

VOL. II of II

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Lexington County

William Jeffrey Young, Circuit Court Judge

RECEIVED

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S.C. Supreme Court

ROGER DALE BURKE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001419

A P P E N D I X

CARMEN V. GANJEHSANI
Appellate Defender

ALAN WILSON
Attorney General

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

JOHN WALT WHITMIRE
Assistant Attorney General

P. O. Box 11549
Columbia, SC 29211

ATTORNEY FOR PETITIONER

ATTORNEYS FOR RESPONDENT

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1 popping the gun off while we was struggling. But
2 when I shot the initial shot, she was standing
3 straight up.

4 Q You would agree with me that if someone was to
5 shoot you, you are going to try to grab that gun;
6 aren't you?

7 A She didn't try to grab it at that time.

8 Q At that point she decided that she loved you?
9 That's what your testimony was, wasn't it?

10 A Along with some other things: "I will call Smokey.
11 I won't take the kids from you. I'm not happy. I
12 want to come home, but I don't want to hurt J.J."

13 Q Do you think she was saying that because you had
14 just shot her with State's Exhibit 46? Wouldn't
15 that make sense?

16 A What I think, I can't say that would be yes or no.
17 I can't say. She begged me not to shoot myself,
18 and I took the gun away from my head, as I said.
19 When I met her at school earlier, and I told you
20 that we had a conversation early that morning when
21 she took the kids to school, she told me -- I told
22 Jenny, I said "I can't live without my kids. Why
23 are you doing this?" She said, "Don't worry about
24 the kids. The kids has got a new daddy now,"
25 meaning my brother.

1 Q I'm sorry. You said you had a phone conversation
2 with her earlier that day?

3 A I talked to her early that morning.

4 Q I thought you testified when Mr. Nettles was
5 talking about it, that you had repeatedly tried to
6 call her and her cell phone had blocked you?

7 A That was the night before when I tried to call
8 Jenny to ask her why didn't she bring my kids home.
9 That was my testimony, sir.

10 Q And after you shot her that once and y'all, I
11 guess, sat down and had a normal, civil
12 conversation --

13 A I wouldn't say it was a normal, civil conversation.
14 No, I wouldn't.

15 Q Was she bleeding at that point in time, Mr. Burke?

16 A She had been shot. She grabbed her chest. I
17 imagine she was. One of the pictures that you
18 showed in evidence had blood up against the cushion
19 of the couch.

20 That's proof I told you I was sitting up
21 against the couch. If she leaned up and was
22 sitting kind of between my legs, if her chest
23 touched the couch, then that's why blood would be
24 on that cushion, just like you leaned up against
25 it.

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1 Q Let me show you State's Exhibit number 5. Is that
2 the blood you are talking about on the cushion?

3 A Yes, that's it.

4 Q Is she on the cushion or is she is sitting on that?
5 Is she sitting on the floor at that point in time?

6 A I told you I was sitting on the cushion. She knelt
7 between my knees in front of me. I am sitting
8 here. My feet is on the floor. She knelt up
9 against me leaning in. Her chest is laying on the
10 corner of that cushion, which is why that blood is
11 there.

12 Q So your testimony is at some point in time, she is
13 on her knees?

14 A Yes, sir, right in front of that cushion where I'm
15 sitting. And that blood stain on the corner of the
16 cushion is where she is leaning up against it from
17 the chest wound.

18 Q Is she in pain, Mr. Burke?

19 A She grabbed her chest at first. She said -- she
20 told me we was going to try to work it out and she
21 grabbed the gun, I told her it was too late. She
22 said she is bleeding but she is okay. She wasn't
23 hurting anywhere.

24 Q And so she is on her knees. I guess your testimony
25 is that at some point she tries to go for that gun;

1 isn't that correct?

2 A Yes, sir, that's correct.

3 Q And you've got to agree with me that if someone
4 shot you --

5 MR. NETTLES: Objection. He doesn't have to
6 agree with him.

7 THE COURT: I understand. Just rephrase it,
8 counsel.

9 BY MR. MADSEN:

10 Q And if someone shot you and they've got the gun
11 there, at some point in time you are going to want
12 to get the gun; aren't you? That would make sense,
13 wouldn't it?

