967)").
 - (c) The date of each result:
 - i. April 5, 2017 (Unpublished opinion filed by the S.C. Court of Appeals).
 - (d) If known, citations of any written opinions or ordered entered pursuant to such result:
 - i. *State v. Newman*, Op. No. 2017-UP-140 (S.C. Ct. App. filed April 5, 2017).
9. If you answered "no" to number (7), state your reasons for not appealing:
 - (a) Not applicable. Applicant filed a Direct Appeal of his convictions and sentences.
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
 - (a) Trial Counsel denied Applicant's right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 3 and 14 of the South Carolina Constitution. See S.C. Code § 17-27-20(A)(1), (4), and (6). Specifically, Trial Counsel's unreasonably deficient performance prejudiced Applicant because there is a reasonable probability that, but for Trial Counsel's errors, the result of the proceeding would have been different. See *Strickland v. Washington*, 466 U.S. 668 (1984).
 - (b) Appellate Counsel denied Applicant's right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States

Constitution and Article I, Sections 3 and 14 of the South Carolina Constitution. Specifically, Appellate Counsel's unreasonably deficient performance prejudiced Applicant because there is a reasonable probability that, but for Trial Counsel's errors, the result of the proceeding would have been different. See *Strickland v. Washington*, 466 U.S. 668 (1984); *Evitts v. Lucey*, 469 U.S. 387 (1985); *Simpkins v. State*, 303 S.C. 364, 401 S.E.2d 142 (1991).

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

(a) Trial Counsel's acts or omissions of ineffective assistance of counsel include but are not limited to the following allegations:

(i) Trial Counsel failed to conduct a reasonable investigation and to develop all available, relevant, and admissible or mitigating evidence in preparation of Applicant's defense. See *Wiggins v. Smith*, 539 U.S. 510 (2003).

(ii) Trial Counsel failed to interview critical witnesses who could have challenged the credibility of the State's witnesses and could have undermined the State's evidence when it was reasonable and necessary to do so in preparation for trial. See *Lounds v. State*, 380 S.C. 454, 670 S.E.2d 646 (2008); *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008); *Von Dohlen v. State*, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004); *Reeves v. State*, 415 S.C. 366, 782 S.E.2d 747 (Ct. App. 2015).

(iii) Trial Counsel failed to convey a plea offer to Applicant and failed to pursue plea negotiations as requested by Applicant.

(iv) Trial Counsel failed to move for severance pursuant to *Bruton v. United States*, 391 U.S. 123 (1968) because admission of Applicant's co-defendant's statements violated the Confrontation Clause.

- (v) Trial Counsel failed to move to strike potential jury #101 Eddie G. Myers for cause or use a peremptory strike to remove juror when it was reasonable and necessary.
- (vi) Trial Counsel failed to object to inadmissible and unduly prejudicial evidence during Applicant's trial, thereby failing to preserve these issues for appellate review and denying Applicant a fair trial.
- (vii) Trial Counsel failed to object the Prosecution's bolstering of the State's witnesses.
- (viii) Trial Counsel failed to properly cross-examine the State's witnesses, including but not limited to Montag Webb and Letroy Samuels, regarding inconsistent statements and impeachment evidence.
- (ix) Trial Counsel failed to properly cross-examine the State's witness, Montag Webb, regarding possible bias and motives for testifying against Applicant. Specifically, questioning Montag Webb about promises in exchange for his testimony.
- (x) Trial Counsel failed to object and move for a mistrial and/or request for a curative instruction regarding Applicant's assertion of his right to counsel when interrogated by law enforcement.
- (xi) Trial Counsel failed to properly argue against and preserve for appellate review the Prosecutor's objection for relevance during Trial Counsel's cross-examination of witness Leon Coleman related to the witness's possible bias against Applicant for having an affair with his wife.
- (xii) Trial Counsel failed to properly argue against and preserve for appellate review the Prosecutor's objection for asked and answered during Trial Counsel's cross-examination of witness Montag Webb related to the meaning of his tear-drop tattoos.

- (xiii) Trial Counsel failed to properly advise Applicant regarding his right/decision to testify at trial.
 - (xiv) Trial Counsel failed to move for a mistrial and/or a curative instruction when Applicant's co-defendant testified that Applicant was violent, had assaulted him and other people, and that he was afraid of Applicant.
 - (xv) Trial Counsel failed to object to and move to strike the Prosecutor's pitting of Applicant's testimony and credibility of other witnesses.
 - (xvi) Trial Counsel failed to properly object to the Trial Court's improper "inferred malice" instruction to the jury.
 - (xvii) Trial Counsel failed to request a jury instruction for "mere presence".
 - (xviii) ~~Trial Counsel failed to adequately prepare for trial by not interviewing~~ witness(es) who could have testified regarding Applicant's good character and reputation when it was reasonable and necessary to present this evidence at trial and request a jury instruction on good character and reputation. *See State v. Harrison*, 343 S.C. 165, 539 S.E.2d 71 (Ct. App. 2000); *Cf. Stalk v. State*, 383 S.C. 559, 681 S.E.2d 592 (2009).
- (b) Appellate Counsel's acts or omissions of ineffective assistance of counsel include but are not limited to the following allegations:
- (i) Appellate Counsel failed to raise the issue of whether the Trial Court erred in refusing Trial Counsel to call and present rebuttal testimony in response to the Prosecution's rebuttal testimony and his co-defendant's testimony.
 - (ii) If found preserved for appellate review, Appellate Counsel failed to raise the issue of whether the Trial Court erred in instructing the jury that "excessive brutal force"

is an inference of malice.

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 Federal Habeas Corpus or Post-Conviction Relief? No. Applicant has not previously filed an application for Post-Conviction Relief or Petition for Writ of Habeas Corpus in either state or federal court.
 - (c) Any petition in the Supreme Court of the United States for certiorari other than petitions, if any, already specified in number (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 number (12), list with respect to each petition, motion, or application:
 - (a) The specific nature thereof: Not applicable.
 - (b) The name and location of the Court in which each was filed: Not applicable.
 - (c) The disposition thereof: Not applicable.
 - (d) The date of each such disposition: Not applicable.
14. Has any ground set forth in number (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 number (14), identify:
 - (a) The grounds which have been presented: Not applicable.
 - (b) The proceedings in which each ground was raised: Not applicable.
16. If any ground set forth in number (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) Post-Conviction Relief is the proper forum and remedy for these allegations because the grounds for relief presented in this application are evidence of ineffective assistance of counsel, issues not preserved for appellate review, and/or

were not appropriate to raise or were not properly raised on Direct Appeal. Applicant is requesting an evidentiary hearing to present evidence in support of his claims of ineffective assistance of counsel. See Pelzer v. State, 378 S.C. 516, 662 S.E.2d 618 (Ct. App. 2008); Mose v. State, 420 S.C. 500, 803 S.E.2d 718 (2017).

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

(a) Your plea hearing? Not applicable.

(b) Your trial? Yes.

(c) Your sentencing? Yes.

(d) Your appeal, if any, from the judgment of conviction and/or imposition of the sentence?
Yes.

(e) Preparation, presentation or consideration of any petitions, motions, or application with
_____ respect to this conviction, which you filed? Yes.

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

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

(i) Eleazer Carter, Esq., 105 South Brooks Street, Manning, SC 29102.

(ii) Robert Dudek, Esq., PO Box 11589, Columbia, SC 29211.

(iii) Dayne C. Phillips, 1614 Taylor Street, Ste D., Columbia, SC 29201.

(b) The proceedings at which each attorney represented you:

(i) Eleazor Carter represented Applicant at trial.

(ii) Robert Dudek represented Applicant on appeal.

(iii) Dayne C. Phillips is currently representing Applicant on this application for Post-
Conviction Relief.

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

Applicant seeks Post-Conviction Relief by vacating his convictions and sentences and

remanding the indictments for a new trial based on ineffective assistance of counsel.

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

No. Applicant is not under sentence from any other court.

ATTACHMENTS

ARREST WARRANT

2013A1420100230

STATE OF SOUTH CAROLINA

☐ County/ ☒ Municipality of
MANNINGTHE STATE
against

JONATHAN CODY NEWMAN

Address: [REDACTED]
 MA [REDACTED]
 Phone: [REDACTED] SSN: [REDACTED]
 Sex: M Race: W Height: 6-1 Weight: 195
 DL State: SC DL#: [REDACTED]
 DOB: [REDACTED] Agency OR#: SC0140100
 Prosecuting Agency: MANNING POLICE DEPARTMENT
 Prosecuting Officer: LT. S. K. DANIELS
 Offense: MURDER
 Offense Code: 0116
 Code/Ordinance Sec: 16-03-0010, 16-03-0020

This warrant is CERTIFIED FOR SERVICE in the
☐ County/ ☒ Municipality of
 MANNING. The accused
 is to be arrested and brought before me to be
 dealt with according to law.

Signature of Judge

(L.S.)

Date: 08/05/2013

RETURN

A copy of this arrest warrant was delivered to
 defendant JONATHAN CODY NEWMAN
 on 08.06.13 1519

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:
 MANNING MUNICIPAL COURT
 36 WEST BOYCE STREET
 MANNING, SC 29102

STATE OF SOUTH CAROLINA

☐ County/ ☒ Municipality of
MANNING

AFFIDAVIT

Form Approved by
S.C. Attorney General
April 13, 2003
SCCA 518

Personally appeared before me the affiant LT. S. K. DANIELS who
 being duly sworn deposes and says that defendant JONATHAN CODY NEWMAN
 did within this county and state on 05/26/2013 violate the criminal laws of the
 State of South Carolina (or ordinance of ☐ County/ ☒ Municipality of MANNING)
 in the following particulars:

DESCRIPTION OF OFFENSE: 16-03-0010, 16-03-0020 / MURDER

I further state that there is probable cause to believe that the defendant named above did commit
 the crime set forth and that probable cause is based on the following facts:

THAT ON MAY 26, 2013 THE DEFENDANT ALONG WITH TWO CO-DEFENDANTS DID COMMIT THE OFFENSE OF MURDER.
 THE DEFENDANT ALONG WITH THE CO-DEFENDANTS DID KILL THE VICTIM WITH MALICE AFORETHOUGHT. THE
 DEFENDANT ALONG WITH THE CO-DEFENDANTS DID SEVERELY BEAT THE VICTIM ULTIMATELY CAUSING HIS DEATH ON
 JULY 29, 2013. PROBABLE CAUSE IS BASED ON STATEMENTS MADE BY CO-DEFENDANTS AND THE PRELIMINARY
 AUTOPSY THAT STATES BLUNT FORCE INJURY TO THE HEAD. THIS INCIDENT OCCURRED IN THE CITY OF MANNING,
 CLARENDON COUNTY, SC. THE AFFIANT ALONG WITH WITNESSES WILL PROVE THE SAME

Signature of Affiant

Affiant's Address 42 WEST BOYCE STREET
 MANNING SC 29102
 Affiant's Telephone (803) 435-8859

STATE OF SOUTH CAROLINA

☐ County/ ☒ Municipality of
MANNING

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER IN THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY;

It appearing from the above affidavit that there are reasonable grounds to believe that
 on 05/26/2013 defendant JONATHAN CODY NEWMAN

did violate the criminal laws of the State of South Carolina (or ordinance of

☐ County/ ☒ Municipality of MANNING) as set forth below.

DESCRIPTION OF OFFENSE: MURDER / MURDER

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said
 defendant and bring him or her before me forthwith to be dealt with according to the law. A copy of this Arrest Warrant shall be delivered
 to the defendant at the time of its execution, or as soon thereafter as is practicable.

Sworn to and subscribed before me

on 08/05/2013

JAMES DINGLE

Judge Code: 200

Judge's Address 36 WEST BOYCE ST
 MANNING SC 29102

Judge's Telephone 803-433-0050

Issuing Court: ☐ Magistrate ☒ Municipal ☐ Circuit

Case: 13-2843

ORIGINAL

App.669

App. 670

Form Approved by
S.C. Attorney General
April 13, 2003
SCCA 518

ARREST WARRANT
2013A1420100156

STATE OF SOUTH CAROLINA
☐ County/ ☒ Municipality of
MANNING

THE STATE
against



JONATHAN CODY NEWMAN
Address: [REDACTED]
Phone: [REDACTED] SSN: [REDACTED]
Sex: M Race: W Height: 6-1 Weight: 195
DL State: SC DL #: [REDACTED]
DOB: [REDACTED] Agency ORI#: SC0140100
Prosecuting Agency: MANNING POLICE DEPARTMENT
Prosecuting Officer: LT. S. K. DANIELS
Offense: BURGLARY 1ST
Offense Code: 0079
Code/Ordinance Sec. 16-11-0311

This warrant is CERTIFIED FOR SERVICE in the
☐ County/ ☒ Municipality of
MANNING. The accused
is to be arrested and brought before me to be
dealt with according to law.

Signature of Judge _____ (L.S.)
Date: 05/28/2013

RETURN
A copy of this arrest warrant was delivered to
defendant JONATHAN CODY NEWMAN
on 6-5-2013
Signature of Constable/Law Enforcement Officer _____

RETURN WARRANT TO:
MANNING MUNICIPAL COURT
36 WEST BOYCE STREET
MANNING, SC 29102

STATE OF SOUTH CAROLINA
☐ County/ ☒ Municipality of
MANNING

AFFIDAVIT

Personally appeared before me the affiant LT. S. K. DANIELS who
being duly sworn deposes and says that defendant JONATHAN CODY NEWMAN
did within this county and state on 05/26/2013 violate the criminal laws of the
State of South Carolina (or ordinance of ☐ County/ ☒ Municipality of MANNING)
In the following particulars:
DESCRIPTION OF OFFENSE: 16-11-0311 / BURGLARY 1ST

I further state that there is probable cause to believe that the defendant named above did commit
the crime set forth and that probable cause is based on the following facts:
THAT ON MAY 26, 2013 THE DEFENDANT DID COMMIT THE OFFENSE OF BURGLARY FIRST DEGREE. THE DEFENDANT
ALONG WITH A CO-DEFENDANT DID ENTER THE RESIDENCE OF THE VICTIM IN THE NIGHT TIME WITH THE INTENT TO
COMMIT A CRIME THEREIN. WHILE INSIDE THE DEFENDANT AND CO-DEFENDANT DID ASSAULT THE VICTIM AND TOOK A
HANDGUN FROM THE RESIDENCE. THIS INCIDENT OCCURRED IN THE CITY OF MANNING, CLARENDON COUNTY, SC. THE
AFFIANT ALONG WITH WITNESSES WILL PROVE THE SAME.

Signature of Affiant [Signature]
Affiant's Address 42 WEST BOYCE STREET
MANNING SC 29102
Affiant's Telephone (803) 435-8859

STATE OF SOUTH CAROLINA
☐ County/ ☒ Municipality of
MANNING

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER IN THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:
It appearing from the above affidavit that there are reasonable grounds to believe that
on 05/26/2013 defendant JONATHAN CODY NEWMAN
did violate the criminal laws of the State of South Carolina (or ordinance of
☐ County/ ☒ Municipality of MANNING) as set forth below:
DESCRIPTION OF OFFENSE: BURGLARY / BURGLARY (AFTER JUNE 20, 1985) - FIRST DEGREE

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said
defendant and bring him or her before me forthwith to be dealt with according to the law. A copy of this Arrest Warrant shall be delivered
to the defendant at the time of its execution, or as soon thereafter as is practicable.

Sworn to and subscribed before me
on 05/28/2013
[Signature] (L.S.)
JAMES DINGLE
Judge Code: 200

Judge's Address 36 WEST BOYCE ST
MANNING SC 29102
Judge's Telephone 803-433-0050

Issuing Court: ☐ Magistrate ☒ Municipal ☐ Circuit

Case: 13-2843

ORIGINAL

5 JUN 2013 16:23

WITNESSES

Sonia Daniels Manning Police Department

ARREST WARRANT NUMBER

2013A1420100230

2013A1420100156

2013A1420100157

2013A1420100231

ACTION OF GRAND JURY

True Bill

Cabrey Titic

Foreperson of Grand Jury

Date: 2/27/14

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2013-GS-14-0293

The State of South Carolina

County of CLARENDON

COURT OF GENERAL SESSIONS

February TERM 2014

THE STATE

vs.

JONATHAN CODY NEWMAN

LETROY SAMUELS

MONTAG LAMALL WEBB

(AMENDED) Indictment for

MURDER

BURGLARY, 1ST DEGREE

Ernest A. Finney III

ERNEST A. FINNEY, III, SOLICITOR

STATE OF SOUTH CAROLINA)
)
COUNTY OF CLARENDON)

(AMENDED) INDICTMENT FOR

MURDER

BURGLARY, 1ST DEGREE

At a Court of General Sessions convened on February 27, 2014, the Grand Jurors of
CLARENDON County present upon their oath:

COUNT ONE - MURDER

That Jonathan Cody Newman, *Expressed* and Montag Lamall Webb did in Clarendon County, on or about May 26, 2013, willfully, feloniously, and intentionally kill the victim, Anthony Wimberly, with malice aforethought, either express or implied, by severely beating the victim, and the victim did die as a proximate result of the injuries then and there sustained on or about July 29, 2013 in Clarendon County, in violation of Section 16-03-0010, S. C. Code of Laws (1976), as amended.

COUNT TWO - BURGLARY, 1ST DEGREE

That Jonathan Cody Newman, *Expressed* and Montag Lamall Webb, did in Clarendon County on or about May 26, 2013 enter the dwelling of Anthony Wimberly located at [REDACTED] without consent and with the intent to commit a crime therein and the entering or remaining in the dwelling occurred in the nighttime and/or when, in effecting entry or while in the dwelling or in immediate flight, the defendants caused physical injury to a non-participant in the crime and/or were armed with a deadly weapon and/or did use or threaten use of a dangerous instrument, all in violation of Section 16-11-0311(A), S.C. Code of Laws (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made
and provided.

Solicitor

Edward A. Finney III

STATE OF SOUTH CAROLINA)

)

IN THE COURT OF GENERAL
SESSIONS

COUNTY OF CLARENDON)

STATE OF SOUTH CAROLINA)

INDICTMENT NOS. 2013-GS-14-0293

vs.)

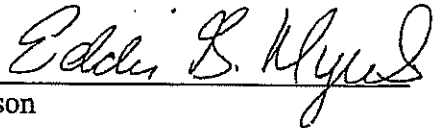
)

VERDICT FORM

JONATHAN CODY NEWMAN,)
DEFENDANT.)

_____)

1) As to the charge of Murder, we, the jury, unanimously find the Defendant:

☐ Not Guilty☒ Guilty2) As to the charge of Burglary, 1st Degree, we, the jury, unanimously find the Defendant:☐ Not Guilty☒ Guilty
ForepersonManning, South Carolina.
January 9, 2015.

App. 674

STATE OF SOUTH CAROLINA

COUNTY OF
STATE

Clarendon

VS.

Jonathan Cody Newman

AKA:

Race: 1 Sex: M Age: 20

DOB: [REDACTED] SS#: [REDACTED]

Address:

City, State, Zip:

DL#: SID#:

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

TO: Murder (30 years - Life)in violation of § 16-3-10 of the S.C. Code of Laws, bearing CDR Code # 0116☐ 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's initials)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.ATTEST: Ch Ryan

Durant, Christopher Ryan

78080
SC Bar#

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 35 days/months/years or ☐ under the Youthful Offender Act not to exceed yearsand/or to pay a fine of \$; provided that upon the service of days/months/years and/or paymentof \$; 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. W/ CT 2☒ 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.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered PTUPTotal: \$ plus 20% fee: \$

Payment Terms:

☐ Set by SCDPPPS

Recipient:

*Fine:

§ 14-1-206 (Assessments 107.5 %)		\$
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ <u>100.00</u>
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ <u>25.00</u>
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114(BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ca	\$
Proviso 90.5 (SCCJA Surcharge)	\$5	\$ <u>5.00</u>
3% to County (if paid in installments)		\$ <u>3.90</u>
TOTAL		\$ <u>133.90</u>

Clerk of Court/ Deputy Clerk

Court Reporter:

SCCA/217 (03/2011)

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2013-GS-14-0293A/W#: 2013A1420100230Date of Offense: 5/26/2013S.C. Code § : 16-03-0010CDR Code #: 0116

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADS days/hours Public Service EmploymentObtain 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 FundOther: ☐ Appointed PD or appointed other counsel,
§ 47.12 requires \$500 be paid to Clerk
during probation.

Presiding Judge

Judge Code: 2176Sentence Date: 11/9/2015

STATE OF SOUTH CAROLINA

COUNTY OF
STATE

Clarendon

VS.

Jonathan Cody Newman

AKA:

Race: 1 Sex: M Age: 20

DOB: SS#:

Address:

City, State, Zip:

DL#: SID#:

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

TO: Burglary, 1st Degree (15 years - Life)

in violation of § 16-11-311 of the S.C. Code of Laws, bearing CDR Code #

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC

w/minor 1st or Lewd Act)

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.ATTEST: *Ch. Ryan*

78080

Durant, Christopher Ryan

SC Bar#

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 30 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 by the State Department of Corrections.

§ 24-13-40 to be calculated and applied

☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

Total: \$ plus 20% fee: \$

Payment Terms:

☐ Set by SCDPPPS

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	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ 25.00
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114 (BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCJA Surcharge)	\$5	\$ 5.00
3% to County (if paid in installments)		\$ 3.90
TOTAL		\$ 133.90

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2013-GS-14-0293

A/W#: 2013A1420100156

Date of Offense: 5/26/2013

S.C. Code § : 16-11-0311

CDR Code #: 0079

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADS

PTUP

days/hours Public Service Employment

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, § 47.12 requires \$500 be paid to Clerk during probation.

Clerk of Court/ Deputy Clerk

Court Reporter:

SCCA/217 (03/2011)

Presiding Judge

Judge Code:

Sentence Date:

11/9/2015

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Clarendon County

William Jeffrey Young, Circuit Court Judge

RECEIVED

MAY 27 2016

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

JONATHAN CODY NEWMAN,

APPELLANT

APPELLATE CASE NO. 2015-000091

ANDERS BRIEF OF APPELLANT

ROBERT M. DUDEK
Chief Appellate Defender

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

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUE ON APPEAL.....	1
STATEMENT OF THE CASE.....	2
ARGUMENT	3
CONCLUSION	10
PETITION TO BE RELIEVED AS COUNSEL.....	11

TABLE OF AUTHORITIES**Cases**

<u>Pinckney v. State</u> , 368 S.C. 502, 629 S.E.2d 367 (2006)	9
<u>State v. Arnold</u> , 361 S.C. 386, 605 S.E.2d 529 (2004)	8
<u>State v. Bostick</u> , 392 S.C. 134, 708 S.E.2d 774 (2011)	8
<u>State v. Brown</u> , 103 S.C. 437, 88 S.E.2d 1 (1916)	8
<u>State v. Hyder</u> , 242 S.C. 372, 131 S.E.2d 96 (1963)	9
<u>State v. Lollis</u> , 343 S.C. 580, 541 S.E.2d 254 (2001)	8, 9
<u>State v. Martin</u> , 340 S.C. 597, 533 S.E.2d 572 (2000)	8
<u>State v. McHoney</u> , 344 S.C. 85, 544 S.E.2d 30 (2001)	8
<u>State v. Mitchell</u> , 341 S.C. 406, 535 S.E.2d 126 (2000)	8
<u>State v. Mouzon</u> , 231 S.C. 655, 99 S.E.2d 672 (1957)	1, 3, 9
<u>State v. Muhammed</u> , 338 S.C. 22, 524 S.E.2d 637 (Ct. App. 1999)	8
<u>State v. Pinckney</u> , 339 S.C. 346, 529 S.E.2d 526 (2000)	8
<u>State v. Schrock</u> , 283 S.C. 129, 322 S.E.2d 450 (1984)	8
<u>State v. Weston</u> , 367 S.C. 279, 625 S.E.2d 641 (2006)	8

STATEMENT OF ISSUE ON APPEAL

Whether the court erred by refusing to direct a verdict on the murder and burglary charges where the only evidence was that appellant or another man punched the decedent during a party, no one came to the decedent's assistance when he fell, and the decedent tragically died from the blow to the head two months later, since there was no evidence of malice, or Mouzon malice necessary for murder, and no evidence appellant entered the home of another with the intent to commit a crime therein?

STATEMENT OF THE CASE

Appellant was indicted by the Clarendon County Grand Jury for the offenses of murder and burglary in the first degree. His case was called to trial on January 6, 2015 before the Honorable W. Jeffery Young, and a jury. Appellant was tried with co-defendant Letroy Samuels. Eleazer Carter represented appellant. Harry Deyoe represented co-defendant Samuels. R. 1.

At the conclusion of the trial on January 9, 2015 the jury found appellant guilty on both charges. The jury acquitted co-defendant Samuels of both charges. R. 496, ll. 1-13. Judge Young sentenced appellant to thirty-five years for murder, and thirty years, concurrent, for burglary in the first degree. R. 505, l. 22 - 506, l. 5.

This appeal follows.

ARGUMENT

The court erred by refusing to direct a verdict on the murder and burglary charges where the only evidence was that appellant or another man punched the decedent during a party, no one came to the decedent's assistance when he fell, and the decedent tragically died from the blow to the head two months later, since there was no evidence of malice, or *Mouzon* malice necessary for murder, and no evidence appellant entered the home of another with the intent to commit a crime therein.

Relevant Facts

Appellant was only nineteen-years-old at the time the decedent tragically died from a punch to his head two months after he was hit. R. 313, ll. 2-6. The decedent was fifty-years-old, he was only 5'9 and he weighed 191 lbs. He died of a closed head injury two months after he was hit in the head. The decedent was able to open his eyes in the hospital in response to some stimulus, but he never regained consciousness in those two months. The state stressed during the trial of the fact that no one attempted to assist the decedent after he was injured during the party because they did not "want to get involved." While the morality of that attitude is certainly subject to question, it did not, as will be seen *infra*, provide evidence that the injury to the decedent was caused by the *mens rea* of malice aforethought. R. 195, l. 9 – 199: l. 14.

Appellant remembered that there was a lot of drinking going on during the party at the duplex that fatal day. Appellant remembered that a woman, Barbara, wanted him to get her another beer. Appellant said he was not able to get Barbara another beer because the decedent "stepped outside and I guess he got mad with me talking to Barbara, he was kind of drunk, told me he did not want any white people around his house." Appellant said: "I really did not know how to respond to what he said so I just sat there and tried to process it for a second . . . then I heard her [Barbara] in there saying 'you do not go out there with that gun.'" R. 325, l. 20 – 326,

l. 19. Appellant said he heard this statement because the doors "are not thick . . . my heart dropped sir, I stepped off of the porch and got to an area in the yard where if he did come outside with a gun I could run." R. 326, l. 14 - 327, l. 4.

Appellant remembered that Montag Webb, who pled guilty to voluntary manslaughter and burglary in this case, became angry with the decedent's statement that: "I do not want no white people at my house." Montag had a white father, and appellant testified that it was Montag who punched the decedent. R. 333, l. 21 - 334, l. 12.

Appellant remembered that co-defendant Samuels and Kevin Slater immediately ran when Montag hit the decedent. Appellant was in shock at the time, and he recalled that Montag dragged the decedent by his arms back into the house. Appellant remembered the door to the other side of the duplex was open but he did not enter. Appellant testified that he never touched the decedent during the party that evening. R. 335, l. 6 - 348, l. 1.

The testimony of Montag Webb, who pled guilty to voluntary manslaughter and burglary in the decedent's death, was incredible in its inconsistency, its admissions of lies to the police, and Montag's admission that he went into his "thief mode" when the decedent was knocked out by the punch. Montag admitted he ransacked the decedent's apartment looking for things to steal. In the light of his incredible testimony, Montag would find time to deny he hit the decedent even though he pled guilty to voluntary manslaughter and burglary. App. 57, ll. 9-21.

Montag testified that appellant's nickname was "J White." He said he was "cool" with appellant. R. 76, ll. 7-23. Co-defendant Samuels' nickname was "Sin." R. 56, l. 22 - 57, l. 4. Montag admitted that he never saw appellant hit the decedent. However, he claimed appellant was in the duplex at the time the decedent fell to the floor. R. 68, l. 18 - 72, l. 24. Montag saw blood on the decedent's face but "I did not see what happened to him." R. 73, ll. 6-15.

Montag did admit that he looked through the decedent's wallet and went through his pockets as he lay helpless on the floor. R. 73, ll. 6-15. Montag then went into his "thief mode." He wanted to steal whatever he could as he ransacked the duplex -- flipping over mattresses and looking in dresser drawers. Most of all Montag remembered: "I was looking for a gun that they said he [the decedent] had and money." However, Montag said he never hit the decedent and He maintained: "I did not touch his body" while going through the decedent's pocket. R. 101, l. 10 - 103, l. 17. Montag wanted the decedent's gun once he heard the decedent was armed. R. 130, l. 23- 131, l. 21.

Montag claimed appellant said in advance that he was going to hit the decedent. However, he told defense counsel for appellant on cross-examination that appellant liked to brag and lie about being tough. R. 112, l. 19 - 113, l. 15.

Kevin Slater was also at the party on May 26, 2013 where people were drinking heavily, and were "in and out of the duplex." They also were making "beer" and liquor runs during the party. R. 150, l. 13 - 155, l. 10.

Slater remembered that the decedent was keeping to himself during the party. "He did not really mingle with us." Slater admitted the decedent got upset with the noise from the party, and told the people partying to keep the noise down. R. 155, l. 5 - 157, l. 18.

Slater maintained that Montag sat down on the steps beside him, and that appellant came up onto the porch. Slater claimed: "I heard a smacking noise . . . I looked back and the guy was laid out." Slater testified that he left immediately when he saw the decedent on the floor. He acknowledged no one assisted the decedent, and that the decedent died two months later. R. 162, ll. 1-25; R. 182, l. 2 - 184, l. 17. Slater repeatedly said he just "did not want to be

involved," and that was also the reason no one tried to help the decedent. R. 183, l. 7 – 184, l. 25.

Co-defendant Samuels testified, and he claimed he saw appellant hit the decedent one time that evening. The decedent was knocked out with that one punch. Samuels allegedly did not see anyone drag the decedent inside the house after he was knocked out. R. 378, ll. 1-19:

Samuels testified: "I saw one punch and I left. And that is the truth." However, Samuels claimed he saw Montag and appellant later with a gun, a wallet and a cellphone. Samuels also maintained that appellant pointed a gun at him, and told him not to tell anyone what happened. R. 400, l. 24 – 402, l. 24.

On cross-examination Samuels admitted he was an alcoholic and a heavy drug user. He acknowledged that this "event" was "the saving grace to save your life." Samuels stuck to his story that "Jonathan struck Mr. Wimberly." R. 403, l. 4 – 409, l. 25.

Directed verdict motion

Defense counsel earlier moved for a directed verdict on the murder and burglary counts. Defense counsel argued *even if it was assumed appellant punched the decedent during the party there was no evidence the decedent was hit with malice aforethought*. At worst, the evidence showed appellant "punched the guy one time." Likewise, defense counsel argued there was no evidence appellant entered the home, and if he did enter the home that he did so with intent to commit a crime therein. The judge denied the directed verdict motions. R. 302, l. 15 – 311, l. 14.

Other issues that should be decided on appeal

Counsel would be remiss, for the sake of judicial economy, not to point out unpreserved errors that would have to be litigated in post-conviction relief if this Court does not reverse on

direct appeal. Witness Leon Coleman claimed that appellant said he was going to rush the decedent for money during the party. When defense counsel for appellant went to impeach Coleman for his bias against appellant -- based on the fact that appellant was having an affair with his girlfriend, and that they also had a child together -- the solicitor objected on the grounds of relevance. The judge sustained the objection and instructed Coleman not to answer the question. The answer was not proffered so the issue of this obviously relevant evidence of bias being excluded was not preserved. The fact that Montag was Coleman's brother-in-law also increased the reason for Coleman to lie about appellant being the perpetrator even though Montag had already pled guilty. R. 48, l. 5 - 51, l. 6.

On cross-examination of Montag defense counsel asked Montag to admit that the two teardrops tattoos -- and the "K" tattoo -- meant that he was a killer or a murderer. Montag lamely claimed the "K" tattoo stood for "his cousin," and the two teardrop tattoos: "They stand for my momma and daddy." The objection to the tattoos inquiry was sustained, and counsel again did not make a proffer, or otherwise attempt obvious impeachment on the teardrop tattoos at a minimum. R. 87, l. 13 - 88, l. 6.

On cross-examination by the solicitor of appellant he repeatedly pitted witnesses against appellant in the presence of the jury. He made appellant say that Leon Coleman was a liar and "Taggy" was also a liar. When the solicitor improperly asked appellant: "So everybody who came up here and said that you hit that old man is a liar?" Appellant correctly responded: "I do not think anybody [at that point during the trial before co-defendant Samuel's testimony] said that I hit him." R. 354, l. 10 - 355, l. 2.

Without objection, the solicitor also had appellant admit that he only made one statement to law enforcement, and that he refused to give another statement *because he had an attorney*.

The solicitor badgered appellant with the fact that he refused to talk to the police after he got an attorney, and he invoked his right to silence. R. 358, l. 9 – 359, l. 6.

Co-defendant Samuels also testified, without objection, that he had seen appellant *hit other people* in the past, and that “I know he [appellant] was a fighter.” R. 382, l. 8 – 383, l. 19. For the sake of judicial economy these post-conviction issues should be considered when determining if appellant received anything approaching a fair trial.

Discussion

A defendant is entitled to a directed verdict when the prosecution fails to provide evidence of the offense charged. State v. Brown, 103 S.C. 437, 88 S.E.2d 1 (1916); State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006); State v. McHoney, 344 S.C. 85, 97 S.E.2d 30, 36 (2001). “If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused,” the trial judge may deny the motion for directed verdict. State v. Lollis, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001); State v. Pinckney, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000); State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000). When the prosecution relies exclusively on circumstantial evidence, the trial judge must direct a verdict in the defendant’s favor unless there is any substantial circumstantial evidence which reasonably tends to prove the guilt of the defendant or from which his guilt may be fairly and logically deduced. State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011); State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000). Likewise, a directed verdict is appropriate when the evidence produced “merely raises a suspicion the accused is guilty.” Lollis, 343 S.C. at 584, 541 S.E.2d at 256; State v. Arnold, 361 S.C. 386, 389-390, 605 S.E.2d 529, 531 (2004); State v. Schrock, 283 S.C. 129, 132, 322 S.E.2d 450, 451-452 (1984); State v. Muhammed, 338 S.C. 22, 524 S.E.2d 637 (Ct. App. 1999). Our courts define suspicion as “a

belief or opinion as to guilt based upon facts or circumstances which do not amount to proof.” Lollis, 343 S.C. at 584, 541 S.E.2d at 256; State v. Hyder, 242 S.C. 372, 131 S.E.2d 96 (1963).

In this case the worst evidence against appellant was if the jury believed he punched the decedent a single time. Even if the jury believed that evidence, it did not provide any evidence appellant acted with malice aforethought, or even Mouzon¹ malice (such great recklessness and wantonness as to exhibit a total disregard for the lives of the decedent or others). There was no evidence appellant killed the decedent with malice aforethought, and he was entitled to a directed verdict on the murder charge.

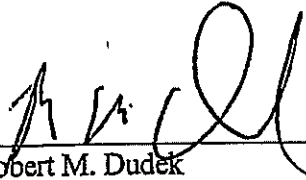
Likewise, appellant was entitled to a directed verdict motion on the burglary charge because even if the jury believed appellant entered the duplex during the party without consent, there was no evidence he did so with the intent to commit a crime therein. See Pinckney v. State, 368 S.C. 502, 629 S.E.2d 367 (2006). In short, the state failed to provide any direct or substantial circumstantial evidence that appellant killed the decedent with malice aforethought, or that he entered the decedent's home without consent and with the intent to commit a crime therein. Even if the jury believed appellant hit the decedent because of his racially charged statement, or because the decedent was armed with a gun and appellant was scared, it did not provide any evidence this crime was murder. The killing of another human being with malice aforethought.

¹ State v. Mouzon, 231 S.C. 655, 99 S.E.2d 672 (1957).

CONCLUSION

By reason of the foregoing arguments, this Court should issue verdicts of acquittal as to both charges.

Respectfully submitted,


Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 27th day of May, 2016.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Clarendon County
William Jeffrey Young, Circuit Court Judge

RECEIVED

MAY 27 2016

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

JONATHAN CODY NEWMAN,

APPELLANT

APPELLATE CASE NO. 2015-000091

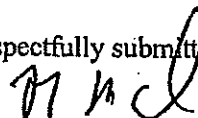
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jonathan Cody Newman states:

1. He is Chief Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge William Jeffrey Young, which was held on January 5-9, 2015, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, he asks the Court to relieve him as counsel for Jonathan Cody Newman.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 27th day of May, 2016.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Clarendon County
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THE STATE,

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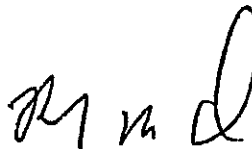
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictment;
- (2) Entire trial and pre-trial transcript.

I certify that this designation contains no matter which is irrelevant to this appeal.

May 27th, 2016



Robert M. Dudek
Chief Appellate Defender

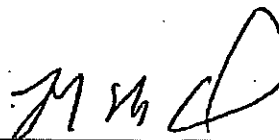
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

Attorney for Appellant

CERTIFICATE OF COUNSEL

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

May 27, 2016



Robert M. Dudek
Chief Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-158

RECEIVED
MAY 27 2016
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Clarendon County

William Jeffrey Young, Circuit Court Judge

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THE STATE,

RESPONDENT,

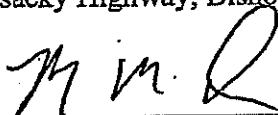
V.

JONATHAN CODY NEWMAN,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Donald J. Zelenka, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Jonathan Cody Newman, #362601 at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 27th day of May, 2016.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 27th day of May, 2016.

Raisa Lencel (L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.

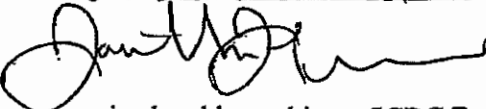
SOUTH CAROLINA DEPARTMENT OF CORRECTIONS

Receipt of Legal Correspondence Verification

This is to verify that legal correspondence from (Name and Address):

Legal Property:
Broadriver Correctional
Institution.

Addressed to (Inmate Name, SCDC#, and Address): My legal property was with-
Jonathan Newman held from me until 6/7/18.
#362601 Saluda #219 Reason for my PCR being
BmCI Columbia SC 29210 turned in late.
4460 Broadriver rd



was received and logged in on SCDC Form 10-12, "Legal/Privileged/Certified Mail Delivery Log," at the
 _____ Correctional Mailroom on (Date) _____.

On (Date) 6/7/18, the above referenced correspondence was delivered to
 Inmate Jonathan Newman, SCDC # 362601, and his signature
 was obtained on SCDC Form 10-12, "Legal/Privileged/Certified Mail Delivery Log".

Additional Notes:

I/m Newman didn't receive his property
until June 7 2018. That is why he wasn't on
time to PCR.

St. Bracey
 Postal Director/Institution

6/14/18
 Date

07-03-2017

Date

Jonathan Newman #362601
Broadriver Ct / Monticello 21B
4460 Broadriver rd
Columbia SC 29210

Clerk of Court

Clarendon County Common Pleas

2013-GS-14-0293

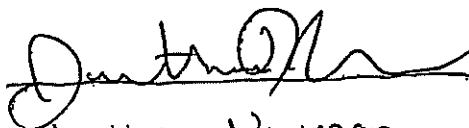
Re: Newman v. State, PCR Case

Dear Honorable Clerk:

Please find for filing and consideration my original pro-se post conviction application. Please return a clock-filed copy with civil action number for my records.

Thank you for your time & concern in this matter.

Respectfully

15/ 
Jonathan Newman

Enclosures

FORM 5

STATE OF SOUTH CAROLINA)

County of Clarendon)Jonathan Newman)
Full name and prison number (if any) of Applicant)

#362601)

v.)

State of South Carolina)

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
Bishopville SC 29010 / BNCL Columbia SC 29210
2. Name and location of Court which imposed sentence Court of General Sessions Clarendon County SC
3. Name(s) of co-defendant(s) (if any) Montag Webb, Letroy Samuels
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 213-GS-14-0293; 35 years
 - (b) Murder / 1st Degree Burglary

- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) January 9th 2015
- (b) _____
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty ☒ _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
- Yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. South Carolina Court of Appeals
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Affirmed
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. April 5th, 2017
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. 2015-000091
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) N/A
- (b) _____

- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Ineffective Assistance of Counsel
- (b) Ineffective of Appellate Counsel
- (c) Denial due process of law
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) See attached pages marked 3-1 thru 3-6
- (b) " " "
- (c) " " "
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? No
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No
- (d) any other petitions, motions or applications in this or any other Court? No
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. N/A
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. N/A
- ii. _____
- iii. _____
- iv. _____

(c) the disposition thereof:

- i. N/A
- ii. _____
- iii. _____
- iv. _____

(d) the date of each such disposition:

- i. N/A
- ii. _____
- iii. _____
- iv. _____

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

- i. N/A
- ii. _____
- iii. _____
- iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

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

(a) which grounds have been presented:

- i. N/A
- ii. _____
- iii. _____

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

- i. N/A
- ii. _____
- iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) N/A
(b) _____
(c) _____

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

(a) your arraignment and plea? _____
(b) your trial, if any? Yes
(c) your sentencing? Yes
(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes
(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?
No

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

(a) the name and address of each attorney who represented you:
i. Eleazar Carter 105 South Brooks Street
Manning SC 29102
ii. _____
iii. _____
(b) the proceedings at which each such attorney represented you:
i. Robert Dudek PO Box 11589 Columbia SC
29211
ii. _____
iii. _____

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

Vacate Convictions and sentencing

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

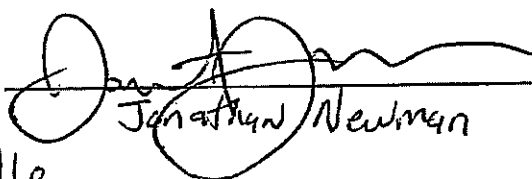
No

STATE OF SOUTH CAROLINA)

County of Lee)

VERIFICATION

I, Jonathan Newman #362601, 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.


Jonathan Newman

SWORN to and subscribed before me this 16
day of June, 2017.

Debra Eastwood (L.S.)
Notary Public

My Commission Expires: 3/3/2024

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

I, Jonathan Newman #362601, 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.

SWORN or affirmed to and subscribed before me this
16 day of June, 2017.

Debra Eastridge
Notary Public

My Commission Expires: 3/3/2020

CERTIFICATE OF SERVICE

I hereby certify that I have this date served the within and foregoing Amended Application for Post-Conviction Relief by depositing a true and correct copy of the same via first-class mail, postage prepaid, upon all parties as follows:

Megan Jameson, Assistant Attorney General
South Carolina Attorney General's Office
1000 Assembly Street, Room 519
Columbia, SC 29201

The Honorable Beulah G. Roberts
Clarendon County Clerk of Court
P.O. Box 136
Manning, SC 29102-0136

By: Courtney Powers
Courtney Powers
Paralegal for Dayne C. Phillips, Esq.

1614 Taylor Street, Suite D.
Columbia, SC 29201
C: (803) 216-5561
F: (803) 380-8035
courtney@pricebenowitz.com

June 26, 2019

CERTIFICATE OF SERVICE

I hereby certify that I have this date served the within and foregoing Applicant's Reply Brief and Motion to Deny Respondent's Proposed Orders by depositing a true and correct copy of the same via first-class mail, postage prepaid, upon all parties as follows:

The Honorable Beulah G. Roberts
Clarendon County Clerk of Court
P.O. Box 136
Manning, SC 29102-0136

Office of the Attorney General
Attn: Brianna L. Schill
PCR Division – 3rd Circuit
PO Box 11549
Columbia, SC 29211

The Honorable Kristi F. Curtis
215 North Harvin Street
Sumter, SC 29150

By: Courtney Powers
Courtney Powers
Paralegal for Dayne C. Phillips, Esq.

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February 12, 2020

STATE OF SOUTH CAROLINA
COUNTY OF CLARENDON

Jonathan Newman, #362601,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
THIRD JUDICIAL CIRCUIT

2018-CP-14-00233

ORDER FOR LIMITED HEARING

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on June 12, 2018. The Court has reviewed the Application, the State's Return and Motion to Dismiss, and Applicant's Reply Brief and Request for Hearing. After reviewing the documents, the court finds it appropriate to convene an evidentiary hearing for the limited purpose of determining whether the statute of limitations dictates dismissal of the Application or whether the statute of limitations should be equitably tolled in this case.

IT IS THEREFORE ORDERED that an evidentiary hearing be convened pursuant to S.C. Code Ann. §17-27-80 solely for the purpose of taking testimony and receiving evidence on the issue of whether the statute of limitations should be equitably tolled .



KRISTI CURTIS
Presiding Judge
Third Judicial Circuit

March 19, 2020
Sumter, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CLARENDON	)	THIRD JUDICIAL CIRCUIT
	)	
Jonathan Newman,	)	Case No.: 2018-CP-14-00233
	)	
Plaintiff	)	
	)	
v.	)	CONSENT ORDER FOR
	)	DISCOVERY
State of South Carolina,	)	
	)	
Respondent.	)	

The Applicant, by and through the undersigned Counsel, moves for leave to obtain discovery in the above-referenced post-conviction relief action. See S.C. Code § 17-27-150(A) (Discovery in post-conviction relief proceeding). Specifically, the Applicant requests to obtain a copy of the Solicitor's case file for the original criminal case. Applicant desires to conduct an independent investigation related to the evidence in preparation for the evidentiary hearing because of the prior attorney's potentially incomplete file, and the allegation of failure to conduct a reasonable investigation and interview critical witnesses.

Respondent attorney, Assistant Attorney General T. Cruise Mitchell, consents to this request to obtain a copy of the Solicitor's case file for the original criminal case.

PROCEDURAL HISTORY

On February 27, 2014, the Clarendon County Grand Jury indicted Applicant for Murder and Burglary, First Degree.

On January 6, 2015, Applicant proceeded to trial before the Honorable W. Jeffery Young and a jury. Eleazor Carter represented Applicant, and Solicitor Ernest Finney and Assistant Solicitor Christopher Durant prosecuted the case on behalf of the State. The



jury returned a verdict of guilty as charged on January 9, 2015. The Trial Court sentenced Applicant to a concurrent thirty-five (35) years imprisonment for the murder conviction and thirty (30) years imprisonment for the burglary conviction.

On April 5, 2017, the South Carolina Court of Appeals affirmed Applicant's convictions and sentences. *State v. Newman*, Op. No. 2017-UP-140 (S.C. Ct. App. filed April 5, 2017). Chief Appellate Defender Robert Dudek represented Applicant, and Assistant Deputy Attorney General Donald Zelenka represented the State on Direct Appeal.

LAW

Section 17-27-150(A) of the South Carolina Code of Laws provides:

A party in a noncapital post-conviction relief proceeding shall be entitled to invoke the processes of discovery available under the South Carolina Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise. If necessary for the effective utilization of discovery procedures, counsel may be appointed by the judge for an applicant who qualifies for appointment pursuant to Section 17-27-60 or similar applicable provisions of law.

Although the Supreme Court of the United States has not expressly recognized a right to effective assistance of counsel in first tier review of ineffective assistance of counsel claims, the Court has carved out an exception to federal *habeas corpus* procedural bars in such cases. See *Martinez v. Ryan*, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012). This puts PCR counsel in state court cases on notice of their obligations for providing effective assistance of counsel. Therefore, State courts are also on notice of the potential consequences of not providing PCR counsel with adequate resources to investigate and present PCR claims.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

It appears PCR Counsel has met with Applicant, reviewed the trial transcript, and has identified additional investigation that is reasonable and necessary in preparation of challenging Applicant's conviction and sentence based on the testimony and arguments presented at trial. It also appears Applicant is unable to prove the second prong of seeking post-conviction relief (i.e., prejudice) without conducting an independent investigation into this evidence. It further appears this request to investigate, obtain and inspect the Solicitor's case file is reasonable and necessary in the fair administration of justice.

IT IS ORDERED For good cause shown, allowing Applicant to obtain a copy of the Solicitor's case file is appropriate for PCR Counsel to provide effective assistance of counsel.

IT IS THEREFORE ORDERED that it is reasonable and necessary for the Solicitor's Office to provide PCR Counsel with a copy of their case related to Applicant's convictions and sentences.



Presiding Judge, Third Judicial Circuit

March 2, 2023

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CLARENDON	)	THIRD JUDICIAL CIRCUIT
	)	
Jonathan Cody Newman,	)	Case No. 2018-CP-14-00233
	)	
Applicant,	)	
	)	
v.	)	SECOND
	)	AMENDED APPLICATION FOR
	)	POST-CONVICTION RELIEF
State of South Carolina.	)	
	)	
Defendant.	)	

As required by Rule 71.1(b), SCRCF, this application is in conformity with Form 5 of the SCRCF Appendix of Forms.

1. Place of Detention: Applicant is detained in the South Carolina Department of Corrections at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210.
2. Name and location of Court which imposed sentence: Clarendon County Court of General Sessions, 3 Keitt Street, SC 29102.
3. Name(s) of co-defendant(s) (if any): Letroy Samuels (joint trial).
4. The indictment number(s) upon which and the offenses for which sentence was imposed:
 - (a) 2013-GS-14-0293 (Murder).
 - (b) 2013-GS-14-0293 (Burglary, First Degree).
5. The date upon which the sentence was imposed and the terms of the sentence:
 - (a) January 9, 2015.
 - (b) Thirty-five (35) years imprisonment for the Murder conviction.
 - (c) Thirty (30) years imprisonment for the Burglary, First Degree, conviction.
 - (d) Concurrent sentences.
6. A finding of guilty was made:
 - (a) After a jury trial before the Honorable W. Jeffrey Young.

7. Did you appeal from the judgment of conviction and/or the imposition of the sentence? Yes.
8. If you answered "yes" to number (7), list:
 - (a) The name of each Court to which you appealed:
 - i. South Carolina Court of Appeals.
 - (b) The result in each Court to which you appealed:
 - i. Appeal Dismissed ("Dismissed after review pursuant to *Anders v. California*, 386 U.S. 738 (1967)").
 - (c) The date of each result:
 - i. April 5, 2017 (Unpublished opinion filed by the S.C. Court of Appeals).
 - (d) If known, citations of any written opinions or ordered entered pursuant to such result:
 - i. *State v. Newman*, Op. No. 2017-UP-140 (S.C. Ct. App. filed April 5, 2017).
9. If you answered "no" to number (7), state your reasons for not appealing:
 - (a) Not applicable. Applicant filed a Direct Appeal of his convictions and sentences.
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
 - (a) Trial Counsel denied Applicant's right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 3 and 14 of the South Carolina Constitution. See S.C. Code § 17-27-20(A)(1), (4), and (6). Specifically, Trial Counsel's unreasonably deficient performance prejudiced Applicant because there is a reasonable probability that, but for Trial Counsel's errors, the result of the proceeding would have been different. See *Strickland v. Washington*, 466 U.S. 668 (1984).
 - (b) Appellate Counsel denied Applicant's right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States

Constitution and Article I, Sections 3 and 14 of the South Carolina Constitution. Specifically, Appellate Counsel's unreasonably deficient performance prejudiced Applicant because there is a reasonable probability that, but for Trial Counsel's errors, the result of the proceeding would have been different. See *Strickland v. Washington*, 466 U.S. 668 (1984); *Evitts v. Lucey*, 469 U.S. 387 (1985); *Simpkins v. State*, 303 S.C. 364, 401 S.E.2d 142 (1991).

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

(a) **Trial Counsel's acts or omissions of ineffective assistance of counsel include but are not limited to the following allegations:**

- (i) Trial Counsel failed to conduct a reasonable investigation and to develop all available, relevant, and admissible or mitigating evidence in preparation of Applicant's defense. See *Wiggins v. Smith*, 539 U.S. 510 (2003).
- (ii) Trial Counsel failed to convey plea offer to Applicant and failed to pursue plea negotiations as requested by Applicant prior to trial.
- (iii) Trial Counsel failed to move for severance pursuant to *Bruton v. United States*, 391 U.S. 123 (1968) because admission of Applicant's co-defendant's statements violated the Confrontation Clause.
- (iv) Trial Counsel failed to move to strike potential jury #101 Eddie G. Myers for cause or use a peremptory strike to remove juror when it was reasonable and necessary.
- (v) Trial Counsel failed to object when the State presented inadmissible and unduly prejudicial evidence during Applicant's trial, thereby failing to preserve these issues for appellate review and denying Applicant a fair trial.
- (vi) Trial Counsel failed to object when the Prosecution bolstered the State's witnesses.

- (vii) Trial Counsel failed to properly cross-examine the State's witnesses, including but not limited to Montag Webb and Letroy Samuels, regarding inconsistent statements and impeachment evidence.
- (viii) Trial Counsel failed to properly cross-examine the State's witness, Montag Webb, regarding possible bias and motives for testifying against Applicant. Specifically, questioning Co-Defendant Montag Webb about negotiations and promises with the State in exchange for his testimony.
- (ix) Trial Counsel failed to object and move for a mistrial and/or request for a curative instruction regarding Applicant's assertion of his right to counsel when interrogated by law enforcement.
- (x) Trial Counsel failed to properly argue against and preserve for appellate review the Prosecutor's objection for relevance during Trial Counsel's cross-examination of witness Leon Coleman related to the witness's possible bias against Applicant for having an affair with his wife.
- (xi) Trial Counsel failed to properly argue against and preserve for appellate review the Prosecutor's objection for asked and answered during Trial Counsel's cross-examination of witness Montag Webb related to the meaning of his tear-drop tattoos.
- (xii) Trial Counsel failed to properly advise Applicant regarding his right/decision to testify at trial.
- (xiii) Trial Counsel failed to move for a mistrial and/or a curative instruction when Applicant's co-defendant testified that Applicant was violent, had previously assaulted him and other people, and that he was afraid of Applicant. At a

minimum, Trial Counsel should have objected to this inadmissible propensity evidence where its probative value is substantially outweighed by its prejudicial effect.

(xiv) Trial Counsel failed to properly object to the Trial Court's improper "inferred malice" instruction to the jury. Specifically, Counsel failed to object to the Court's inference of malice charge for "excessive brutal force".

(xv) Trial Counsel failed to request a jury instruction for "mere presence".

(b) Additional allegations of ineffective assistance of counsel:

(i) Trial Counsel failed to adequately prepare for trial. Specifically, Trial Counsel failed to meet with or review the State's evidence with Applicant prior to the trial. Counsel also failed to inform Applicant of his scheduled trial.

(ii) Trial Counsel failed to inform Applicant of his rights, charges, and sentencing ranges prior to trial. Specifically, Trial Counsel failed to advise Applicant that murder carries a mandatory minimum sentence of thirty (30) years to life imprisonment upon conviction.

(iii) Trial Counsel failed to object when the Clerk of Court told the jury that they "have the charge with a true verdict" while being sworn under oath.

(iv) Trial Counsel failed to object when the Trial Court improperly told the jury that a trial is a "search for the truth" and that the jury is seeking to "reach a fair and just verdict" during the Court's opening remarks. *See State v. Alesky*, 343 S.C. 20, 538 S.E.2d 248 (2000); *State v. Daniels*, 401 S.C. 251, 737 S.E.2d 473 (2012); *State v. Beaty*, 423 S.C. 26, 813, S.E.2d 502 (2018).

(v) Trial Counsel failed to object when the Prosecutor referenced the Trial Court's

statement that "this was a search for the truth".

- (vi) Trial Counsel failed to object when the Prosecutor improperly stated, "my job as an Assistant Solicitor is to represent the interest of this community to represent your interest."
- (vii) Trial Counsel failed to cross-examine Co-Defendant Montag Webb about him facing a mandatory minimum sentence of thirty (30) years to life imprisonment upon conviction for Murder and a mandatory minimum sentence of fifteen (15) years to life imprisonment upon conviction for Burglary, First Degree.
- (viii) Trial Counsel failed to properly cross-examine the Pathologist Dr. Amy Durso regarding the cause and manner of death being a homicide. Specifically, Counsel failed to question the Pathologist about homicide being a medical determination and not a legal determination of homicide/murder.
- (ix) Trial Counsel failed to object when the Prosecutor and Co-Defendant's lawyer referenced Co-Defendant Samuels's statements to the police. Additionally, Counsel was ineffective in inquiring and referencing the Co-Defendant Samuels's.
- (x) Trial Counsel failed to object when the Prosecutor improperly referenced the Applicant's invocation of his right to an attorney when questioned by the police.
- (xi) Trial Counsel failed to properly cross-examine Co-Defendant Samuels.
- (xii) Trial Counsel failed to object when the Prosecutor told the jury to "reach a verdict that speaks the truth" during his closing argument.
- (xiii) Trial Counsel failed to object when the Prosecutor misstated the law regarding the inference of malice during his closing argument.
- (xiv) Trial Counsel was ineffective for improperly referencing items of deadly weapons as

an inference of malice.

(xv) Trial Counsel failed to object when the Prosecutor improperly referenced Assault with Intent to Kill.

(xvi) Trial Counsel failed to object to the Trial Court's instruction that the jury could infer malice based on use of a deadly weapon.

(xvii) Trial Counsel failed to object to the Trial Court's instruction that the jury could infer malice based on excessive brutal force.

(c) **Appellate Counsel's acts or omissions of ineffective assistance of counsel include but are not limited to the following allegations:**

(i) If found preserved for appellate review, Appellate Counsel failed to raise the issue of whether the Trial Court erred in instructing the jury that "excessive brutal force" is an inference of malice.

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 Federal Habeas Corpus or Post-Conviction Relief? No. Applicant has not previously filed an application for Post-Conviction Relief or Petition for Writ of Habeas Corpus in either state or federal court.

(c) Any petition in the Supreme Court of the United States for certiorari other than petitions, if any, already specified in number (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 number (12), list with respect to each petition, motion, or application:

(a) The specific nature thereof: Not applicable.

(b) The name and location of the Court in which each was filed: Not applicable.

- (c) The disposition thereof: Not applicable.
- (d) The date of each such disposition: Not applicable.
14. Has any ground set forth in number (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 number (14), identify:
- (a) The grounds which have been presented: Not applicable.
- (b) The proceedings in which each ground was raised: Not applicable.
16. If any ground set forth in number (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) Post-Conviction Relief is the proper forum and remedy for these allegations because the grounds for relief presented in this application are evidence of ineffective assistance of counsel, issues not preserved for appellate review, and/or were not appropriate to raise or were not properly raised on Direct Appeal. Applicant is requesting an evidentiary hearing to present evidence in support of his claims of ineffective assistance of counsel. See Pelzer v. State, 378 S.C. 516, 662 S.E.2d 618 (Ct. App. 2008); Mose v. State, 420 S.C. 500, 803 S.E.2d 718 (2017).
17. Were you represented by an attorney at any time during the course of:
- (a) Your plea hearing? Not applicable.
- (b) Your trial? Yes.
- (c) Your sentencing? Yes.
- (d) Your appeal, if any, from the judgment of conviction and/or imposition of the sentence? Yes.
- (e) Preparation, presentation or consideration of any petitions, motions, or application with respect to this conviction, which you filed? Yes.
18. If you answered "yes" to one or more parts of number (17), list:

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

- (i) Eleazer Carter, Esq., 105 South Brooks Street, Manning, SC 29102.
- (ii) Robert Dudek, Esq., PO Box 11589, Columbia, SC 29211.
- (iii) Dayne C. Phillips, 1614 Taylor Street, Ste D., Columbia, SC 29201.

(b) The proceedings at which each attorney represented you:

- (i) Eleazor Carter represented Applicant at trial.
- (ii) Robert Dudek represented Applicant on appeal.
- (iii) Dayne C. Phillips is currently representing Applicant on this application for Post-Conviction Relief.

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

Applicant seeks Post-Conviction Relief by vacating his convictions and sentences and remanding the indictments for a new trial based on ineffective assistance of counsel.

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

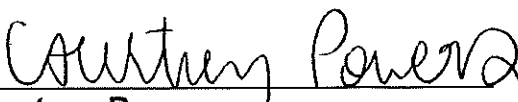
No. Applicant is not under sentence from any other court.

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
COUNTY OF CLARENDON)	THIRD JUDICIAL CIRCUIT
Jonathan Cody Newman,)	Case No.: 2018-CP-14-00233
Applicant,)	
v.)	
State of South Carolina)	CERTIFICATE OF SERVICE
Defendant.)	

I hereby certify that I have this date served the within and foregoing Second Amended Application for Post-Conviction Relief by depositing a true and correct copy of the same via first-class mail, postage prepaid, upon all parties as follows:

Cruise Mitchell, Assistant Attorney General
 SC Attorney General's Office
 PO Box 11549
 Columbia, SC 29211

The Honorable Beulah G. Roberts
 Clarendon County Clerk of Court
 P.O. Box 136
 Manning, SC 29102-0136

By: 
Courtney Powers
Paralegal for Dayne C. Phillips, Esq.

1614 Taylor Street, Suite D.
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 courtney@pricebenowitz.com

October 20, 2023

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CLARENDON	)	2018-CP-14-00233
Jonathan Cody Newman,	)	
	)	
Applicant,	)	Transcript of Record
	)	
vs.	)	
	)	
State of South Carolina,	)	July 25, 2024
	)	
Respondent.	)	
	)	

B E F O R E:

The Honorable Grace G. Knie
Sumter County Courthouse
Sumter, South Carolina

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

Dayne C. Phillips, Esquire
Attorneys for Applicant

Cruise Mitchell, Esquire
Attorneys for State

Sallie Beth Todd
Official Court Reporter

I N D E X

<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>

CHRISTOPHER R. DURANT

BY MR. PHILLIPS 9

BY MR. MITCHELL 17

ROBERT DUDEK

BY MR. PHILLIPS 20 33

BY MR. MITCHELL 31

JONATHAN C. NEWMAN

BY MR. PHILLIPS 36 49 / 114

BY MR. MITCHELL 48

ELEAZER CARTER

BY MR. PHILLIPS 522 108

BY MR. MITCHELL 96

Certificate of Court Reporter..... 131

E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>	<u>PAGE</u>

(There were no exhibits offered during this trial.)

1 THE COURT: Good morning, I'm Judge Knie. It is my
2 sincere pleasure to be here in Sumter for the term of post-
3 conviction relief hearings.

4 As counsel understands, these are civil non-jury hearings
5 and I normally hold court in the upstate. I am from
6 Spartanburg. Okay. And this is my first time holding court
7 in Sumter, although I spent a lovely week here when I was
8 mentoring to be a judge and I was in this courtroom for a
9 week. And so I very much am enjoying being back in this
10 courthouse and in this courtroom today.

11 We have the first matter, it is Jonathan C. Newman,
12 applicant v. the State, respondent. And that is civil action
13 number 2018-CP-14-00233. Our court reporter is Sallie Todd.
14 And if counsel will first identify themselves for the record,
15 starting with counsel for the applicant.

16 MR. PHILLIPS: Good morning, Your Honor. Dayne Phillips
17 on behalf of the applicant, Jonathan Newman.

18 THE COURT: Thank you, Mr. Phillips. Nice to see you,
19 sir.

20 MR. PHILLIPS: Pleasure. Thank you.

21 MR. MITCHELL: Good morning, Your Honor. I'm Assistant
22 Attorney General Cruise Mitchell on behalf of the State of
23 South Carolina.

24 THE COURT: Okay. Thank you, Mr. Mitchell. Nice to see
25 you as well.

1 I will note on the record that Mr. Newman is here. Good
2 morning, sir.

3 MR. NEWMAN: Good morning.

4 THE COURT: And, sir, if at any time you want to talk to
5 Mr. Phillips, you just let me know and I can arrange for you
6 all to talk privately, okay?

7 MR. NEWMAN: Yes, ma'am.

8 THE COURT: All right. Are you all ready to go?

9 MR. PHILLIPS: Yes, Your Honor.

10 THE COURT: Okay. And I will state that Mr. Mitchell has
11 already sent me the file electronically, but if he has the
12 paper copy that's much easier for me to follow, especially
13 since there's Webex. I'm using my laptop for Webex, okay.

14 MR. MITCHELL: I have it right here, Your Honor. Can I
15 approach?

16 THE COURT: Yes, sir. Any objection, Mr. Phillips?

17 MR. PHILLIPS: No, Your Honor.

18 THE COURT: All right. Thank you. And the witness stand
19 is over there. Okay. Just -- I'm in a different courtroom
20 today than I was in earlier in the week, but just so everybody
21 knows. Okay.

22 Mr. Phillips, I know that the applicant is the moving
23 party with the burden of proof, but do you have any objection
24 to Mr. Mitchell giving me the procedural history or would you
25 like to do that?

1 MR. PHILLIPS: The attorney general's office can
2 absolutely give the procedural history.

3 THE COURT: Okay. Thank you. Okay.

4 MR. MITCHELL: May I please the Court, Your Honor?

5 THE COURT: Yes.

6 MR. MITCHELL: Applicant was indicted at the February,
7 2014 term of Clarendon County Grand Jury for murder and first
8 degree burglary. Applicant was represented by Eleazer R.
9 Carter, Esquire. The case was prosecuted by solicitor Ernest
10 A. Finney, III former assistant solicitor, Christopher DuRant.

11 On January 9th, 2015, applicant proceeded to a jury trial
12 before the Honorable W. Jeffrey Young. The jury found
13 applicant guilty as indicted. Judge Young sentenced applicant
14 to 30 years imprisonment for burglary and 35 years for murder
15 with those sentences to run concurrently.

16 A timely notice of appeal was filed on January 20th,
17 2015. Chief Appellate Defender, Robert M. Dudek of the South
18 Carolina Office of Appellate Defense perfected the appeal.
19 The South Carolina Court of Appeals dismissed the appeal and
20 granted appellate counsel's motion to be relieved. The
21 remitted was sent April 28th, 2017. And with that, Your
22 Honor, I'll turn it over to Mr. Phillips.

23 THE COURT: Okay. And this was an action out of
24 Clarendon County, is that correct?

25 MR. MITCHELL: Yes, Your Honor.

1 THE COURT: And I just want to explain and then I'll ask
2 Mr. Phillips if he consents and Mr. Newman if he consents.
3 Normally we would have this hearing there, but with PCRs, it's
4 the biggest county wins and -- usually. And the hearings are
5 held in the circuit where the offense occurred and where the
6 case was tried, but not necessarily in that county. And
7 because everybody comes to one place to have these heard
8 within the circuit, I think technically the Circuit Judge can
9 -- can pick where these are heard. But usually it's in the
10 largest county, which must be Sumter for this circuit. Okay.

11 So do you all agree venue is appropriate here, Mr.
12 Phillips?

13 MR. PHILLIPS: Yes, Your Honor. No objection.

14 THE COURT: Okay. All right.

15 MR. MITCHELL: No objection from the State, Your Honor.

16 THE COURT: Okay. Mr. Newman, do you understand what I
17 just said?

18 MR. NEWMAN: Yes, ma'am.

19 THE COURT: Do you have any questions about it?

20 MR. NEWMAN: No, ma'am.

21 THE COURT: Do you agree with your lawyer?

22 MR. NEWMAN: Yes, ma'am.

23 THE COURT: All right. Thank you, sir. And I guess I do
24 need to have him sworn.

25 Mr. Brown?

1 THE CLERK: Yes, ma'am.

2 Raise your hand there, sir. State your full name?

3 THE WITNESS: Jonathan Cody Newman.

4 **JONATHAN NEWMAN, HAVING BEEN DULY SWORN TESTIFIES AS**
5 **FOLLOWS:**

6 THE CLERK: Thank you.

7 THE COURT: Okay. And so Mr. Newman, everything else
8 that I've said to you was true and correct, your answers to my
9 questions thus far?

10 THE WITNESS: Yes, ma'am.

11 THE COURT: All right. Thank you, sir. All right. So
12 let's -- let's get the procedural history and then I'll turn
13 it over to Mr. Phillips. All right. Or I'll -- however you
14 all are going to handle it, but --

15 MR. MITCHELL: If there's anything additional that the
16 State would like to add as far as procedural history, we are
17 alleging both ineffective assistance of trial counsel and
18 appellate counsel in this case.

19 **8.0**

20 THE COURT: Okay. And Mr. Mitchell, did you go into the
21 appellate part of it as well? It was appealed --

22 MR. MITCHELL: Yes, Your Honor.

23 THE COURT: Denied and then remitted or issued and all of
24 this is -- nobody's objecting to anything regarding timing?

25 MR. PHILLIPS: No. And Your Honor, we actually -- the

1 State initially did in this case, years ago. This is why the
2 case is so old. We had a hearing specifically on the statute
3 of limitations issue and there was already an order issued
4 that it was -- the tolling was essentially applied in this
5 case. With the tolling proper, I believe the State agrees at
6 this point that it -- we're having a merits hearing.

7 THE COURT: Okay.

8 MR. MITCHELL: That's correct, Your Honor.

9 THE COURT: All right. So, thank you. I know that y'all
10 are experts at what you do, so I'm going to turn it over then
11 to Mr. Phillips.

12 MR. PHILLIPS: Thank you, Your Honor. The applicant
13 would like to call Christopher DuRant as his first witness.

14 THE COURT: Sir, please come forward. And I didn't mean
15 to deny you all your right to an opening, but I will give you
16 the opportunity to close.

17 MR. PHILLIPS: Thank you, Your Honor. And to be candid
18 with the PCRs, so that I -- I generally waive the opening.

19 THE COURT: Okay. All right.

20 THE CLERK: State your full name, sir?

21 MR. DURANT: Christopher DuRant.

22 **CHRISTOPHER DURANT, HAVING BEEN DULY SWORN TESTIFIES AS**
23 **FOLLOWS:**

24 THE CLERK: Step around, sir. Be careful. State your
25 full name and spell your last name for the record please, sir?

1 THE WITNESS: Christopher Ryan DuRant, D-U-R-A-N-T.

2 THE COURT: Okay. This would be direct examination.

3 MR. PHILLIPS: That's -- that's correct, Your Honor.

4 THE COURT: Okay.

5 **DIRECT EXAMINATION OF CHRISTOPHER DURANT BY MR. PHILLIPS:**

6 Q: Good morning, Mr. DuRant?

7 A: Morning.

8 Q: And so you're no longer with the solicitor's office; is
9 that correct?

10 A: That is correct. I left in 2019.

11 Q: All right. If you could go back in time and discuss your
12 involvement in this specific case?

13 A: I was the -- the senior prosecutor in Clarendon County.
14 This case was assigned to me. I did most of the -- the case
15 work leading up to trial, Solicitor Finney did come over from
16 Sumter County to sit during trial and assisted with the trial.

17 Q: And so in this case, and you -- you tell me if I'm
18 providing anything incorrect or anything that you're confused
19 on, ask for -- please ask for a clarification. So obviously
20 in this case we had three main co-defendants?

21 A: That's right.

22 Q: All right. And one of them is the applicant, Jonathan
23 Newman?

24 A: Right.

25 Q: The other is Montage Webb?

1 A: Right.

2 Q: And then Latroy Samuels?

3 A: Correct.

4 Q: And in this case, Montage Webb cooperated with the State?

5 A: He did. Yes.

6 Q: He testified as a witness at trial?

7 A: Right.

8 Q: And then it was the joint trial with the applicant, Mr.

9 Newman as well as Mr. Samuels, they went to trial together at
10 the same time. Is that right?

11 A: That's right.

12 Q: All right. Now, in terms of your preparation of this
13 case as the -- one of the prosecutors on this case, Montage
14 Webb, how many times did y'all meet with him in preparation
15 for trial?

16 A: I -- I don't recall. This is -- you know, this trial was
17 nine and a half years ago.

18 Q: You -- you would agree at least five times, right? There
19 are numerous transcripts of those meetings that you had --
20 your office had with him. Is that fair to say?

21 A: Meeting -- transcripts of meetings that I -- that my
22 office had with Montage Webb?

23 Q: Well, of statements made by Montage. And we will -- I
24 guess go back specifically to the meetings, how many meeting -
25 - you said -- I guess your answer is that you don't remember

1 how many meetings you had with Mr. Webb?

2 A: I -- personally that I was involved in -- now perhaps law
3 enforcement may have met with Montage Webb five times, but
4 personal meetings that I was involved in would've been with
5 his lawyer present. I'd be surprised if it was five, but
6 again, I don't recall.

7 Q: All right. So under five?

8 A: I would think so. Yes.

9 Q: All right. Now, during those meetings, was there any
10 point where any type of offer or promise of negotiation was
11 provided to Mr. Webb?

12 A: I believe he pled guilty before trial. Yes.

13 Q: That's right. So in terms of, could you walk me through
14 that process? You're meeting with this co-defendant, he
15 agrees to plead guilty and cooperate and provide testimony.
16 What specifically was discussed with him in terms of the
17 cooperation?

18 A: Again, I mean, you're talking about conversations that
19 happened nearly 10 years ago. And so it's hard for -- I -- I
20 -- I don't recollect the specifics of those conversations.
21 What I remember about Montage Webb particularly, I -- he had
22 given some statements to law enforcement.

23 First of all, this case was somewhat complicated by the
24 fact that all of the interviews before trial were only audio
25 recorded by law enforcement, no video recording. So we had to

1 get them transcribed. I recall that Montage Webb had given a
2 statement -- some statements beforehand that were inculpatory
3 or at least placed him at the scene of the crime and placed
4 him at least in -- at being involved in a burglary.

5 After the fact, I remember that -- that there was an
6 issue with whether or not he was Mirandized during one of his
7 -- before one of his inculpatory statements that was
8 problematic. But again, I -- I believe that law enforcement
9 viewed Mr. Newman as the -- the ringleader, so to speak. As
10 the -- as the most inculpatory party. But again, I -- I just
11 don't remember specifics of those conversations, what we
12 would've talked about with his lawyer.

13 Q: And so with the numerous statements that Mr. Webb had --
14 and you tell me what you remember here, obviously, he
15 ultimately gave wildly different statements. Is that fair to
16 say? His statements were inconsistent with one another?

17 A: I recall that his statement at trial, that he, I -- I
18 would say that he tried to -- to kind of straddle the fence a
19 bit at trial. And that it was not as strong at trial as he
20 had been to us beforehand.

21 Q: I guess the reason I say that it would be fair to say
22 that he had provided a statement where he has no culpability,
23 one of the statements.

24 A: It's possible, I don't remember.

25 Q: And then another statement, he's saying that the

1 applicant has full culpability. Is that fair to say?

2 A: I know that in one of his initial statements with law
3 enforcement, immediately after the crime, he admitted being
4 there. He admitted to taking part in at least a burglary.

5 Q: And then, at trial he says he didn't actually see whoever
6 struck the blow to the victim of the case. Is that fair to
7 say?

8 A: That -- I don't recall specifically what he testified to
9 at trial, but I remember being somewhat frustrated that he had
10 attempted to kind of back up from what he told us before.

11 Q: And I won't go too far down the rabbit hole at least for
12 other witnesses, but specifically for you, in terms of the
13 prosecution meeting with Mr. Webb and his decision to plead
14 guilty prior to that joint trial, and then him obviously
15 cooperating and testifying, what specifically was said to him
16 as far as his cooperation? I'm just trying to flesh that out
17 here.

18 A: I mean, what -- what are you asking? What -- what was
19 the plea offer or was there a plea offer?

20 Q: All the above. Yes.

21 A: Yeah. I -- I -- I don't recall. I suspect that -- well,
22 I believe that he pled guilty before trial. Probably what
23 happened is that sentencing was deferred until after trial.
24 But I -- I cannot -- I can't confirm that. That would be my
25 guess based on how he would've been handled. But you were

1 talking about asking me to recollect 10 years later how he was
2 handled.

3 Q: Understood. Well, the reason I ask is a very significant
4 thing, because obviously if there was a promise or some type
5 of negotiation that could be cross examined on by the defense
6 counsel at trial.

7 A: Right. Right.

8 Q: And so if that was done in terms of what was the office
9 policy at the time and record keeping regarding that, in other
10 words, whether there's a promise or a negotiation for a
11 cooperating witness where's the records, you know, the
12 preserving, you know, essentially those specific things that
13 would be discoverable?

14 A: Yeah. Well, it wasn't my practice to make a definitive
15 plea offer to -- to make it, at least to give a set number of
16 years a recommendation of sentence. My standard practice
17 would've been to say that I'll -- I'll treat you fairly and I
18 -- that we will take it into account at sentencing.

19 Q: All right. And so you're saying you have no recollection
20 of any plea negotiations or any type of promises or anything
21 of that nature?

22 A: I don't -- I don't recall offering a specific number to
23 Montage Webb. I do recall, I believe allowing him to plead
24 guilty to the lesser offense of voluntary manslaughter before
25 trial. And so we are trying to be transparent and going ahead

1 and -- and handling his plea before trial.

2 Q: Understood.

3 A: And so he got a benefit. It was clear to the -- the
4 jury, to Mr. Newman that Montage Webb had already received a
5 benefit because he had been allowed to plead to the lesser
6 included offense.

7 Q: Understood. And so in terms of your kind of general
8 nature in your office policy, there wouldn't be any other type
9 of records that would be in the file?

10 A: I don't believe so. No.

11 Q: Okay. In terms of Latroy Samuels, was there any
12 negotiations done with him? Obviously he went to trial.
13 That's a different -- different set of circumstances, but I'm
14 just trying to flesh out all the facts.

15 A: I -- I don't recall there being significant discussions
16 with Latroy Samuels. Again, I don't, it's been so long, but I
17 don't recall any significant plea discussions. I'm sure there
18 -- there probably -- those discussions were at least
19 attempted.

20 Q: Now, going to the applicant himself, were there plea
21 negotiations with his counsel in this case?

22 A: I would assume that there were, just based on the facts
23 of the case, kind of the circumstances of the crime and the
24 other factors involved, I would assume that there had been a
25 plea offer. I've been to the -- the solicitor's office and

1 pulled the file since I got notice to come to today's hearing
2 or when it was previously scheduled. And I didn't see any
3 record of a plea offer in the file. My guess would be that
4 that was probably communicated by email or on the phone with
5 Mr. Carter. I don't have access to my solicitor's office
6 emails anymore though, unfortunately.

7 Q: All right. So you're thinking that there probably was
8 specific negotiations, but there's no record in your file?

9 A: That's right.

10 Q: All right. So you have had the opportunity to review
11 your file in preparation for your testimony?

12 A: I -- I did. Yes.

13 Q: And there's no records of a specific plea offer that's in
14 the file?

15 A: No. There's no documentation in the file.

16 Q: All right. Now, with that being said, since you have no
17 specific recollection, you just believe there's most likely
18 there were negotiations, but you can't say any details about
19 the negotiation?

20 A: Yeah. It -- it'd been unusual for this type of case for
21 there not to be a plea offer extended.

22 Q: All right. Any idea what that would've been?

23 A: I -- I -- it -- it would just be kind of conjecture. I -
24 - probably volunteer manslaughter, just -- but I -- I don't
25 know.

1 Q: Okay. Something -- you're saying it's not out of the
2 realm of possibility that the offer would've been something
3 that would have been a lesser than murder?

4 A: Not out -- no.

5 Q: With -- going back to Mr. Webb, during those meetings
6 with him, was there any other meetings in your office where
7 law enforcement was present or an investigator from your
8 office that had notes involved with those meetings?

9 A: We had an investigator at the time, so no.

10 MR. PHILLIPS: No further questions of this witness, Your
11 Honor.

12 THE COURT: Cross-Examination, Mr. Mitchell?

13 MR. MITCHELL: Just briefly, Your Honor.

14 **CROSS-EXAMINATION OF CHRISTOPHER DURANT BY MR. MITCHELL:**

15 Q: Mr. DuRant, just to be clear, you don't -- you don't know
16 whether a plea offer or what the plea offer was offered to Mr.
17 Newman?

18 A: I do not. No.

19 Q: And you testified at the time that your standard practice
20 was not to give a cooperative co-defendant a specific promise?

21 A: That's correct.

22 MR. MITCHELL: Okay. No further questions, Your Honor.

23 THE COURT: Any redirect?

24 MR. PHILLIPS: No, Your Honor. He can be released.

25 THE COURT: Okay. Any -- any objection to this gentleman

1 being excused?

2 MR. MITCHELL: No objection, Your Honor.

3 THE WITNESS: Thank you, very much.

4 THE COURT: Okay. Thank you, mister -- it's DuRant,
5 correct?

6 THE WITNESS: That's right.

7 THE COURT: Thank you, sir. You may go. The next
8 witness, please.

9 MR. PHILLIPS: Thank you, Your Honor. Let me get set up
10 with the Webex. We can go ahead and get Mr. Dudek.

11 THE COURT: Okay.

12 REPORTER'S NOTE: (Off the record discussion)

13 THE COURT: All right. So I believe the best way to have
14 this witness sworn will be for the clerk to go to where Mr.
15 Phillips is.

16 THE CLERK: Raise your right hand, sir.

17 THE COURT: Sir, can you hear us?

18 MR. PHILLIPS: Mr. Dudek.

19 THE CLERK: Raise your right hand, sir. State your full
20 name.

21 THE COURT: He's muted. Mr. Dudek, can you hear us? Can
22 you get closer to your monitor?

23 MR. DUDEK: I can hear fine. I can hear everything.

24 THE CLERK: Okay. Raise your right hand.

25 THE COURT: I'm going to have you sworn by the clerk.

1 MR. DUDEK: Oh, I'm sorry.

2 THE CLERK: State your full name.

3 **ROBERT DUDEK, HAVING BEEN DULY SWORN TESTIFIES AS**
4 **FOLLOWS:**

5 THE CLERK: Thank you, sir.

6 THE COURT: Okay. Mr. Dudek, sir, can you speak more
7 loudly or get a little closer to that monitor?

8 MR. DUDEK: Okay. Yes, ma'am. Is this loud enough,
9 Judge?

10 THE COURT: My court reporter said she can't hear you.

11 MR. DUDEK: Okay. Can you hear me now?

12 THE COURT: Barely.

13 MR. DUDEK: Is this any better?

14 THE COURT: No.

15 THE COURT: Mr. Phillips, can you see about that volume?

16 MR. PHILLIPS: Yes, Your Honor.

17 THE COURT: Mine's off, so I'm coming to you through the
18 mic.

19 COURT REPORTER: Mine's off too because of feedback. If
20 he'll speak straight into his microphone, I'm sure it will be
21 fine.

22 THE COURT: Perfect.

23 MR. PHILLIPS: Bob, can you hear me okay? Excuse me, Mr.
24 Dudek.

25 MR. DUDEK: Yes, Mr. Phillips. I can hear you fine.

1 THE COURT: Okay. The court reporter says she can hear
2 you now, sir. Thank you. Good morning, sir.

3 MR. DUDEK: Good morning.

4 THE COURT: This will be direct examination by Mr.
5 Phillips.

6 MR. DUDEK: Robert M. Dudek.

7 ROBERT DUDEK, HAVING BEEN DULY SWORN TESTIFIES AS
8 FOLLOWS:

9 DIRECT EXAMINATION OF ROBERT DUDEK BY MR. PHILLIPS:

10 Q: Good morning, Mr. Dudek?

11 A: Good morning, Mr. Phillips.

12 Q: Could you give a little brief overview of your background
13 as the Chief Appellate Defender of the Appellate Division on
14 the Commission of Indigent Defense?

15 A: Sure. I've been an appellate defender for 34 years. I
16 became the Chief for the Capital Appeals, and then in 2009, I
17 became the Chief Appellate Defender.

18 Q: And so in -- in this case, I guess overall, how many
19 appeals do you feel you've done in the course of your career?

20 A: I -- I -- we averaged a hundred a year, I guess that'd be
21 about 3,400, would be about a guess.

22 Q: And how many death penalty appeals have you worked on?

23 A: Again, I'm guessing Mr. Phillips, maybe 30.

24 Q: And with that, certainly at this point, have you ever
25 been qualified as an expert witness?

1 A: I don't -- I don't believe I have. No, sir.

2 Q: And how many times have you testified as a witness?

3 A: Again, kind of countless and PCRs, maybe hundred times.
4 Again, that being a guess.

5 Q: All right. And so you ultimately were assigned and
6 worked on the applicant, Jonathan Newman's case?

7 A: That's correct.

8 Q: And -- go ahead. Please explain.

9 A: No. I assigned the cases for this office and I assigned
10 this one to myself probably because it was a murder.

11 Q: And could you describe some of the background related to
12 this case?

13 A: You mean --

14 Q: From a legal standpoint?

15 A: Okay. Well, as you know, since you once worked here, you
16 know, getting the -- once the transcript is assigned, or case
17 is assigned, I read the entire transcript. I take notes and
18 this essentially identify what issues are preserved. And then
19 I just, you know, narrow it down to what I think is a possible
20 winning issue or issues, and then make the decision on what
21 issue gives my client the best chance to win the issue or
22 issue. And those are what I brief.