14 A It would make sense. But also I trusted her. I
15 put the gun down. I thought we -- you know, like I
16 said, I loved Jenny. Even though I knew she had
17 been with my brother and was trying to take my kids
18 and raise them in that bullshit, I still loved
19 Jenny.

20 Q And you thought you could trust her, but she went
21 for this gun; didn't she?

22 A Yes, sir, I testified to that.

23 Q So you got to that gun first, didn't you?

24 A I didn't know. That's not what I told you. Jenny
25 grabbed the gun. When Jenny grabbed the gun, she

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1 stood up. When she went for the gun and stood up,
2 she had possession of the gun. I jumped up
3 simultaneously, and I grabbed the gun before she
4 could fire because the safety was on.

5 Q So Jenny was no dummy. If she's going to grab a
6 gun, she had the gun this way (indicating); didn't
7 she? But your testimony was that she didn't know
8 how to work the safety?

9 MR. NETTLES: Objection, compound question and
10 assumes facts not in evidence.

11 THE COURT: Break the question up, counsel.

12 BY MR. MADSEN:

13 Q She had this gun, didn't she?

14 A She grabbed the gun off the couch. When she
15 grabbed the gun, she stood up, and I seen what -- I
16 read her like a book. So I went for the gun as
17 well, and I grabbed the gun and we went to
18 struggling.

19 Q Was she holding the gun by the handle, Mr. Burke?

20 A When she went for the gun, she grabbed it. When
21 she stood up, she had the gun. She went to raise
22 it, if I remember correct, she raised the gun and I
23 snatched it from her hand. She hadn't fired the
24 trigger because the safety was on.

25 Q If she raised the gun, she pointed the barrel at

1 you?

2 A I wouldn't say it was direct straight, but it was
3 simultaneously. She reached and grabbed the gun
4 and that was her intent, and I reached and grabbed
5 the gun.

6 Q Would it be fair to say that at some point in
7 time, you gained control of this gun; didn't you?

8 A Yes, sir, and I testified to that as well.

9 Q And it would be fair to say then you shot her a
10 bunch more?

11 A I testified that we started struggling over the
12 gun.

13 Q And you shot her, didn't you?

14 A Yes, sir.

15 Q And on that gun you've got to pull the trigger,
16 don't you?

17 A Yes, sir, that's true.

18 Q And we heard testimony from some of your friends
19 you are a strong guy?

20 A I wouldn't say I was strong, but I wouldn't say I
21 was a weakling.

22 Q Stronger than Jenny though, right?

23 A Yes, sir. I took the gun from her. I told you
24 that.

25 Q Sure. And I guess you could read her like a book.

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1 So it wasn't hard for you to get that gun from her,
2 was it?

3 A Well, I beat her to the punch. She was going to
4 shoot me. I grabbed the gun, and we started
5 fighting over it.

6 Q So why did you shoot her four more times,
7 Mr. Burke?

8 A I told you, we were struggling over the gun. My
9 hand was on the trigger and we are tussling around.
10 I guess that's why there are so many different
11 angles everywhere, sir. I told you that.

12 Q You already testified you are not a weakling.

13 A That's true.

14 Q Why didn't you just take that gun and step back at
15 that point in time, Mr. Burke?

16 A She was fighting me for the gun. I told you that.
17 I can't tell you why it wasn't choreographed. I
18 stepped back and got the drop on her. She grabbed
19 it. I got the gun from her. She was fighting for
20 it. We were -- the gun went off. I want to say I
21 thought it was only four shots total, but y'all say
22 it's five.

23 Q And when you are fighting her for that gun, are you
24 y'all standing on your feet or are you lying on the
25 ground?

1 A We are standing up that time, and Jenny dropped to
2 her knees. She had her hands up. That's when she
3 was trying to fight for the gun, and I tried to
4 take the gun and stick it to her chest, and Jenny
5 collapsed to the floor.

6 Q You were standing up the whole time? Is that what
7 you are testifying to?

8 A Yes, sir, that's true.

9 Q So at some point in time when y'all are struggling
10 for the gun, then she goes down to her knees?
11 Isn't that what you are testifying to?

12 A Yes, sir.

13 Q And I believe you told Sergeant Frier that the last
14 shot you believe went in her head; isn't that
15 correct?

16 A I told you, if you read that statement, it's just
17 what I told you. I tried to put the gun to her
18 chest, but I may have hit her in the head. I
19 didn't realize she was hit in the head until she
20 hit the floor and blood was coming out from under
21 her head. I didn't really know that she was
22 actually hit there. To be honest, I didn't look
23 and see where she was hit, sir.