23 Q: And in this case, you ultimately filed an Anders brief;
24 is that right?

25 A: Yes, sir. That's correct.

1 Q: Could you describe what an Anders brief is?

2 A: Yes. An Anders brief, Anders v. California is a
3 procedure where if the appellate attorney decides that there's
4 no meritorious issue, they are required to brief an issue for
5 the Appellate Court. Here, the Court of Appeals, for them to
6 make an independent judgment, not based just on the issue
7 raised in the Anders brief, but on the entire record whether
8 the Court thinks there's a meritorious issue.

9 If the Court thinks there's a meritorious issue, then
10 they send it back to the appellate attorney, here me, ordering
11 me to rebrief the same issue I briefed or any other issue that
12 the Appellate Court wants briefed. If the Court agrees
13 there's no meritorious issue, then the appeal is dismissed.
14 And I as the appellate attorney, am relieved as counsel.

15 Q: And then, so -- and again, just to kind of reiterate or
16 clarify, in this case, your decision to write or submit an
17 Anders brief was because you didn't believe there were any
18 meritorious issues preserved for appellate review?

19 A: Right. I determined that there were -- there was no
20 meritorious issue. There was no issue I thought gave me or
21 Mr. Newman a chance of winning on appeal.

22 Q: And in your review of the transcript, were there issues
23 that were present that had they been preserved, you would have
24 raised?

25 A: That's correct. If I had found what I consider to be

1 meritorious issue, I would not have filed an Anders brief and
2 I would've raised that issue or those issues as a merits
3 brief.

4 Q: And so, specifically in review of the case, there was the
5 inference jury instructions related to the malice being
6 inferred by use of a deadly weapon, malice being inferred
7 based off of excessive brutal force. Any of the inference
8 testimony, could you expound on if that was properly
9 preserved, whether you would've raised that issue on appeal?

10 A: Yea. If I understand your question correctly, there was
11 an objection. Reading it in context to the jury being
12 instructed that there was an inference -- let me go right to
13 the record, that there was a inference of malice from
14 excessive or brutal force that was discussed on page 425 and
15 426 of the -- of the transcript.

16 Q: And so with the jury instructions, had there been a
17 proper objection, would that been an issue that you would've
18 raised on appeal or that you would've filed a initial brief of
19 appellant versus an Anders brief?

20 A: This is difficult. I don't have a clear memory first of
21 all, Mr. Phillips, on it. I obviously refreshed my memory. I
22 think in -- in, you know Belcher came out in 2009. That was
23 the first one on it. And I think from reading the colloquy
24 between the Judge and the attorney that the Judge certainly
25 understood, or I shouldn't say certainly, but I think

1 understood what the objection was. And this, again, this was
2 really before perhaps the whole thing on the inference of
3 malice really got rolling.

4 I mean, you know, Burdett was not until 2019 as I recall.
5 And you know, like I cited, Belcher was 2009, this trial was
6 2016. But anyway, long story short, I mean, I didn't brief
7 it, so at the time it did not strike me as a winning issue. I
8 can certainly say in later years now, more recent times,
9 anytime there's an objection to an inference of malice based
10 on anything, I would be much more inclined to brief it.

11 I recently, you know, briefed just an inference of malice
12 from an unlawful act without just cause or excuse. But at the
13 time, it -- it didn't make a big impression on me. I didn't
14 think it was a meritorious issue or I would've raised it. So
15 if I was wrong, I was wrong.

16 Q: Well, and I -- and I guess not saying that you were wrong
17 specifically as to Belcher at the time, Belcher was good law
18 at the time of this trial?

19 A: That's correct.

20 Q: And specifically as to the -- the jury instruction
21 regarding malice being inferred, that the jury could infer
22 malice based on the use of a deadly weapon. At that point, if
23 there was an objection that was properly to preserve that
24 issue, then you could have raised that on direct appeal?

25 A: Yeah. I mean, I -- I -- I could have raised the issue,

1 you know, further -- you know, since you asked, the case that
2 we're discussing State v John Macklemore out of Lexington on
3 the use of a fist, that was my case on appeal. So I was
4 intimately familiar with it and Macklemore, and it's you know
5 not dissimilar case.

6 But Macklemore's kind of a tragic case also, where
7 Macklemore in fact hit the -- hit the decedent and the
8 decedent fell and kind of freakishly hit his head, I think on
9 the tongue of a trailer. It's been many, many years, but if I
10 remember correctly. So it was not a -- not a dissimilar --
11 you know, it's not dissimilar case, but yeah, I -- yes, I
12 could have raised the issue.

13 Belcher was the law at the time, Belcher said -- now
14 Burdett later said after this trial, don't -- don't give an
15 inference of malice from the use of a deadly weapon at all.

16 At the time of this case, it was, don't give that
17 inference of malice instruction if there's self-defense or,
18 you know, say involuntary manslaughter, criminal negligence,
19 anything that would reduce murder to a defense, say accident
20 or lesser included offense. But yeah, that was a -- that was
21 a state of the law at the time.

22 Q: And so, two opinions were actually issued yesterday. And
23 I know for you to understand the law of PCR, we're not trying
24 to argue that counsel's clairvoyant, but two issues, two
25 opinions came out on this yesterday that kind of outlined the

1 procedural history of this law. Were you aware of those that
2 came out yesterday?

3 A: No. I'm -- frankly, the only two cases I was familiar
4 with from yesterday were the SVP cases on -- on the test they
5 found not reliable. So, no, you got me --

6 Q: Well -- and I -- I apologize. July 17th. I apologize.

7 A: No.

8 Q: Two weeks ago.

9 A: No, I'm not familiar with them. I certainly think I'm
10 well familiar with the progression of the inference of malice
11 instruction, so I can -- should be able to answer whatever you
12 want.

13 Q: And so, it's just -- the next part of that was the
14 inference on excessive brutal force. Had you seen that
15 objected to prior to this? That jury instruction?

16 A: I'm not sure I understand the question correctly. I
17 mean, I could have -- I could have briefed it. Probably, I
18 can tell you if it -- I just took over this transcript today
19 probably a good chance that I would have briefed it. Like I
20 say more recently, any inference of malice based on anything,
21 I'm much more apt to brief it because, you know, my reading of
22 the Supreme Court is there certainly not -- you know, they're
23 simply kind of all over these jury charges on as to any
24 inference of malice. We obviously have come a long way since
25 the presumption days, but just on getting these inferences of

1 malice removed as being unnecessary.

2 Q: And not to confuse you, I guess the major issue is if you
3 could explain the error preservation rule in South Carolina.
4 In other words, what you're bound by to raise as far as the
5 meritorious issue, what is considered a preserved issue for
6 appellate review?

7 A: Sure. I -- I, you know, think of error preservation as a
8 fairness to the trial judge standard from the request or
9 objection by trial counsel. Does the judge appear to
10 understand, in fairness to that judge, does he or she
11 understand what the objection is or the request to charge or
12 whatever?

13 You don't have to use any magic words, but if defense
14 counsel barely in a common sense manner conveys his or her
15 objection or request to charge to the judge, then the Court
16 would, and -- and I think should consider the issue preserved
17 for appellate review.

18 Q: Right. And so in other words, counsel would've had to
19 make a specific objection to those jury instructions and you
20 would -- and essentially perceive from the trial court a
21 specific ruling on those objections for that issue to be
22 preserved for appellate review?

23 A: Right. I mean in other words, just take it out of
24 context, with this case we objected, say the voluntary
25 manslaughter being instructed and the judge says, No, I'm not

1 -- I'm not going to instruct it. Then you know, you have,
2 then you have an objection and you don't have -- you have an
3 objection my counsel.

4 You have a ruling from the judge. You have to have a
5 ruling from the judge. And then under State case called State
6 v. Alexander Santee Johnson, you do not have to renew your
7 exception after the jury charge, as long as you object to it
8 at some point on the record if the judge rules against you.

9 Q: And so, the last set of questions that I'm going to go
10 through with you here deal with the kind of case laws that go
11 even farther back than State v. Daniels and then State v.
12 Beatty regarding the language, the kind of prohibition of the
13 search for the truth language. Are you familiar with that
14 case law?

15 A: The search for the truth?

16 Q: Yes.

17 A: Yeah. I mean, I've had -- I've had many cases that --
18 that I grieved on, on that issue not on having the -- this --
19 the -- the argument. I had State v. Bane Alexia (ph) a death
20 penalty case long time ago. I'm sure you're familiar with
21 that, where I argued this instruction shouldn't be given.
22 That it was a search for the truth, because it dilutes the
23 reasonable doubt standard by essentially reducing the burden
24 of proof from proof beyond a reasonable doubt to finding the
25 truth being a preponderance of the evidence standard. So I'm

1 intimately familiar with the issue.

2 Q: In the case you just referenced, that's from 2000, is
3 that sound right?

4 A: That sounds about right. Yes, sir.

5 Q: And so, if that language was in the Court's opening
6 remarks to the jury and the prosecutor and defense counsel
7 used that language in opening statements and arguments, and it
8 was kind of weaved throughout the trial, if that had been
9 objected to, would that have been an issue you would've raised
10 on appeal?

11 A: Yes, but let me put this caveat. If the defense attorney
12 also argues or tells the jury that the trial is a search for
13 the truth, then, you know, I think the Appellate Courts can be
14 all over that is saying, you did the same thing. You don't
15 have any right to complain about something you did yourself.

16 Q: Understood as far as a direct appeal issue, not from a
17 post-conviction relief standpoint; is that fair to say?

18 A: Yes. I mean, that would be -- that certainly could be an
19 appellate issue if it was preserved on that the jury should
20 not -- I mean, the attorneys did -- the judge always instructs
21 that the arguments of counsel are not -- not evidence. Now,
22 you know, whatever the judge says is obviously a totally
23 different world. So if that judge, he or she tells the jury
24 that a trial is a search for the truth, then yes, I have a --
25 I have a problem with that. And if it's objected to, then

1 certainly I think that could be a meritorious issue on appeal.
2 That's certainly not necessarily a winning one, but it would
3 be meritorious.

4 Q: And -- and you would -- and it wouldn't have been
5 potentially an Anders brief if he had a meritorious issue?

6 A: I'm sorry. Can you say that again, Mr. Phillips?

7 Q: I know, I apologize. We got some echo. That if the
8 issue was preserved and if you thought essentially was to
9 raise that issue, it would not have been an Anders brief?

10 A: That's correct.

11 MR. PHILLIPS: No further questions, Your Honor. I'll
12 leave this on here.

13 THE COURT: Ashley, is there a way that we can stop the
14 echo? Does that mean that after the person in this courtroom
15 asks the question, it has to be muted, or while the person is
16 asking the question from this courtroom, it would be muted?

17 LAW CLERK: It looks like you were unmuted the entire
18 time. So maybe you stay muted and Mr. Phillips.

19 THE COURT: I'm -- okay. Well, my computer is muted.

20 MR. PHILLIPS: Your Honor, I -- I agree with you that I
21 think we could ask the question, hit mute on this and that
22 should --

23 THE COURT: Well, maybe now it's -- now that maybe I've
24 muted, can you all still hear me?

25 LAW CLERK: I can hear you.

1 THE COURT: So it's through the mic in the courtroom that
2 you all can hear me?

3 MR. PHILLIPS: That's -- that's correct, Your Honor.
4 You're muted online.

5 THE COURT: All right. So it'll be a lot easier for our
6 court reporter, I'll remain muted. All right.

7 Cross examination, Mr. Mitchell.

8 And just to be clear, Mr. Dudek has not been qualified as
9 an expert. It was not asked to that extent. Not saying that
10 he couldn't be, but -- but he was not qualified as an expert.
11 All right. Thank you.

12 **CROSS-EXAMINATION OF ROBERT DUDEK BY MR. MITCHELL:**

13 Q: Good morning, Mr. Dudek. How are you?

14 A: Good morning, Mr. Mitchell. Doing well.

15 Q: Mr. Dudek, the objection on page 426 to the inference of
16 malice, would you agree that that was made such that it was a
17 preserved issue for appeal?

18 A: I would've, yes. I -- I think -- I think, again, the
19 Judge understood what the request is. On 426, the Judge says
20 -- the counsel says we do object to the addition that the
21 solicitor has presented, meaning again, the excessive brutal
22 force leading to an inference of malice.

23 And the Judge says, Okay, that's allowing an inference of
24 malice, use of a brutal force. And then he brings up
25 Macklemore, or actually defense counsel brings up Macklemore,

1 and the Judge cites another case, State v. Belger, B-E-L-G-E-
2 R. So I think it's -- oh, and the Judge does mention
3 Macklemore. So yes, I would agree that the -- that issue was
4 preserved.

5 Q: And this trial occurred in 2015, correct?

6 A: Yeah, that's right. I think my brief went in in 2016.
7 Right.

8 Q: And State v. Burdette came out in 2019?

9 A: Burdette was 2019, Belcher was 2009.

10 Q: And correct me if I'm wrong, Mr. Dudek, but Belcher said
11 that you cannot instruct an inference of malice through the
12 use of a deadly weapon, only when there is evidence presented
13 that would excuse or justify the killing.

14 A: That's correct.

15 Q: And you filed an Anders brief in this case, correct?

16 A: That's correct.

17 Q: So you saw no meritorious issues?

18 A: That's correct.

19 Q: And when you file an Anders brief, the Court of Appeals
20 also reviews the entire record to determine whether there was
21 any meritorious issues, correct?

22 A: That's correct.

23 Q: And they granted your motion to relieve and dismiss the
24 appeal?

25 A: That's correct.

1 Q: So presumably, the Court of Appeals also didn't see any
2 meritorious issues?

3 A: I agree with that.

4 Q: And Mr. Dudek, in State v. Alexi, the Court didn't
5 overturn that conviction, correct?

6 A: That's correct. They -- they affirmed.

7 Q: And their reasoning was because the instruction was not -
8 - not part of the reasonable doubt or circumstantial evidence
9 charge?

10 A: That's my memory as well. Yes, sir.

11 Q: Thank you very much, Mr. Dudek. I believe that's all I
12 have for you.

13 A: Yes, sir.

14 THE COURT: Redirect?

15 MR. PHILLIPS: Yes, Your Honor.

16 **REDIRECT EXAMINATION OF ROBERT DUDEK BY MR. PHILLIPS:**

17 Q: Mr. Dudek, I just want to clarify one thing. Page 426 of
18 the record, you indicated on cross-examination that that issue
19 was preserved, but then contradicted yourself that it wasn't
20 preserved. So I'm just trying to make sure, since you filed
21 an Anders brief and said that there were no meritorious issues
22 preserved for appellate review, which is it?

23 A: Well, I don't know if I contradicted myself. I certainly
24 think the issue -- I mean, I think in fairness, the issue's
25 preserved. Okay. I mean, I didn't raise it. My testimony

1 has been, if I -- if I was coming about it today in 2024, more
2 recently, the direction the Court -- Supreme Court's been
3 going, what I was saying is, I think I would've briefed this
4 issue as being meritorious. But yes, I am saying, I think in
5 fairness to defense counsel, fairness to the trial judge, the
6 issue was preserved. And I didn't brief it at the time
7 because I obviously did not think it was meritorious. If I'm
8 wrong, I'm wrong.

9 Q: And so, on page 426, just want to make sure that we have
10 -- specifically on line seven, the Court says they're allowing
11 the inference of malice as well as the use of excessive brutal
12 force. He says, "I've checked it and I think it's
13 appropriate." There's another case on point, it says State v.
14 Belger. But we know that it's referencing State v. Belcher
15 and that it doesn't allow use of a deadly weapon in that case,
16 specifically to a gun.

17 A: Right. That's correct. And then the Judge also cites
18 Macklemore, so you're correct. I think they -- I think it is
19 -- I think it's pretty clear in context. They're talking
20 about Belcher and it was Belcher's put down as -- as a Belger,
21 B-E-L-G-E-R rather than Belcher, B-E-L-C-H-E-R. So I agree
22 with that. I think that -- I think the Judge understood what
23 the objection to the jury instruction was.

24 MR. PHILLIPS: Understood. No further questions, Your
25 Honor.

1 THE COURT: Okay. Thank you. Any objection to this
2 witness being excused?

3 MR. MITCHELL: None from the State, Your Honor.

4 MR. PHILLIPS: None from the applicant, Your Honor.

5 THE COURT: Okay. Thank you. Thank you very much, sir.
6 Have a nice day.

7 THE WITNESS: Thank you, Your Honor.

8 THE COURT: Okay. Any objection to me leaving Webex?

9 MR. PHILLIPS: No, Your Honor.

10 MR. MITCHELL: Not going to say, Your Honor.

11 THE COURT: Okay. Thank you, Ash. Okay.

12 Next witness?

13 MR. PHILLIPS: Yes, Your Honor. At this time the
14 applicant would call himself Jonathan Newman. He'll be the
15 next witness, Your Honor.

16 THE COURT: Okay. Does anybody need a break before we
17 hear from Mr. Newman, including Mr. Newman? You all okay?

18 MR. MITCHELL: I'm good, Your Honor.

19 THE COURT: Okay.

20 MR. PHILLIPS: We're good. Thank you, Your Honor.

21 THE COURT: All right. Sir, you're going to have to come
22 up here, watch your step and take your time. All right?

23 MR. NEWMAN: Yes, ma'am.

24 THE CLERK: Put your left hand on the Bible, raise your
25 right hand. State your full name?

1 MR. NEWMAN: Jonathan Cody Newman.

2 JONATHAN NEWMAN, HAVING BEEN DULY SWORN TESTIFIES AS
3 FOLLOWS:

4 THE CLERK: Step around, sir, please. State your full
5 name and spell your last name for the record, please, sir.

6 THE WITNESS: Jonathan Cody Newman, N-E-W-M-A-N.

7 THE COURT: Okay. Mr. Phillips, direct examination.

8 MR. PHILLIPS: Thank you, Your Honor.

9 DIRECT EXAMINATION OF JONATHAN NEWMAN BY MR. PHILLIPS:

10 Q: Good morning, Mr. Newman. If -- if you could, could you
11 introduce yourself and give a little bit of background about
12 meeting with your lawyer for the first time and we'll go from
13 there?

14 A: Hey. Again, my name is Jonathan Cody Newman. As far as
15 meeting with my lawyer goes, I think it was probably a total
16 of two times that I met with him. It was once right before
17 the trial and then it was one during the week of trial.

18 THE COURT: Is his mic on? Is your mic on?

19 THE WITNESS: Yes, ma'am.

20 THE COURT: Okay. You can sit back, maybe -- let's -

21 COURT REPORTER: I think I can hear okay.

22 THE COURT: Okay. Keep going.

23 MR. PHILLIPS: ___ And Your Honor, if you have any issues,
24 please let us know.

25 BY MR. PHILLIPS:

1 Q: So you said, how did he become your lawyer? Let's take a
2 step back. How did -- how did you find him to be your lawyer?

3 A: I think first I was given, was it Scott Robinson. And
4 then I guess there was some type of issue with Scott Robinson
5 being in the same office as my co-defendant's lawyer. I can't
6 remember his name. I think it was his last name was Carter.
7 Carter or something like that. So anyways, I guess from that
8 point they gave me a different lawyer and they appointed me
9 Eleazer Carter.

10 Q: And so once he was appointed, were you in jail at the
11 time or were you out on bond?

12 A: I never got a bond. I was in jail the whole time.

13 Q: And you said, so once the point where Mr. Carter was
14 appointed to represent you until the day the trial started, he
15 visited you how many times?

16 A: Probably a total of two times. Once before trial. It
17 was like right before trial and then one during the week of
18 trial.

19 Q: And when you said once during the week of trial, how soon
20 was that to the Monday of jury selection?

21 A: I think it was right after the jury selection. Again,
22 I'm not -- I'm just -- it's -- it's been about 10 years, so
23 I'm assuming. I just know that it was the week of trial and I
24 -- if I had to, you know -- again, I don't want to guess
25 because I don't want to say the wrong thing. But at the same

1 time, I do know that it was -- it was probably right after the
2 jury -- or right before the jury selection or either right
3 after it was -- it was -- it wasn't very far after.

4 Q: And just to clarify that, you're saying he visited you
5 once before trial and once during the week of the trial?

6 A: Correct.

7 Q: Okay. And so, during that meeting before trial, what was
8 discussed between you and your lawyer?

9 A: He -- he wasn't -- he was probably there 30 minutes. We
10 didn't really discuss much. He just went over pretty much a
11 couple basics on what was going on with the case. He asked me
12 some questions, I answered them and -- but I don't really know
13 the specific questions. Again, it's been -- it's been 10
14 years ago.

15 Q: All right. So during that meeting, did you review any
16 discovery? Did he bring any of the evidence to that meeting?

17 A: Not that I recall. No.

18 Q: All right. What did he -- what did he discuss with you?
19 Try that -- as best you can?

20 A: I think he just wanted me to ask like what happened.
21 Like what happened and you know, where I was at, you know,
22 what happened, who was involved and things like that.

23 Q: Okay. So he asked you basically background on the facts
24 of the case. Did he show you any pieces of paper? Did he
25 show you any videos, any audio statements?

1 A: Not that I recall. No.

2 Q: All right. So in terms of evidence, you and him during
3 this meeting, you said that lasted 30 minutes, no evidence was
4 reviewed?

5 A: I didn't get anything regarding my case. I think until
6 it was the week of trial, I got a motion of discovery during
7 the week of trial, because I remember telling myself, dang, I
8 didn't get the motion until the week of trial. And I -- I
9 found that kind of crazy that I'm getting a motion, you know.
10 Normally, I've seen people get their motion before and I got
11 mine during the week of trial. I just find that kind of odd.

12 Q: And again, just to clarify, you got this in the mail and
13 it was -- how did you get it?

14 A: I got it -- I got it in the mail.

15 Q: All right. You got it in the mail while you're in the
16 jail. And how many days before trial -- or you said -- or did
17 you say during trial? Be as specific as possible.

18 A: I know -- one thing I do know is, it was either the week
19 of trial or a day before trial because I -- because they just
20 popped it on me and said, hey, well you're going to trial.
21 And I didn't know anything about me going to trial until like,
22 you know, I was told I was going to trial. Then next week I
23 was going to trial.

24 Q: Is -- explain, how did you learn that you were going to
25 trial?

1 A: I believe I got something in the mail.

2 Q: Was that at the same time as you receiving the discovery?

3 A: I don't -- I don't remember.

4 Q: All right. So, you know, at some point whether it was at
5 the same time or not, sometime in between leading up to that
6 same week of before the trial, you received something in the
7 mail saying that you were on the trial roster?

8 A: Correct.

9 Q: Okay. Not sure how many days before the trial?

10 A: No, sir.

11 Q: All right. And when you said your second visit was
12 during the trial, what point of the trial was that? That he
13 basically sat down and you all were kind of going through
14 everything?

15 A: If I'm not mistaken, I know that we were -- we were doing
16 the jury selection. And then during, you know -- after that
17 he said he was going to come to visit me. So I believe maybe
18 it was a day or two into the trial that I -- that I got a
19 visit with him.

20 Q: So jury selection had already occurred?

21 A: If I can recall correctly, yes.

22 Q: Can you remember whether anything else had happened?

23 Opening statements?

24 A: You know, I -- I was young. I -- I -- I wasn't really
25 familiar with the -- with the -- with the, you know, how the

1 procedures of court. You know, I'm only just now being kind
2 of, you know, familiar with how things go. Then I had -- I
3 had no clue at all how court works. So I can't really give
4 you the answer to that though.

5 Q: Do you think it was the first day, second day?

6 A: It's probably the -- probably the second day. I'd have
7 to go with the second day.

8 Q: All right.

9 A: But again, I don't want to guess because I don't want to
10 give any inaccurate information. But I do know that it was
11 probably a day or two in.

12 Q: Well, just like we discussed, I don't want you to guess
13 either. Don't speculate. You give the answers that -- if you
14 don't know your answers, I don't know. So specifically you
15 think potentially the second day, but it easily could have
16 been late -- later than the first day?

17 A: Yes.

18 Q: All right. And you do believe that it happened after
19 jury selection?

20 A: Yes.

21 Q: What -- so what occurred during that meeting?

22 A: I mean, it wasn't really long enough to -- to prepare
23 defense for anything. I, you know, I don't really -- I can't
24 really recall what happened. I just know that it was just a -
25 - a background on what he was going to do, what -- you know.

1 You know, asking me to give me a background on -- on the case,
2 how it happened and wanted me to -- I think I wrote a -- he
3 wanted me -- he gave me a piece of paper. He wanted me to
4 write down just the facts of everything that was going on.
5 And that's how the defense was prepared.

6 Q: Okay. So he was basically trying to do theme and theory
7 after jury selection as far as what the defense was going to
8 be?

9 A: Correct.

10 Q: All right. How -- so your first meeting happens at the
11 jail. The second meeting, where were you when that meeting
12 was happening?

13 A: They -- they were both at the county jail.

14 Q: Both at the jail. So was this, again, at that point, if
15 it's the week of trial, was that after court? Before court?
16 Try to be as specific as possible.

17 A: It -- it was definitely after court.

18 Q: All right. So potentially at the end of one of the days?

19 A: Correct.

20 Q: Okay. Now, in terms of him discussing essentially case
21 facts, getting to know the case better through your position,
22 your -- your knowledge, was there any specifics discussed
23 about legal process? Whether to challenge evidence, whether -
24 - what a potential defense would be? Was there any
25 constitutional arguments or issues that were discussed with

1 you?

2 A: That I don't -- I don't remember.

3 Q: Was there anything discussed regarding any evidence,
4 challenging any piece of evidence, in terms of its
5 admissibility?

6 A: That I don't -- I don't remember.

7 Q: How long do you think that meeting lasted?

8 A: Probably a total of an hour maybe.

9 Q: And specifically during that hour meeting, was there
10 discussion or preparation about whether you would testify in
11 the trial?

12 A: I'm not sure, but if -- if -- I'm not sure. Because
13 again, it's been -- it's been 10 years. To look back that far
14 is kind of -- it's -- it's a -- it's a long time to look back
15 into.

16 Q: And ultimately, what did he tell you as far as what the
17 defense would be? Did you all discuss that?

18 A: On a defense, I -- I know that -- let me -- let me think
19 for a second. Because again, it's been a long time, but I do
20 know we discussed that. I -- I don't -- I don't really
21 remember. I don't -- again, like you said, I don't want to
22 give inaccurate information and for me to recall that's --
23 that's been -- that's been a long time ago.

24 Q: Was there any discussions about your co-defendant, Latroy
25 Samuels?

1 A: Yes. I mean, we -- I was given -- I was told what --
2 what their statements were after I had already got my motion
3 to discover. We talked about what their statements were and
4 that -- the fact that they had given multiple different
5 inaccurate, you know, statements and then switched it up and
6 then also got charged with giving false information to law
7 enforcement.

8 So we were going to act on that, you know, being a -- an
9 argument because, you know, the -- the -- giving false
10 information to law enforcement and then to use their
11 testimonies again is just, you know, it's kind of crazy, so.

12 Q: Okay. So he explained to you that Mr. Webb and Mr.
13 Samuels had provided multiple statements that he believed were
14 inconsistent and that was essentially their -- the defense
15 would be to attack them on cross-examination on credibility?

16 A: Oh. Yes, sir.

17 Q: Okay. And so, was there any other discussions about Mr.
18 Webb being a witness that was going to testify at the trial?

19 A: Yeah. I was made aware that he was going to testify.
20 Yes.

21 Q: And at what -- was that the first meeting or the second
22 meeting?

23 A: I don't recall exactly which one it was, but I do know
24 that I was made aware that he would be testifying on me.

25 Q: And what did you -- and -- and again, this is a two-way

1 street, during this first meeting or second meeting, what were
2 you conveying to your lawyer?

3 A: About as far as what happened?

4 Q: That's right. What were you telling him? I mean, he's
5 asking you these questions.

6 A: He asked, you know, what was going on, you know, how --
7 what we were doing that day, why we were there, my chain of
8 events on what -- how I ended up there, where I was before,
9 where I went after. And you know, pretty much just, you know,
10 where I was at. And then what I had -- what my part in it
11 was.

12 Q: And as far as that, and that's ultimately how he decided
13 to proceed?

14 A: Correct.

15 Q: So what was the defense that you all agreed upon?

16 A: Well, everybody was saying first Montage was saying that
17 me and Latroy had something to do with it, and Latroy was
18 saying me and Montage had something to do with it. Okay. And
19 the fact of the matter was that there's only -- they're just
20 trying to say that I punched the man one time, but nobody
21 during trial said I punched the man and I'm not the one who
22 punched the man. So the -- the argument was -- is that
23 Montage punched him, which I said in my statement when I got
24 on stand during trial.

25 Q: Understood. And so your preparation, was there any other

1 discussion before you testified as far as preparation about
2 you having a right to not testify regarding the State's burden
3 of proof? I mean --

4 A: Yeah. They said I didn't have to testify. I was --
5 again, I get nervous. I don't like being stared at, so
6 therefore I was -- when I was young, it was -- I -- I didn't
7 really want to get on there, but then I was made aware that if
8 I didn't get up there it would look bad on me. So therefore,
9 I got up on there on the stand.

10 Q: All right. And -- and try to elaborate that. You said
11 it would look bad on you, that was a discussion you had with
12 your lawyer?

13 A: Yeah. They said that if I didn't get on the stand it
14 would look like I was guilty of something maybe. So therefore
15 I needed to get up and -- and give my statement, which I
16 really wasn't comfortable with at the time. And never was I
17 comfortable with it. But again, I went against my gut and I
18 got up there and I gave my statement.

19 Q: And so in terms of the representation, was there anything
20 besides those two meetings that the lawyer did in preparation
21 for trial with you?

22 A: Can you -- can you ask the question one more time?

23 Q: So you -- you met with your lawyer two different times?

24 A: Correct.

25 Q: One time before trial, one time during the trial. Was

1 there anything else that the lawyer did -- and sent you the
2 discovery of the mail. Was there anything else that your
3 lawyer did during the course of his representation once he was
4 appointed through trial that you haven't provided or testified
5 to today?

6 A: Not -- not that I can recall. No.

7 Q: Was there anything else he did during the trial with you
8 that you haven't testified to as far as your direct
9 interaction with him? In terms of preparing you for trial or
10 explaining the procedure, constitutional rights, those kind of
11 things. Was there any other conversations that you had
12 specifically with him?

13 A: I know there was a conversation about the jury selection
14 and the -- the attack on the jury selection was -- is that we
15 would go on the racial status of -- of the people that were on
16 there. So I believe that was bad advice, but at the same
17 time, is that we would pick more white people to get on the
18 stand than there would be black people where it somehow would
19 work on my favor.

20 Which at the time I didn't think much of it now, but
21 recalling back on that, I don't think that was good -- I mean,
22 that was good advice to give. And that's what we did, that's
23 what we acted on. And I don't really -- looking back on, I
24 believe, don't think that was the best advice to give.

25 Q: So you said your lawyer strategy, that's what he said, he

1 was --

2 A: He was -- that was one of the strategies. Yes.

3 Q: What other strategies?

4 A: That's all that I can recall. You know, as -- as far as
5 what stuck to my mind, that's the only thing that I -- I can
6 really recall.

7 Q: Understood.

8 MR. PHILLIPS: No further question, Your Honor.

9 THE COURT: Cross-examination.

10 MR. MITCHELL: I just have one question, Your Honor.

11 **CROSS EXAMINATION OF JONATHAN NEWMAN BY MR. MITCHELL:**

12 Q: Mr. Newman, do you remember during your trial after the
13 State rested the -- the Judge going over your right to testify
14 or not?

15 A: No, sir. I don't recall.

16 MR. MITCHELL: Your Honor, may I approach the witness?

17 THE COURT: Yes. And if you will, tell me what page
18 you're referring to.

19 MR. MITCHELL: This is page 296. 297, sorry, Your Honor.

20 THE COURT: Thank you.

21 **BY MR. MITCHELL:**

22 Q: Mr. Newman, if you don't mind just -- just reading that.
23 You don't have to read it out loud just to refresh your --

24 A: The whole thing?

25 Q: Start from the Court. Yeah.

1 A: Okay. Okay.

2 Q: And Mr. Newman, after the Judge fully informed you of
3 your right to testify, he asked if you understood everything?

4 A: Yes, sir.

5 Q: And how -- how did you respond?

6 A: I responded, yes.

7 MR. MITCHELL: That's all the questions I have for Mr.
8 Newman.

9 THE COURT: Any redirect?

10 MR. PHILLIPS: Very brief. I -- and Your Honor, if I
11 could have some leeway, just something that I asked a question
12 on, just wanted to expound one thing. If Your Honor gives me
13 -- I know -- I understand as far as the basis of being --

14 THE COURT: Mr. Mitchell, any objection? I don't know
15 what he's going to expand on, but I'm -- it's informal. It --
16 we don't have a jury.

17 MR. MITCHELL: He can go ahead, Your Honor.

18 MR. PHILLIPS: It'll be brief. Thank you.

19 **REDIRECT EXAMINATION OF JONATHAN NEWMAN BY MR. PHILLIPS:**

20 Q: Just wanted to make sure, I know you said you couldn't
21 recall, but I want to be specific in asking you this. In
22 terms of the discussions, was there any discussion about
23 specifically your charge and its sentencing range? In other
24 words, that it carried a mandatory minimum of 30 years' day
25 for day to life imprisonment?

1 A: What are you asking? Can you ask you that one more time?

2 Q: In other words, at this point, did the lawyer explain to
3 you that the charge of murder carries a mandatory minimum of
4 30 years to life imprisonment?

5 A: Yes.

6 Q: Okay. So he did explain that to you?

7 A: If I recall correctly, yes.

8 Q: And as far as -- and this is the -- the leeway, I asked
9 for Your Honor, the plea offer. What plea offer did he convey
10 to you?

11 A: They offered me 20 years.

12 Q: Specifically, a voluntary manslaughter of 20 years?

13 A: I don't remember. I mean, I don't remember if they said
14 voluntary manslaughter. I just know that they came to me and
15 said, hey, they're offering you 20 years, and I didn't take
16 it.

17 Q: And at what point did they present that offer?

18 A: A couple days in the trial.

19 Q: During the trial?

20 A: Correct.

21 Q: You're not sure what -- at what point of the trial, but
22 at some point during the trial.

23 A: I know it was late. It was late in the week of trial.
24 It was probably right -- it was right -- right before it
25 ended, they offered me 20 years.

1 Q: All right. And what specific discussions did you have
2 with your lawyer about that offer?

3 A: You know, 20 years, when I -- looking back, 20 years, you
4 know, I have children 20 years. The only thing I think about
5 was them being 18 and me coming home. So therefore, I -- I
6 wasn't going to take 20 years.

7 Q: All right. And there was no discussions about plea
8 offers prior to trial?

9 A: No, there was not.

10 MR. PHILLIPS: No further questions. Thank you, Your
11 Honor.

12 THE COURT: Okay. So Mr. Mitchell, is there any cross
13 with regard to that?

14 MR. MITCHELL: No, Your Honor.

15 THE COURT: Okay.

16 MR. PHILLIPS: Thank you.

17 THE COURT: All right. And Mr. Phillips specifically,
18 there was no redirect on anything raised by counsel in cross,
19 correct?

20 MR. PHILLIPS: That's correct, Your Honor.

21 THE COURT: All right. So, anything before I let this
22 witness stand down?

23 MR. PHILLIPS: None, Your Honor.

24 MR. MITCHELL: None, Your Honor.

25 THE COURT: Okay. Sir, you can return to council table.

1 Watch your step, okay?

2 MR. MITCHELL: Your Honor, the next witness will be Mr.
3 Carter. That may be a little lengthy to go through. If we
4 take five minutes, I think that might be in the best -- best
5 interest of everybody.

6 THE COURT: All right. We'll take 10 -- we'll take nine
7 minutes and we'll come back in, according to my computer clock
8 at 11:30.

9 MR. MITCHELL: Thank you, Your Honor.

10 THE COURT: Thank you.

11 (Court is in recess.)

12 THE CLERK: Place your left hand on the Bible. Raise
13 your right hand. State your full name.

14 MR. CARTER: Eleazer Carter.

15 **ELEAZER CARTER, HAVING BEEN DULY SWORN TESTIFIES AS**
16 **FOLLOWS:**

17 THE CLERK: Thank you. Step around and please, sir, be
18 careful. State your full name and spell your last name for
19 the record, please, sir.

20 THE WITNESS: Eleazer Robert Carter. Last name C-A-R-T-
21 E-R, Carter.

22 **DIRECT EXAMINATION OF ELEAZER CARTER BY MR. PHILLIPS:**

23 Q: Good morning, Mr. Carter.

24 A: All righty.

25 Q: If you could, give me a little bit of background about

1 how you got involved with this specific case, Mr. Newman's
2 case.

3 A: Sure. As -- as I understand it, my firm became involved
4 because King Cutter and Scott were part of the same group, the
5 public defender's office. And because there were three co-
6 defendants in this matter, they had to send the case outside
7 the public defender's office, and some kind of way I got
8 appointed.

9 Q: And do you remember when you were appointed on this case?

10 A: I do not. 2014, '15.

11 Q: So how much time from the time of appointment until Day 1
12 of trial, how much time did you have to prepare?

13 A: First -- I'd say first about 10 months and then second
14 about another 12 months.

15 Q: And -- and describe that when you say first and second, I
16 want to make sure -- what you mean by that?

17 A: This matter went forward on a -- went forward in trial on
18 a murder charge, but that's not what he was originally charged
19 with. I think he was originally charged with assault and
20 battery, no, high and aggravated nature or assault and battery
21 with the intent to kill or something to that effect. And
22 Mister, the decedent, drug on for just short of a year. And
23 of course, you know what happens when somebody is beaten up
24 and they die less than a year. Charges switch from attempted
25 murder to actually murder, I believe it was.

1 Q: So when you were appointed it was an attempted murder
2 charge and then during the course of the appointment the
3 charge was enhanced?

4 A: Yeah, I think it was attempted murder and yes, it was
5 enhanced after the gentleman died. Because he lingered on in
6 the hospital forever and a day, but short enough to enhance
7 the charges.

8 Q: Now, in terms of that amount of time that you just
9 described, from appointment to the first day of trial, how
10 many times did you meet with the applicant?

11 A: Probably two -- probably two times during the less than
12 murder charge and then probably -- not probably, but about
13 two, possibly three times before trial. Now after the --
14 during the -- the assault less than murder, I -- I think it
15 was, I want to say assault and battery high and aggravated
16 nature, but it might have been intent to kill. I don't
17 remember what the initial charge was. But I think I went to
18 see him after -- before the murder charge because I believe
19 his father called me and said something to the effect of, my
20 son was trying to reach you or something to that effect.

21 Q: All right. And so in terms of the -- you said there was
22 two meetings initially and then after the enhancement, three
23 meetings. Do you know what days those happened on?

24 A: I have absolutely no idea.

25 Q: Do you have any notes of those meetings?

1 A: I'm sure I have. I'm sure I took notes. No, I do not
2 have notes here. I'm sure I took notes and probably wrote the
3 date down also.

4 Q: And so, do you have the copy of the file with you?

5 A: I do not.

6 Q: All right. Have you reviewed the file in preparation of
7 your testimony?

8 A: I have not.

9 Q: All right.

10 A: The file is not in my office, but it's not such that I
11 could not have hunted down, but I have not.

12 Q: And so in terms of, you wouldn't have anything as far as
13 your knowledge here today to testify, you wouldn't have any
14 specific proof of dates that those meetings occurred on X
15 amount of day on X days and we discussed these things at those
16 meetings?

17 A: That's correct. In court here today, I do not have that.

18 Q: All right. In terms of this case with the two additional
19 co-defendants, walk me through kind of the preparation that
20 you had in terms of Mr. Webb and Mr. Samuels in terms of
21 preparation of trial.

22 A: All right. If I -- if I understand your question, maybe
23 I should ask you to be specific.

24 Q: I can clarify.

25 A: Please do.

1 Q: So in terms of Mr. Webb providing multiple statements to
2 police we'll -- we'll stay with him first. In terms of your
3 preparation for your cross-examination of this witness, at
4 what point did you learn that he had pled guilty and was going
5 to be a cooperating witness for the State?

6 A: As I recall, he pled guilty right up -- sometime right
7 before trial. He -- it is not like he planned to plead guilty
8 and we -- a whole year went by before he actually showed up to
9 do it. But I think he planned to plea right before trial.

10 Q: Now, the State -- the prosecutors had transcripts of
11 these audio recorded meetings with him. You had those in
12 preparation for trial?

13 A: I know I had audio -- audios of -- of Mr. Newman. I
14 don't -- and -- and I believe I had audios of Mr. Webb, but
15 not Mr. Samuels.

16 Q: And did you have the transcripts that they discussed in
17 reference in the trial?

18 A: Written transcripts? I don't recall having those.

19 Q: And in terms -- but you do recall having at least the
20 audio versions of those meetings with Mr. Webb?

21 A: I believe I recall. I believe I had them. I don't
22 recall them. I don't recall anything he said on it. Today, I
23 do not recall it, but I -- but I'm certain that I -- I had
24 them.

25 Q: Would it be fair to say that he provided inconsistent

1 statements?

2 A: I believe they all did.

3 Q: Significantly, right? From the trial transcript.

4 A: Miss -- well I -- I don't know if I want to add the word
5 significant to it, but they all provided inconsistent
6 statements including my client, Mr. Newman.

7 Q: And so with those statements in preparation for trial,
8 like you said, he pled guilty and you knew he was going to be
9 a cooperating witness. Specifically, as to Mr. Samuels, did
10 you have any reason to believe that he was going to testify in
11 the trial? Had -- had there been any type of discussions with
12 his counsel in preparation for trial?

13 A: Are we were talking about Mr. Webb or Samuels?

14 Q: Samuels now, Latroy Samuels.

15 A: Okay. All right. I knew Mister -- no, I didn't know. I
16 believe Mr. Samuels was going to testify because attorney --
17 Mr. Samuels' attorney indicated to me that he would, that he
18 was straight out; I'm not involved; I didn't do nothing. All
19 I did was stand out there on the street one night at the night
20 of the event. And so he was going to testify, yes, I knew.

21 Q: And so in terms of preparation, you had that -- you said
22 you did not have any -- the audio statements of Mr. Samuels,
23 correct? That was the difference between him --

24 A: That's correct. I didn't know there were statements of
25 Mr. Samuels.

1 Q: Now, in terms of prior to trial, with those meetings that
2 you had, what specifically did you discuss with Mr. Newman?

3 A: Okay. Like I said, the first meetings I think we
4 discussed what his position was about it. What are the facts
5 of it, how did it happen? And this -- at this point, this was
6 before Mister, the decedent had died. What role he played
7 into it? How did he come to be at the house? Was he at the
8 house? I mean, those type questions. Those are the things
9 that I inquired from him and I learned about --

10 You -- you want to hear some of the things that were
11 discussed?

12 Q: Yes.

13 A: Okay. I learned about how -- keep in mind Mr. Webb and
14 Mr. Newman lived in a house behind the -- the victim's house.
15 Well, back through a path behind the victim's house. And they
16 all walk through that path and walk up beside the victim's
17 house and walk up and down [REDACTED] Street in Manning, you know,
18 a couple of blocks away from the house in both directions.

19 So they just kind of loaf through there at, you know,
20 from time to time. And -- and I learned that in the process
21 of doing that, the victim was a drinker and in the process of
22 drinking, exchanged some words with them. And at some point
23 the victim may have displayed a weapon. And in displaying
24 that weapon it was a nice weapon and they liked it and they
25 wanted it. It was some sort of antique weapon with a chrome

1 look. And they wanted it and they got it. Or, well, I don't
2 know if they got it. They wanted it and they went to the
3 house for it.

4 Q: And you're saying that's specifically what was discussed
5 with you prior to trial? Or what the State's theory of the
6 case was? I want -- I'm just trying to be clear.

7 A: You're correct. What was discussed with me was they were
8 walking up and down the street and they walked through the
9 path and they had some exchanges with the victim. That's what
10 was discussed with me right up until before the trial. And
11 then sometime right before the -- right before the trial, I
12 learned about the weapon, of them wanting the weapon.

13 Q: Understood. And so as far as plea negotiations, I -- I
14 didn't move to sequester anybody you were here earlier. As
15 far as plea negotiations, do you remember whether there was
16 any pretrial plea negotiations in this case?

17 A: Okay. And we're speaking as to Mr. Newman, correct?

18 Q: That's -- just directly to you.

19 A: All right.

20 Q: Not -- not to --

21 A: All right.

22 Q: Not to the others yet.

23 A: Yes. There were a plea offer I think originally of 30
24 years for both the burglary and the murder. And -- and I
25 believe that plea went down to -- we're just talking plea

1 offers in general, not no time period. And I believe that
2 plea went down to -- plea offer went down to 20 years. And I
3 think it went down to 15 years. My recollection is it may
4 have gone down to 15 years. And, do you want me to just
5 continue or elaborate on that?

6 Q: How -- how were they communicated with you, was it --

7 A: Directly. They were speaking directly to me. I think
8 first Mister -- the -- the lead prosecutor -- what is his
9 name?

10 Q: Mr. DuRant.

11 A: Mr. DuRant said something to me and as we pushed forward
12 up to trial during trial, Chip Finney, the solicitor, says --
13 asked me would he take 15 years, I believe it was.

14 Q: All right. And so these weren't communicated over the
15 phone or email, they were in person?

16 A: No, they were right at the auditorium. The trial went on
17 at the auditorium because the Courthouse -- courtroom was shut
18 down.

19 Q: And all these plea offers were communicated to him?

20 A: Every last one of them.

21 Q: Now, and his position when you provided those plea offers
22 to him.

23 A: Okay. I think the best way I can answer you is he turned
24 them down. But if you'd like for me --

25 Q: If you could expound on it --

1 A: Expound --

2 Q: -- you can take it one at a time. That's fine.

3 A: All right. Well the first one, he turned down and I
4 might have encouraged him. Oh, 30 years, I don't think that's
5 a good idea. We could do better than that. Okay.

6 The second one caused me to have some concern and I
7 thought maybe he should have took it. I think I shared it
8 with him. No, I don't think I know I shared it with him, but
9 I believe I shared it with his mother and maybe the father. I
10 -- I think they're -- they were there at different times and I
11 spoke to them at different times because I don't think the
12 mother and father was married.

13 Q: All right. How many times did you speak with his father?

14 A: I know -- but definitely once on the phone, possibly
15 twice on the telephone. And then I think I spoke with them at
16 the -- at the trial.

17 Q: And so --

18 A: Before the trial and at some point during the trial, but
19 I spoke to the father, I think on the third offer because I
20 just -- it scared me that he would not have taken the 15
21 years. But again, the reason I wanted to tell you about them
22 -- the -- the offers differently is because by the time we got
23 to the third offer, Montage Webb had already decided, I'm
24 taking the offer, had already decided to take his offer. And
25 -- and he was taking his offer so that he could testify

1 against my guy. And -- and because they were -- I mean, they
2 were like buds, best of buds. I think they even lived
3 together in the house behind the victims in the path of the
4 house behind the victim's house. And so that kind of caught
5 me off guard with Montage being willing to tell on him.

6 Because they were like, you know, best of buds.

7 Q: And so that third offer, that 15-year, do you believe
8 that was during the actual trial?

9 A: That was during the trial because -- and I think they
10 offer -- well, and I'm speculating, I think they offered it
11 because they felt a little bit of what I felt may have
12 conveyed to Mr. Newman. The jury might go with you. And --
13 and --

14 Q: Because of the inconsistencies in the statements?

15 A: I beg your pardon?

16 Q: Was that your feeling based off all the inconsistencies
17 in the statements?

18 A: Okay. Possibly because of that, maybe not. But, well,
19 yes, because I thought that would've affected how the jury
20 felt about him. So -- so I kind of thought, you know, he
21 might could've weaseled or he might could've gotten his way
22 through trial and maybe get a verdict in his favor. But that
23 was during the 20-year offer. The other offer, you know, I
24 just thought no matter what, you should take it -- you should
25 take it because of the inconsistencies and because of what I

1 ultimately learned about them; them being my client and
2 Montage.

3 Q: Now. And that 15-year offer is the one that you shared
4 with his father --

5 A: I --

6 Q: -- that you spoke to.

7 A: Okay.

8 Q: I know I shared it with his mother.

9 A: Okay.

10 Q: But she believed that because Montage's offer was less.
11 Okay. I'm -- I'm stretching my belief, okay? But I know I
12 shared it with the mother, who I believe was here from
13 Manning, and I think the father came up here from Florida.
14 I'm stretching my memory. And I don't -- I can't honestly say
15 that I told him about the 15-year. I don't recollect telling
16 him that, but I know I shared it with the mother.

17 Q: Okay. Now, in terms of Mr. Webb, we just talked about
18 that. So he pleads guilty prior to trial. What did you know
19 about his offer to essentially plead guilty and cooperate in
20 terms of his testimony?

21 A: Only that he got the offer and that he took it, which
22 made me think, hey, Mr. Newman, you might want to take this
23 too.

24 Q: Did you make any requests as far as any promises or
25 negotiations with the prosecutors? Any discovery requests?

1 A: Did I make any requests --

2 Q: Like a supplemental motion discovery requesting any
3 communications or documents related to promises or
4 negotiations related to Mr. Webbs?

5 A: Well, I'm sure my -- Brady -- Rule 5 Brady motions
6 requested everything.

7 Q: Okay.

8 A: I always do.

9 Q: Understood. And so, as far as Mr. Webb's concerned,
10 there was nothing else provided to you other than the fact
11 that he was pleading to the lesser of voluntary manslaughter.
12 In other words, you didn't have any information that he was
13 going to be sentenced to a specific number. Is that what your
14 testimony is?

15 A: I don't recollect whether he was getting a specific
16 number, but I -- my belief was it was between 10 and 15 based
17 on passing talk with Chip Finney and Mr. DuRant, the
18 prosecutors. It was based on some conversation, which is what
19 scared me about Mr. Jonathan Newman not taking a plea because,
20 you know, Webb had just gotten a sweetheart deal. Assuming
21 they were guilty of these things, Webb had gotten a sweetheart
22 deal. So I was thinking -- because see, remember Jonathan, I
23 think these kids are -- they were kids, 18, 19, 20 years old.

24 Q: Was there any specific reason why you wouldn't have
25 crossed Mr. Webb during the trial regarding that 10 to 15 that

1 he was going to receive specifically that he avoided the
2 mandatory minimum, 30?

3 A: Well, today I don't recollect if I did or did not. Are
4 you telling me I did not?

5 Q: So if you -- that's right. If -- if you didn't, was
6 there any strategic reason why you wouldn't have done so?

7 A: I -- yes. There would've -- my recollection, I believe
8 my answer is yes, and this is why my answer is yes. Montage,
9 as I said, you know, they were like two brothers from a
10 different mother, they were just so close. Because he had
11 that sweetheart deal and he was testifying against my client.
12 I was afraid of any and everything that he would say. And I
13 felt like he was going to give testimony that was really going
14 to slam dunk Jonathan Newman because, you know, they gave the
15 facts about how they -- he indicated how they talked about
16 going back to the house to get the gun and that when they got
17 to the house, you know, they searched the house and there was
18 testimony about how they searched the house, looked through
19 the drawers and the dressers in the closets looking for the
20 gun.

21 And -- and I don't remember whether the man came home or
22 whether the man was there drinking and fall out or knock out,
23 or whether they had beaten him unconscious or whatever the
24 case may be. And I knew that that's what his testimony was.
25 That's what he was going to say. And I knew it was just

1 destroyed Jonathan with the jury.

2 Q: Well, and I guess I'll be specific, with Mr. Webb was
3 facing 30 years of life in prison and the law allows you to
4 specifically cross-examine him. It's one of the few times we
5 could bring up a sentence. Was there any strategic reason why
6 you wouldn't have cross-examined him on the fact that he
7 avoided a 30-year, day for day mandatory minimum sentence?

8 A: As I speak to you, I don't know that I did not, but if I
9 did not, then it would've been me not wanting too much
10 testimony from him that could have beaten up my client.

11 Q: Okay. As far as his bias that he would've avoided the
12 mandatory minimum sentence?

13 A: My answer is I don't know why I would not have if I did
14 not.

15 Q: So no strategic reason why, right?

16 A: Nothing sticks out in my head at this moment exactly.

17 Q: And that would go the same for that belief that he was
18 potentially going to be sentenced with a deferred sentencing
19 to 10 to 15 years. I mean, it'd basically be the same -- same
20 position; is that fair to say?

21 A: Was -- you're asking if it was my belief that he was
22 still going to get the 10 to 15 years?

23 Q: That's right.

24 A: Yes. I believe that he was going to get whatever time
25 that -- that -- that made him decide, I'll take the plea. And

1 that -- that time period was somewhere between 10 to 15 years,
2 which I conveyed to Jonathan.

3 Q: And as far as cross-examination, would there be a
4 strategic reason why you wouldn't pin him down on that?

5 A: On the getting 10 to 15-year sentence?

6 Q: Right. Because it was -- his sentencing was deferred
7 when he testified he had not --

8 A: That -- that's correct. It -- he had not gone forward
9 and received his sentence. No, I don't have any recollection
10 on why I didn't -- if I did not.

11 Q: Now in terms of the trial itself, I -- there is an
12 opening remarks to the jury where the trial judge explains to
13 the jury which now has been removed from the bench book on
14 page 6, that there's a -- that this trial is not for
15 entertainment. This is a real trial, which is a fundamental
16 part of our democracy, and it is a search for the truth and an
17 effort to make sure justice is done.

18 And then later, again, there is, in opening remarks, a
19 reference again to that the jurors are swarmed to uphold the
20 integrity and fairness of the judicial system and -- and,
21 excuse me, the judicial role in there to help the jury in
22 their search for the truth.

23 And that if you go down on page 7, that they -- ladies
24 and gentlemen, remember you took an oath a few minutes ago to
25 listen to the evidence in this case and to reach a fair and

1 just verdict.

2 Is there any strategic reason, and I'll hand this to you
3 just to reflect your -- refresh your recollection, if you got
4 any questions about it why you would not have objected to that
5 language?

6 A: There is no strategic reason why I would not, or did not
7 object to that language.

8 Q: And based on case law, you would agree that that is
9 objectionable language?

10 A: I do not agree.

11 Q: All right. And so are you familiar with State v.
12 Aleksey, State v. Daniels, State v. Beatty, where they address
13 these issues and one of the later cases the State v. Beatty
14 where the Court admonishes again -- again saying that, you
15 know, we've explained that this language is not appropriate
16 because it's not a search for the truth. It's actually
17 whether the State can meet its burden of proving beyond a
18 reasonable doubt each and every element of the offense. So I
19 guess which part could you -- just trying to let you answer
20 there, what part of that would not be objectionable as far as
21 what was presented in those opening remarks by the trial
22 court?

23 A: Okay. Are you asking me am I aware of it or what part of
24 it do I believe?

25 Q: Yes, start starting at aware of it. And then the second

1 part, I guess you did have a clarification that you did not
2 believe.

3 A: Okay. My answer is no. I -- I'm not aware of those
4 cases indicating that. So I'm not -- I wasn't aware of it
5 then. And the other question is, what part of it did I not
6 find -- can you repeat that?

7 Q: You -- you -- to clarify, you said you didn't believe it
8 was objectionable, but I think you may just have clarified
9 that in your answer that you weren't aware of those cases to
10 object; is that fair to say?

11 A: That would be correct.

12 Q: Okay. And on page 14 in the trial transcript, the
13 prosecutor's opening statement on -- starting on line 17,
14 prosecutor says, Justice is the goal in this case. And that's
15 what the judge just told you a few minutes ago. He told you
16 that your job was to render a verdict that speaks justice,
17 that this was a search for the truth and that is what it is.

18 I guess I'm not going to beat a dead horse here. It'd be
19 the same thing. You didn't have any basis in your mind at
20 that point to object to that statement; is that fair to say?

21 A: That would be fair to say.

22 Q: All right. And then on page 17 of opening statements,
23 the prosecutor ends with starring line 11, You will hear from
24 a pathologist that obtained the cause of this man's death, you
25 will have everything you need to render a verdict that speaks

1 the truth, to -- to render a verdict that speaks justice and
2 that's your goal. Justice is your goal. Don't fall short.

3 Same answer? As far as the speak the truth language.

4 A: I do not -- I did not believe that to be objectionable
5 then and now -- and now I do not believe it to be
6 objectionable.

7 Q: And -- and you've never reviewed those cases I
8 referenced?

9 A: You mean before the trial?

10 Q: That's correct.

11 A: Right -- and right after the trial?

12 Q: Yep.

13 A: The answer is no.

14 Q: Okay. And then during closing argument of the State on
15 page 428 starting on line 20, prosecutor argues, We believe
16 that you were directly suited to hear this case, that you use
17 your common sense based on your life experiences to analyze
18 the evidence in this case, and to reach a verdict that speaks
19 the truth that makes sense. Again, that would be your same
20 answer. I know it's --

21 A: Yes, sir.

22 Q: -- being redundant here.

23 A: I understand, you're correct.

24 Q: All right.

25 A: That -- that's my answer.

1 Q: And then kind of finally in your closing argument in page
2 435 starting on line 3, you argue to the jury, The verdict
3 comes from the Latin word, Ver dictum, which means speak the
4 truth. Judge Young told you in his opening remarks that this
5 was to assert the truth. No -- make no -- make no mistake
6 about it, your job is to find the truth. I'd ask you to
7 listen closely to these lawyers. Go back there and consider
8 what you've heard -- oh, excuse me. This is your -- your
9 closing argument comes right after that. This is from the
10 judge.

11 Again, so these are remarks from the judge leading into
12 your closing argument. Literally right before you give a
13 closing argument that the trial counselor or trial court says,
14 The verdict comes from the Latin word, Ver dictum, which means
15 speak the truth. Judge Young told you in his opening remarks
16 that this was to assert the truth. Make no mistake about it.
17 This is your job to find the truth. I ask you to listen
18 closely to these lawyers. Go back there and consider what
19 you've heard this week and render a verdict that speaks the
20 truth.

21 And same answer, correct? I know we've kind of gone
22 round and round. The main thing is to sum that up is you
23 weren't aware of that case law, and you didn't believe that
24 the search for the truth language was a burden shifting
25 argument or violated a defendant's right to due process. And

1 so you didn't know to object to that specific language; is
2 that fair to say?

3 A: I did not object to it. I don't know that I didn't know
4 to object to it. And in during trial, a lot of objections
5 becomes strategic. You start to draw the jury's attention to
6 things that are not super important. And -- and when the
7 defense lawyer representing the defendant, start objecting to
8 sometimes non comprehensible things to the jury -- to the jury
9 pool, you draw attention to it.

10 And I think about that whenever I try cases about the
11 value of objecting to something just because it's a good idea
12 to object or -- or even because it's something that's slightly
13 wrong, I don't always object because it draws attention
14 oftentimes to a juror, to something they probably would not
15 have paid any attention to.

16 Q: Understood. And again, I know you're not aware of the
17 case law, but specifically with that case law, again, I know
18 you wouldn't be aware, but that our Supreme Court has
19 admonished lawyers, the bench and bar, from presenting that in
20 trials. Are you aware of it as you -- as you testify today?

21 A: No, I'm not aware of it.

22 Q: All right. Now, in terms of preparation for trial and
23 during the trial, what discussions or preparation did you have
24 with Mr. Newman about his right to refuse to testify or
25 preparation to testify?

1 A: Mr. Newman, like with any other general sessions
2 defendant, I always have a discussion with them about what
3 their rights are that they can testify or they don't have to
4 testify. I give them that -- I give them that basic
5 discussion and get that understanding from them that they
6 understand. And then I tell them about, okay, what happens if
7 you testify?

8 And -- and even though we'll talk about that before
9 trial, I always talk with them about it before the end of the
10 -- depending on when I would've called them in the defendant's
11 case in chief.

12 I discussed that with them based on testimony already
13 given based on the -- what actually the facts of the case
14 testimony already given any exhibits, that kind of stuff.

15 And with -- in this case, Jonathan, I'm sure I discussed
16 it with him in light of Mr. Webb's testimony, especially Mr.
17 Webb's testimony about, you know, them being boys and them
18 hanging out, them living and staying at the same house and how
19 they would walk from, you know, sort of like the back street
20 through a path that passed the decedent's house, the victim
21 house there.

22 And he was extreme -- Mr. Webb was extremely believable
23 with this information he gave based on how close of friends
24 they were. How close of friends Mr. Webb and Mr. Jonathan
25 Newman were -- were. And I think he was believable despite

1 the fact that he, you know, cut a deal.

2 I -- I -- I just, I believe the juror believed him.

3 Anyhow, I'm saying that to say, so based on that, I would've
4 had a good discussion with Jonathan about what -- Jonathan
5 Newman about testifying. And I believe he made the decision.

6 My recollection is he made the decision in conjunction
7 with some conversation with his mother and I -- I'm want to
8 say, I think with his father -- both or both were there. I
9 talked with both of them if not together, then separately.
10 And I spoke with Jonathan. When Jonathan made his decision, I
11 still went back and talked with, I believe both of them.

12 Q: Did you all.

13 A: Well, I -- I know with the mother. With the father, I'm
14 just --

15 Q: Did you ever prepare him to testify? Did you all do a
16 mock direct examination?

17 A: The answer is, yes. Again, we were at the auditorium
18 courtroom. Let me take that back. I'm not sure. A mock
19 examination.

20 Q: In other -- right. In other words, where you -- do a run
21 through in preparation for his testimony where you ask him the
22 questions that you have on direct examination?

23 A: Okay. If you ask it that way, the answer is yes, I did.
24 But if you're asking me did I do a mock examination, sit him
25 down and then go through it, then the answer is no. But yes,

1 I always discuss with them about his testimony -- with him --
2 him and any other criminal defendant about their testimony --
3 what and -- and what questions will be asked of them. What I
4 would be asking him, what I would be seeking.

5 Q: Okay. I think you clarified it. So you certainly gave
6 broad strokes of what your direct examination would be, but
7 you did not do a question and answer session with him about
8 his direct testimony?

9 A: I think they're the same, but you're right. I did not.
10 We did not sit down and just go through question, answer,
11 question, answer, question, answer, question, answer. We
12 didn't do that.

13 Q: Understood. Now, in terms of the jury selection, I -- I
14 know it's been a while. The foreman ends up being Mr. Eddie
15 Myers. I know you probably don't remember that; is that fair
16 to say?

17 A: That's fair to say.

18 Q: Understood. And this is Juror Number 101. During jury
19 selection, he indicates that he has -- he's known Mr. Webb,
20 his family, and his sisters, they all went to school together.
21 Was there any reason why you didn't ask to strike him for
22 cause? And I -- and I'm -- here's the page. It's page 14 and
23 15. I give that to you.

24 A: All right. Okay. So during jury selection, I -- I -- I
25 don't -- I don't know that Mister -- I don't know that I knew

1 Mr. Webb had already been locked down as going to plea before
2 jury selection.

3 Q: But he already pled prior to that, right?

4 A: Again, no. I think he had a plea agreement. I don't --
5 I don't know if you remember we're talking about pleading
6 versus pleading and being sentenced, but I think he had a plea
7 agreement, but I don't know that he had already pled. And I -
8 - I just don't remember it at this point in time.

9 And if I let somebody that said that they knew him on the
10 jury, then I would've allowed it on the understanding that
11 this person might have been helpful to the two of them because
12 Mr. Jonathan Newman and he were extremely best buds. I
13 would've believed that, oh, this might be beneficial to us.
14 And now I'm speaking hindsight now.

15 Q: Right. So that's not something you actually remember
16 that wasn't a strategic thought that you had at the time. And
17 I mean, being candid, I think what your testimony is, you
18 don't remember.

19 A: Oh, correct.

20 Q: Okay. I -- I don't want to put words in your mouth, but
21 your testimony is you don't remember why you didn't move to
22 strike for cause. It, you -- you just -- that was again,
23 hindsight. Now that'd be the only rational basis you could
24 come up with?

25 A: Right. I don't remember that person saying they were,

1 you know, family, friends, whatever with Mr. Webb.

2 Q: And -- and again, I know you're not disputing anything as
3 far as the record's concerned on page 14 of jury selection of
4 that January 5th transcript -- that -- that's there, you --
5 you don't dispute that part that it happened?

6 A: That the jury selection happened. I do not dispute.

7 Q: Right. And that Mr. Myers was Juror Number 101 and he
8 indicated that relationship.

9 A: If the transcript says that I do not dispute it, I have
10 zero recollection of it.

11 Q: Fair enough. And so outside of -- you don't have any
12 recollection as far as any reason why you wouldn't have move
13 to strike?

14 A: No, I don't have any reason of why I did not, if he ended
15 up -- if he was one of the jurors.

16 Q: Now, in terms of Mr. Webb's teardrop tattoos, I know you
17 did try to cross-examine on the teardrop tattoos and he
18 specifically said it was for his parents and there was a
19 prosecutor objection that was sustained. Was there any reason
20 why you didn't have any further argument as to the bias or
21 follow up question that it was related to some type of
22 violence or murder? Was there any other arguments that you
23 had? Was it any off the record bench?

24 A: There were no others. If the judge sustained an
25 objection, I -- I try not to push them because I want them to

1 help me on something else later, maybe.

2 Q: That's all right then. I just wanted to make sure there
3 wasn't any off the record discussions related specifically to
4 that cross-examination.

5 A: I have no recollection of it, no.

6 Q: Now, in terms of Mr. Samuels, was there any reason
7 similar to what we just went through with Mr. Webb regarding
8 him facing that mandatory minimum of 30 years? Again was
9 there any reason why you didn't try to cross-examine him on
10 that fact?

11 A: If you read the transcript, then you would see that Mr.
12 Samuels -- the -- the facts looked like he just happened to
13 have been standing out there in front of the house when these
14 two, Mr. Webb and Mr. Newman were doing whatever it was they
15 were doing, and he just happened to have known. That's what
16 the facts -- facts clearly looked alike.

17 I don't -- I don't recall him ever going in the man's
18 house, even though I believe he was in the house either next
19 door or something, staying in the house next door or two doors
20 down. But he just looked like an unfortunate guy who just
21 happened to walk up and start talking with them out front.
22 What was your question?

23 Q: Well -- and I guess it kind of to get into the
24 differences between Mr. Webb, Mr. Samuels, Mr. Webb actually
25 testifies at trial that he never saw Mr. Newman strike the

1 victim; is -- is that your memory?

2 A: Vaguely, that's my memory. But again, now, Mr. Webb was
3 trying to seesaw with the solicitor's office.

4 Q: All right. Well, during the testimony that Mr. Samuels
5 had, there was a point where the prosecutor was cross-
6 examining him on page 383, where he's asking about did he have
7 a reason to be afraid of Mr. Newman? And he says, well, I
8 wouldn't say I'd be more afraid. I would say I'd be more
9 cautious. Prosecutor asked, Okay. Why would you be cautious?
10 And --

11 A: You talking about Mr. Webb or Mister --

12 Q: Mr. Samuel. Here, I have the transcript for you here.

13 A: Okay. All right.

14 Q: And Mr. Samuel says, Why are you cautious? He says,
15 Because I've seen him hit some people and I know he's a
16 fighter. The prosecutor says, He has hit you before; has he
17 not? And his answer is, Yes, he has.

18 Is there any strategic reason why you wouldn't, at that
19 point, object under 403 that any probative value would be
20 substantially outweighed by its prejudicial effect of those
21 questions, or under 404B, that that's inadmissible propensity
22 evidence? And in addition to that, maybe moving for a
23 mistrial because now they've inserted that Mr. Newman is a
24 violent person who has previously attacked not only the co-
25 defendant, but other people. And again, this is page 383.

1 A: Okay. Yes. When -- when I allow, I -- as -- as the
2 attorney for the defendant allows certain things like that to
3 go by, I am attempting not to draw attention to the jury about
4 these things because sometimes they just sort of pass along
5 real smooth-like. And when you start making objections,
6 you're -- you're really bringing the attention, you're
7 bringing life to the facts, to the jury sometimes.

8 Now, that's what I think whenever I'm doing trials. As I
9 speak to you today, I don't know why I did not, and it
10 probably would've been a good idea if I had.

11 Q: Now you would agree that that would be inadmissible
12 propensity evidence that it's --

13 A: I -- I think that it could be perceived that way.

14 Q: And so again, now obviously you have the clarity of
15 hindsight.

16 A: Correct.

17 Q: You do believe it's objectionable?

18 A: Well, I believe I probably should have objected, but then
19 I object sometimes when it's not a good objection.

20 Q: Understood.

21 A: Uh-huh. (Affirmative response)

22 Q: And -- and I guess just to clarify, did you have any
23 recollection of that? I know we're all talking at the moment
24 and your answer was in hindsight, but in that moment there
25 wasn't any -- you don't have any recollection of a strategic

1 reason why you didn't object?

2 A: Correct. I do not have any recollection of it, and I
3 don't have any recollection of the question and -- and the
4 answer either.

5 Q: Now, in terms of the trial, there was a point where there
6 is a discussion in the trial related with Lieutenant Sonia
7 Daniels where it is brought out on cross-examination by the
8 co-defendant's lawyer that Mr. Newman had invoked his right to
9 counsel when trying to be interrogated. Was there any
10 specific reason why you didn't object to that? And I'll give
11 you a second to kind of review. Its pages 247 and 248 of the
12 record where essentially the answer is, Did you -- did you try
13 to interview him a second time? And Lieutenant Sonia Daniels
14 says, No, I did not. And the question was, Was he arrested at
15 that time? He was. So that's why he asked for a lawyer. And
16 then she says, I cannot tell you why he asked for an attorney,
17 but he was arrested. And then going to the next page on 248.

18 Again, same thing, Mr. Devoe (ph), the lawyer for the co-
19 defendant says, So when he requested that I want a lawyer,
20 that's because he was already arrested and he was arrested at
21 the time. So when that lawyer brought out the invocation of
22 counsel in terms of not wanting to speak to police, was there
23 any strategic reason at that point that you didn't want to
24 object?

25 A: There's no strategic reason. And I don't believe that it

1 was objectionable for Lieutenant Daniels to say he wanted a
2 lawyer. I don't -- I didn't think that would've been damaging
3 to him.

4 Q: So you're familiar with what's considered a Doyle
5 violation?

6 A: I am.

7 Q: All right. And when a prosecutor, this is actually a co-
8 defendant's lawyer, but when a prosecutor was to ask that type
9 of question that they invoke the right to counsel, refuse to
10 questioning, that that would trigger a -- what we would
11 consider Doyle violation objection that it would be
12 inadmissible to present that to a jury.

13 A: To a jury, correct, I agree.

14 Q: All right. And so your position is that it's different
15 because it was the co-defendant's attorney cross-examining?
16 I'm just -- I don't want to put words in your mouth, I'm just
17 trying to figure out where the -- where you distinguish
18 though.

19 A: Well, the answer is yes. I thought it to be different
20 because it was a co-defendant. And the other thing, a co-
21 defendant's lawyer represents only their client, but by the
22 same token we -- we didn't have a big, super difference in
23 between Mr. Devoze (ph) and myself, Attorney Devoze (ph) and
24 myself in terms of both of us trying to get our client off. I
25 didn't think he was doing anything damaging to my client just

1 as I could not think of anything damaging to do to his client
2 or to ask.

3 So when he asked that, it didn't trigger me to believe
4 that it was something so damaging to him. Again, I'm very
5 cautious with my objections unless I see that it's that the --
6 the question and answer -- answer to the -- or the -- the
7 question is damaging to him.

8 And I'm very cautious as to how I waive at the jury to
9 pay attention to something. I think about those things
10 specifically. Well in any county, but particularly in
11 Clarendon County.

12 Q: Well, and in this case, Mr. Samuels actually did have, I
13 mean, he essentially was implicating Mr. Newman in the case.
14 I mean, you bring up to the judge that you all have different
15 theories of defense in the trial, and you even bring up that
16 you wanted to potentially call a rebuttal witness that the
17 judge doesn't allow because you all are having separate
18 defenses. In other words, again, one of the reasons
19 potentially you could move for a severance of a joint trial
20 where you have constitutional rights conflicting between co-
21 defendants.

22 A: That -- is that a question?

23 Q: That's right. In other words, it -- what you said was
24 that it was because you all were on the same page, but the
25 trial transcript, you don't dispute that the trial transcript

1 shows differently. That Mr. Samuels was essentially trying to
2 implicate and put all guilt on Mr. Newman and that you all --
3 your defenses were not parallel, they were conflicting.

4 A: I -- I the answer is yes, I agree to that. Yes, I agree
5 to that.

6 Q: Okay. Now, as far as Leon Coleman, do you remember this
7 specific witness? I know that it's been quite some time. I
8 just want to make sure to give you at least a moment to answer
9 before I throw that on you.

10 A: My answer is I do not remember Leon Coleman, but if you
11 refresh my memory, then it -- it might be helpful.

12 Q: Essentially he had lived in the community for quite some
13 time. He had had contact. He was the brother-in-law of Mr.
14 Webb.

15 A: Brother-in-law or stepbrother?

16 Q: It -- it indicates on page 40 that Mister -- that they
17 call him Tag, talking about Mr. Webb. He says, that is my
18 brother-in-law.

19 A: Okay. No, I do not remember.

20 Q: All right. In terms of cross-examination, as far as bias
21 with that, was there any specific reason, just want to make
22 sure why you didn't get into -- again, at that time, you
23 specifically brought up the fact that he knew he had pled
24 guilty prior to trial. Was there any other reason why you
25 didn't go into the fact that there was allegation that Mr.

1 Newman had had an affair with his wife?

2 A: I -- I don't remember that. I -- there's something about
3 that that I know occurred, but I don't remember that. I
4 remember there being something about Mr. Newman and somebody's
5 girlfriend or wife or something and something about him liking
6 black girls or something to that effect.

7 Q: Okay. And so from a -- again, I know your recollection
8 is -- is hazy and I understand it's been a long time. You --
9 you do remember at least tangentially that there was some
10 discussion about one of the witnesses and there potentially
11 being some type of connection with Mr. Newman and their wife
12 or significant other.

13 A: I remember something about that.

14 Q: All right. And so there was no strategic reason why you
15 didn't cross-examine Leon Coleman regarding that bias that he
16 would potentially have against Mr. Newman because of this
17 alleged affair with his wife?

18 A: I have no recollection of Mr. Coleman -- Coleman and I --
19 the incident about Mr. Johns -- Mr. Newman and his wife. I
20 remember there was something about something about that, but I
21 don't remember Mr. Coleman testifying. I don't remember Leon
22 Coleman, period.

23 Q: Period. Understood. Now, the pathologist, Mr. Durso --
24 Ms. Durso (ph), excuse me, she ultimately ends her testimony
25 as many of them do referring to the cause and manner of death

1 as a homicide. Was there any specific reason why you did not
2 cross-examine on the differences between the medical
3 definition of a homicide and the legal definition of a
4 homicide and how they're completely different?

5 In other words, a medical definition of homicide is one
6 where it's at the hands of a potentially another, not
7 necessarily that it implies any specific legal guilt, but it's
8 just the determination that they have on the medical side and
9 that it's completely separate from a legal determination of
10 say, murder charge.

11 That a medical label from a pathologist that this was a
12 homicide does not equate to the legal definition of say, a
13 murder. In other words, was there any specific reason why you
14 didn't cross-examine to -- to clarify that fact for the jury?

15 A: There is no specific reason why. I have no recollection
16 of why I did not cross-examine the medical examiner on that
17 fact of the difference between the medical versus legal.

18 Q: Thank you. Now, in terms of this rebuttal testimony we
19 talked about that you -- that you asked the judge -- looking
20 at page 422 and 23, you're asking to essentially be able to do
21 rebuttal testimony about related to the gun you specifically
22 state, Yes, Judge, Your Honor. We just approached the bench a
23 second ago. Ordinarily, rebuttal witnesses are reserved for a
24 plaintiff, for the State in this case. And I understand that
25 that's the normal practice and procedure. What makes this

1 matter different is that we have two separate defendants who
2 have separate positions. We believe we should have been
3 allowed to present rebuttal witness because there is another
4 defendant whose position is quite different from ours. We
5 wanted to present testimony from additional witness with
6 regards to something that the other defendant made reference
7 to. And I understand the Court's not going to allow us to ask
8 that.

9 And essentially the State said they would object to that
10 on the following page. The judge says, Mr. Carter, you could
11 have also cross-examined him about it, but you did not do
12 that. Therefore, I'll decline the testimony from your client
13 is disallowed.

14 And your response is, if you recall, I did cross-examine
15 him, but he said he did not recall a gun. As far as that
16 specific issue what witness were you going to call in rebuttal
17 regarding that?

18 A: I have absolutely no idea.

19 Q: All right. Would it potentially have been Mr. Webb
20 regarding his discussions about the weapon in the home?

21 A: I'm sorry, I have absolutely no idea.

22 Q: Do you have any recollections regarding Mr. Webb's
23 testimony about him going into crook mode or thief mode? And
24 that basically that was part of why his memory was not
25 accurate because he was in -- as he described it, crook mode

1 and going through the house looking for things to steal.

2 A: Okay. My recollection about crook mode, thief mode,
3 whatever it was, was that they wanted that gun and they ram-
4 shacked it -- it was a little shotgun house. They just ram-
5 shacked it. They overturned drawers, knocked things off the
6 top of the counter. That's my recollection about thief mode,
7 crook mode. They wanted it and they were in there going
8 through it real fast. Mr. Montage Webb's testimony about it.

9 Q: That he was doing all of that?

10 A: Yeah.

11 Q: Right. Specifically, he wasn't necessarily saying that
12 Mr. Newman was doing all of those things. He said he was in
13 crook mode and then there was talk about thief mode and that's
14 -- he was tunnel vision is basically what he was saying?

15 A: That's correct. But now, as I also understand it, well,
16 okay. Now what I think I recollect, and -- and maybe I'm not
17 recollecting it correctly, was that's what he was doing while
18 Jonathan Newman was dealing with Mister -- with the victim.

19 Q: Well, and again hold the transcript and I know that's
20 your recollection. Now, the -- you wouldn't necessarily
21 dispute that the record indicates that he -- he doesn't know
22 what Mr. Newman's doing other than standing in the front of
23 the house. Not that he was doing anything specific with the
24 victim of this case. He didn't testify to any of that
25 specifically.

1 A: I don't -- I don't remember. I'm sorry.

2 Q: So with the jury instructions I know you were in here
3 when we were discussing that with appellate counsel who
4 ultimately filed an Anders brief. We didn't believe there was
5 any meritorious issues on appeal with the jury instructions of
6 inferred malice based on use of a deadly weapon or inferred
7 malice based on excessive brutal force.

8 Was there any strategic reasons why you didn't object
9 specifically as to, again, his fists or the excessive use of
10 brutal force directly as far as being a improper charge on the
11 facts of the case? Based on State v. Belcher? Because State
12 v. Belcher was referenced.

13 A: At this moment. I -- I'm thinking that I did object to
14 it, but if the -- if the transcript reflect that I did not, I
15 mean, I'm thinking I did object to it. I -- I don't have any
16 recollection.

17 Q: I guess, let me clarify. As far as you had the initial
18 objection, right? There was also -- they asked for this
19 inference on excessive brutal force. Was there any reason why
20 you didn't object to that specific line of questioning? Not
21 necessarily the Belcher use of a -- a gun as a deadly weapon.

22 A: There is no reason as I speak right to you today about
23 why I did not ask for -- objective to additional language
24 about excessive force.

25 Q: Okay. And with that being said, as far as you had asked

1 for a jury instruction on self-defense now was there a reason
2 that you asked for the jury instruction on self-defense which
3 was denied when it kind of -- I guess the counter to that is
4 that you would not have a jury instruction on any type of
5 inference of use of a -- a weapon when you have a self-defense
6 jury instruction. I'm just trying to -- will you walk me
7 through where you believed you had the evidence to present for
8 the instruction on self-defense?

9 A: I can't walk you through it at this time. I don't even
10 remember it. If -- but I can speculate if you want me to.

11 Q: No, no, no. So on page 425, I'll help you here. On 425,
12 you -- you indicated to the judge, you argued, We believe that
13 they had a proper right to defend themselves so we would ask
14 the Court for self-defense. And the judge responded,
15 Absolutely there is not a shred of evidence of self-defense in
16 this case, and denied that motion.

17 Was there any specific -- was that the strategy going
18 into trial was to make a self-defense argument, to have a
19 self-defense jury instruction?

20 A: No, it was probably as a result of some testimony that
21 may have been given. I got a vague recollection that the
22 victim started doing or saying something to them when they
23 were -- before they went in the house and ram-shacked it. I
24 got a -- a recollection that he may have done or said
25 something or showed a gun to them or something, and that that

1 may have make them defend themselves and they ended up in the
2 house. But that's a recollection that may not be completely
3 accurate.

4 Q: Okay. And so -- and again, just trying to clarify and
5 kind of pin this down. Your -- in preparation for trial, your
6 trial strategy was not to present a self-defense case?

7 A: It was not.

8 Q: Okay.

9 A: It was -- we didn't do it.

10 Q: Okay. And so when you asked for that jury instruction,
11 your strategic reason for doing so was --

12 A: Because I thought there was some testimony that somebody
13 said before they commenced -- before the man ended up being
14 beaten that he may have done or said something to them because
15 they were always walking through the path beside his little --
16 the house was joined with another house like a duplex --

17 Q: Right.

18 A: -- doors side by side. And -- and that he may have done
19 or said something to them or may have invited them in to
20 drink. And, you know, it was something that occurred that
21 would've made me say that; I don't remember it in details.

22 Q: Now, in terms of the circumstantial evidence charge, were
23 you aware of State v. Logan that outlines a specific
24 circumstantial evidence charge?

25 A: I understand the circumstantial evidence State v. Logan.

1 At this moment does not stick -- does not stick out in my
2 mind.

3 Q: Would there have been any reason why you didn't object to
4 the circumstantial evidence charge that was presented by the
5 Court and -- and asked to present that -- that language that
6 was instructed by the Court and our Supreme Court in 2013?

7 A: I don't remember the circumstantial charge given by the
8 Court.

9 Q: All right.

10 A: I -- I'm not saying it didn't, I'm sure it did. I just
11 don't remember it. So I don't have a reason for why I would
12 not have -- why I would've or would not have objected to it.

13 Q: So on page 485, if you could -- you start on line 6. You
14 can just take a look that's kind -- it walks through the jury
15 instruction on direct and circumstantial evidence that the
16 trial court provided.

17 A: Okay

18 Q: Thank you. And now if you could, as far as what I'm
19 handing you is kind of an outline of the circumstantial
20 evidence charge that's presented in Logan. Would you be able
21 to take a look at that and I'll give you a second?

22 A: Uh-huh. (Affirmative response)

23 Q: All right. And so in reviewing those two specific
24 charges or the difference between the Logan charge and what
25 was presented by the trial court, was there any strategic

1 reason why you did not object or request or to ensure that the
2 judge would make or to instruct the jury on the Logan charge?

3 A: Well, they were roughly the same. My understanding of
4 what circumstantial evidence versus direct evidence is my
5 understanding of what it is, is pretty much the same from
6 Logan, State v. Logan, is pretty much the same as what the
7 judge charged. In terms of there being some micro
8 differences, I didn't pay it any attention. And if there are
9 -- if there were such differences, I don't know why I would
10 not have objected, but I didn't pay it any attention.

11 Q: And kind of -- and being specific in cutting to it, in
12 the Logan charge it requires that all of the circumstances
13 must be consistent with each other and when taken together
14 point conclusively to the guilt of the accused beyond a
15 reasonable doubt. And if these circumstances merely portray
16 the defendant's behavior as suspicious, the proof has failed.
17 And so that wasn't a part of the specific circumstantial
18 evidence charge that was presented here, is that fair to say?

19 A: Correct. It was not.

20 MR. PHILLIPS: A moment, Your Honor.

21 THE COURT: Yes, sir.

22 MR. PHILLIPS: No further questions, Your Honor.

23 THE COURT: Okay. So, Mr. Phillips, before I let Mr.
24 Mitchell cross, I want to make sure we get some spellings
25 correct on the record. You and Mr. Dudek or Dudek were

1 referring to the transcript at pages 426. And you may have
2 also covered this with this witness, Mr. Carter. There's
3 several cases that you're referring to and in the original
4 transcript, I believe they're misspelled. So State v.
5 Mclemore, it should be M-C-L-E-M-O-R-E 1992 case, correct?