24 Q But that's what you told Sergeant Frier; isn't that
25 correct?

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1 A Yes. I testified that I went to put the gun to her
2 chest and we were fighting over the gun and that
3 Jenny collapsed to the floor.

4 Q And you would agree with me that Sergeant Frier
5 hadn't -- didn't know where Jenny was at that point
6 in time when you were giving that statement; isn't
7 that correct?

8 A Yes, sir, that's true.

9 Q So there's not a lot of doubt that you ended up
10 hitting Jenny in the head, is there?

11 A No, sir.

12 Q And you recall the doctor's testimony that she was
13 shot, I guess, right about here (indicating); isn't
14 that correct?

15 A Yes, sir. But even when I moved the body, I never
16 seen the exact location of the wound.

17 Q But there was a lot of blood, wasn't there?

18 A I didn't stick around to see the blood. There was
19 blood coming out from under her when I got back.

20 Q And the bullet ended up somewhere down here
21 (indicating)?

22 MR. NETTLES: Objection. How can he know
23 where the bullet ended up?

24 MR. MADSEN: If he can answer that.

25 THE COURT: Again, he ask the question. But,

1 ladies and gentlemen, remember again, the lawyer's
2 question has no weight. The only thing you consider is
3 the answer of the witness. Go ahead.

4 BY MR. MADSEN:

5 Q Can you answer it?

6 A What is the question again now?

7 Q You heard the testimony. You heard the testimony
8 about where the wound was and where the bullet
9 ended up back here (indicating)?

10 A If that was the doctor's's testimony, I guess we
11 would have to agree with it.

12 Q And you would agree with me then that that would be
13 a downward angle, wouldn't it?

14 MR. NETTLES: Objection. How can he answer
15 that?

16 THE COURT: He can ask him. If the witness
17 doesn't know, he can say he doesn't know. Again,
18 jurors, I remind you a lawyer's question has no weight.
19 You consider only the answer of the witness.

20 A I testified that she was on her knees at this time
21 fighting me for the gun. I went to put the gun to
22 her chest. I guess I hit her in the head. I guess
23 if I am standing up and she is on her knees, I
24 guess it does go down like the angle says. I don't
25 see what you are getting in here. I thought I

1 covered that.

2 Q And you would agree with me that at least on that
3 first shot, it occurred in this living room area
4 right around in there (indicating)?

5 A No, sir, that's not what I said neither. I was
6 standing in the living room area, but Jenny was
7 standing in the kitchen.

8 Q And Brandon saw his mom get shot, didn't he?

9 A Yes, sir, the first shot he did. Then he went
10 outside.

11 Q And you were pretty sure that Dalton saw it, too?

12 A The statement says -- I said, I think in the
13 statement, Dalton may have seen it; but I'm not
14 sure.

15 Q In your statement you say: I think Dalton was
16 standing there also. Does that sound right?

17 A That's what I said, I think Dalton was; but I can't
18 be sure of that, no, sir.

19 Q So before you shot her the other times, how long
20 did y'all sit in there and talk?

21 A This whole incident, we didn't sit there for hours
22 choreographing this. I shot and the kids ran
23 outside. I put the gun to my head. You know, she
24 comes to me: Don't, the kids need their daddy.

25 I sat down on the cushion of the chair. She

1 knelt between my legs. She went for the gun. I
2 went for the gun. I took it from her. We started
3 fighting over the gun, and she was shot some more
4 times.

5 Q And when Brandon and Dalton and her came in, I
6 guess you were either in this hall (indicating) or
7 this bedroom (indicating)?

8 A I was between -- I had been in that bedroom. And
9 when they came in, I was about the place where the
10 hall sticker is at.

11 Q So if you open that door, you are not going to see
12 you at that point in time?

13 A That's true. I put in my statement that I came out
14 from behind the door, and that's when I shot her.

15 Q And you would agree with me that this is all six
16 days before Christmas, isn't it?

17 A Yes, sir, that's correct.

18 Q And you would agree with me that you and her had
19 that hearing scheduled for two days later, isn't
20 that true, on the 21st?