6 MR. PHILLIPS: Yes, Your Honor.

7 THE COURT: Concerning malice. And then State v.
8 Belcher, it should be spelled B-E-L-C-H-E-R, correct?

9 MR. PHILLIPS: Yes, Your Honor.

10 THE COURT: Okay. I just wanted to make sure that in
11 this record they're spelled correctly.

12 MR. PHILLIPS: Thank you, Your Honor. And --

13 THE COURT: All right.

14 MR. PHILLIPS: If we're doing a matter of housekeeping I
15 would just put on the record at this point that the Logan
16 charge issue would be in addition to the allegations. And I
17 understand that the State can have the opportunity to make any
18 type of argument on that, but wanted to present that evidence
19 for the record.

20 THE COURT: Okay. And so that would be an oral amendment
21 to the application?

22 MR. PHILLIPS: That's correct, Your Honor.

23 THE COURT: Any objection to that, Mr. Mitchell?

24 MR. MITCHELL: No objection. I have not thoroughly
25 reviewed Logan since this was not an allegation from the

1 language I asked directly from the case. So --

2 THE COURT: Maybe what we need to do is put that site on
3 the record.

4 MR. PHILLIPS: Yes, Your Honor. Thank you. Yes -- yes,
5 Your Honor. I'll do it. Give me one second. State v. Logan
6 is 405 S.C. 83, 747 SE2nd 444. It's a 2013 case of our
7 Supreme Court.

8 THE COURT: Thank you, sir.

9 MR. PHILLIPS: Thank you.

10 THE COURT: Okay. I'm happy to take a break.

11 MR. PHILLIPS: Yes.

12 THE COURT: Okay. So why don't we take 10 minutes and
13 we'll come back. Okay.

14 And sir, you're welcome to step down, relax, use the
15 restroom, but you can't talk with anyone regarding your
16 testimony, okay. Thank you.

17 (Court is in recess.)

18 THE COURT: Okay. Be seated, okay.

19 THE COURT: All right. Counsel, are you ready to
20 proceed?

21 MR. PHILLIPS: Yes, your Honor.

22 MR. MITCHELL: Yes, your Honor.

23 THE COURT: Okay. And so we are now at cross-examination
24 of the current witness. This is the fourth witness for the
25 applicant, Mr. Carter. Cross-examination by Mr. Mitchell.

1 And did you all have something you all wanted to put on the
2 record before --

3 MR. MITCHELL: Yes, your Honor. I was just going to
4 request that I hand the record on PO to Mr. Carter for his
5 reference during this testimony.

6 THE COURT: Okay. Any objection?

7 MR. PHILLIPS: No objection, your Honor.

8 THE COURT: Okay. Thank you.

9 THE WITNESS: Sir.

10 **CROSS-EXAMINATION OF ELEAZER CARTER BY MR. MITCHELL:**

11 Q: Good afternoon, Mr. Carter.

12 A: Hello.

13 Q: So you were appointed in this case?

14 A: That's correct.

15 Q: And that was after a conflict with his co-defendants in
16 the public defender's office?

17 A: That was my understanding, correct.

18 Q: And you met with Mr. Newman prior to the trial, correct?

19 A: Yes.

20 Q: And during those meetings, you did review the State's
21 evidence and the discovery in this case?

22 A: Yes.

23 Q: And so everything you received, you shared with Mr.
24 Newman?

25 A: That's correct. And now, except -- yes, I shared and I'm

1 -- I would have given him copies of any papers, but audio
2 tapes, I -- I don't think I gave him that. I -- I informed
3 him of what was on it and I understood -- this. I'm sorry, I
4 said tapes. And I understood that he had had some meetings
5 with law enforcement on more than one occasion.

6 Q: And there were -- were there plea negotiations prior to
7 trial?

8 A: The answer is yes. There almost always are, but you
9 know, the offer tends to be something non considerable.

10 Q: So I believe you testified that there were -- there was
11 initially an offer for 30 years, correct?

12 A: That's correct.

13 Q: And you relayed that to Mr. Newman?

14 A: Uh-huh. That's correct. I -- I'm sure I did. I don't
15 recollect the exact day or anything, but I'm sure I did. I
16 always tell parties.

17 Q: And that plea offer went down to 20 years?

18 A: From 30 years, and it went down to 20 and below.

19 Q: And you communicated that plea offer to Mr. Newman as
20 well?

21 A: Every single one.

22 Q: So all plea offers were communicated to Mr. Newman?

23 A: And/or his -- definitely his mother, maybe his father.

24 Q: And it was Mr. Newman's choice to reject that?

25 A: It wasn't mine, correct.

1 Q: Now, Mr. Montage Webb pled guilty prior to this trial.
2 Do you know exactly what he was going to get as far as
3 sentence?

4 A: I -- I understood it. I don't know it. I didn't see
5 anything that says 10 or 15 years, but I understood it to be
6 something within 10 or 15 years, either by passing and talking
7 with Chip Finney or Mr. DuRant.

8 Q: But you were not given anything that definitively said
9 Montage Webb, if he cooperated against Mr. Newman, was going
10 to be sentenced to 10, 15 years?

11 A: I -- I -- no, I was not given -- I have no recollection
12 of having received anything of that sort.

13 Q: And during your cross-examination of Mr. Webb, it --
14 testimony did come out that Mr. Webb did plead guilty to this
15 crime?

16 A: That's correct.

17 MR. MITCHELL: I beg the Court's indulgence one second,
18 your Honor.

19 BY MR. MITCHELL:

20 Q: And, Mr. Carter, if you'll turn to page 1 -- page one 120
21 and look at line 18 please.

22 A: Yes, sir. Line 18?

23 Q: Yes, sir. If you'll read to line 24, this is your cross
24 examination of Montage Webb.

25 A: Question: In deciding to come clean and pleading to this

1 incident, you had an agreement with the solicitor and the
2 police?

3 Answer: Yes.

4 That agreement allow you to get a plea for a lesser time?

5 Answer: Yes.

6 Line 24.

7 Q: So you did cross-examine Montage Webb on his potential
8 bias through his deal with the solicitor's office?

9 A: I -- I did.

10 Q: And, Mr. Carter, will you turn to Page 6 of the
11 transcript please? This is during the judge's opening
12 remarks. And the judge remarks that -- he said, In searching
13 for the truth and ensuring that justice is done is often slow,
14 deliberative, and repetitive. The exact opposite of what
15 you've seen on television, seen in movies, or read in books.
16 None of -- none of that is in conjunction with the reasonable
17 doubt standard or an instruction on circumstantial evidence,
18 correct?

19 A: That's correct.

20 Q: And as your common practice as a trial attorney, would
21 you -- would you want to -- you think it'd be good to object
22 at almost the very first words the Court has spoken at the
23 very beginning and the first thing the jury's going to hear
24 from you is an objection to the judge giving -- talking to
25 them?

1 A: No, I don't believe that it's appropriate to object.
2 However, if I objected, I don't think I would have done it
3 while -- when the judge was doing it. I might have objected
4 after he finished and asked him to go back and correct it, but
5 no, I would not have.

6 Q: And during your meetings with Mr. Newman, did you discuss
7 whether or not he was going to testify in this case?

8 A: My answer is I'm sure I did. As I speak to you right
9 now, I don't have a recollection of -- of when the actual
10 discussion, but I mean, I always do in a criminal defendant
11 case -- a general session's case involving a defendant.

12 Q: And did the trial court advise Mr. Newman of his right to
13 testify?

14 A: Yes.

15 Q: And he explained the consequences?

16 A: That's correct.

17 Q: And Mr. Newman made his own decision about whether to
18 testify or not?

19 A: He made the final decision. I believe he may have had
20 some -- I -- I think he may have had some discussion with his
21 mother and father. I think my recollection of that because I
22 tried to make them a part -- in my mind, he was a kid. And so
23 I tried to make sure somebody was helping me decide something
24 -- helping him and myself. I didn't want to be the one to
25 decide something for him because I just saw him as a little

1 kid. He looked like a baby in trial, a big baby, but a baby.

2 Q: And before he testified, you did run through what you
3 were going to ask him and -- and -- and how the testimony
4 would proceed?

5 A: The -- the short answer to that is yes.

6 Q: And, Mr. Carter, if you'll turn to page 520. I believe
7 it's in the second ---

8 A: Five what?

9 Q: 520 of the Volume 2 of the appeal.

10 A: Is it numbered?

11 Q: It should be. So there's two different numbers. There's
12 a -- there should be a 14 and then a 519 and 520.

13 A: Oh, okay. Yes, I see. It's in the corner. I got it.

14 Q: And if you look at Line 17, that's when the judge has
15 given the colloquy to the potential juror, Eddie Myers. And
16 the judge asked him about his relationship with Montage Webb,
17 correct?

18 A: Line 24 on Page 520, the judge did indicate, but you
19 could listen to the evidence in this case and make a decision
20 based on the evidence.

21 Q: And the potential juror said, I do my best, yes, sir.
22 And then the Court said, So that would be a yes? And then the
23 juror said, Yes, sir?

24 A: That's correct.

25 Q: So the juror, during the colloquy, informed the Court

1 that he can make a decision based solely on the evidence?

2 A: That's what the Court concluded from what the juror said.

3 Q: And Mr. Carter, if you'll turn to Page 87 of the record.

4 A: Yes, sir, I have it.

5 Q: And if you'll look at line -- starting with line 16 down

6 to 25.

7 A: Yes, sir, I see it.

8 Q: So you were asking Mr. Webb about his tattoos, correct?

9 A: It says, Cross-examination by Mr. Carter.

10 Yes, Line 16: What is that K for, a kill?

11 Answer: No, it stands for my cousin.

12 Question: Okay. The two teardrops are for kill or murder?

13 Answer: No, they stand for my mama and my daddy.

14 Question, Line 20: The teardrop -- Question on Line 20: The

15 teardrops are for your mama and your daddy?

16 Answer: Yes.

17 Line 22, Question: They're not for having killed someone?

18 Mr. DuRant: Objection.

19 Q: So you were clearly trying to show that he had teardrops

20 on his face that may have meant to kill or murder?

21 A: That's what I was trying to bring out.

22 Q: And he -- he responded that it was his cousin, correct?

23 And then --

24 A: His cousin, and then he said the mom and daddy.

25 Q: And the judge ruled that was sustained because it had

1 already been asked and answered?

2 A: Correct.

3 Q: And he even answered your question anyway by saying, No,
4 on line 1 of Page 88?

5 A: That's correct.

6 Q: So the jury heard his answer regardless of the objection,
7 correct?

8 A: That's correct.

9 Q: So you wouldn't see a need to proffer any more testimony
10 regarding that issue?

11 A: Ask again.

12 Q: You wouldn't see any need to proffer any testimony --
13 further testimony regarding that issue?

14 A: That's correct. You're correct.

15 Q: Mr. Carter, will you turn to Page 222 for me, please?

16 A: I have it.

17 Q: And will you look at Line 14?

18 A: Yes, sir.

19 Q: This is during the Direct Examination by Mr. Finney of
20 Lieutenant Daniels. This is the Direct Examination regarding
21 the statements that Mr. Newman made and when he asked for an
22 attorney. And if you'll look at -- will you read Line 17,
23 please, 17 through 19?

24 A: Yes, sir. Starting at Line 17.

25 Question: Was he advised of his rights to under the Miranda

1 case?

2 Answer, Line 19: Not at the time. It was just a
3 conversation.

4 Q: So based on that testimony, he was not Mirandized at the
5 time that statement was made?

6 A: That's what the transcript reflects, yes.

7 MR. MITCHELL: I beg the Court's indulgence, Your Honor.

8 THE COURT: Yes, sir.

9 BY MR. MITCHELL:

10 Q: And, Mr. Carter, during your cross-examination of Leon
11 Coleman, I know you testified you didn't remember, but you did
12 attempt to elicit testimony regarding bias that he may have
13 had with Johnathan -- against Jonathan Cody Newman?

14 A: If I questioned him, I'm sure I did. That would be my
15 objection, to show any biasness, especially if Mr. Newman had
16 some relations with his wife.

17 Q: And the judge -- there was an objection made, correct?
18 When you tried to get into that, and the judge sustained it?

19 A: I don't remember questioning him, but -- so I wouldn't
20 remember.

21 Q: Well, let -- let me ask you this. In your normal
22 practice, when a judge sustains an objection about a question,
23 you don't keep asking the same question, correct?

24 A: Not if I want to stay in good favor, correct. You're
25 correct. I take that back sometime. I do insist until the

1 judge is firm on it, then I abandon it.

2 Q: And, Mr. Carter, I know this was a long time ago, but
3 during your cross-examination of Montage Webb, do you remember
4 if you were able to elicit testimony that he didn't see Mr.
5 Newman punch the victim, correct?

6 A: The answer -- your -- the answer to your question is
7 correct, and the reason I'm saying it, no, I'm saying it is
8 because Montage Webb seesawed with his -- with different
9 answers. But, yes, I recall him saying, Well, I wasn't
10 looking; I was doing other things.

11 Q: And as a primary witness for the State, that -- that
12 testimony was -- would be beneficial to the defense, correct?

13 A: Absolutely.

14 Q: And he also testified that, yeah, he never saw Mr. --
15 basically, he didn't directly eyewitness Mr. Newman punching
16 the victim in this case, correct?

17 A: You're asking if that was his testimony, correct.

18 Q: Yes, that's right.

19 A: Uh-huh. Yes.

20 Q: And, Mr. Carter, do you remember if you -- you were
21 encouraging Mr. Newman to take a plea?

22 A: You used the word, encourage him. I don't really
23 encourage anybody to take a plea. I talk with them about it
24 and give them the benefits of it. Because Montage had set
25 himself up good with the plea, I would have -- I -- I hate

1 using the word, encourage. I would have discussed strongly
2 with Mr. Newman.

3 And I probably should have -- at the time when we were at
4 the Court, I probably should have been a little more forceful
5 with Mr. Newman's father about it because I think the mother
6 may have been a little more -- I don't want to sound sexist,
7 but a little more emotional about, you know, her child going
8 into a plea, even, whether it's for a year or 10 or 30 years,
9 would have been a little more -- his mother was a little more
10 emotional about it. Maybe not all mothers; his mother was.
11 The father was a little more open for considering whatever.

12 Q: And, Mr. Carter, I know you -- you may have requested a
13 self-defense instruction, but your -- your defense strategy in
14 this case was not a self-defense case?

15 A: No. I mean, my defense was we didn't do it. It wasn't
16 us.

17 Q: Yeah, Mr. Newman didn't do it?

18 A: Mr. Newman didn't do it. Initially, and that's -- I
19 initially believed that because I thought that Mr. Montage
20 Webb and Mr. Latroy Samuels may have been the instigator, and
21 that they just kind of pulled Jonathan in with it because, you
22 know, initially I thought he was just a little, local, white
23 boy hanging with them. And -- and -- I initially believed
24 that all the way up to the start of the trial, particularly in
25 light of my conversation with Jonathan, and then I learned

1 that, you know, he was one of the boys.

2 No, I didn't learn that. I concluded that he was one of
3 the boys who are from -- I mean, they referred to each others
4 with all kind of nicknames and one was calling the other one
5 nigga, the other one was calling Jonathan -- it was like
6 Jonathan was an adopted black man where he could use the word
7 back and forth with them. Actually, that came out in trial, I
8 believe.

9 Q: And since this wasn't a self-defense case in the time of
10 this trial in 2016 --

11 A: Uh-huh. (Affirmative response)

12 Q: We've had a lot of discussion about State v. Belcher,
13 which is about whether you can infer malice to the use of a
14 deadly weapon. And at the time you -- a judge could not
15 instruct on that unless there was evidence of the
16 justification killing, and there was no evidence of
17 justification killing in this case, right?

18 A: Absolutely, there was none.

19 Q: And either way, you did object to the inference of malice
20 charge, correct?

21 A: I did because I didn't -- I didn't think any of them, but
22 particularly Jonathan, intended to kill the man. I -- I just
23 really did not believe. I think he intended to just wrestle
24 him, punch him, and beat him because they wanted the gun, but
25 I, under no circumstances, did I think they even wanted the

1 man to be dead. That's why I was just so shocked when he got
2 the sentence he got.

3 Q: Mr. Carter, I believe that's all the questions I have for
4 you today.

5 A: All right.

6 THE COURT: Redirect.

7 **REDIRECT EXAMINATION OF ELEAZER CARTER BY MR. PHILLIPS:**

8 Q: Mr. Carter, the 15-year deal that you testified to on
9 direct examination, you had communicated that with Mr. Newman.

10 A: Okay. The answer is I think I did. And the reason I'm
11 saying I think I did, because Finney would have said to me,
12 would he take 15? and, you know, at that point -- and I did
13 tell it to Jonathan and his mother, but at that point, you
14 know, I believe Jonathan concluded that, that jury was going
15 to let him go. I halfway felt a little bit like that too, but
16 I believe he had concluded that, and then his conversation
17 with the mother might have suggested it.

18 But the answer to your question is yes, I think I told
19 him -- I spoke with him of it. I -- I didn't tell him we got
20 a 15 -- I'm sorry, a 15-year sentence on the table. But
21 Solicitor Finney asked me would he take it, and I said I'd go
22 back with him, and I believe I got an affirmative no from him.

23 Q: All right. So I got to -- I got a little bit ---

24 A: Okay.

25 Q: To be clear, you said you didn't specifically tell him 15

1 years?

2 A: No, I don't think I said that; did I?

3 Q: I don't know. I got confused, at first you didn't --

4 A: All right.

5 Q: -- but then by the end of it, it sounded like that's what
6 you were -- did.

7 A: Okay. Solicitor Finney asked me at some point, maybe day
8 two or three or somewhere, would he take 15 years, and I told
9 him I didn't think so, but let me carry it to him. And I
10 think -- and I don't think. I -- I spoke with him about it,
11 and when he said no, I spoke with his mother about it because
12 they were not all together the same time because just like in
13 this room, he goes to the room and the parents are still out
14 on the outside.

15 And I talked with her about it, and I only talked with
16 her really to have a conversation with her, but I wasn't
17 relying or counting on her alone. I was really counting on
18 what Jonathan had to say about it. I don't -- I don't
19 remember telling the father, I'm not saying I didn't, I don't
20 remember telling the father, but I remember her because she
21 was just in there.

22 Q: Did you ever tell Mr. Newman that you believe this is
23 prior to trial or during the trial that Mr. Webb was basically
24 promised a eight-year deal, eight-year sentence?

25 A: I -- I might have, but I don't recall telling him that.

1 I might have though.

2 Q: Well, what would lead you to believe that you might have
3 told him that?

4 A: Because I -- I learned that he -- whenever it was that I
5 learned that he had gotten a good sentence, I think I was
6 asking Finney something, and then I tried to separate Finney
7 from DuRant to ask DuRant if there was something going on and
8 somebody may have said something.

9 DuRant has always -- DuRant, the one who testified, was
10 always a, I'll -- I'll try to be fair to you, never want to
11 give an answer, yes, I'll do 10 or 15 years until right at the
12 last minute. And then, so I tried to play Finney against
13 that, but -- Finney is the solicitor.

14 So if I got that, I would have gotten it from -- if I got
15 an impression of that, I would have gotten it from one or --
16 one or the other. And so I might have told Jonathan about
17 that. And I -- if I had told him that, I would have said that
18 to him to make him start thinking about a possible plea
19 because I knew a lot of his decisions was -- he was a kid. I
20 mean, he was a man by law, but he was a kid in my eyes.

21 Q: Understood. Now, you talked about that you would wait to
22 -- that -- you didn't do this, but you said that potentially,
23 if you did object, say, to opening remarks from a judge, you
24 wouldn't do it at that time. You'd wait till the judge
25 finished. As far as that's concerned, you're -- you're aware

1 that, for an issue to be preserved for an Appellate Court,
2 it's got to be contemporaneous. In other words, if you
3 waited, the Appellate Court may say that you've -- you waited
4 too long?

5 A: I'm aware of that, yes.

6 Q: Okay. And that you -- in other words, not to bring it to
7 the jury's attention, that you have the ability to say you had
8 a matter of law and not do a straight objection in front of
9 the jury. You're aware you can do that as well?

10 A: I am. I -- I try a lot of cases, and I know the impact
11 of just objecting in front of the jury to something. So that
12 -- we're talking procedurally. I know the impact of it. On
13 that particular thing, I -- I don't believe I thought it was
14 something to object to, or --

15 Q: Understood.

16 A: -- I didn't know it would be something to object to. I
17 think --

18 Q: Understood.

19 A: -- that's what I want to say.

20 MR. PHILLIPS: Just a moment, your Honor. No further
21 questions, your Honor.

22 THE COURT: Okay. Anything else from either of you of
23 this witness?

24 MR. PHILLIPS: No, your Honor.

25 MR. MITCHELL: No, your Honor.

1 THE COURT: Okay. Any objection to Mr. Carter being
2 excused?

3 MR. MITCHELL: Not from the State.

4 MR. PHILLIPS: No, your Honor.

5 THE COURT: Okay. Thank you, sir. If you will hand
6 those books back to counsel. Thank you. Okay.

7 MR. PHILLIPS: And if -- Your Honor, if -- if I may --

8 THE COURT: Any other witnesses, sir?

9 MR. PHILLIPS: If I could, it'd be just two questions,
10 recall the applicant, just --

11 THE COURT: Okay.

12 MR. PHILLIPS: -- based on that testimony.

13 THE COURT: Well, first, we have to hear from --

14 MR. PHILLIPS: The State. I understand.

15 THE COURT: -- respondent.

16 MR. PHILLIPS: Understand.

17 THE COURT: But you have no other witnesses at this time?

18 MR. PHILLIPS: None, your Honor.

19 THE COURT: Do you rest at this time with regard to your
20 case in chief?

21 MR. PHILLIPS: Yes.

22 THE COURT: Not saying that you can't call reply
23 witnesses.

24 MR. PHILLIPS: That's right.

25 THE COURT: This is just like a civil trial. I know you

1 know. Okay.

2 MR. PHILLIPS: Yes, Your Honor.

3 THE COURT: All right. Any motions?

4 MR. PHILLIPS: At -- at this time, the -- essentially
5 that -- based on the evidence presented, that we've met the
6 Strickland standard, that there is deficient performance.
7 Obviously I've discussed the allegations as a whole, since
8 there's a significant number of them, with the State that you
9 -- you -- I'll make the argument, but we believe it may be in
10 the interest of the Court for us to submit proposed orders --

11 THE COURT: Okay.

12 MR. PHILLIPS: -- given, given the --

13 THE COURT: I think you're misunderstanding me. Okay.
14 So normally this would be maybe the time that the respondent
15 might have a motion concerning the evidence that you have
16 presented.

17 MR. PHILLIPS: For a summary judgment, Your Honor?

18 THE COURT: Directed verdict.

19 MR. PHILLIPS: Or direct -- well --

20 THE COURT: Okay.

21 MR. PHILLIPS: Correct.

22 THE COURT: Any -- anything? I'm looking --

23 MR. MITCHELL: No.

24 THE COURT: -- over your -- no? I'm just --

25 MR. MITCHELL: No.

1 THE COURT: -- giving you a chance to make it. All
2 right. Let me hear from the respondent and then I will call
3 on both of you after calling on you for reply, summations, and
4 motions. Go ahead.

5 MR. MITCHELL: Your Honor, I believe the applicant has
6 not met his --

7 THE COURT: Are you calling any witnesses?

8 MR. MITCHELL: Oh, no, Your Honor.

9 THE COURT: Okay. So no witnesses? All right. So -- so
10 there's nothing to reply to? Any objection to the applicant
11 being recalled?

12 MR. MITCHELL: No, Your Honor.

13 THE COURT: All right.

14 MR. PHILLIPS: Thank you, Your Honor.

15 THE COURT: He can actually just sit right there.

16 MR. PHILLIPS: Perfect.

17 THE COURT: Okay? You're still under oath, sir.

18 **REDIRECT EXAMINATION OF JONATHAN NEWMAN BY MR. PHILLIPS:**

19 Q: Mr. Newman, during the course of the -- Mr. Carter's
20 representation, did he ever convey or discuss with you a 15-
21 year plea offer?

22 A: No, it was only 20.

23 Q: All right. And clarify that. You said there was only --

24 A: There only one plea offer that was offered to me, it was
25 20 years. It wasn't 30 and it wasn't 15.

1 Q: So you received one plea offer for 20 years?

2 A: Yes, sir.

3 Q: And you rejected that offer?

4 A: Yes, sir.

5 Q: No -- no discussion of a 15-year plea offer?

6 A: Not at all.

7 Q: Now, as far as Mr. Webb, you explained what was discussed
8 to you by Mr. Carter regarding what you thought of the
9 sentence he would potentially receive. What was that
10 discussion?

11 A: I mean, he told me that he was getting eight years. It
12 was -- it was clear definition. It was already -- I guess, to
13 my knowledge, it was already prearranged that he was going to
14 get eight years for his -- for him going on the State to
15 testify.

16 Q: At what point did you learn that information?

17 A: During trial.

18 Q: Beginning trial, towards the end --

19 A: It was the beginning of the trial. It was from -- it was
20 always from -- from the very beginning that he was going to
21 get a eight-year plea. That was -- it wasn't -- I never heard
22 anything about he being -- when he decided on his plea it was
23 always that he was going to get eight years, and from the very
24 beginning, it was always he was going to get eight years.
25 That's what he got.

1 Q: As far as what was communicated to you by your lawyer?

2 A: Yes, sir.

3 MR. PHILLIPS: No further questions, Your Honor.

4 THE COURT: Okay. Any cross?

5 MR. MITCHELL: No cross-examination, Your Honor.

6 THE COURT: Okay. Any -- anything else from the -- I'm
7 going to let you all both make your summations, but anything
8 else from the applicant at this time?

9 MR. PHILLIPS: None. None, Your Honor.

10 MR. MITCHELL: None from the State.

11 THE COURT: Okay. Any motions from the State?

12 MR. MITCHELL: No, Your Honor.

13 THE COURT: Okay. So I'm happy to hear your summations.
14 It helps me, okay, for y'all to draw it together just like you
15 would do for a jury, but without the drama.

16 MR. PHILLIPS: Understood, Your Honor. Specifically, the
17 applicant argues and submits that based on the evidence
18 presented at this evidentiary hearing, that trial counsel
19 denied his right to effective assistance of counsel as
20 guaranteed by the 6th and 14th amendments of the United States
21 Constitution Article 1, Sections 3 of the -- and 14 of the
22 South Carolina Constitution.

23 Specifically, that trial counsel's unreasonably deficient
24 performance prejudiced him because there's a reasonable
25 probability that those errors resulted in the proceeding that

1 would have been different, satisfying the Strickland standard
2 that there's been deficient performance on behalf of trial
3 counsel based on the allegations presented, and that there's
4 prejudice, proven prejudice, that the outcome would have been
5 different had those things been done.

6 Specifically in -- we understand that there's a
7 significant number of allegations that are raised highlighting
8 the search for the truth language that is woven not only from
9 the very beginning of the opening remarks, but all the way
10 through the prosecutor's opening statement, as well as the
11 closing arguments of both the State and defense, highlighting,
12 again, other -- what I would consider to be high-level issues
13 are the failure to object to this inadmissible propensity
14 evidence, and what we would argue unduly prejudicial evidence
15 that he had a -- a prior history of violence and specific
16 violence of attacking the co-defendant.

17 And there was no objection to that, no motion for a
18 mistrial or curative instruction, no arguments, objections as
19 to Rule 403 or 404B. And so we believe that is one that
20 certainly shows deficient performance and prejudice. We
21 argued this, obviously, for all of these specific allegations
22 of the other allegations that the inference of malice related
23 to the excessive brutal force.

24 I don't believe there was any case law specifically that
25 supports an inference of malice, of excessive brutal force.

1 The case law at the time, as far as Belcher, having that you
2 couldn't have an inference of malice based on the use of a
3 deadly weapon when there weren't any mitigating circumstances,
4 when there wasn't a self-defense-type argument that's
5 presented, which, in this case, there wasn't. The request for
6 a self-defense instruction was denied.

7 Mr. Carter said that was not the strategy in the case,
8 that the jury being instructed that there was an inference of
9 malice of use of a deadly weapon was improper because that
10 wasn't part of the case facts that they -- they argued, I
11 know, specifically that it was from a fist, but that use of a
12 deadly weapon was not relevant and certainly should not have
13 been instructed to the jury to where they are now considering
14 a piece of law that wasn't relevant to the case.

15 In our -- in our eyes would be prejudicial to the jury as
16 they're receiving the law, especially when there wasn't
17 specific argument that goes to the excessive brutal force
18 argument, which is akin to somewhat of the one-punch-type
19 argument being an inference of malice, especially given the
20 case law of Belcher, and now as it's been further clarified in
21 Burdette.

22 And again, two weeks ago, we had two cases come out from
23 our Appellate Court directly addressing these issues, showing
24 how prejudicial these specific instructions are as far as
25 improper comments on the facts, highly -- highly prejudicial

1 to a right to a fair trial. And the excessive brutal force,
2 there wasn't any specific objections to that even though there
3 was one with the deadly weapon, but we don't believe it was
4 relevant, should not have been presented.

5 In addition to that, the added charge of the Logan
6 charge, what I argue or will argue now was specific that the
7 critical language from that charge is the exact language
8 that's omitted. The -- the whole purpose for the State v.
9 Logan charge was to have that additional language that is
10 critical that when there's circumstantial evidence, for a jury
11 to rely on that, to have that -- and again, I don't want to
12 misquote. So if, your Honor, bears with me for two seconds.

13 THE COURT: Yes, sir.

14 MR. PHILLIPS: That to the extent the State relies on
15 circumstantial evidence, all of the circumstances must be
16 consistent with each other, and when taken -- taken together
17 conclusively to the guilt of the accused beyond a reasonable
18 doubt. If these circumstances merely portray the defendant's
19 behavior as suspicious, the proof has failed. And so that is
20 one of the key lines from the Logan charge that's not included
21 in the circumstantial evidence charge that was ultimately
22 provided to the jury. The other issue is that there was
23 testimony elicited from the co-defendant's lawyer on cross-
24 examination that during the law enforcement's investigation
25 that the defendant -- that the applicant invoked his right to

1 counsel.

2 Had the prosecutor done that, I -- it's directly, in my
3 opinion, a Doyle violation and would certainly be
4 objectionable if the co-defendant tried to elicit the fact
5 that he, in a pretrial setting invoked his right to counsel
6 and did not make a -- another statement to police that that is
7 improper to be put before the jury.

8 Again, there's plenty of other allegations and I'd be
9 happy to go through each one of them. I don't know if Your
10 Honor wants me to specifically do that, but I do feel that
11 many of these, I'll end with the Sixth Amendment cross-
12 examination, that there was a failure to provide adequate
13 cross-examination confrontation of the witnesses. Mr. Webb
14 avoided a day for day mandatory minimum sentence. One of the
15 first appeals I won was State versus (inaudible). And with
16 that, it goes directly to that issue that defense counsel is
17 allowed to directly cross examine a witness when they avoid a
18 mandatory minimum sentence on that issue.

19 Because normally we -- as Your Honor knows, we can't talk
20 about sentences, we can't go into that. But when they avoid a
21 mandatory minimum sentence, that level of bias, potential bias
22 is so high that the law allows us to then directly attack
23 that. And so -- and with that --

24 THE COURT: What sentence did Mr. Webb receive? Eight
25 years?

1 MR. PHILLIPS: That -- that's correct, Your Honor.

2 THE COURT: Okay. It was -- there was a lot of back and
3 forth about it. Okay.

4 MR. PHILLIPS: I know Mr. Carter testified that he
5 thought it could have been 10 to 15, but mister --

6 THE COURT: But ultimately it was eight?

7 MR. PHILLIPS: That's correct.

8 THE COURT: Okay. Did he plead ahead of time with a
9 deferred sentence?

10 MR. PHILLIPS: And let me - I don't want to speak out of
11 assuming. I'm a hundred -- almost a hundred percent, but I
12 want to -- I don't ever want say something that's not a
13 hundred percent confirmed, Your Honor. I got it.

14 THE COURT: If it was a -- then he's not in anymore,
15 right?

16 MR. MITCHELL: I know for a fact he is not incarcerated.
17 I do not know his exact sentence though.

18 THE COURT: Was it a deferred sentence?

19 MR. MITCHELL: It was a -- and they did it right after.
20 I mean, as the trial at basically the same time.

21 THE COURT: So he pled, deferred the sentence and then he
22 --

23 MR. MITCHELL: I honestly do not know.

24 THE COURT: Okay. Okay.

25 MR. PHILLIPS: Your Honor, I will pull it to be --- but -

1 -

2 THE COURT: I think there was some confusion among the
3 witnesses about what actually happened. And it's been a while
4 and they handle a lot of cases, so I understand that, but --

5 MR. PHILLIPS: And -- and I'll pull it. It is our belief
6 that it's, and I'll get confirmation, I don't want to do any
7 fraud upon the Court kind of an issue.

8 THE COURT: And I'm not trying to make you a witness. I
9 just want -- I -- it would be very difficult for me to pull
10 that sentence if he's not in the Department of Corrections any
11 -- any longer. And so --

12 MR. PHILLIPS: I would -- I would have to reach out to
13 Christie Bigelow at General Counsel and she could get that for
14 me.

15 THE COURT: Right. Right. Right.

16 MR. PHILLIPS: With that being said, what we do know is
17 that he avoided a mandatory minimum of 30 years, day for day,
18 and that that could have been cross-examined on, and it wasn't
19 specifically. And knowing, based on his own admission, Mr.
20 Carter said his belief was that he was going to receive
21 something around 10 to 15, and then said it was even possible
22 that he knew that he could get eight and he didn't cross on
23 that either.

24 And having that belief, if he had those conversations
25 with Solicitor Finney, he should have cross examined on it.

1 But at a minimum, the mandatory minimum that he avoided, the
2 law allows him to directly say he's got 30 years' worth of
3 reasons or however many days is in 30 years.

4 Those amount of reasons to come up here and say anything
5 that he said during the -- the trial, which ultimately for
6 that, the main issue as far as direct testimony was more or
7 less the -- the co-defendant that he was on trial with less so
8 than Mr. Webb. But with that being said --

9 THE COURT: But there's not an allegation that the
10 solicitor withheld that information?

11 MR. PHILLIPS: No. No. This is the confrontation. In
12 other words, Mr. Carter was ---

13 THE COURT: Okay. Got you.

14 MR. PHILLIPS: Mr. Carter was ineffective.

15 THE COURT: Okay. I just want to make sure I understood.
16 Okay.

17 MR. PHILLIPS: Yeah, no prosecutorial misconduct argument
18 that it was a (inaudible) to adequately confront the witness
19 based on not cross-examining on that mandatory minimum. And
20 so with that, I would say that, again, I know we've raised
21 many other allegations, but as a whole, and looking at these
22 that you have deficient performance on the basis of counsel,
23 and then you have prejudice that had the deficient performance
24 or that the deficient performance itself affected the outcome.

25 And specifically going to the second prong or the second

1 allegation set of ineffective assistance of appellate
2 allegation, Chief Appellate Defender Robert Dudek said he
3 believed that the Belcher charge was properly objected to, was
4 preserved, but he said he didn't believe it was meritorious.

5 My argument would be that if he believed it was
6 preserved, he raised a different issue. No-merits brief and
7 Anders brief that he should have raised that inference charge
8 on a merits basis to the Appellate Court. And that based on
9 his testimony, which supports the arguments of ineffective
10 assistance of trial counsel that had there been other issues
11 properly preserved for appellate review -- other meritorious
12 issues reserved for appellate review, he would not have had to
13 file an Anders brief.

14 He - no merits brief would have been necessary because he
15 could have filed a merits brief for the -- in other words,
16 we'll go on and say, the cross-examination issue if a Judge
17 denied them to do that, that would've created it. Or in this
18 case, the inferences themselves or the search for the truth
19 language that had those issues been properly preserved for
20 appellate review, the Appellate Court could have addressed
21 those issues on direct appeal, but they were not able to
22 because they were not reserved and he was -- had to file an
23 Anders brief, a no-merits brief.

24 So with that being said, we believe that the applicant
25 was being denied his Sixth Amendment right to effective

1 assistance of counsel and appellate counsel or trial counsel
2 and appellate counsel, and be happy to respond to any
3 specifics that Your Honor may have. The State and I have
4 discussed that given the wealth of allegations we could do
5 proposed orders for the Court if that's in something the Court
6 wants to --

7 THE COURT: I don't normally get that offer.

8 MR. PHILLIPS: And look, most people don't want to do
9 that. But I understand for the Court's edification sometimes
10 these cases when you have a lot of allegations, that's the --
11 and -- and I'll -- obviously, we'll do whatever the Court
12 desires. If you -- if you want to review it, make a decision,
13 and then the other party files the Rule 59(e) to -- to address
14 it, we can do that as well. But certainly, put that in the
15 Court's discretion.

16 THE COURT: Okay.

17 Okay. Mr. Mitchell?

18 MR. MITCHELL: Your Honor, the State submits that the
19 applicant has not met his burden of establishing ineffective
20 assistance of counsel. As far as the plea offer for Montage
21 Webb, the record of the transcript shows that Mr. Carter did
22 in fact cross-examine Mr. Webb on the fact that he is looking
23 for less time by testifying. He didn't exactly say that he
24 got eight years, but he -- the point is, the jury knows that
25 Mr. Webb is testifying against him in the hopes of -- of a

1 reduced sentence. So I don't think he's approved deficiency
2 or prejudice on that.

3 Furthermore, Mr. Carter, and everyone's confused about
4 what the plea deal was, I know it's been a long time ago, but
5 Mr. Carter said he didn't know for sure about the time that
6 Mr. Webb was going to receive. I know there's been testimony
7 that says otherwise, but if he doesn't know what the time is
8 going to receive, he can't ask him about it. But bottom line
9 is, Mr. Carter did ask Mr. Webb regarding why he was
10 testifying his motivation for doing so.

11 Furthermore, Your Honor, Mr. Carter -- Mr. Webb
12 testified, and Mr. Carter elicited from him on cross, that he
13 did not see Mr. Newman hit anybody and the victim. So the
14 testimony that he wasn't on cross was beneficial to Mr.
15 Newman's defense in a way. And Mr. Durant even said that
16 Montage Webb's testimony did not go the way he wanted it to
17 go. And so, I would say he failed to prove prejudice on that
18 regard.

19 Regarding invoking -- the comment regarding his assertion
20 of right to counsel, Your Honor, prior to that the -- the on
21 direct examination of Lieutenant Daniels, it was clear that
22 these statements were made pre-Miranda. And for a Doyle
23 violation to occur, it has to be a comment on someone's right
24 to invoke counsel post-Miranda. And it could be post-arrest
25 pre-Miranda as well.

1 So, since it was a pre-Miranda, I do not believe it was a
2 violation. And even so, Your Honor, I don't believe that that
3 is what moved the needle in this case. And so he also failed
4 to prove prejudice in that regard.

5 The inference of malice, Mr. Carter did object to the
6 inference of malice on excessive, brutal force. Mr. Dudek,
7 who's been appellate defender for decades, testified that it
8 was a preserved issue. He didn't see any merit for it because
9 this trial occurred in 2015 and Belcher didn't come out --
10 excuse me, but that didn't come out until 2019.

11 And Belcher said that a jury instruction on inferred
12 malice through the use of a deadly weapon can only -- is only
13 not allowed if there was some sort of justification defense in
14 this case. There was no justification defense in this case.
15 Thus the jury instruction at the time was proper.

16 Your Honor, regarding this -- the Logan charge. If you
17 look at the case of Logan, this is when the State relies
18 exclusively on circumstantial evidence. And here, you had
19 direct testimony from his co-defendant that he saw Mr. Newman
20 punch the victim. And furthermore, the Court and Logan
21 affirmed the conviction based on the circumstantial evidence
22 charge given in that case, which was similar to the one given
23 at trial.

24 In regards to the uncommunicated plea offer, Mr. Carter
25 was -- testified and was adamant that every plea offer he

1 received, he communicated with Mr. Newman about, so therefore
2 he has failed to prove prejudice in that regard as well.

3 Your Honor, I agree with Mr. Phillips that there's a lot
4 of legal issues in this case, and if Your Honor decides for us
5 to do proposed orders, that would be fine with the State.

6 THE COURT: Okay. Thank you. Anything else?

7 MR. PHILLIPS: None, Your Honor.

8 THE COURT: Okay. So, let me direct my comments then to
9 Mr. Jonathan C. Newman. Do -- sir, is it Cody or Jonathan?
10 What do you go by?

11 MR. NEWMAN: Jonathan.

12 THE COURT: Okay. All right. Mr. Jonathan C. Newman.
13 Sir, you've not appeared in front of me before and the
14 attorneys though have asked around or either know that I
15 normally am going to review everything in great detail before
16 I issue instructions for an order. And so, today I've had the
17 benefit of the testimony, seeing you in person, which makes it
18 all very real to me. But I want to review everything again,
19 and I've got the transcripts, and I've got your application
20 and any amendments to it. And we've got an oral amendment
21 today. I've made notes. And so, that's what I would like to
22 do. I don't want you to be discouraged by the fact that I'm
23 not making a decision today, but rather be encouraged by that,
24 okay?

25 MR. NEWMAN: Okay. Thank you, ma'am.

1 THE COURT: All right. I do wish you the very best, sir.

2 All right. Counsel, because you all have begged the
3 question, I will ask that you each draft a proposed order.
4 How much time do you think you all need?

5 MR. PHILLIPS: Right now -- I -- I don't know what
6 happened in the last week, but the solicitors came out the
7 woodwork trying to schedule like three murder trials for --
8 starting in September all the way through the end of the year.
9 So if I could have a little bit of leeway time as we start
10 court doing ---

11 THE COURT: 30 days?

12 MR. PHILLIPS: At minimum, please.

13 THE COURT: Okay. And so 10 days is what I would
14 normally, so 30 days. And if you need more, you -- you let me
15 know, okay? Okay.

16 And I know Mr. Mitchell, we were talking about scheduling
17 earlier and you said that you're kind of jammed up until
18 September?

19 MR. MITCHELL: Yes, Your Honor. Me and Mr. Jennings, we
20 have two more PCR terms this -- through August. And then --
21 so, I am busy, Your Honor.

22 THE COURT: Okay. All right. So I'll tell you all 30
23 days, but if you all need more time, you can let me know,
24 okay?

25 MR. MITCHELL: Sure. Thank you.

1 MR. PHILLIPS: Thank you, Your Honor.

2 THE COURT: Thank you. It's a pleasure to see you guys.
3 I don't see you very much and I've not ever been here before
4 really except to mentor with another Judge. So, pleasure.

5 (COURT IS IN RECESS.)

6

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CLARENDON	)	FOR THE THIRD JUDICIAL CIRCUIT
	)	
	)	
Jonathan Cody Newman, SCDC #362601,	)	Case No. 2018-CP-14-00233
	)	
Applicant,	)	
	)	
v.	)	ORDER OF DISMISSAL
	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	
	)	

I. INTRODUCTION

The matter before this Court is an action for post-conviction relief (PCR) commenced by Jonathan Cody Newman ("Applicant") on June 12, 2018. On July 25, 2024, a hearing into the matter was convened before the Honorable Grace Gilchrist Knie at the Sumter County Courthouse. Applicant was present and represented by Dayne C. Phillips, Esquire. Assistant Attorney General T. Cruise Mitchell represented the State.

After hearing the testimony at the PCR hearing and upon full review of the record, this Court finds Applicant's allegations regarding ineffective assistance of counsel are without merit. For the reasons discussed below, this Court denies relief and dismisses this action with prejudice.

II. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clarendon County Clerk of Court. Applicant was indicted at the February 2014 term of the Clarendon County Grand Jury for murder and first-degree burglary (2013-GS-14-0293). Applicant was represented by Eleazer R. Carter, Esquire. On January 9, 2015, Applicant proceeded to a jury trial before the Honorable W. Jeffrey Young. The jury found

Applicant guilty as indicted. Judge Young sentenced Applicant to thirty years imprisonment for burglary and thirty-five years for murder, to run concurrently.

A timely Notice of Appeal was filed on January 20, 2015. Chief Appellate Defender Robert M. Dudek (Appellate Counsel) of the South Carolina Office of Appellate Defense perfected the appeal in the form of an *Anders*¹ brief and a motion to be relieved as counsel. The South Carolina Court of Appeals dismissed the appeal and granted Appellate Counsel's motion to be relieved. *State v. Newman*, Op. No. 2015-UP-140 (S.C. Ct. App. filed April 5, 2017). The Remittitur was sent April 28, 2017.

III. STATEMENT OF FACTS

On May 25, 2013, Applicant and his two co-defendants were hanging out at a duplex that shared a common porch. (R. p.58). One of the duplex's was owned by Kevin Slater and the other by the victim. (R. p.151). That evening, Mr. Slater had friends come over to hang out and drink. (R. p.58; p.152). During the early morning hours of May 26, 2013, Applicant and his co-defendant, Montag Webb, devised a plan to rob the victim. (R. p.45). Applicant then hit victim on the shared porch. (R. p.225; p.378). Montag Webb and Applicant robbed the victim of a firearm after ransacking his home. (R. p.69; p.74–76; p.130).

Dr. Mark Jones testified that the victim had evidence of blunt force trauma to his head and face and he was unconscious while being supported by a ventilator following the incident. (R. p.289). Dr. Jones explained that the victim eventually died from those injuries on July 29, 2013. (R. p.291). Applicant, Montag Webb, and Letroy Samuels were all subsequently charged with his murder.

¹ *Anders v. California*, 386 U.S. 738 (1967).

IV. CURRENT APPLICATION

Applicant commenced this PCR application on June 12, 2018. In his application Applicant alleged he was entitled to relief based on the following grounds:

1. Ineffective Assistance of counsel

- a. Counsel failed to conduct adequate investigation and prepare for trial
- b. Counsel was ineffective for failing to properly investigate, interview witnesses, review discovery, and adequately prepare for trial.
- c. Counsel was ineffective for failing to request severance from Applicant and Co-Defendant Samuels.
- d. Counsel was ineffective for failing to convey plea negotiation information and failed to properly pursue plea negotiations as requested by Applicant.
- e. Counsel was ineffective for failing to remove for cause potential juror #101 Eddie G. Myers, or use preemptive strike to remove juror.
- f. Counsel was ineffective for not properly objecting or otherwise preserving for appellate review the prosecution's objection to defense Counsel's questioning of key witnesses Leon Coleman about Applicant having an affair with Coleman's wife.
- g. Counsel was ineffective for failing to object to prosecutor asking State witness Lt. Daniels to bolster credibility of prosecution witnesses, and Samuel's statements.
- h. Counsel was ineffective for not properly cross-examining state witness Montag Webb about prior inconsistent statements. Additionally, Counsel failed to properly cross-examine Samuels about inconsistent statements.
- i. Counsel was ineffective for not objecting to, moving for mistrial and/or requesting curative instruction regarding Applicant's assertion of right to counsel when questioned by police.
- j. Counsel was ineffective for not making a Bruton objection or moving for severance when Lt. Daniels and Investigator Bosdall relayed to the jury Applicant's codefendant's statements to the jury that incriminated applicant.
- k. Counsel was ineffective for failing to properly advise Applicant with respect to Applicant's decision to testify.
- l. Counsel was ineffective for failing to handle, prepare for and object to co-defendant Samuel's testimony which incriminated Applicant substantially.
- m. Counsel was ineffective for failing to object or move for mistrial when co-defendant Samuels testified that the Applicant had assaulted him (Samuels) and others, was a violent person, "was a fighter" and that Samuels was afraid of him (Applicant).
- n. Counsel was ineffective for failing to properly object and prepare for Co-Defendant's testimony and present rebuttal case and response to such testimony incriminating the Applicant.
- o. Counsel was ineffective for failing to object or preserve for appellate review prosecutions pitting [Applicant's] testimony and credibility against other witnesses.

- p. Counsel was ineffective for failing to object to the court's "inferred malice" instruction. The Court instructed the jury that it would infer malice based on use or brutal force on victim.
- q. Counsel was ineffective for failing to request "mere presence" instruction be charged to the jury.
- r. [Appellate] Counsel was ineffective for failing to brief and argue on appeal the following issues:
 - i. Court erred by restricting cross-examination of witness Leon Coleman related to bias Coleman had against Applicant due to Applicant having an affair with Coleman's wife.
 - ii. Court erred restricting cross-examination of cooperating witness Montag Webb related to the witness's tattoos.
 - iii. Court erred by denying attorney for Applicant request to do recross cooperating witness Montag Webb about prior inconsistent statements. (Trial pg. 147).
 - iv. Court erred by refusing to allow the Applicant to present rebuttal testimony/evidence in response to co-defendant Samuel's testimony and the prosecutions rebuttal case. (Trial pg. 422-25).
 - v. Court erred in denying Applicants request for "self-defense" instruction (Trial. pg. 425). There was evidence that victim had a firearm and threatened applicant and others prior to incident.
- s. Rule 5 / Brady violation

On June 26, 2019, Applicant, through his retained PCR attorney, Dayne Phillips, filed an amended application raising the following allegations:

1. Ineffective Assistance of Counsel

- a. Trial Counsel failed to conduct a reasonable investigation and to develop all available, relevant, and admissible or mitigating evidence in preparation of Applicant's defense.
- b. Trial Counsel failed to interview critical witnesses who could have challenged the credibility of the State's witness and could have undermined the State's evidence when it was reasonable and necessary to do so in preparation for trial.
- c. Trial Counsel failed to convey a plea offer to Applicant and failed to pursue a plea negotiations as requested by Applicant.
- d. Trial Counsel failed to move for severance pursuant to Bruton v. United States, 391 U.S. 123 (1968) because admission of Applicant's co-defendant's statements violated the Confrontation Clause.
- e. Trial Counsel failed to move to strike potential juror #101 Eddie G. Myers for cause or use a preemptory strike to remove juror when it was reasonable and necessary.
- f. Trial Counsel failed to object to inadmissible and unduly prejudicial evidence during Applicant's trial, thereby failing to preserve these issues for appellate review and denying Applicant a fair trial.

- g. Trial Counsel failed to object [to] the Prosecution's bolstering of the State's witnesses.
 - h. Trial Counsel failed to properly cross-examine the State's witness, including but not limited to Montag Webb and Letroy Samuels, regarding inconsistent statements and impeachment evidence.
 - i. Trial Counsel failed to properly cross-examine the State's witness, Montag Webb, regarding possible bias and motives for testifying against Applicant, specifically, questioning Montag Webb about promises in exchange for his testimony.
 - j. Trial Counsel failed to object and move for a mistrial and/or request for a curative instruction regarding Applicant's assertion of his right to counsel when interrogated by law enforcement.
 - k. Trial Counsel failed to properly argue against and preserve for appellate review the Prosecutor's objection for relevance during Trial Counsel's cross-examination of witness Leon Coleman related to the witness's possible bias against Applicant for having an affair with his wife.
 - l. Trial Counsel failed to properly argue against and preserve for appellate review the Prosecutor's objection for asked and answered during Trial Counsel's cross-examination of witness Montag Webb related to the meaning of his tear-drop tattoos.
 - m. Trial Counsel failed to properly advise Applicant regarding his right/decision to testify at trial.
 - n. Trial Counsel failed to move for a mistrial and/or curative instruction when Applicant's co-defendant testified that Applicant was violent, had assaulted him and other people, and that he was afraid of Applicant.
 - o. Trial Counsel failed to object to and move to strike the Prosecutor's pitting of Applicant's testimony and credibility of other witnesses.
 - p. Trial Counsel failed to properly object to the Trial Court's improper "inferred malice" instruction to the jury.
 - q. Trial Counsel failed to request a jury instruction for mere presence.
 - r. Trial Counsel failed to adequately prepare for trial by not interviewing witness(es) who could have testified regarding Applicant's good character and reputation when it was reasonable and necessary to present this evidence at trial and request a jury instruction on good character and reputation.
2. Ineffective Assistance of Appellate Counsel
- a. Appellate Counsel failed to raise the issue of whether the Trial Court erred in refusing Trial Counsel to call and present rebuttal testimony in response to the Prosecution's rebuttal testimony and his co-defendant's testimony.
 - b. If found preserved for appellate review, Appellate Counsel failed to raise the issue of whether the Trial Court erred in instructing the jury that "excessive brutal force" is an inference of malice.

On October 20, 2023, Applicant, through his retained PCR attorney, Dayne Phillips, filed a second amended application raising the following additional allegations:

- 1. Ineffective Assistance of Counsel

- a. Trial Counsel failed to adequately prepare for trial. Specifically, Trial Counsel failed to meet with or review the State's evidence with Applicant prior to the trial. Counsel also failed to inform Applicant of his scheduled trial.
 - b. Trial Counsel failed to inform Applicant of his rights, charges, and sentencing ranges prior to trial. Specifically, Trial Counsel failed to advise Applicant that murder carries a mandatory minimum sentence of thirty (30) years to life imprisonment upon conviction.
 - c. Trial Counsel failed to object when the Clerk of Court told the jury that they "have the charge with a true verdict" while being sworn under oath.
 - d. Trial Counsel failed to object when the Trial Court improperly told the jury that a trial is a "search for the truth" and that the jury is seeking to "reach a fair and just verdict" during the Court's opening remarks. *See State v. Alexsky*, 343 S.C. 20, 538 S.E.2d 248 (2000); *State v. Daniels*, 401 S.C. 251, 737 S.E.2d 473 (2012); *State v. Beaty*, 423 S.C. 26, 813, S.E.2d 502 (2018).
 - e. Trial Counsel failed to object when the Prosecutor referenced the Trial Court's statement that "this was a search for the truth".
 - f. Trial Counsel failed to object when the Prosecutor improperly stated, "my job as an Assistant Solicitor is to represent the interest of this community to represent your interest."
 - g. Trial Counsel failed to cross-examine Co-Defendant Montag Webb about him facing a mandatory minimum sentence of thirty (30) years to life imprisonment upon conviction for Murder and a mandatory minimum sentence of fifteen (15) years to life imprisonment upon conviction for Burglary, First Degree.
 - h. Trial Counsel failed to properly cross-examine the Pathologist Dr. Amy Durso regarding the cause and manner of death being a homicide. Specifically, Counsel failed to question the Pathologist about homicide being a medical determination and not a legal determination of homicide/murder.
 - i. Trial Counsel failed to object when the Prosecutor and Co-Defendant's lawyer referenced Co-Defendant's Samuel's statements to police. Additionally, Counsel was ineffective in inquiring and referencing the Co-Defendant Samuels.
 - j. Trial Counsel failed to object when the Prosecutor improperly referenced the Applicant's invocation of his right to an attorney when questioned by the police.
 - k. Trial Counsel failed to properly cross-examine Co-Defendant Samuels.
 - l. Trial Counsel failed to object when the Prosecutor misstated the law regarding the inference of malice during his closing argument.
 - m. Trial Counsel was ineffective for improperly referencing items of deadly weapons as an inference of malice.
 - n. Trial Counsel failed to object when the Prosecutor improperly referenced Assault with Intent to Kill.
 - o. Trial Counsel failed to object to the Trial Court's instruction that the jury could infer malice based on use of a deadly weapon.
 - p. Trial Counsel failed to object to the Trial Court's instruction that the jury could infer malice based on excessive brutal force.
2. Ineffective Assistance of Appellate Counsel

- a. If found preserved for appellate review, Appellate Counsel failed to raise the issue of whether the Trial Court erred in instructing the jury that “excessive brutal force” is an inference of malice.

V. INEFFECTIVE ASSISTANCE OF COUNSEL, GENERALLY

Ordinarily, PCR allegations are centered upon an allegation that the applicant did not receive *effective* assistance of counsel guaranteed by the Sixth Amendment. The allegation of denial of such representation sets forth a *prima facie* violation of this constitutional right, and raises a question of fact that can only be determined by an evidentiary hearing. *Rogers v. State*, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

The reviewing court applies the two-part test outlined in *Strickland v. Washington* to determine whether counsel’s conduct “was so ineffective as to require reversal” of the applicant’s conviction. 466 U.S. 668, 687 (1984). To obtain relief, a PCR applicant must prove (1) counsel’s performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel’s deficient performance. *Id.* at 687–88; *accord. Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *Strickland*, 466 U.S. at 700; *see also Bell v. Cone*, 535 U.S. 685, 695 (2002) (explaining that “[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable” (citation and internal quotation marks omitted)).

The applicant has the burden of establishing both deficiency and prejudice in order to be entitled to relief. *Hughes v. State*, 346 S.C. 554, 558, 552 S.E.2d 315, 317 (2001); Rule 71.1(e), SCRCP. To prove deficient performance, the applicant must establish that, in light of all the circumstances, the acts or omissions complained of “were outside the wide range of competence”

demanding of attorneys in criminal cases. *Strickland*, 466 U.S. at 688. To prove prejudice, the applicant must establish “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. A reasonable probability is a probability “sufficient to undermine confidence in the outcome.” *Id.* Significantly, “the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged.” *Id.* at 696.

VI. FINDINGS OF FACT & CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the PCR hearing, observed the witnesses, passed upon their credibility, and weighed their testimony accordingly. After hearing the testimony presented and considering the legal arguments by counsel, as well as the record in this action incorporated by way of the State’s return, this Court finds Applicant’s claims to be without merit. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings of facts and conclusions of law based upon all of the probative evidence presented.

Failure to Strike for Cause Juror #101

Applicant contends Counsel was ineffective for failing to move to strike potential jury #101 Eddie G. Myers for cause or use a preemptory strike to remove juror when it was reasonable and necessary. This Court finds this allegation is without merit.

This Court finds Applicant has failed to prove Counsel was ineffective in this regard. Applicant alleges Counsel should have struck Juror #101 because he admitted during the voir dire to knowing Montag Webb’s (co-defendant) sister. During voir dire, the juror in question asserted he could make his decision based upon the evidence. (R. p.520–521). Counsel was not deficient for failing to use a peremptory strike against Juror #101 based on the mere fact Juror #101 knew the co-defendant’s sister in this case, especially when the juror affirmed, under oath, that he could make

a decision based solely on the evidence presented. Counsel testified, at the evidentiary hearing, he believed a family member of Applicant's co-defendant may be positively disposed to Applicant—this is a valid reason for not striking juror #101. Therefore, since this Court finds Counsel articulated a valid reason for not striking the juror, Counsel was not deficient.

Furthermore, to prevail upon a claim of ineffective assistance of counsel for failing to use a peremptory strike against a potential juror, Applicant "must provide credible evidence that the trial attorney's refusal to strike a juror prejudiced the defense." *Palacio v. State*, 333 S.C. 506, 517, 511 S.E.2d 62, 68 (1999). Here, Applicant has presented no credible evidence that Counsel's failure to strike Juror #101 prejudiced Applicant's defense at trial.

Accordingly, this allegation is DENIED.

Failure to Properly Cross-Examine Montag Webb Regarding Possible Bias

Applicant next contends Counsel was ineffective for failing to properly cross-examine the State's witness, Montag Webb, regarding possible bias and motives for testifying against Applicant, specifically, questioning Montag Webb about promises in exchange for his testimony. This Court finds this allegation to be without merit.

Applicant alleges Counsel was ineffective for failing to properly cross-examine the State's witness Montag Webb about promises in exchange for his testimony. During the cross-examination of Montag Webb, the following exchange occurred:

Q. In deciding to come clean and pleading to this incident you had an agreement with the solicitor and the police?

A. Yeah.

Q. That agreement allowed you to get a plea for a lesser time?

A. Yeah.

Q. So that you would not have to spend the rest of your life in jail?

A. Yeah.

Q. In the process of doing that. That is why you here testifying so you can fulfill your part of the obligation?

A. I do not mean none of it so yeah. Yeah.

(R. p.120–121).

Clearly, Counsel was attempting to elicit testimony regarding Montag Webb's bias and motivation for testifying against Applicant. Although Applicant asserts Counsel should have elicited testimony regarding the precise number of years Montag Webb received as part of his plea, it is unclear from the record whether Montag Webb was promised a specific sentence in exchange for testifying. Solicitor testified, at the evidentiary hearing, he does not recall specifics surrounding the plea agreement, but it was not his standard practice to make a specific promise to a cooperating witness. This Court finds Applicant has failed to show that a specific promise to Montag Webb was made prior to Applicant's trial. Regardless, Counsel did cross-examine Montag Webb on his bias and motivation for testifying, i.e. to receive lesser time. Therefore, Counsel was not deficient in his cross-examination of Montag Webb in this regard.

Furthermore, Applicant has failed to prove he was prejudiced by any alleged deficiency in the cross-examination of Montag Webb regarding his bias. Montag Webb testified he did not know who hit the victim and did not see Applicant hit victim. (R. p.67; p.82). Even Solicitor expressed, at the evidentiary hearing, that he was frustrated by the testimony of Montag Webb. Therefore, Applicant has failed to show how further cross-examination of Montag Webb regarding his bias would have resulted in a different outcome at trial.

Accordingly, this allegation is **DENIED**.

Failure to Object to “Searching for the Truth” Language

Applicant makes several allegations Counsel was ineffective for failing to object to allegedly inappropriate comments made by the trial court.

Applicant alleges Counsel failed to object when the Trial Court improperly told the jury that a trial is a “search for the truth” and that the jury is seeking to “reach a fair and just verdict” during the Court’s opening remarks. *See State v. Aleksey*, 343 S.C. 20, 538 S.E.2d 248 (2000); *State v. Daniels*, 401 S.C. 251, 737 S.E.2d 473 (2012); *State v. Beaty*, 423 S.C. 26, 813, S.E.2d 502 (2018).

During its opening remarks, the Court made this statement:

This is a real trial which is a fundamental part of our democracy and it is a search for the truth in a effort to make sure justice is done. In searching for the truth and ensuring justice is done is often slow, deliberate, and repetitive. The exact opposite of what you may have seen on television, seen in movies, or read in books...Ladies and gentlemen in determining what the true facts are in this case you must decide whether or not the testimony of a witness is believable. It will be my responsibility to rule as a matter of law whether certain testimony is admissible, but once testimony is admitted whether or not you decide to believe it is solely for you to determine...Ladies and gentlemen please do not let your thoughts wonder, but give strict attention to the testimony in this case so at the end of all the testimony, after the argument of council, and the charge on the law by me. You will then be in a position to determine what the true facts are and to apply the law to those facts and thus render a true and just verdict.

(R. pp.6–13).

Applicant cites to *Beaty* in support of his argument Counsel was ineffective; however, Applicant’s trial occurred before the opinion in *Beaty* was published. Only law that existed at the time of Applicant’s trial may be used to determine whether Counsel was deficient for failing to object. *See, e.g., Gilmore v. State*, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994) (“We have never required an attorney to be clairvoyant or anticipate changes in the law” (citing *Thornes v. State*, 310 S.C. 306, 309–10, 426 S.E.2d 764, 765 (1993))), *overruled on other grounds by Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999); *Thornes*, 310 S.C. at 309–10, 426 S.E.2d

at 765 (“This Court has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial.”).

At the time of Applicant’s trial, *State v. Aleksey*, 343 S.C. 20, 538 S.E.2d 248 (2000) was the controlling precedent. The Court in *Aleksey* held that “instruction telling jury its ‘one single objective’ was ‘to seek the truth’ did not violate defendant’s due process rights by shifting the burden of proof and diluting the reasonable doubt standard, as instruction was not part of the reasonable doubt or circumstantial evidence charges but was part of the instructions on witness credibility, and instruction was followed by additional exhortation to bear in mind the state’s heavy burden of proof”. *Id.*

In this case, trial court’s alleged improper remarks occurred in its opening statement to the jury, not during jury instructions, and were not made in the context of reasonable doubt or circumstantial evidence; thus, were not improper at the time of trial. Counsel was not deficient in failing to object to these remarks as they were proper under case law that existed at the time of Applicant’s trial.

Furthermore, the trial court gave an accurate definition of reasonable doubt in its opening statement and in its charge to the jury rendering any alleged error harmless. Therefore, Applicant has failed to prove he was prejudiced.

Accordingly, this allegation is DENIED.

Failure to Object to Prosecutor’s Opening Statement and Closing Argument

Applicant contends Counsel was ineffective for failing to object to remarks made the solicitor during the State’s opening statement. During the State’s opening statement, Solicitor made the following remarks:

I am Assistant Solicitor here in Clarendon County. It is my pleasure to present this case with the duly elected appointed Solicitor Chip Finney. I work here in

Clarendon County and my job as an Assistant Solicitor is to represent the interest of this community to represent your interest, and is to represent the interest of the state of South Carolina. The Supreme Court has said that our job as prosecutors is not to just seek convictions but to ensure that justice is reached, to see justice, and make no mistake about it that is your goal. Justice is the goal in this case and that is what the Judge just told you a few minutes ago. He told that your job was to, was to render a verdict that speaks justice. That this was a search for the truth and that is what it is. The burden is on the State in this case to prove the evidence of the crimes charged beyond a reasonable doubt.

(R. p.14).

Applicant first contends Counsel should have objected when the solicitor referenced the trial court's statement that "this was a search for the truth." Again, these remarks were made by the prosecutor in his opening statement, and not by the trial court during his jury charge on reasonable doubt. Therefore, Counsel was not deficient in failing to object to these remarks.

Furthermore, any alleged error is harmless considering this statement occurred in the beginning of the trial when the prejudicial effect is lessened. Additionally, as noted above, the trial court gave an accurate definition of reasonable doubt during its jury charge emphasizing the State's burden of proof. (R. p.482). Thus, Applicant has failed to prove prejudice in this regard.

Applicant contends Counsel should have objected to Solicitor's remark during his closing when he requested the jury "reach a verdict that speaks the truth." (R. p.428). As stated above, this trial occurred before *Beaty* was published, so no objection was warranted. Additionally, the Solicitor informed the jury in his closing that beyond a reasonable doubt "means the State must submit its case so that you are firmly convinced of the defendants guilty." (R. p. 428). This is an accurate definition of reasonable doubt. Furthermore, the trial court gave an accurate definition of reasonable doubt. (R. p.482). Therefore, any improper comment by the Solicitor was cured by the Trial Court's instruction to the jury.

Accordingly, this allegation is DENIED.

Next, Applicant contends Counsel should have objected to Solicitor's remarks that his job "is to represent the interest of this community to represent your interest, and is to represent the interest of the State of South Carolina." This allegation is without merit. The Solicitor emphasized that the jury must base its decision on whether the State has proven its case beyond a reasonable doubt by the evidence presented at trial. The Solicitor never informed the jury to base their decision on anything other than the evidence presented. Therefore, this Court finds the Solicitor's remarks in his opening statement proper and not objectionable. Thus, Counsel was not deficient in failing to object. Additionally, the Solicitor emphasized the requirement that the State must prove its case beyond a reasonable doubt using only the evidence presented at trial. Therefore, Applicant has failed to prove he was prejudiced by Counsel's alleged failure to object to the Solicitor's opening statement.

Accordingly, this allegation is DENIED.

Failure to Properly Object to the Prosecutor's Objection to Defense Counsel's Questioning of Leon Coleman Regarding Applicant Having an Affair with Coleman's Wife

Applicant contends Counsel was ineffective for not properly objecting or otherwise preserving for appellate review the prosecution's objection to defense Counsel's questioning of key witnesses Leon Coleman about Applicant having an affair with Coleman's wife.

During the cross-examination of Leon Coleman, Counsel elicited the following testimony:

Q. Let me finish the question. You have other reasons for saying J White said he was going to take a gun from somebody, right? You have other reasons right?

A. No sir because he said it.

Q. You mentioned earlier that you and Madeline had a period where you all broke up?

A. Yes sir.

Q. During that time Madeline had a boyfriend?

A. I mean I drove trucks. I mean it really did not matter to me that she was seeing someone else I drove trucks.

Q. I know but you know she had other boyfriends?

A. Yes sir. I had a friend on the side too.

Q. You know that J White was one of her friends right?

A. No sir because I heard J White was going with the daughter, you know her daughter.

Q. Ok well that is what you heard but you also learned that Madeline said that her seconds baby was J White, and we talked about.....

Mr. DuRant: I am objecting, relevance.

The Court: Sustain, sustain do now answer the question.

(R. p.49-50).

Here, it is clear Counsel was attempting to elicit testimony regarding a potential bias of witness, Leon Coleman. However, Solicitor objected, and the trial court sustained. Counsel continued his examination where Leon Coleman testified that he had no reason to believe Applicant was a bad guy, no reason to believe Montag Webb should not have been hanging around Applicant, and he did not see Applicant do anything wrong that night nor did he see Applicant commit a crime that night. (R. pp.50-51).

Applicant contends Counsel should have proffered the testimony of Leon Coleman to preserve the issue for appeal; however, Applicant presented no testimony from Leon Coleman at the evidentiary hearing as to what he would have testified to during a proffer. Additionally, Leon Coleman's testimony that he did not see Applicant commit any crime that night was favorable testimony elicited during Counsel's cross-examination. (R. p.51). Therefore, Applicant has failed to meet his burden establishing prejudice.

Accordingly, this allegation is DENIED.

Failure to Cross-Examine Pathologist Regarding Cause and Manner of Death of Victim

Applicant contends Trial Counsel failed to properly cross-examine the Pathologist Dr. Amy Durso regarding the cause and manner of death being a homicide. Specifically, Counsel failed to question the Pathologist about homicide being a medical determination and not a legal determination of homicide/murder.

This allegation is without merit. Applicant's defense at trial was that he was not the person who hit the victim. There was no justification defense presented; thus, the distinction between homicide being a medical determination and not a legal determination was not relevant to Applicant's defense. Therefore, Counsel was not deficient for failing to cross-examine the pathologist about homicide being a medical determination and not a legal determination of homicide/murder. Additionally, Applicant has failed to prove prejudice for the very same reason—there was no real dispute, at trial, about whether this was a homicide or not.

Accordingly, this allegation is DENIED.

Failure to Properly Advise Applicant Regarding His Right to Testify

Applicant contends Counsel failed to properly advise Applicant regarding his right/decision to testify at trial. This Court finds this allegation is without merit.

Counsel testified he always discusses with his clients their right to testify or not and the consequences of testifying. Counsel explained he discussed with Applicant the testimony that had already been given at trial to help inform his decision. Counsel prepared Applicant for testifying by discussing the questions he would be asking him. This Court finds Counsel's credible testimony demonstrates he properly advised Applicant of his right to testify and the consequences of his decision. Thus, Counsel was not deficient in this regard.

Furthermore, Applicant has failed to prove he was prejudiced by an alleged deficiency. "A

defendant's decision to testify or not must be made with knowledge of the consequences of either choice". *Brown v. State*, 340 S.C. 590, 533 S.E.2d 308 (2000). "On-the-record waiver of constitutional or statutory right is but one method of determining whether defendant knowingly and intelligently waived that right". *Brown v. State*, 317 S.C. 270, 453 S.E.2d 251 (1994). Here, the trial court engaged in a thorough colloquy with Applicant explaining his right to testify or not and the consequences of either choice. (R. p.297–298). Applicant affirmed, under oath, he understood his rights. (R. p.298). Therefore, even assuming Counsel had not properly advised Applicant of his right to testify, any misadvice was cured by the trial court during the explanation of rights colloquy.

Additionally, Applicant testified at his trial explaining his version of events while maintaining his innocence of the charges. Specifically, Applicant testified that his co-defendant Montag Webb hit the victim contradicting the testimony of both his co-defendants, Montag Webb and Letroy Samuels. Additionally, Applicant testified he never went into the victim's apartment. Furthermore, during cross-examination, Applicant insisted he did not hit the victim. (R. pp.313–371). Because Applicant's testimony was more helpful than harmful to his defense, Applicant has failed to prove he was prejudiced by Counsel's alleged failure to advise him or prepare him to testify. *See Brown v. State*, 340 S.C. 590, 596, 533 S.E.2d 308, 311 (2000) (finding that the respondent failed to prove prejudice because "on the whole, his testimony was more helpful to him than harmful" and "there is no reasonable probability the result of the trial would have been different had he chosen not to testify, because without his testimony, the jury would only have heard uncontroverted evidence of respondent's guilt."). Additionally, Applicant presented no testimony as to how his testimony at trial would have been different had Counsel further prepared him to testify.

Accordingly, this allegation is DENIED.

***Failure to Properly Argue Against the Prosecutor's Objection Regarding Witness's Teardrop
Tattoo***

Applicant contends Trial Counsel failed to properly argue against and preserve for appellate review the Prosecutor's objection for asked and answered during Trial Counsel's cross-examination of witness Montag Webb related to the meaning of his tear-drop tattoos. This Court finds this allegation is without merit.

During the cross-examination of Montag Webb, the following exchange occurred:

Q. What is the "K" for a kill?

A. No it stand for my cousin.

Q. Okay the two tear drops are for kill or murder?

A. No they stand for my momma and daddy.

Q. The tear drops are for your momma and your daddy?

A. Yeah.

Q. They are not for having killed some....

Mr. Durant: Objection Your Honor he has asked the question.

The Court: Sustained

A. No

(R. pp.87-88).

The Trial Court sustained the prosecutor's objection after Counsel was about to ask, for the third time, if the teardrop tattoos represent murder. After the objection was sustained, the witness answered "no" anyway, so Counsel was entirely reasonable in not further opposing the court's ruling on the objection or requesting a proffer. Counsel testified he did not wish to push the judge

by further following up on the objection. This is a valid reason for not arguing against the trial court's ruling. Applicant has also failed to establish he was prejudiced because he offered no evidence or testimony that the witness would have answered any differently had he been proffered.

Accordingly, this allegation is DENIED.

Failure to Object to Prior Bad Act Evidence

Trial Counsel failed to move for a mistrial and/or curative instruction when Applicant's co-defendant testified that Applicant was violent, had assaulted him and other people, and that he was afraid of Applicant.

Applicant has failed to prove he was prejudiced by the allegedly inadmissible evidence of a prior bad act. At trial, the following exchange occurred during the cross examination of Letroy Samuels, Applicant's co-defendant:

Q. And is it not true that you are afraid of Jonathan Newman?

A. I will not say afraid. I would say more cautious.

Q. Ok why are you cautious?

A. Because I have seen him hit some people and I know he is a fighter.

Q. He has hit you before has he not?

A. Yes he has.

(R. p.383).

Applicant alleges he was prejudiced by Counsel's failure to object to this prior bad act testimony.

However, the witness testified to the events following the murder:

Q. And is it not true even when you saw Jonathan Newman and Montag Webb after this incident that they told you they would kill you if you said anything?

A. Yes, well he pointed the gun at me and said I better not say anything.

Q. They did not say they would kill you?

A. He just said you better not say anything.

Q. Did you not tell the police that they told you they would kill you?

A. Because when he pointed the gun at me that is what I took it as, a threat of him saying I will kill you because I knew what it meant.

Q. Is it not true that you also told police that you were afraid of Jonathan Newman because he would do what he said?

A. Yes.

(R. pp.383–384).

This clearly admissible testimony, which is far more damaging to Applicant's defense than the alleged prior bad act testimony, was presented directly after the alleged inadmissible statement. Samuels lengthy testimony at trial severely implicated Applicant in the murder. Specifically, Samuels testified he witnessed Applicant hit the victim and, later that night, saw Applicant with the gun he stole from the victim. (R. p.378; p.383). Additionally, Samuels testified Applicant pointed the gun at him and told him not to say anything, implying that Applicant would kill him if he talked to law enforcement. (R. pp.383–384; p.386). Samuels further testified he heard Applicant and Montag Webb discussing whether they should burn their clothing. (R. p.386). Samuels brief reference to the fact Applicant had "hit some people" and "know he is a fighter" was a comparatively insignificant portion of his testimony against Applicant. This Court finds, based on the totality of Samuels testimony, which was crippling for Applicant's defense, Applicant has failed to prove there was a reasonable probability the result of his trial would have been different had Counsel objected to the alleged inadmissible prior bad act evidence. *See Strickland* 466 U.S. at 694 (a reasonable probability is "a probability sufficient to undermine confidence in the outcome").

Failure to Object to Testimony Regarding Applicant's Assertion of his Right to Counsel

Applicant contends Trial Counsel was ineffective for failing to object and move for a mistrial and/or request for a curative instruction regarding Applicant's assertion of his right to counsel when interrogated by law enforcement.

First, there is no evidence in the record, nor any evidence offered at the evidentiary hearing, that Applicant was mirandized before refusing to give a second statement. *See Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976) ("a state prosecutor may not seek to impeach a defendant's exculpatory story, told for the first time at trial, by cross-examining the defendant about his failure to have told the story *after receiving* Miranda warnings at time of his arrest...") (emphasis added). In fact, there is evidence in the record that Applicant was not mirandized at the time he requested an attorney. (R. p.222, ll.17-19). Thus, Applicant has failed to meet his burden showing a *Doyle* violation occurred.

Second, at the evidentiary hearing it seems Applicant's counsel believed Letroy Samuel's counsel was cross-examining the witness when the alleged violation occurred, when in fact it was Counsel who was cross-examining the witness. (R. pp.247-248). Therefore, it would be improper for Counsel to object to testimony he elicited.

Third, Counsel was clearly attempting to intimate to the jury that Applicant initially gave one statement, before he was arrested, then did not give another statement because he requested an attorney *after he was arrested*. This was done to distinguish Applicant from his co-defendant's, who gave multiple statements without asking for a lawyer *before* they were arrested. This Court finds this was a reasonable trial strategy.

Failure to Object to Inferred Malice Jury Instruction

Applicant alleges Counsel should have objected to the trial court's jury instructions. Trial

Counsel failed to object to the Trial Court's instruction that the jury could infer malice based on excessive brutal force. This Court finds this allegation is without merit.

During the Jury Charge conference, Counsel objected to the inferred malice based on excessive force charge. (R. p.425–426). At the evidentiary hearing, Appellate Defender Robert M. Dudek testified he believed the issue was preserved for appeal, but did not see it as a winning issue. Therefore, the record conclusively refutes this allegation.

Furthermore, no case law existed at the time of trial that rejected an instruction on an inference of malice based on excessive force; therefore, Applicant was not prejudiced by any alleged deficiency in this regard.

Accordingly, this allegation is DENIED.

Ineffective Assistance of Appellate Counsel Claims

Applicant makes various allegations of ineffective assistance of appellate counsel claims. First, Applicant contends Appellate Defender Robert M. Dudek was ineffective for failing to raise the issue of whether the Trial Court erred in instructing the jury that “excessive brutal force” is an inference of malice. This allegation is without merit.

Appellate Defender Robert M. Dudek testified he filed an *Anders*² Brief of Appellant in Applicant's direct appeal. Dudek testified he did not believe this was a winning issue at the time, because it was before *State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019) was published which established that an instruction on inference of malice based on the use of a deadly weapon is not proper. Dudek testified that at the time of trial an inference of malice charge was only improper when self-defense or manslaughter was argued by the defense. This was not the case at Applicant's trial. This Court finds this is a valid reason for not raising this issue on appeal; thus, appellate

² *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

counsel was not deficient in this regard.

Furthermore, Applicant has failed to prove prejudice. Dudek filed an *Anders* brief which requires the Court of Appeals to review the entire record to determine whether there is a meritorious issue. The Court of Appeals dismissed Applicant's appeal after review of the record.

Next, Applicant contends Appellate Counsel should have raised the issue of whether the Trial Court erred in refusing Trial Counsel to call and present rebuttal testimony in response to the Prosecution's rebuttal testimony and his co-defendant's testimony. After the conclusion of the presentation of testimony at Applicant's trial, Counsel made the following motion:

Mr. Carter: Yes Judge, Your Honor we just approached the bench a second ago. Ordinarily rebuttal witnesses are reserved for the plaintiff or State in this case and I understand that that is the normal practice and procedure. What makes this matter different is we have two separate defendants who has separate positions we believe that we should have been allowed to present a rebuttal witness because there is another defendant whose position is quite different from ours. We wanted to present testimony from an additional witness with regards to something that the other defendant made reference to and I understand the Court is not going to allow us but I ask His Honor consider that.

The Court: Would the State like to.

Mr. Finney: Judge, we do not feel that it would be appropriate in light of the fact that there was sufficient discovery given to the defense prior to trial that there was an allegation that his client had a gun or had the deceased gun, showed it to other people. He was on notice to that and could have presented during this case.

The Court: Mr. Carter you could have also cross examined him about that, but you did not do that. Therefore I will decline testimony from your client is disallowed. Any other motions.

Mr. Carter: If you will recall I did cross examine him but he said he did not recall a gun.

(R. pp.422-423).

This Court finds this was a properly sustained objection; thus, Appellate Counsel was not ineffective for failing to raise this issue. Furthermore, as earlier noted, Counsel filed an

Anders brief, and the Court of Appeals dismissed Applicant's appeal after reviewing the entire record for meritorious issues. Thus, Applicant has failed to prove prejudice regarding any and all ineffective assistant of appellate counsel claims.

Additionally, to the extent Applicant is alleging Counsel was ineffective regarding this issue, Counsel properly requested and preserved for appeal the Trial Court's refusing to allow rebuttal testimony from Applicant; therefore, he was not deficient. At the evidentiary hearing, Counsel testified he does not recall which witness he wished to present rebuttal testimony from. Applicant has failed to present testimony from any potential rebuttal witness at the evidentiary hearing; thus, he has failed to prove he was prejudiced.

Accordingly, this allegation is DENIED.

Applicant further contends Appellate Counsel should have raised the issue that Trial Court erred in denying Applicant's request for self-defense. This Court finds this allegation is without merit. This Court finds there was not sufficient evidence presented supporting a charge on self-defense. Applicant contends there was testimony that the victim had a gun and threatened Applicant. However, there was no evidence presented that Applicant was without fault in bringing on the difficulty, no evidence presented Applicant believed he was in imminent danger of losing his life or sustaining serious bodily injury, and no evidence presented Applicant had no probable means of avoiding danger. *See State v. Curry*, 406 S.C. 364, 752 S.E.2d 263 (2013) (setting forth the elements of self-defense). In fact, Applicant testified at trial and asserted he did not hit the victim. Applicant never testified he acted in self-defense. Thus, Applicant has failed to prove Appellate Counsel was ineffective for failing to raise this issue.

Accordingly, this allegation is DENIED.

Failure to Object to Prosecutor's Pitting of Witnesses

Applicant contends Trial Counsel failed to object to and move to strike the Prosecutor's pitting of Applicant's testimony and credibility of other witnesses. This Court finds this allegation is without merit.

During the cross-examination of Applicant, the following exchange occurred:

Q. You did not remember that Leon Coleman heard what you said to Taggy?

A. He did not hear me say what he said he heard me say.

Q. So Leon Coleman is a liar?

A. Yes he is.

Q. And Taggy is a liar?

A. Yes sir.

Q. And everybody who came up here and said that you hit that old man is a liar?

A. I do not believe anybody said that I hit him.

Q. I believe Taggy said it?

A. He said that he did not see it.

Q. Leon told Lieutenant Daniels that he saw you hit Mr. Wimberly?

A. No he did not.

Q. Then Leon Coleman is a liar.

A. Yes he is a liar.

(R. pp.354-355).

Applicant avers he was prejudiced by this allegedly improper line of questioning. However, Applicant's testimony contradicted the testimony of Leon Coleman and Montag

Webb to some extent. Although Montag Webb testified he did not see Applicant hit the victim, he did state that he heard the hit after walking past Applicant down the steps of the porch. (R. p.83). As previously noted, Applicant testified that Montag Webb was the one who punched the victim. (R. p.334). Leon Coleman testified that Applicant told him he was going to rush the victim and steal his gun. (R. p.45). Applicant testified he never made that comment to Leon Coleman. (R. p.354). Thus, Applicant's responses to this line of questioning were consistent with Applicant's defense at trial. The testimony Solicitor Finney elicited during the exchange in question was clearly not harmful to Applicant's defense. Furthermore, Counsel utilized this line of questioning by arguing in his closing that testimony was presented from "a whole bunch of liars." (R. p.461). Clearly, the responses to the Solicitor's line of questioning supported Applicant's theory that the other witnesses were liars, as evidenced by Counsel's closing argument. Since this testimony was not harmful to Applicants defense, Counsel was not deficient for objecting to this testimony and Applicant was not prejudiced for the same reasons.

Accordingly, this Court finds this allegation is DENIED.

Failure to Convey Plea Offer

Applicant contends Counsel was ineffective for failing to convey plea negotiation information and failed to properly pursue plea negotiations as requested by Applicant. This Court finds this allegation is without merit.

Counsel testified at the evidentiary hearing that Applicant was offered three different plea offers. The first offer was for 30 years, which Counsel advised Applicant against accepting. The second offer was for 20 years which Counsel noted he told Applicant to consider this offer. Applicant ultimately rejected this offer. The third offer was for 15 years which was conveyed

during trial. Counsel credibly testified he conveyed every one of the offers to Applicant. This Court finds Counsel's testimony credible. Counsel noted he believed Applicant concluded the jury may acquit him, so Applicant rejected the offer for 15 years. Counsel testified he relayed the offer of 15 years to Applicant's mother in addition to Applicant.

Although Applicant testified he never received the 15 year offer, this Court finds, based on Counsel's credible testimony, that Counsel conveyed this offer to Applicant who ultimately rejected it. Therefore, Applicant has failed to prove Counsel was ineffective in this regard.

Failure to Review Discovery with Applicant and Adequately Prepare for Trial

Applicant contends Trial Counsel failed to adequately prepare for trial. Specifically, Trial Counsel failed to meet with or review the State's evidence with Applicant prior to the trial. Counsel also failed to inform Applicant of his scheduled trial.

At the evidentiary hearing, Applicant testified Counsel met with him twice before trial. Applicant testified he did not recall reviewing discovery with Counsel, only that Counsel asked him his version of what happened. Counsel testified he met with Applicant twice times when the Applicant was facing the lesser charge and two or three times before the murder trial after the enhancement. Counsel credibly testified he reviewed the discovery and State's evidence with Applicant.

There is no established "minimum number of meetings between counsel and client prior to trial necessary to prepare an attorney to provide effective assistance of counsel." *United States v. Olson*, 846 F.2d 1103, 1108 (7th Cir.1988) (there is no constitutional minimum number of meetings between attorney and client and observes that an experienced attorney may get more out of a single meeting than a neophyte); *Moody v. Polk*, 408 F.3d 141, 148 (4th Cir. 2005); *Campbell v. Polk*, 447 F.3d 270, 279, n.2 (4th Cir. 2006) ("we cannot conclude that the fact that Campbell's counsel

only met with him five times before trial made them ineffective.”). “[B]revity of consultation time between a defendant and his counsel, alone, ‘cannot support a claim of ineffective assistance of counsel.’” *Davis v. State*, 44 So. 3d 1118, 1130 (Ala. Crim. App. 2009) (quoting *Murray v. Maggio*, 736 F.2d 279, 282 (5th Cir. 1984)); *White v. Godinez*, 301 F.3d 796, 800 (7th Cir. 2002) (“A brief consultation does not by itself establish that counsel’s performance was inadequate.”); *Chavez v. Pulley*, 623 F. Supp. 672, 685 (E.D. Cal. 1985) (“brevity of consultation time between a defendant and his counsel alone cannot support a claim of ineffective assistance of counsel,” especially where the defendant “fails to allege what purpose further consultation with his attorney would have served and fails to demonstrate how further consultation with his attorney would have produced a different result”). This Court finds, based on Counsel’s credible testimony, that he reviewed the discovery and the State’s evidence with Applicant prior to trial.

Applicant further fails to specify what Counsel did not disclose to him from materials provided in discovery, or what, if anything, could have been achieved had Counsel spent more time with him in consultation regarding the contents of his discovery. *See Smith v. State*, 404 S.C. 493, 500–01, 745 S.E.2d 378, 382 (Ct. App. 2012) (noting that an applicant must present evidence to show how additional time spent in consultation regarding discovery would have resulted in a different outcome; mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief). Thus, Applicant has failed to meet his burden establishing prejudice as to this allegation.

Applicant also makes various vague allegations that Counsel was not adequately prepared for trial and did not conduct a reasonable investigation. However, Applicant presented no evidence or testimony as to what specifically Counsel should have investigated further or how additional preparation would have resulted in a different outcome at trial. In order to prevail upon a claim

that counsel did not adequately prepare or investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more prepared. *Harris v. State*, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145-46 (2008) (citing *Jackson v. State*, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998)). Furthermore, an applicant must also present evidence to show how the discoverable matters or defenses would have resulted in a different outcome. *Id.* (citing *Davis v. State*, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997); *Skeen v. State*, 325 S.C. 210, 214, 481 S.E.2d 129, 132 (1997)). Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief.

Applicant has also failed to present the testimony of any potential exculpatory witnesses at the post-conviction relief evidentiary hearing. Our courts have “repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness’ failure to testify at trial.” *Bannister v. State*, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998). Thus, Applicant has failed to prove he suffered prejudice as to these allegations.

Accordingly, these allegations are DENIED.

Failure to Object to the Trial Court’s Instruction on Circumstantial Evidence³

Applicant contends that Counsel should have objected to the Trial Court’s jury instruction on circumstantial evidence. During its charge on the law, the trial court gave the following instruction:

Now, Ladies and Gentlemen, there are two types of evidence that are generally presented during a trial. There’s direct evidence and there is circumstantial evidence. Direct evidence is the testimony of a person who claims to have actual knowledge of a fact such as a eye witness. It is evidence which immediately

³ This allegation was raised for the first time at the evidentiary hearing. The State did not object to Applicant amending his application to include this allegation.

establishes the main fact to be proved. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. It is evidence which immediately establishes collateral facts from which the main fact may be inferred. Circumstantial evidence may be based on inference and not on personal knowledge or observation. The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence. Ladies and Gentlemen you should weigh all of the evidence in this case and after weighing all of the evidence if you are not convinced of the guilt of the defendants beyond a reasonable doubt you must find the defendants not guilty.

(R. p.484).

“In criminal case relying in whole or in part on circumstantial evidence, once proper reasonable doubt instruction is given, jury should be instructed that law makes absolutely no distinction between weight or value to be given to either direct or circumstantial evidence, nor is greater degree of certainty required of circumstantial evidence than of direct evidence, that jury should weigh all evidence in case, and after weighing all evidence, if jury is not convinced of guilt of defendant beyond a reasonable doubt, it must find defendant not guilty.” *State v. Grippon*, 327 S.C. 79, 489 S.E.2d 462 (1997), *holding modified by State v. Cherry*, 361 S.C. 588, 606 S.E.2d 475 (2004). The Supreme Court ruled in *Logan* that “defendants should not be restricted from requesting a jury charge that reflects the requisite connection of collateral facts necessary for conviction.” *State v. Logan*, 405 S.C. 83, 747 S.E.2d 444 (2013). The Court noted “this holding does not prevent the trial court from issuing the circumstantial evidence charge provided in *Grippon* and *Cherry*. However, trial courts may not exclusively rely on that charge over a defendant’s objection.” *State v. Logan*, 405 S.C. 83, 100, 747 S.E.2d 444, 452–53 (2013).

Here, the Trial Court gave a proper reasonable doubt instruction immediately preceding its instruction on circumstantial evidence. Meaning, the circumstantial evidence charge was proper. Applicant asserts Counsel should have requested the optional language espoused in *Logan*. However, at Applicant’s trial, the State did not exclusively rely on circumstantial evidence in its

theory of the case. Lt. Sonia Daniels testified that Montag Webb made a statement that he witnessed Applicant hit victim on the porch. (R. p.225). Letroy Samuels testified that he personally witnessed Applicant hit victim. (R. p.378). This Court finds Applicant has failed to show that Counsel's representation fell below an objective standard of reasonableness for failing to request the *Logan* charge. Because the trial court's instruction was proper and in light of the direct evidence presented against Applicant, this Court finds Applicant has not proven Counsel was ineffective for failing to request the *Logan* charge.

Accordingly, this allegation is DENIED.

Failure to Make a Bruton Objection or Move for Severance

This allegation was abandoned by Applicant prior to the commencement of the evidentiary hearing. Furthermore, no *Bruton*⁴ violation occurred since both Applicant and his co-defendant testified at trial, so there was no confrontation clause violation.

Failure to Request Mere Presence Jury Instruction

Applicant contends Counsel was ineffective for failing to request a jury instruction on mere presence. This Court finds the record refutes this allegation. During Applicant's trial, the Trial Court gave the following instruction on accomplice liability:

The State must prove beyond a reasonable doubt by competent evidence that the theory of hand of one is the hand of all. And a principal in the crime is not who actually commits the crime or who is present, aiding, abetting or assisting in committing the crime. When a person doesn't act in the presence of and with the assistance of another, the act is done by both where two or more acting with a common plan or intent are present at the commission of a crime it does not matter who actually commits the crime. All are guilty. The hand of one is the hand of all and present at the commission of the crime needs to be sufficiently near, aid, abet and assist in the commission of the crime. However, *mere presence at the scene of a crime is not sufficient to convict* at the principal in the theory of aiding and abetting and intent is also a necessary element for there to be a common design or

⁴ *Bruton v. U.S.*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968).

intent to commit the crime and the crime must have been committed pursuant thereto for the person aiding and abetting by some overt act.

(R. pp.492–493) (emphasis added).

Here, the Trial Court clearly instructed the jury on mere presence; thus, Counsel was not ineffective for failing to request a mere presence instruction.

Accordingly, this allegation is DENIED.

Failure to Cross-Examine Co-Defendant Letroy Samuels

Applicant contends Counsel was ineffective for failing to properly cross-examine Co-Defendant Samuels. This Court finds this allegation is without merit. At the evidentiary hearing, Applicant presented no evidence or testimony of how further cross-examination of Samuels would have resulted in a different outcome at trial. At trial, Counsel cross-examined Samuels on his alcohol use the night of the murder, clearly to attack the credibility of the witness. (R. pp.405–406). Counsel further cross-examined Samuels regarding his multiple, inconsistent statements to law enforcement. (R. p.407–413). This Court finds Counsel properly cross-examined Co-Defendant Samuels; thus, was not deficient. Furthermore, Applicant presented no evidence or testimony of how further cross-examination of Samuels would have resulted in a different outcome at trial. Therefore, Applicant has failed to prove prejudice regarding this allegation.

Accordingly, this allegation is DENIED.

Failure to Advise Applicant of his Charges and Sentencing

Applicant contends Counsel was ineffective for failing to advise Applicant of his charges and sentencing. This Court finds this allegation is without merit. At the evidentiary hearing, Applicant testified that Counsel discussed and explained his charges and sentencing ranges. By Applicant's own admission, Counsel was not deficient in advising him of his charges and sentencing range. Thus, Applicant has failed to prove Counsel was ineffective in this regard.

Accordingly, this allegation is DENIED.

VII. CONCLUSION

Based on the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. This Court finds Counsel was not deficient in any manner, nor was Applicant prejudiced by Counsel's representation. Therefore, this Court denies relief on all allegations and dismisses this PCR action with prejudice.

Applicant must file and serve a notice of appeal within thirty days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review pursuant to Rule 203, SCACR. Applicant has a right to appellate counsel's assistance in seeking review of the denial of PCR. *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to Rule 243, SCACR, for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. The application for post-conviction relief be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of the State.

AND IT IS SO ORDERED this 3rd day of October, 2024.



THE HONORABLE GRACE GILCHRIST KNIE
Presiding Judge
Third Judicial Circuit

Spartanburg, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CLARENDON	)	THIRD JUDICIAL CIRCUIT
	)	
Jonathan C. Newman,	)	Case No. 2018-CP-14-00233
	)	
Applicant,	)	
	)	
v.	)	MOTION TO ALTER OR AMEND
	)	PURSUANT TO RULE 59(E), SCRCP
State of South Carolina,	)	
	)	
Defendant.	)	
_____	)	

The Applicant, by and through the undersigned Counsel, moves this Court to alter or amend the denial of Applicant's PCR Application in the above-captioned case that was emailed to Counsel on October 3, 2024, pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. See U.S. Const. amends. V, VI, XIV; S.C. Const. art. I, §§ 3 and 14. Specifically, Applicant incorporates by reference the issues and arguments addressed in the Applicant's Proposed Order Granting Applicant Post-Conviction Relief as if fully set forth verbatim into this motion. (Attachment: Applicant's Proposed Order). Applicant submits the following arguments and does not abandon or waive any previous arguments or issues raised in the prior pleadings, proposed orders, and evidentiary hearing in this PCR action. Therefore, this Court should reconsider its Order of Dismissal, withdraw that order, and enter an Order Granting Applicant Post-Conviction Relief.

[Conclusion and Signature Page to Follow]

CONCLUSION

Based on the foregoing reasons, the undersigned Counsel respectfully requests that this Court reconsider the Order of Dismissal, withdraw that order, and enter an Order Granting Applicant Post-Conviction Relief, reversing and remanding Applicant's convictions and sentences for a new trial.

IT IS SO MOVED.

Respectfully submitted,

s/ Dayne Phillips

Dayne C. Phillips, Esq.

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ATTORNEY FOR THE APPLICANT

October 10, 2024

ATTACHMENT

THE STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CLARENDON	)	THIRD JUDICIAL CIRCUIT
	)	
Jonathan Newman,	)	Case No.: 2018–CP–14–00233
	)	
Applicant,	)	
	)	
v.	)	ORDER GRANTING APPLICANT
	)	POST-CONVICTION RELIEF
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

This matter comes before the Court on Jonathan Newman’s application for Post-Conviction Relief (PCR) filed on June 12, 2018. Applicant appeared before the Court for an evidentiary hearing at the Sumter County Courthouse on July 25, 2024. Dayne Phillips represented Applicant, and Assistant Attorney General T. Cruise Mitchell represented the Respondent. Trial Counsel, Appellate Counsel, Former Assistant Solicitor Christopher Durant, and Applicant testified at the PCR hearing.

After reviewing the proposed orders from the parties and weighing the evidence presented at the hearing (including a review of the record), this Court grants Applicant’s PCR application requesting a new trial based on ineffective assistance of counsel. See *Strickland v. Washington*, 466 U.S. 668 (1984); U.S. Const. amends. VI, XIV; S.C. Const. art. I, §§ 3 and 14; S.C. Code § 17-27-20(A)(1), (4), and (6).

PROCEDURAL HISTORY

On February 27, 2014, the Clarendon County Grand Jury indicted Applicant for murder and burglary in the first degree (2013-GS-14-0293).

On January 9, 2015, Applicant proceeded to a joint trial before the Honorable W. Jeffrey Young and a jury. Eleazer Carter represented Applicant, Harry Devoe represented

his co-defendant, Harry Devoe, and Solicitor Ernest Finney and Assistant Solicitor Christopher Durant prosecuted the case on behalf of the State. The jury found Applicant guilty as charged. The Trial Court sentenced the Applicant to thirty-five (35) years imprisonment for the murder conviction, and a concurrent thirty (30) years imprisonment on the burglary conviction. Applicant filed a timely notice of appeal.

On May 27, 2016, Chief Appellate Defender Robert Dudek filed an *Anders* brief, noting that, in his opinion, the appeal is without legal merit sufficient to warrant a new trial. *See Anders v. California*, 386 U.S. 738 (1967).

On April 5, 2017, the South Carolina Court of Appeals dismissed the appeal (Appellate Case No. 2015-000091). *State v. Newman*, 2017-UP-140 (S.C. Ct. App. filed April 5, 2017). The Court of Appeals issued the Remittitur on April 28, 2017.

PCR Action

On June 12, 2018, Applicant filed an application requesting PCR. Applicant also filed Amended PCR applications on July 5, 2019, and October 24, 2023.

On February 12, 2020, Respondent filed its Return and Motion to Dismiss. Applicant filed a Reply Brief and Motion to Deny Respondent's Proposed Order on March 5, 2020. The Honorable Kristi Curtis issued an Order on March 19, 2020, to schedule a limited hearing to address the Respondent's motion to dismiss.

On November 2, 2022, the parties appeared before the Honorable Edward W. Miller. Judge Miller granted Applicant's motion to toll the statute of limitations at the conclusion of the hearing and ordered the Respondent to schedule an evidentiary hearing on the merits of the PCR allegations.

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PCR Allegations

In his initial PCR application, Applicant alleged the following acts or omissions of ineffective assistance of Trial and Appellate Counsel:

1. Counsel failed to conduct adequate investigation and prepare for trial.
2. Counsel was ineffective for failing to properly investigate, interview witnesses, review discovery, and adequately prepare for trial.
3. Counsel was ineffective for failing to request severance from Applicant and Co-Defendant Samuels.
4. Counsel was ineffective for failing to convey plea negotiation information and failed to properly pursue plea negotiations as requested by Applicant.
5. Counsel was ineffective for failing to remove for cause potential juror #101 Eddie G. Myers, or use preemptive strike to remove juror.
6. Counsel was ineffective for not properly objecting or otherwise preserving for appellate review the prosecution's objection to defense Counsel's questioning of key witnesses Leon Coleman about Applicant having an affair with Coleman's wife.
7. Counsel was ineffective for failing to object to prosecutor asking State witness Lt. Daniels to bolster credibility of prosecution witnesses, and Samuel's statements.
8. Counsel was ineffective for not properly cross-examining state witness Montag Webb about prior inconsistent statements. Additionally, Counsel failed to properly cross-examine Samuels about inconsistent statements.
9. Counsel was ineffective for not objecting to, moving for mistrial and/or requesting curative instruction regarding Applicant's assertion of right to counsel when questioned by police.
10. Counsel was ineffective for not making a *Bruton* objection or moving for severance when Lt. Daniels and Investigator Bosdall relayed to the jury Applicant's codefendant's statements to the jury that incriminated applicant.
11. Counsel was ineffective for failing to properly advise Applicant with respect to Applicant's decision to testify.

12. Counsel was ineffective for failing to handle, prepare for and object to co-defendant Samuel's testimony which incriminated Applicant substantially.
13. Counsel was ineffective for failing to object or move for mistrial when co-defendant Samuels testified that the Applicant had assaulted him (Samuels) and others, was a violent person, "was a fighter" and that Samuels was afraid of him (Applicant).
14. Counsel was ineffective for failing to properly object and prepare for Co-Defendant's testimony and present rebuttal case and response to such testimony incriminating the Applicant.
15. Counsel was ineffective for failing to object or preserve for appellate review prosecutions pitting [Applicant's] testimony and credibility against other witnesses.
16. Counsel was ineffective for failing to object to the court's "inferred malice" instruction. The Court instructed the jury that it would infer malice based on use or brutal force on victim.
17. Counsel was ineffective for failing to request "mere presence" instruction be charged to the jury.
18. [Appellate] Counsel was ineffective for failing to brief and argue on appeal the following issues:
 - i. Court erred by restricting cross-examination of witness Leon Coleman related to bias Coleman had against Applicant due to Applicant having an affair with Coleman's wife.
 - ii. Court erred restricting cross-examination of cooperating witness Montag Webb related to the witness's tattoos.
 - iii. Court erred by denying attorney for Applicant request to do recross cooperating witness Montag Webb about prior inconsistent statements. (Trial pg. 147).
 - iv. Court erred by refusing to allow the Applicant to present rebuttal testimony/evidence in response to co-defendant Samuel's testimony and the prosecutions rebuttal case. (Trial pg. 422-25).
 - v. Court erred in denying Applicants request for "self-defense" instruction (Trial. pg. 425). There was evidence that victim had a firearm and threatened applicant and others prior to incident.
19. Rule 5 / Brady violation.

In his amended PCR application, Applicant alleged the following acts or omissions of ineffective assistance of Trial and Appellate Counsel:

1. Trial Counsel denied Applicant's right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 3 and 14 of the South Carolina Constitution. See S.C. Code § 17-27-20(A)(1), (4), and (6). Specifically, Trial Counsel's unreasonably deficient performance prejudiced Applicant because there is a reasonable probability that, but for Trial Counsel's errors, the result of the proceeding would have been different. See *Strickland v. Washington*, 466 U.S. 668 (1984).
2. Trial Counsel failed to conduct a reasonable investigation and to develop all available, relevant, and admissible or mitigating evidence in preparation of Applicant's defense. See *Wiggins v. Smith*, 539 U.S. 510 (2003).
3. Trial Counsel failed to interview critical witnesses who could have challenged the credibility of the State's witnesses and could have undermined the State's evidence when it was reasonable and necessary to do so in preparation for trial. See *Lounds v. State*, 380 S.C. 454, 670 S.E.2d 646 (2008); *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008); *Von Dohlen v. State*, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004); *Reeves v. State*, 415 S.C. 366, 782 S.E.2d 747 (Ct. App. 2015).
4. Trial Counsel failed to convey a plea offer to Applicant and failed to pursue plea negotiations as requested by Applicant.
5. Trial Counsel failed to move for severance pursuant to *Bruton v. United States*, 391 U.S. 123 (1968) because admission of Applicant's co-defendant's statements violated the Confrontation Clause.
6. Trial Counsel failed to move to strike potential jury #101 Eddie G. Myers for cause or use a peremptory strike to remove juror when it was reasonable and necessary.
7. Trial Counsel failed to object to inadmissible and unduly prejudicial evidence during Applicant's trial, thereby failing to preserve these issues for appellate review and denying Applicant a fair trial.
8. Trial Counsel failed to object to the Prosecution's bolstering of the State's witnesses.
9. Trial Counsel failed to properly cross-examine the State's witnesses,

- including but not limited to Montag Webb and Letroy Samuels, regarding inconsistent statements and impeachment evidence.
10. Trial Counsel failed to properly cross-examine the State's witness, Montag Webb, regarding possible bias and motives for testifying against Applicant. Specifically, questioning Montag Webb about promises in exchange for his testimony.
 11. Trial Counsel failed to object and move for a mistrial and/or request for a curative instruction regarding Applicant's assertion of his right to counsel when interrogated by law enforcement.
 12. Trial Counsel failed to properly argue against and preserve for appellate review the Prosecutor's objection for relevance during Trial Counsel's cross-examination of witness Leon Coleman related to the witness's possible bias against Applicant for having an affair with his wife.
 13. Trial Counsel failed to properly argue against and preserve for appellate review the Prosecutor's objection for asked and answered during Trial Counsel's cross-examination of witness Montag Webb related to the meaning of his tear-drop tattoos.
 14. Trial Counsel failed to properly advise Applicant regarding his right/decision to testify at trial.
 15. Trial Counsel failed to move for a mistrial and/or a curative instruction when Applicant's co-defendant testified that Applicant was violent, had assaulted him and other people, and that he was afraid of Applicant.
 16. Trial Counsel failed to object to and move to strike the Prosecutor's pitting of Applicant's testimony and credibility of other witnesses.
 17. Trial Counsel failed to properly object to the Trial Court's improper "inferred malice" instruction to the jury.
 18. Trial Counsel failed to request a jury instruction for "mere presence".
 19. Trial Counsel failed to adequately prepare for trial by not interviewing witness(es) who could have testified regarding Applicant's good character and reputation when it was reasonable and necessary to present this evidence at trial and request a jury instruction on good character and reputation. See *State v. Harrison*, 343 S.C. 165, 539 S.E.2d 71 (Ct. App. 2000); *Cf. Stalk v. State*, 383 S.C. 559, 681 S.E.2d 592 (2009).

20. Appellate Counsel denied Applicant's right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 3 and 14 of the South Carolina Constitution. Specifically, Appellate Counsel's unreasonably deficient performance prejudiced Applicant because there is a reasonable probability that, but for Trial Counsel's errors, the result of the proceeding would have been different. See *Strickland v. Washington*, 466 U.S. 668 (1984); *Evitts v. Lucey*, 469 U.S. 387 (1985); *Simpkins v. State*, 303 S.C. 364, 401 S.E.2d 142 (1991).
21. Appellate Counsel failed to raise the issue of whether the Trial Court erred in refusing Trial Counsel to call and present rebuttal testimony in response to the Prosecution's rebuttal testimony and his co-defendant's testimony.
22. If found preserved for appellate review, Appellate Counsel failed to raise the issue of whether the Trial Court erred in instructing the jury that "excessive brutal force" is an inference of malice.

In his second amended PCR application, Applicant alleged the following *additional* acts or omissions of ineffective assistance of Trial and Appellate Counsel:

1. Trial Counsel failed to properly cross-examine the State's witness, Montag Webb, regarding possible bias and motives for testifying against Applicant. *Specifically, questioning Co-Defendant Montag Webb about negotiations and promises with the State in exchange for his testimony.*
2. Trial Counsel failed to move for a mistrial and/or a curative instruction when Applicant's co-defendant testified that Applicant was violent, had previously assaulted him and other people, and that he was afraid of Applicant. *At a minimum, Trial Counsel should have objected to this inadmissible propensity evidence where its probative value is substantially outweighed by its prejudicial effect.*
3. Trial Counsel failed to properly object to the Trial Court's improper "inferred malice" instruction to the jury. *Specifically, Counsel failed to object to the Court's inference of malice charge for "excessive brutal force".*
4. Trial Counsel failed to adequately prepare for trial. Specifically, Trial Counsel failed to meet with or review the State's evidence with Applicant prior to the trial. Counsel also failed to inform Applicant of his scheduled trial.

5. Trial Counsel failed to inform Applicant of his rights, charges, and sentencing ranges prior to trial. Specifically, Trial Counsel failed to advise Applicant that murder carries a mandatory minimum sentence of thirty (30) years to life imprisonment upon conviction.
6. Trial Counsel failed to object when the Clerk of Court told the jury that they "have the charge with a true verdict" while being sworn under oath.
7. Trial Counsel failed to object when the Trial Court improperly told the jury that a trial is a "search for the truth" and that the jury is seeking to "reach a fair and just verdict" during the Court's opening remarks. See *State v. Alesky*, 343 S.C. 20, 538 S.E.2d 248 (2000); *State v. Daniels*, 401 S.C. 251, 737 S.E.2d 473 (2012); *State v. Beaty*, 423 S.C. 26, 813, S.E.2d 502 (2018).
8. Trial Counsel failed to object when the Prosecutor referenced the Trial Court's statement that "this was a search for the truth".
9. Trial Counsel failed to object when the Prosecutor improperly stated, "my job as an Assistant Solicitor is to represent the interest of this community to represent your interest."
10. Trial Counsel failed to cross-examine Co-Defendant Montag Webb about him facing a mandatory minimum sentence of thirty (30) years to life imprisonment upon conviction for Murder and a mandatory minimum sentence of fifteen (15) years to life imprisonment upon conviction for Burglary, First Degree.
11. Trial Counsel failed to properly cross-examine the Pathologist Dr. Amy Durso regarding the cause and manner of death being a homicide. Specifically, Counsel failed to question the Pathologist about homicide being a medical determination and not a legal determination of homicide/murder.
12. Trial Counsel failed to object when the Prosecutor and Co-Defendant's lawyer referenced Co-Defendant Samuels's statements to the police. Additionally, Counsel was ineffective in inquiring and referencing the Co-Defendant Samuels's.
13. Trial Counsel failed to object when the Prosecutor improperly referenced the Applicant's invocation of his right to an attorney when questioned by the police.
14. Trial Counsel failed to properly cross-examine Co-Defendant Samuels.

15. Trial Counsel failed to object when the Prosecutor told the jury to "reach a verdict that speaks the truth" during his closing argument.
16. Trial Counsel failed to object when the Prosecutor misstated the law regarding the inference of malice during his closing argument.
17. Trial Counsel was ineffective for improperly referencing items of deadly weapons as an inference of malice.
18. Trial Counsel failed to object when the Prosecutor improperly referenced Assault with Intent to Kill.
19. Trial Counsel failed to object to the Trial Court's instruction that the jury could infer malice based on use of a deadly weapon.
20. Trial Counsel failed to object to the Trial Court's instruction that the jury could infer malice based on excessive brutal force.
21. If found preserved for appellate review, Appellate Counsel failed to raise the issue of whether the Trial Court erred in instructing the jury that "excessive brutal force" is an inference of malice.

EVIDENTIARY HEARING

On July 25, 2024, Applicant appeared before the Court for an evidentiary hearing. Trial Counsel Carter, Appellate Counsel Dudek, former Assistant Solicitor Christopher Durant, and Applicant testified at the evidentiary hearing. At the conclusion of the hearing, this Court instructed the parties to submit Proposed Orders for the Court's review and consideration.

LAW

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI. To establish ineffective assistance of counsel, a Petitioner must satisfy the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984) (establishing the standard for ineffective assistance of counsel claims). "First, an [Petitioner] must show that counsel's performance was

deficient. Under this prong, [t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989) (internal citations omitted). “The second prong of the *Strickland* test requires a showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 118, 386 S.E.2d at 625 (internal citations omitted). Therefore, a Petitioner 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” when seeking relief based on ineffective assistance of counsel. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting *Strickland*, 466 U.S. at 692).

In a PCR action, “[t]he burden of proof is on the Petitioner to prove his allegations by a *preponderance of the evidence*.” *Frasier v. State*, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP) (emphasis added). Strategic “[d]ecisions made [by counsel] in ignorance of relevant, available information cannot be characterized as strategic.” *Weik v. State*, 409 S.C. 214, 236, 761 S.E.2d 757, 768 (2014). “Ordinarily, the existence of ‘overwhelming evidence’ does not automatically preclude a finding of prejudice.” *Smalls v. State*, 422 S.C. 174, 189, 810 S.E.2d 836, 844 (2018). Notably, “for the evidence to be ‘overwhelming’ such that it categorically precludes a finding of prejudice . . . the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the *Strickland* standard of ‘a reasonable probability . . . the factfinder would have had a reasonable doubt’ cannot possibly be met.”

Id. 422 S.C. at 191, 810 S.E.2d at 845.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court viewed the testimony presented at the evidentiary hearing, observed the witnesses at the hearing, assessed their credibility, and weighed the testimony accordingly based on the evidence and facts of the case. This Court also reviewed the Clerk of Court records regarding the Applicant's convictions and sentences, the trial transcript, the applications for post-conviction relief, and the legal arguments made by the lawyers. Accordingly, the relevant findings of fact and conclusions of law are set forth below as required by Section 17-27-80 of the South Carolina Code of Laws.

This Court finds that the Applicant, Trial Counsel, Appellate Counsel, and Christopher Durant all testified credibly at the evidentiary hearing. This Court also finds that Trial and Appellate Counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *See Strickland*, 466 U.S. at 687-88. This Court further finds that Trial and Appellate Counsel's deficient performance prejudiced Petitioner because it "so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Butler*, 286 S.C. at 442, 334 S.E.2d at 814 (quoting *Strickland*, 466 U.S. at 692). Therefore, this Court has concluded that Trial and Appellate Counsel provided ineffective assistance of counsel because "there is a reasonable probability that, but for [trial] counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625 (internal citations omitted); *See* U.S. Const. amends. VI, XIV; S.C. Const. art. I, §§ 3 and 14; S.C. Code § 17-27-20(A)(1), (4), and (6).

Ineffective Assistance of Trial Counsel

- I. This Court finds Trial Counsel provided ineffective assistance of counsel because Counsel failed to adequately prepare for trial by (1) not reviewing the State's evidence with Applicant; (2) not informing Applicant of his rights, charges, and sentencing ranges—mandatory minimum of sentence of 30 years to life imprisonment upon conviction of murder—prior to trial; (3) not properly advising Applicant regarding his right and decision whether to testify at trial; and (4) not informing Applicant of his scheduled trial.**

At the PCR hearing, Applicant testified that Trial Counsel met with him twice—once before trial and once after jury selection. Applicant also testified that Counsel did not review the discovery with him. Applicant further testified that Counsel failed to advise him regarding his right to decide whether to testify and did not inform him of the scheduled trial.

Trial Counsel maintained at the hearing that he met with Applicant numerous times and discussed the evidence with Applicant. Counsel also maintained that, although he did not recall discussing the right to testify and the consequences of that decision with Applicant, he generally discusses that right with his clients.

Trial Counsel's deficient performance prejudiced Applicant by denying him a fair trial without knowing his constitutional rights or the importance of the evidence against him. Therefore, Trial Counsel provided ineffective assistance of counsel because Counsel failed to adequately prepare for trial by (1) not reviewing the State's evidence with Applicant; (2) not informing Applicant of his rights, charges, and sentencing ranges—mandatory minimum of sentence of 30 years to life imprisonment upon conviction of murder—prior to trial; (3) not properly advising Applicant regarding his right and decision whether to testify at trial; and (4) not informing Applicant of his scheduled trial. See *Green v. State*, 351 S.C. 184, 196, 569 S.E.2d 318, 324 (2002) (holding that although an

Petitioner “must ordinarily show actual prejudice, he may be relieved of that burden if counsel’s ineffectiveness is so pervasive as to render a particularized prejudice inquiry unnecessary”); *State v. Freeman*, 319 S.C. 110, 459 S.E.2d 867 (Ct. App. 1995) (finding multiple errors, which were not prejudicial separately, could be prejudicial to deny an individual a right to a fair trial when they were viewed together).

II. This Court finds Trial Counsel provided ineffective assistance of counsel because Counsel failed to move to strike potential juror #101 Eddie G. Myers for cause or use a peremptory strike to remove juror when it was reasonable and necessary due to the juror’s connection with co-defendant Montag Webb.

During jury qualification, juror #101 Eddie Myers stated, “I heard y’all mention Montag Webb and I’ve known his family and sisters, went to school together for a while.” (ROA 520; Tr. 14, lines 17-20). The Trial Court inquired, “[C]ould you listen to the evidence in this case and make your decision based upon the evidence?”, and Juror #101 replied, “I’d do my best, yes, sir.” (Tr. 14, line 24 – 15, line 3).

At the PCR hearing, Counsel maintained that he believed this juror’s connection to co-defendant Montag Webb’s sister could be favorable to Applicant *despite* the jury’s determination of co-defendant Webb’s credibility was critical to the State obtaining a conviction against Applicant. The Trial Court also never specifically asked juror #101 whether he could be fair and impartial to Applicant based on his connection to co-defendant Webb.

Trial Counsel’s decision to seat a juror with a direct, long-standing relationship to co-defendant Webb, particularly where the Trial Court had not asked the juror whether he could be fair and impartial to Applicant, is an unreasonable trial strategy. See *Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (finding “counsel must articulate a

valid reason for employing a certain strategy to avoid a finding of ineffectiveness, and where counsel articulates a strategy, it is measured under an objective standard of reasonableness.” See *Stacy v. Solem*, 801 F.2d 1048, 1051 (8th Cir. 1986) (finding that “labeling counsel’s actions as “trial strategy” does not automatically immunize an attorney’s performance from sixth amendment challenges.”).

Therefore, Trial Counsel provided ineffective assistance of counsel because Counsel failed to move to strike potential juror #101 Eddie Myers for cause or use a peremptory strike to remove that juror when it was reasonable and necessary due to the juror’s connection with co-defendant Montag Webb.

III. This Court finds Trial Counsel provided ineffective assistance of counsel because Counsel failed to convey a fifteen-year plea offer to Applicant.

At the PCR hearing, Applicant testified that Trial Counsel never informed him of a fifteen (15) year plea offer during the trial. Applicant also testified that he would have accepted that plea offer.

Counsel maintained that there were three plea offers provided by the prosecution. Counsel stated that he advised Applicant to reject the first plea for thirty (30) years imprisonment, and that he told Applicant to consider the second plea offer for twenty (20) years imprisonment. Counsel also maintained that he discussed the third plea offer for fifteen (15) years imprisonment after it was presented during the trial. Counsel also stated that he shared this plea offer with Applicant’s mother.

Therefore, Trial Counsel provided ineffective assistance of counsel because Counsel failed to convey a plea offer to Applicant. See *Missouri v. Frye*, 566 U.S. 134 (2012) (holding the Sixth Amendment right to effective assistance of counsel extends to the consideration of plea offers that lapse or are rejected); see also *Lafler v. Cooper*, 566

U.S. 156 (2012) (holding the right to effective assistance of counsel extends to the plea-bargaining process).

IV. This Court finds Trial Counsel provided ineffective assistance of counsel because Counsel failed to properly cross-examine his co-defendant and State’s witness, Montag Webb, regarding possible bias and motives for testifying against Applicant. Specifically, Counsel failed to adequately question co-defendant Webb about negotiations and promises with the State in exchange for his testimony, his potential mandatory minimum sentence of fifteen years, and his potential maximum sentence of life imprisonment.

“The Sixth Amendment guarantees a criminal defendant the right ‘to be confronted with the witnesses against him.’” *State v. Dinkins*, 339 S.C. 597, 601, 529 S.E.2d 557, 559 (Ct. App. 2000) (quoting U.S. Const. amend. VI); See U.S. Const. amends. V, VI, XIV; S.C. Const. art. I, § and 14. The right of confrontation is essential to a fair trial because it promotes reliability and ensures that convictions will not result from testimony of individuals who cannot be challenged at trial. *Id.*

Furthermore, “[a] defendant has the right to cross-examine a witness concerning bias under the Confrontation Clause.” *State v. Mizzell*, 349 S.C. 326, 563 S.E.2d 315 (2002). “On cross-examination, any fact may be elicited which tends to show interest, bias, or partiality of the witness.” *Id.* (internal quotation marks omitted).

A criminal defendant may show a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby to expose to the jury the facts from which jurors ... could appropriately draw inferences relating to the reliability of the witness.

Id. (alteration in original) (internal quotation marks omitted). However, “[t]he trial judge retains discretion to impose reasonable limits on the scope of cross-examination.” *Id.* “Before a trial judge may limit a criminal defendant’s right to engage in

cross-examination to show bias on the part of the witness, the record must clearly show the cross-examination is inappropriate.” *Id.* If the defendant establishes the limitation unfairly prejudiced him, the error is reversible. *Id.*

“The jury is, generally, not entitled to learn the possible sentence of a defendant because the sentence is irrelevant to finding guilt or innocence.” *Id.* at 331, 563 S.E.2d at 318. “However, other constitutional concerns, such as the Confrontation Clause, limit the applicability of this rule in circumstances where the defendant’s right to effectively cross-examine a co-conspirator witness of possible bias outweighs the need to exclude the evidence.” *Id.* at 331–32, 563 S.E.2d at 318.

Discussion

At the PCR hearing, Counsel testified that he believed co-defendant Webb would receive a 10-to-15-year sentence based on discussions with the Prosecutors. Counsel admitted that he did not have a strategic reason for failing to adequately cross-examine co-defendant Webb regarding whether he received a plea offer for a 10-to-15-year sentence or was potentially avoiding a mandatory minimum sentence and maximum sentence of life imprisonment by testifying as a cooperating witness. *See Mizzell, Id.* at 334–35, 563 S.E.2d at 319 (finding “a witness admitting he is subject to a ‘long sentence’ is quite different from a witness admitting he could be sentenced to a maximum of life in prison”); *State v. Gracely*, 399 S.C. 363, 374-75, 731 S.E.2d 880, 886 (2012) (finding “The fact that a cooperating witness avoided a mandatory minimum sentence is critical information that a defendant must be allowed to present to the jury.”).

Therefore, Trial Counsel provided ineffective assistance of counsel because Counsel failed to properly cross-examine his co-defendant Webb regarding possible bias

and motives for testifying against Applicant by not adequately questioning co-defendant Webb about negotiations and promises with the State in exchange for his testimony, his potential mandatory minimum sentence of fifteen years, and his potential maximum sentence of life imprisonment.

V. This Court finds Trial Counsel provided ineffective assistance of counsel because Counsel failed to properly argue against and preserve for appellate review the Prosecutor’s objection for relevance during Trial Counsel’s cross-examination of witness Leon Coleman related to the witness’s possible bias against Applicant for having an affair with his wife.

“The Sixth Amendment guarantees a criminal defendant the right ‘to be confronted with the witnesses against him.’” *State v. Dinkins*, 339 S.C. 597, 601, 529 S.E.2d 557, 559 (Ct. App. 2000) (quoting U.S. Const. amend. VI); See U.S. Const. amends. V, VI, XIV; S.C. Const. art. I, § and 14. The right of confrontation is essential to a fair trial because it promotes reliability and ensures that convictions will not result from testimony of individuals who cannot be challenged at trial. *Id.*

Furthermore, “[a] defendant has the right to cross-examine a witness concerning bias under the Confrontation Clause.” *State v. Mizzell*, 349 S.C. 326, 563 S.E.2d 315 (2002). “On cross-examination, any fact may be elicited which tends to show interest, bias, or partiality of the witness.” *Id.* (internal quotation marks omitted).

A criminal defendant may show a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby to expose to the jury the facts from which jurors ... could appropriately draw inferences relating to the reliability of the witness.

Id. (alteration in original) (internal quotation marks omitted). However, “[t]he trial judge retains discretion to impose reasonable limits on the scope of cross-

examination.” *Id.* “Before a trial judge may limit a criminal defendant's right to engage in cross-examination to show bias on the part of the witness, the record must clearly show the cross-examination is inappropriate.” *Id.* If the defendant establishes the limitation unfairly prejudiced him, the error is reversible. *Id.*

Discussion

At trial, Leon Coleman admitted that co-defendant Webb was his brother-in-law and that he gives him money when needed. Coleman’s testimony also implicated Applicant based on an alleged statement made by Applicant the night of the murder:

I know his name is J White. He came to the window and told Taggy [Montag Webb] there is a guy inside that got a gun and some money and he was going to rush him and take it from him.

(Tr. 43, line 23 – 44, line 2). Coleman subsequently identified Applicant in court as the person who made that statement. (Tr. 44, lines 18-24).

Counsel failed to proffer Coleman’s testimony during cross-examination about his wife having an affair with Applicant after the Trial Court sustained the State’s objection. See *Mizzell*, 349 S.C. 326, 563 S.E.2d 315 (finding “[a] defendant has the right to cross-examine a witness concerning bias under the Confrontation Clause”).

Therefore, Trial Counsel provided ineffective assistance of counsel because Counsel failed to properly argue against and preserve for appellate review the Prosecutor’s objection for relevance during Trial Counsel’s cross-examination of witness Leon Coleman related to the witness’s possible bias against Applicant for having an affair with his wife.

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VI. This Court finds Trial Counsel provided ineffective assistance of counsel because Counsel failed to object and move for a mistrial and/or a curative instruction when Applicant's co-defendant, Letroy Samuels, testified that Applicant was violent and had previously assaulted him and other people.

Typically, evidence of a person's character is not admissible to prove the person acted "in conformity therewith on a particular occasion." Rule 404(a), SCRE. Evidence of a person's "other crimes, wrongs, or acts" are generally inadmissible to prove a person's general character "in order to show action in conformity therewith." Rule 404(b), SCRE (commonly referred to as prior bad act or *Lyle* evidence). The proponent of prior bad act evidence must demonstrate it has a legitimate purpose, "i.e., the evidence does something more than prove a person has propensity to commit crimes". *Johnson v. State*, 433 S.C. 550, 555, 860 S.E.2d 696, 699 (Ct. App. 2021). Under Rule 404(b), SCRE, there are only five legitimate purposes for the admission of prior bad act evidence: to prove "motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent."

This Court addressed the proper approach to determining the admissibility of prior bad act evidence in *State v. Perry*, 430 S.C. 24, 842 S.E.2d 654 (2020). In a criminal case, the State must convince the trial court that the prior bad act evidence is logically relevant to a material fact at issue in the case: "If it is logically pertinent in that it reasonably tends to prove a material fact in issue, it is not to be rejected merely because it incidentally proves the defendant guilty of another crime." *Lyle*, 125 S.C. at 417, 118 S.E. at 807.

If, after applying the logical relevancy test with "rigid scrutiny," the trial court concludes the prior bad act evidence serves some purpose other than to show the defendant's proclivity for criminal conduct (and that purpose is one of the five listed in Rule 404(b)), then the evidence is admissible unless its "probative value is substantially

outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Rule 403, SCORE; see *Perry*, 430 S.C. at 44, 842 S.E.2d at 665.

Notably, if the prior bad act did not result in a criminal conviction, the State also bears the burden of proving the prior bad act by clear and convincing evidence. *Johnson*, 433 S.C. at 556, 860 S.E.2d at 699. The danger of unfair prejudice is enhanced when the prior bad act is “strikingly similar” to the one for which the appellant is being tried. *State v. Gore*, 283 S.C. 118, 121, 322 S.E.2d 12, 13 (1984).

Prior bad act evidence “is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge.” *Michelson v. United States*, 335 U.S. 469, 475–76 (1948) (footnote omitted). The Court of Appeals reiterated the purpose of barring prior bad act evidence to prove character in *Johnson*, deeming it useless to the factfinder:

The law’s disdain of character evidence draws from notions of basic fairness tied together by the “golden thread”—the presumption of innocence—so one is rightly judged by whether the government has proven what it has charged, regardless of who it has charged. That is, after all, the spirit of the rule of law.

Johnson, 433 S.C. at 556, 860 S.E.2d at 700.

In determining whether to grant a mistrial, our Supreme Court has noted that “[t]he less than lucid test is . . . whether the mistrial was dictated by manifest necessity or the ends of public justice, the latter being defined as the public’s interest in a fair trial designated to end in just judgment.” *State v. Prince*, 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983). Specifically, the trial court is to consider the following factors when ruling on

a motion for mistrial: (1) the character of the testimony; (2) the circumstances under which it was offered; (3) the nature of the case; (4) other testimony in the case; and (5) “perhaps other matters.” *State v. Craig*, 267 S.C. 262, 269, 227 S.E.2d 306, 310 (1976). Therefore, although the decision to grant or deny a mistrial is within the trial court’s discretion, such discretion is not unfettered. See *State v. Edwards*, 373 S.C. 230, 236, 644 S.E.2d 66, 69 (Ct. App. 2007).

Discussion

At trial, Applicant’s co-defendant, Letroy Samuels, testified that he was “cautious” of Applicant: “Because I have seen him hit some people and I know he is a fighter.” (Tr. 383, lines 16-17). Co-defendant Samuels also testified that Applicant had previously hit him. (Tr. 383, line 18-19). Notably, co-defendant Samuels implicated Applicant in the murder, and this inadmissible propensity evidence corroborated the State’s theory that Applicant is dangerous and struck the fatal blow on the decedent.

Without any challenge by Trial Counsel, the State knowingly elicited unfairly prejudicial prior bad act character evidence when the propensity evidence was not *res gestae*, was “strikingly similar” to the one for which Applicant is being tried, was not a result of a criminal conviction, and was not proven by clear and convincing evidence. See *generally Johnson*, 433 S.C. at 556, 860 S.E.2d at 699; *Gore*, 283 S.C. at 121, 322 S.E.2d at 13 (finding the danger of unfair prejudice is enhanced when the prior bad act is “strikingly similar” to the one for which the appellant is being tried).

Notably, the probative value of this evidence is substantially outweighed by the danger of the unfair prejudice to Appellant. See Rule 403, SCRE; *Perry*, 430 S.C. at 44, 842 S.E.2d at 665. Therefore, Trial Counsel provided ineffective assistance of counsel

because Counsel failed to object and move for a mistrial and/or a curative instruction when Applicant's co-defendant Samuels testified that Applicant was violent and had previously assaulted him and other people.

VII. This Court finds Trial Counsel provided ineffective assistance of counsel because Counsel failed to object when (1) the Clerk of Court told the jury that they "have the charge with a true verdict" while being sworn under oath; (2) the Trial Court improperly told the jury that a trial is a "search for the truth" and that the jury is seeking to "reach a fair and just verdict" during the Court's opening remarks; (3) the Prosecutor referenced the Trial Court's statement that "this was a search for the truth"; and (4) the Prosecutor told the jury to "reach a verdict that speaks the truth" during his closing argument.

In *State v. Aleksey*, 343 S.C. 20, 538 S.E.2d 248 (2000), our Supreme Court held that jury instructions on reasonable doubt which also charge the jury to "seek the truth" or "search for the truth" run the risk of unconstitutionally shifting the burden of proof to the defendant. The Court also found there was no reversible error because the "seek the truth" language was charged in conjunction with the "credibility of witnesses" charge, and not with either the reasonable doubt or circumstantial evidence charges. *Id.* at 27–29, 538 S.E.2d at 251–53.

In *State v. Daniels*, 401 S.C. 251, 737 S.E.2d 473 (2012), Daniels argued the trial judge erred in charging the jury that their verdict would represent the "truth and justice for all parties." The Majority in *Daniels* held:

Although the issue is not preserved, we instruct the trial judge to remove any suggestion from his general sessions charges that a criminal jury's duty is to return a verdict that is "just" or "fair" to all parties. Such a charge could effectively alter the jury's perception of the burden of proof, substituting justice and fairness for the presumption of innocence and the State's burden to prove the defendant's guilt beyond a reasonable doubt. Moreover, to a lay person, the "all parties involved" in a criminal case may well extend beyond the defendant and the State, and include the victim. These inaccurate and

misleading charges risk depriving a criminal defendant of his right to a fair trial.

Id. at 256, 737 S.E.2d at 474.

In a concurring opinion, former Chief Justice Toal explained:

As a final note, although no constitutional error occurred, the trial court's inappropriate statements in this case came close to jeopardizing the legitimacy of the trial. Judges and juries are critical actors in our judicial system. Jurors are sworn to declare the facts of the case as they are proved from the evidence placed before them. 50A C.J.S. Juries § 1 (2004). The very term “jury” connotes a deliberative body of persons. *Id.* A judge sits as a public officer, who presides over, conducts, and administers the law by virtue of the office, and does so cloaked in judicial authority. *Id.* Judges § 7 (2004). Judges and juries are not, as this trial judge put it, “in it together.” While their functions may act as a complement to one another, it is erroneous to imply that they somehow work hand in hand, and any blurring of their roles serves as an unnecessary and improper distraction.

Judicial instructions to the jury in a criminal case that “whatever verdict you reach will represent truth and justice for all parties,” that “we must see to it that the trial is fair and the verdict is just” and that you and I are “in it together,” may seem at first blush to be simply harmless phrases intended to put the jury at ease and portray the judge as a “regular guy.” However, the constitutional framework governing criminal trials is a highly technical body of law developed by the United States Supreme Court and by state courts operating under the Supreme Court's guidance. It is inappropriate to jeopardize the constitutionality of a trial by instructing the jury in this way.

It is critical that jurors understand the proper application of the reasonable doubt standard. That standard does not charge the jury with ensuring justice for all of the parties. Justice Pleicones correctly notes that this language could result in jurors substituting concepts of justice or fairness for the State's constitutional duty to prove guilt beyond a reasonable doubt. Thus, I join the Justice Pleicones's admonition to the trial court to restrict his jury instructions to matters of law, and refrain from issuing instructions which run the risk of depriving defendants of their right to a fair trial.

Id. at 263–64, 737 S.E.2d at 480.

In *State v. Beaty*, 423 S.C. 26, 813 S.E.2d 502 (2018), our Supreme Court “instruct[ed] trial judges to omit any language, whether in remarks to the jury or in an instruction, which might have the effect of lessening the State’s burden of proof in a criminal case. Such language includes, but is not limited to, any language suggesting to the jury that its task is to “search for the truth” or to find “true facts,” or that the jury should render a ‘just verdict.’”

Discussion

At trial, the Trial Court made the following opening remarks to the jury:

This is a real trial which is a fundamental part of our democracy and it is a search for the truth in an effort to make sure justice is done. In searching for the truth and ensuring justice is done is often slow, deliberate, and repetitive. . . . Ladies and gentlemen the attorneys who are appearing before you are advocates for the parties they represent, but first and foremost they are officers of this court who are sworn to uphold the integrity and the fairness of our judicial system and to help you in your search for the truth. . . . You will then be in a position to determine what the true facts are and to apply the law to those facts and thus render a true and just verdict.

(Tr. p. 6 – 13).

The Prosecutor also reiterated this prohibited language in State’s opening statement and closing argument to the jury:

Justice is the goal in this case and that is what the Judge just told you a few minutes ago. He told that (sic) your job was to, was to render a verdict that speaks justice. That this was a search for the truth and that is what it is.

. . .

We believe that you were directly suited to hear this case and you use your common sense based upon your life experiences to analyze the evidence in this case and reach a verdict that speaks the truth, that makes sense.

. . .

The verdict comes from the Latin word Veredictum, which means to speak the truth. Judge Young told you in his opening remarks that this was to assert the truth, make no mistake about it, that is your job to find the truth... Go back there and consider what you've heard this week and rendered (sic) a verdict that speaks the truth. Thank you.

(Tr. p. 14; p. 428; p. 435).

Therefore, Trial Counsel provided ineffective assistance of counsel because Counsel failed to object when (1) the Clerk of Court told the jury that they “have the charge with a true verdict” while being sworn under oath; (2) the Trial Court improperly told the jury that a trial is a “search for the truth” and that the jury is seeking to “reach a fair and just verdict” during the Court's opening remarks; (3) the Prosecutor referenced the Trial Court's statement that “this was a search for the truth”; and (4) the Prosecutor told the jury to “reach a verdict that speaks the truth” during his closing argument.

VIII. This Court finds Trial Counsel provided ineffective assistance of counsel because Counsel failed to object when the Prosecutor improperly stated, “my job as an Assistant Solicitor is to represent the interest of this community to represent your interest.”

In *State v. McGill*, 191 S.C. 1, 3 S.E.2d 257, 261 (1939), our Supreme Court held that a Solicitor “is a quasi judicial officer, and . . . that a solicitor must not, because of the high position he holds, say things, or do things, which would have any effect to prevent a citizen, however humble, from obtaining the fair and impartial trial he is entitled to under the law”. See generally *State v. Cannon*, 229 S.C. 614, 93 S.E.2d 889 (1956) (finding a prosecuting attorney has a duty to treat the defendant in an impartial manner); *State v. Craig*, 267 S.C. 262, 265, 227 S.E.2d 306, 308 (1976) (noting that “[a]s a general rule, conduct of the prosecutor calculated to arouse prejudice against the accused, and to prevent him from having a fair trial will not be tolerated”); see also *State v. Quattlebaum*,

338 S.C. 441, 527 S.E.2d 105 (2000) (finding “[p]rosecutors are ministers of justice and not merely advocates . . . A prosecutor has special responsibilities to do justice and is held to the highest standards of professional ethics. . . . We will not tolerate deliberate prosecutorial misconduct which threatens rights fundamental to liberty and justice”).

Discussion

During the opening statement, the Prosecutor stated that he represented the juror’s interest in the community:

I am Assistant Solicitor here in Clarendon County. It is my pleasure to present this case with the duly elected appointed Solicitor Chip Finney. I work here in Clarendon County and my job as an Assistant Solicitor is to represent the interest of this community to represent your interest, and is to represent the interest of the state of South Carolina.

The Prosecutor deliberately and erroneously told the jury that he represents their interests in the community to arouse the prejudice of the jury and to bolster the State’s case. Therefore, Trial Counsel provided ineffective assistance of counsel because Counsel failed to object when the Prosecutor improperly stated, “my job as an Assistant Solicitor is to represent the interest of this community to represent your interest.” See *State v. Liberte*, 336 S.C. 648, 521 S.E.2d 744 (Ct. App. 1999) (“A prosecutor may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking. The evil lurking in such prosecutorial appeals is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence. Jurors may be persuaded by such appeals to believe that, by convicting a defendant, they will assist in the solution of some pressing social problem. The amelioration of society’s woes is far too heavy a burden for the individual criminal defendant to bear.”).

IX. This Court finds Trial Counsel provided ineffective assistance of counsel because of Counsel's unreasonable strategy to present that Applicant did not provide an additional statement to the police due to invoking his right to an attorney after his arrest.

On cross-examination of Lt. Sonia Daniels, the Trial Counsel elicited testimony that Applicant did not provide a second interview to police after his arrest because he invoked his right to counsel. (Tr. 247, lines 1-7; Tr. 248, lines 1-3). See *Edmond v. State*, 341 S.C. 340, 534 S.E.2d 682 (2000) (noting "[t]he obvious purpose [of the *Doyle* rule] is to try to prevent jurors from improperly inferring the accused is guilty simply because he exercised rights guaranteed him by the state and federal constitutions) (referring to *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240 (1976)); see generally *State v. Holliday*, 333 S.C. 332, 509 S.E.2d 280 (Ct. App. 1998) (reversing conviction because solicitor's cross-examination of defendant, during which she repeatedly questioned defendant as to why he had not told his version of events until the day of trial, was improper in that the questions clearly referenced his post-Miranda silence)

Therefore, Trial Counsel provided ineffective assistance of counsel because of Counsel's unreasonable strategy to present that Applicant did not provide an additional statement to the police due to invoking his right to an attorney after his arrest.

X. This Court finds Trial Counsel provided ineffective assistance of counsel because Counsel failed to object to the Trial Court's instruction on Circumstantial Evidence and request that the Court charge the jury using the *Logan* charge.

In *State v. Logan*, 405 S.C. 83, 747 S.E.2d 444 (2013), our Supreme Court held that trial courts "should" instruct the jury with the following circumstantial evidence charge when requested by the defendant. *Id.* at 99, 747 S.E.2d at 452.

There are two types of evidence which are generally presented during a trial—direct evidence and circumstantial

evidence. Direct evidence directly proves the existence of a fact and does not require deduction. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact.

Crimes may be proven by circumstantial evidence. The law makes no distinction between the weight or value to be given to either direct or circumstantial evidence, however, to the extent the State relies on circumstantial evidence, all of the circumstances must be consistent with each other, and when taken together, point conclusively to the guilt of the accused beyond a reasonable doubt. If these circumstances merely portray the defendant's behavior as suspicious, the proof has failed.

The State has the burden of proving the defendant guilty beyond a reasonable doubt. This burden rests with the State regardless of whether the State relies on direct evidence, circumstantial evidence, or some combination of the two.

Id. (emphasis added). “When requested, the Logan charge must be given in cases based in whole or part on circumstantial evidence.” *State v. Herndon*, 430 S.C. 367, 371, 845 S.E.2d 499, 501 (2020).

Discussion

At trial, the Trial Court provided the following instruction to the jury on circumstantial evidence:

Now, Ladies and Gentlemen, there are two types of evidence that are generally presented during a trial. There's direct evidence and there is circumstantial evidence. Direct evidence is the testimony of a person who claims to have actual knowledge of a fact such as an eye witness. It is evidence which immediately establishes the main fact to be proved. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. It is evidence which immediately establishes collateral facts from which the main fact may be inferred. Circumstantial evidence may be based on inference and not on personal knowledge or observation. The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of

circumstantial evidence. Ladies and Gentlemen you should weigh all of the evidence in this case and after weighing all of the evidence if you are not convinced of the guilt of the defendants beyond a reasonable doubt you must find the defendants not guilty.

(Tr. p. 484).

Based on the State's theory of the case and the inconsistent statements by Applicant's co-defendants, it is objectively unreasonable for Trial Counsel not to request the *Logan* charge. See *Herndon*, 430 S.C. at 371, 845 S.E.2d at 501 (finding "[w]hen requested, the Logan charge must be given in cases based in whole or part on circumstantial evidence"). Therefore, Trial Counsel provided ineffective assistance of counsel because Counsel failed to object to the Trial Court's instruction on Circumstantial Evidence and request that the Court charge the jury using the *Logan* charge.

Ineffective Assistance of Appellate Counsel

XI. This Court finds Appellate Counsel provided ineffective assistance of counsel because Counsel failed to raise the issue of whether the Trial Court erred in instructing that the jury could infer malice based on "excessive brutal force."

A defendant is constitutionally entitled to effective assistance of appellate counsel. *Evitts v. Lucey*, 469 U.S. 387, 105 S.Ct. 830 (1985). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." *Thrift v. State*, 302 S.C. 535, 397 S.E.2d 523 (1990). Our Supreme Court has declined to adopt different rules for appellate and trial counsel in terms of strategy. *State v. Tisdale*, 357 S.C. 474, 594 S.E.2d 166 (2004). Notably, even where appellate counsel files an *Anders*¹ brief, the *Strickland* test should be applied in determining whether appellate counsel was

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

ineffective. *Bennett v. State*, 383 S.C. 303, 680 S.E.2d 273 (2009)

The burden of proof is upon the applicant to show counsel's performance was deficient as measured by the standard of reasonableness under prevailing professional norms. The applicant must then prove that, because of appellate counsel's deficient performance there is a reasonable probability that, but for appellate counsel's unprofessional errors, the result of the proceeding (appeal, not trial) would have been different. *Southerland v. State*, 337 S.C. 610, 524 S.E.2d 833 (1999); *Ezell v. State*, 345 S.C. 312, 548 S.E.2d 852 (2001) (finding where the result of an appeal would have been different had appellate counsel not been deficient, the appropriate remedy is to grant a new trial).

Furthermore, jury charges that comment on the facts of a case are not allowed. See S.C. Const. art. V, § 21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law."). A jury instruction is a comment on the facts when it expresses the court's opinion of a case, thereby imposing the court's belief on the jury in a way likely to influence it. See *Enlee v. Seaboard Air Line Ry.*, 110 S.C. 137, 146, 96 S.E. 490, 492 (1918) ("The purpose of [prohibiting judges from charging on the facts] is to prevent the trial judge from intimating to the jury his opinion of the case what weight or credence should be given to the evidence and participating in any manner with the jury's finding of fact."); see also *State v. Thorne*, 237 S.C. 248, 251, 116 S.E.2d 854, 855 (1960) ("Under our Constitution the jury is the exclusive judge of the facts, and the true meaning and real object is that the jury must be left to form its own judgment, unbiased by any expressions, or even intimations, of opinion by the Judge.").

In *State v. Burdette*, our Supreme Court recently held: “[R]egardless of the evidence presented at trial, a trial court shall not instruct the jury that it may infer the existence of malice when the deed was done with a deadly weapon.” *Id.*, 427 S.C. 490, 505 n.3, 832 S.E.2d 575, 583 n.3 (2019). The *Burdette* Court explained that this particular jury charge was an impermissible charge on the facts. *Id.* at 502–03, 832 S.E.2d at 582. The Court also held that this ruling was effective in cases pending on direct review or not yet final, as long as the issue is preserved. *Id.* at 505, 832 S.E.2d at 583. The Court overruled “in part” prior case law, including *Belcher*, “insofar as it can be construed that [the court had] approved a trial court’s charge that a jury may infer the existence of malice from the defendant’s use of a deadly weapon.” *Id.* at 505 n.3, 832 S.E.2d at 583 n.3.

The *Burdette* Court noted, “It is always for the jury to determine the facts, and the inferences that are to be drawn from th[o]se facts.” *Id.* (quoting *State v. Cheeks*, 401 S.C. 322, 328, 737 S.E.2d 480, 484 (2013)). The Court observed that “[w]hen the trial court tells the jury it may use evidence of the use of a deadly weapon to establish the existence of malice, ... the trial court has directly commented upon facts in evidence, elevated those facts, and emphasized them to the jury.” *Id.* The Court determined that “[e]ven telling the jury that it is to give evidence of the use of a deadly weapon only the weight the jury determines it should be given does not remove the taint of the trial court’s injection of its commentary upon that evidence.” *Id.* at 502-03, 832 S.E.2d at 582.

The *Burdette* court concluded that “[a] jury instruction that malice may be inferred from the use of a deadly weapon is an improper court-sponsored emphasis of a fact in evidence” and held that “[r]egardless of the evidence presented at trial, trial courts shall not instruct a jury that the element of malice may be inferred when the deed is done with

a deadly weapon.” *Id.* at 503-05, 832 S.E.2d at 582-83. Additionally, the Court stated that its ruling was effective in all cases pending on direct review or not yet final if the issue was preserved. *Id.* at 505, 832 S.E.2d at 583.

Discussion

At trial, Trial Counsel objected during the charge conference to the Trial Court’s instruction to the jury that they could infer malice based on “use of excessive brutal force.” (Tr. p. 425 – 426).

At the evidentiary hearing, Appellate Defender Dudek testified that he believed the issue was preserved for appellate review but did not believe it was a winning issue. Based on Appellate Counsel’s experience and knowledge of *State v. Belcher*, 385 S.C. 597, 612, 685 S.E.2d 802, 810 (2009), it is unreasonable for Counsel not to raise that issue on appeal.

Therefore, Appellate Counsel provided ineffective assistance of counsel because Counsel failed to raise the issue of whether the Trial Court erred in instructing that the jury could infer malice based on “excessive brutal force.” See *Simpkins v. State*, 303 S.C. 364, 401 S.E.2d 142 (1991), *overruled on other grounds* by *State v. Stokes*, 381 S.C. 390, 673 S.E.2d 434 (2009) (finding appellate counsel was ineffective in failing to raise an issue, preserved below, which would have entitled defendant to reversal on appeal); see also *Pantovich v. State*, 427 S.C. 555, 832 S.E.2d 596 (2019) (“The PCR court initially found Pantovich failed to prove prejudice because he alleged no irregularity in the court of appeals’ *Anders* procedure. We reversed, finding that to demonstrate prejudice ‘the applicant must show ... but for appellate counsel’s errors, the result of the appeal would have been different.’”).

CONCLUSION

Based on the foregoing reasons, this Court finds and concludes Applicant has established constitutional violations and deprivations that would require post-conviction relief. This Court finds that Trial Counsel and Appellate Counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. See *Strickland*, 466 U.S. at 687-88. This Court also finds that Counsel's deficient performance prejudiced Petitioner because it "so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Butler*, 286 S.C. at 442, 334 S.E.2d at 814 (quoting *Strickland*, 466 U.S. at 692).

This Court has concluded that Trial Counsel and Appellate Counsel provided ineffective assistance of counsel because "there is a reasonable probability that, but for [trial] counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625 (internal citations omitted); See U.S. Const. amends. VI, XIV; S.C. Const. art. I, §§ 3 and 14; S.C. Code § 17-27-20(A)(1), (4), and (6). Therefore, this PCR application must be granted, and Applicant shall receive a new trial.

This Court notifies the Respondent that the State must file and serve a notice of appeal within thirty days of receipt by counsel of the judgment entry's written notice to secure appropriate appellate review. See Rule 203, SCACR.

IT IS ORDERED that Applicant's application for PCR is hereby **GRANTED**.

[Signature Page to Follow]

STATE OF SOUTH CAROLINA
 COUNTY OF CLARENDON

Jonathan C. Newman,
 Applicant,

v.

State of South Carolina,
 Defendant.

IN THE COURT OF COMMON PLEAS
 THIRD JUDICIAL CIRCUIT

Case No. 2018-CP-14-00233

CERTIFICATE OF SERVICE

I hereby certify that I have this date served the within and foregoing Motion to Alter or Amend pursuant to Rule 59(e), SCRPC, by depositing a true and correct copy of the same via first-class mail, postage prepaid, upon all parties as follows:

T. Cruise Mitchell, Esq.
 SC Attorney General's Office
 P.O. Box 11549
 Columbia, SC 29211

The Hon. Beulah G. Roberts
 Clarendon County Clerk of Court
 PO Box 136
 Manning, SC 29102-0136

The Honorable Grace Gilchrist Knie
 180 Magnolia Street
 Spartanburg, SC 29306

By:



Courtney Powers

Paralegal for Dayne C. Phillips, Esq.

1614 Taylor Street, Suite D.
 Columbia, SC 29201
 (803) 216-5561
 courtney@pricebenowitz.com

October 11, 2024

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STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS NONJURY
<u>COUNTY OF CLARENDON</u>	)	
JONATHAN C. NEWMAN,	)	TRANSCRIPT
	)	
APPLICANT,	)	OF
	)	
vs.	)	RECORD
	)	
STATE OF SOUTH CAROLINA,	)	
	)	2018-CP-14-233
<u> RESPONDENT.</u>	)	

January 31st, 2025

B E F O R E:

THE HONORABLE GRACE G. KNIE, Judge.

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

DAYNE PHILLIPS
ESQ.
Attorney for the Applicant

CRUISE MITCHELL
ASSISTANT ATTORNEY GENERAL
Attorney for the Respondent

Pamela E. Green
CIRCUIT COURT REPORTER

I N D E X

(WHEREUPON, there were no exhibits marked or
testimony taken during this hearing.)

P R O C E E D I N G S

THE COURT: Okay. We are on the record.
I am Judge Knie and this is a term of Common Pleas
Nonjury. I am present at the Spartanburg County
Courthouse located at 180 Magnolia Street. I'm in
Courtroom 2A. My law clerk is here with me and our court
reporter is Pamela Green.

This hearing, by consent, is being conducted via
WebEx with counsel being present via WebEx as well as the
applicant.

This is the matter of Jonathan C. Newman versus the
State of South Carolina. He is the applicant. The State
is the respondent. This is a post-conviction relief
matter.

It is civil action -- it is a civil action pending in
Clarendon County, which is the Third -- in the Third
Judicial Circuit. It is County Number 14. Civil Action
Number 2018-CP-14-233.

The hearing has been convened based upon a motion to
amend pursuant to Rule 59(e) or rather motion to alter or
amend pursuant to Rule 59(e) of the South Carolina Rules
of Civil Procedure.

Let me first have counsel identify themselves for the
record starting with counsel for the applicant.

1 MR. PHILLIPS: Good morning, Your Honor. Attorney
2 Dayne Phillips, D-A-Y-N-E, representing the applicant,
3 Jonathan Newman.

4 THE COURT: Okay. And let me make sure that our
5 court reporter can you hear okay, Mr. Phillips.
6 okay?

7 THE COURT REPORTER: I can.

8 MR. PHILLIPS: Yes, Your Honor.

9 THE COURT: I'm turning up the volume on my machine.

10 MR. MITCHELL: Your Honor, can you hear me?

11 I have no sound. I can't hear any of y'all.

12 THE COURT: Mr., Mr. Mitchell, I, I can hear you. I
13 can hear you. You're muted.

14 Can you unmute?

15 MR. PHILLIPS: I can hear Mr. Mitchell as well.

16 THE COURT: Okay. Mr. Mitchell, can you hear us now?

17 (WHEREUPON, there was no response from Mr. Mitchell.)

18 MS. SEARCY: Judge, this is Ashley. I'm gonna
19 message him real quick.

20 (Pause.)

21 MS. SEARCY: Okay. Judge, this is Ashley. He still
22 does not have sound. So I'm gonna get him to call me.

23 THE COURT: Okay. We'll be at ease.

24 okay?

25 MR. PHILLIPS: Yes, Your Honor.

1 (Pause.)

2 MS. SEARCY: Cruise, can you hear me?

3 MR. MITCHELL: Yes, Your Honor. I can hear you.

4 THE COURT: Okay.

5 MR. MITCHELL: Can you hear then?

6 THE COURT: Yes.

7 MR. MITCHELL: Okay. Great. Sorry about that. Some
8 technical difficulties.

9 THE COURT: Okay. So, give me just one second and I
10 will announce the case again.

11 Okay?

12 MR. MITCHELL: Yes, Your Honor. Thank you.

13 (Pause.)

14 THE COURT: Okay. Before we begin again, Mr. Newman,
15 can you hear me?

16 THE APPLICANT: Yes, ma'am.

17 THE COURT: Okay. I, I -- are you able to get a
18 little closer to the monitor?

19 THE APPLICANT: There's a big table in the way.

20 THE COURT: Right.

21 Okay. Okay. I can hear you. I just want to make
22 sure that, if, if you do need to address me at some point,
23 that we're -- we can all hear you.

24 All right. Thank you.

25 THE APPLICANT: Yes, Your Honor.

1 THE COURT: All right. And so, we are on the record
2 with regard to the matter of Jonathan C. Newman,
3 applicant, versus the State of South Carolina, respondent.
4 This case is pending in Clarendon, Clarendon County. It
5 is the Third Judicial Circuit, the fourteenth county. It
6 is Case Number 18-CP-14-00233.

7 This is a post-conviction relief matter and I am
8 Judge Knie. I am at the Spartanburg County Courthouse in
9 Courtroom 2A. With me is my law clerk as well as the
10 court reporter, Pamela Green.

11 Counsel, by consent, has agreed that they would be
12 present via WebEx and -- as well as the applicant,
13 Mr. Newman.

14 I will first get counsel to identify themselves for
15 the record.

16 MR. PHILLIPS: Attorney Dayne Phillips, D-A-Y-N-E,
17 attorney for applicant, Jonathan Newman.

18 MR. MITCHELL: I'm Assistant Attorney General Cruise
19 Mitchell on behalf of the State of South Carolina.

20 THE COURT: Okay. And, Mr. Newman, again, can you
21 hear me?

22 This would be Judge Knie.

23 THE APPLICANT: Yes, Your Honor. I can hear you.

24 THE COURT: Okay. And, sir, if you'll raise your
25 right-hand.

1 (WHEREUPON, the applicant was placed under oath at
2 this time.)

3 THE COURT: Okay. Thank you, sir.

4 Mr. Newman, you are currently in the Department of
5 Corrections, correct?

6 THE APPLICANT: Yes, ma'am.

7 THE COURT: And, sir, do you agree for the hearing to
8 be conducted via WebEx today with a live court reporter?

9 THE APPLICANT: Yes, ma'am.

10 THE COURT: And you understand that your lawyer is
11 present it looks like in a very nice office, which must be
12 in his office, in, in Columbia.

13 Is that correct, Mr. Phillips?

14 MR. PHILLIPS: Actually at my home office. So I'm
15 in, in Lexington.

16 THE COURT: Okay. And Mr. Mitchell is present in
17 what looks like a very nice office, which is in Richland?

18 MR. MITCHELL: That's correct, Your Honor.

19 THE COURT: Okay. So, Mr. Newman, if at anytime --
20 I, I know this is a civil matter. But the underlying
21 action is, is General Sessions. If at any time you want
22 to talk to Mr. Phillips, you let me know.

23 okay?

24 THE APPLICANT: Yes, ma'am.

25 THE COURT: And we can arrange for him to call you

1 there, which I've done on many occasions with people that
2 are in the Department of Corrections, and y'all can talk
3 privately.

4 All right?

5 THE APPLICANT: Yes, ma'am.

6 THE COURT: All right. And so this is an action in
7 post-conviction relief that was pending -- that is pending
8 in Clarendon County and I actually heard the
9 post-conviction relief evidentiary hearing in Sumter on or
10 about July the 25th of 2024.

11 An order was issued and the order was filed. The,
12 the date stamp or the day that it was clocked in in
13 Clarendon is October the 7th and then this motion to alter
14 or amend pursuant to Rule 59(e) of South Carolina Rules of
15 Civil Procedure, the motion was emailed to me on October
16 the 13th. And so I consider this to be a valid motion.

17 I know the file date on it was a little later. But I
18 think that's just because these things I believe have to
19 be sent you -- have to be sent via paper as opposed to
20 electronic filing, which slows everything down. But I, I
21 have had -- the -- counsel did serve me with the motion
22 within 10 days as is required under the rule.

23 And so this is Mr. Phillips motion. And so I have a
24 copy of the motion in front of me and I will first hear
25 from Mr. Phillips, who is counsel for Mr. Newman, and then

1 I will turn it over to Mr. Mitchell. I will then allow
2 Mr. Phillips to reply to anything that he believes is new
3 and needs to be addressed.

4 Mr. Newman, just so you understand, normally
5 testimony would not be taken at this type of hearing.
6 okay?

7 THE APPLICANT: Yes, ma'am.

8 THE COURT: All right. Mr. Phillips.

9 MR. PHILLIPS: Thank you, Your Honor.

10 Specifically, the applicant moves for the Court to
11 alter or amend the denial of his PCR application based on
12 the proposed order that was submitted to counsel. To
13 ensure that those arguments are preserved for appellate
14 review, we have filed the motion for Rule 59(e) and
15 attached the proposed order. That way each argument that
16 was presented in the proposed order would be preserved for
17 appellate review.

18 So, in terms of specifically new arguments, there are
19 no additional arguments to be presented. It was a step to
20 ensure that the proposed order was filed and recorded and
21 that the Rule 59(e) encompassed that and it made sure that
22 he -- we were in full compliance with our preservation so
23 that those issues could be raised by appellate counsel.

24 THE COURT: Okay. All right. Thank you.

25 And I do have a copy of the very detailed proposed

1 order. It's 34 pages in length attached to your motion to
2 alter or amend, sir. Thank you for the effort on that.

3 MR. PHILLIPS: Thank you, Your Honor.

4 THE COURT: Okay. Anything else then before I hear
5 from counsel for the respondent?

6 MR. PHILLIPS: None, Your Honor --

7 THE COURT: Okay.

8 MR. PHILLIPS: -- unless you wanted it to -- me to
9 specifically address the issues that are in pro -- the
10 proposed order, which I know Your Honor's reviewed and
11 made that determination.

12 THE COURT: Yes, sir. No, sir, I, I don't think
13 that's necessary.

14 All right. Okay.

15 MR. PHILLIPS: Yes, Your Honor.

16 THE COURT: Mr. Mitchell.

17 MR. MITCHELL: May it please the Court, Your Honor.

18 Your Honor, because there's nothing new that has not
19 been presented to the Court, the State would request that
20 you deny the Rule 59(e) motion. Your Honor correctly
21 found that the counsel was not constitutionally
22 ineffective in this matter thus, and because there's no
23 new evidence presented, that the motion should be denied.

24 THE COURT: Okay. Anything else?

25 MR. PHILLIPS: No, Your Honor.

1 Just to reiterate the applicant's position that the
2 arguments raised in the proposed order show that counsel's
3 performance was deficient and fell below the, the norms in
4 the community of lawyers as far as his performance and
5 then also that those deficient performance established
6 prejudice that it -- there's a reasonable likelihood that
7 it would of affected the outcome of the case individually
8 specifically with the issue for each issue raised.

9 Not arguing any type of cumulative error but
10 individual error based on each allegation and the argument
11 that was presented that there was proof based on the
12 testimony presented at the PCR hearing of deficient
13 performance as well as prejudice to establish the
14 ineffective assistant of counsel. Therefore -- thereby,
15 our specific request is for a new trial and to re -- or to
16 remand for a new trial based on post-conviction relief.

17 THE COURT: Okay. Okay. Thank you.

18 Anything else, Mr. Mitchell?

19 MR. MITCHELL: Nothing further from the State, Your
20 Honor.

21 THE COURT: Okay. All right. I will review
22 everything again. I, I do appreciate the detail and I do
23 appreciate y'all doing this on short notice this week. I
24 had some time open up and I know we've tried several times
25 to have this scheduled and it's just been extremely

1 difficult. Y'all are very busy.

2 So, thank you very much. I hope that you-all are
3 doing well.

4 Mr. Phillips, I hope that your family is well, and,
5 Mr. Mitchell, I hope that yours is also.

6 Okay?

7 MR. PHILLIPS: Yes, Your Honor. Thank you and I, I
8 hope the same for you. Certainly appreciate your, your
9 concern and just thank you and hope everybody's doing
10 well.

11 THE COURT: Thank you.

12 Okay. Okay. Mr. Newman, I am going to review
13 everything again, sir. I will issue an order in writing
14 and it will go to counsel and then you will be notified
15 through your legal counsel.

16 Okay?

17 THE APPLICANT: Yes, Your Honor.

18 THE COURT: Okay. Thank you.

19 That will conclude the hearing at this time.

20 MR. PHILLIPS: Thank you.

21 THE COURT: Okay.

22 MR. MITCHELL: Thank you, Your Honor.

23 THE COURT: All right.

24

25 * * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

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C E R T I F I C A T E

I, Pamela E. Green, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas Nonjury for Clarendon County, South Carolina, on the 31st day of January, 2025.

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

April 3rd, 2025



PAMELA E. GREEN, Court Reporter

2025 FEB 14 PM 2:39
Shanta Brangston, CLK - Clarendon SC

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CLARENDON	)	FOR THE THIRD JUDICIAL CIRCUIT
	)	
Jonathan Cody Newman,	)	
SCDC #362601	)	
Plaintiff(s),	)	
	)	
-vs-	)	ORDER REGARDING MOTION
	)	FOR RECONSIDERATION
State of South Carolina,	)	
	)	Case No.: 2018-CP-14-00233
<u>Defendant(s).</u>	)	

Hearing Date:	January 31st, 2025
Hearing Judge:	Grace Gilchrist Knie
Counsel for Plaintiff:	Dayne C. Phillips
Counsel for Defendant:	T. Cruise Mitchell
Court Reporter:	Pamela Green

A Rule 59 (e), SCRCP motion to reconsider and to alter or amend has been received from the Defendant, filed with the Court on October 18th, 2024, and served on the Court on October 18th, 2024. The Motion to Reconsider was properly served on the Court per Rule 59(g), SCRCP. The Court, held a hearing on this matter on January 31st, 2025. Present representing the Plaintiff was Dayne C. Phillips, Esq. Present representing the Defendant was T. Cruise Mitchell, Esq. The Plaintiff was present via WebEx.

After careful consideration of the oral arguments of Counsel and review of the record, the Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or fact not appropriately considered.

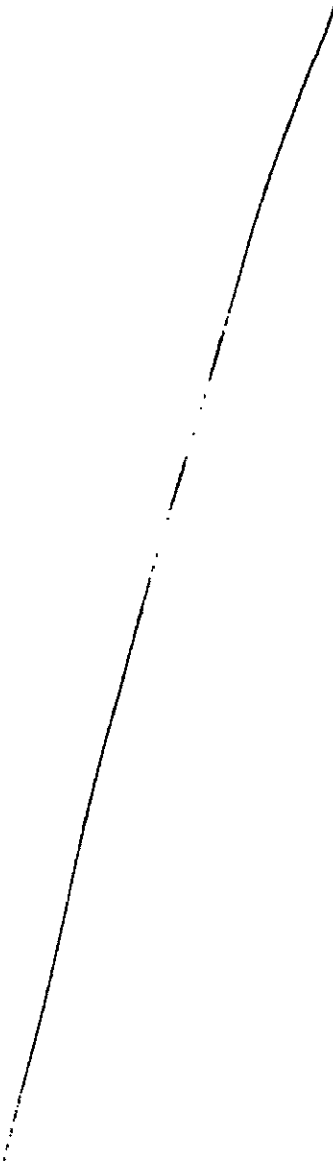
Accordingly, the Plaintiff's Motion for Reconsideration made pursuant to Rule 59, SCRCP, is respectfully DENIED.

AND IT IS SO ORDERED.



February 10, 2025

Grace Gilchrist Knie, Judge
Circuit Court, Seventh Judicial Circuit



STATE OF SOUTH CAROLINA
COUNTY OF CLARENDON
IN THE COURT OF COMMON PLEAS FOR THE THIRD JUDICIAL CIRCUIT

Jonathan Cody Newman, #362601

Applicant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

AFFIDAVIT OF SERVICE

The undersigned hereby certifies that a true copy of the filed Order Regarding Motion for Reconsideration has been served upon the applicant by mailing one copy in the United States mail, postage prepaid, addressed to:

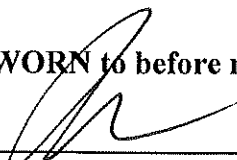
**Dayne C. Phillips, Esquire
Price Benowitz LLP
1614 Taylor Street
Suite D
Columbia, SC 29201**

This 27th day of February, 2025.



Blake Means
Legal Assistant for Respondent

SWORN to before me this 27th day of February, 2025.



Notary Public for South Carolina.

My Commission Expires:



THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CLARENDON COUNTY
Court of Common Pleas

The Honorable Grace Gilchrist Knie

Case No. 2018-CP-14-00233

Jonathan Cody Newman #362601,

Petitioner,

v.

State of South Carolina,

Respondent.

NOTICE OF APPEAL

Petitioner Jonathan Cody Newman appeals the Honorable Grace Gilchrist Knie's Order Denying his Application for Post-Conviction Relief filed on **October 7, 2024**, and the Court's Order Denying Applicant's Motion to Alter or Amend Judgment (Rule 59(e), SCRCP) filed on **February 14, 2025 (received February 21, 2025)**.


Dayne C. Phillips, Esq.
1614 Taylor Street, Suite D.
Columbia, SC 29201

ATTORNEY FOR PETITIONER

March 3, 2025

Other Counsel of Record:

T. Cruise Mitchell, Assistant Attorney General
South Carolina Attorney General's Office
1000 Assembly Street, Room 519
Columbia, SC 29201

cc: Shanita Brangman, Clarendon County Clerk of Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CLARENDON COUNTY
Court of Common Pleas

The Honorable Grace Gilchrist Knie

Case No. 2018-CP-14-00233

Jonathan Cody Newman #362601,

Petitioner,

v.

State of South Carolina,

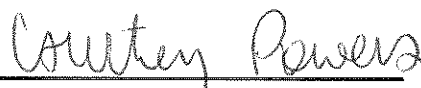
Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Assistant Attorney General Cruise Mitchell, and the Honorable Shanita Brangman, by depositing a copy in the United States Mail, postage prepaid, on **March 3, 2025**, addressed to the following parties:

Cruise Mitchell, Esquire, South Carolina Attorney General's Office
1000 Assembly Street, Room 519, Columbia, SC 29201

The Hon. Shanita Brangman, Clarendon County Clerk of Court
PO Box 136, Manning, SC 29102-0136


Courtney Powers
Paralegal for Dayne Phillips, Esq.
1614 Taylor Street, Suite D.
Columbia, SC 29201

March 3, 2025