21 A Yes, sir, that's true and that's a part of the
22 problem. My kids were going to be with me at
23 Christmas, and that was weighing heavily on my mind
24 at this time.

25 She had made the statement that, "The kids had

1 a new daddy now. It will be a lonely Christmas,
2 you son of a bitch." And I wasn't -- as I said, I
3 wasn't -- I couldn't wake up Christmas morning and
4 not do the things that I have always done with my
5 kids.

6 Q Sure.

7 A I took a lot of pride in that.

8 Q But you would agree with me when you have
9 differences between husband and wife for that, the
10 proper way to do it is to air it out in court;
11 isn't that true?

12 A Yes, sir, I would say it was.

13 Q But you didn't wait for that, did you?

14 A No, sir.

15 Q You decided to take matters into your own hands,
16 didn't you?

17 A I wouldn't say that neither. I didn't go there
18 with the intent to kill her.

19 Q At some point in time, you left and you took the
20 kids with you; didn't you?

21 A Yes, sir.

22 Q And y'all went to that secluded pond in the woods;
23 isn't that right?

24 A After we rode around for a while like I told you.

25 Q And it's in December; isn't that true?

1 A Yes, sir.

2 Q And you left those kids there; isn't that correct?

3 A Yes, sir. But it being December, it was not -- it
4 was not cold outside. It was actually pretty sunny
5 that day. It got colder that night. But at that
6 time, midday, it was actually real, real sunny and
7 nice outside.

8 Q And you left the kids there by that pond, and you
9 would agree with me that kids and water can create
10 a dangerous situation; can't it?

11 A Yes, sir, it was, but they wasn't right on the
12 edge. Like I said, that was a bad mistake I made
13 as a father. I thought I was doing what I thought
14 to be the right thing, which was the wrong thing.
15 I --

16 Q So you left them there --

17 MR. NETTLES: Objection, Your Honor. I think
18 he was still talking.

19 THE COURT: If you are not through, you can
20 answer it. Finish your answer.

21 BY MR. MADSEN:

22 Q I'm sorry, I thought you were done.

23 A I'm confused now. I don't know where I was at.

24 Q And so once you left them, did you go straight back
25 to Drive at that point in time?

1 A No, sir, I told you I went to Terry's.

2 Q And then after you went to Terry's, did you come
3 back and check on the kids?

4 A No, sir, I went straight from Terry's to Jenny's
5 house.

6 Q And when you got to Jenny's house, you found Jenny
7 dead?

8 A Jenny was laying on the floor, yes, sir.

9 Q Right in this living room (indicating)?

10 A Yes, sir. I didn't -- that's close. That would be
11 correct, sir.

12 Q And you remember the Christmas tree, don't you?

13 A Yes, sir. But I like to point out that wherever --
14 you made a big deal of saying she was shot in front
15 of the Christmas tree. If you look at the living
16 room with all that big furniture, there is nowhere
17 you can lay in that floor that you are not in front
18 of that Christmas tree.

19 Q That somehow makes it better, Mr. Burke?

20 A No, sir, but I didn't put a bow up on her head and
21 stick her under the tree neither, sir.

22 Q And when you went back, you dragged her out of that
23 house; didn't you?

24 A Yes, sir, I testified that I put her in the car.

25 Q And you tried to clean up, didn't you?

1 A No, not -- I tried to burn the house down. I
2 didn't try to clean up nothing.

3 Q You told Sergeant Frier that you picked up shell
4 casings. I think you said you picked up three
5 shell casings, didn't you?

6 A I did grab a few shell casings, and then I
7 attempted to burn the house down.

8 Q And you attempted to burn the house down because
9 you wanted to clean up that blood evidence; isn't
10 that correct?

11 A That's what I put in my statement, but that was not
12 my sole intention. I had originally poured the gas
13 there to burn it down for all that other shit that
14 I saw.

15 Q When you got there, Jenny was bloody, wasn't she?

16 A I seen blood on the floor, but it wasn't like she
17 was -- I didn't really pay attention. I was in a
18 hurry to get back to my kids.

19 MR. MADSEN: Let me mark these for
20 identification.

21 (State's Exhibits Number 52-53 are marked for
22 identification).

23 BY MR. MADSEN:

24 Q Let me show you what has been marked as State's
25 Exhibit Number 53 for I.D. purposes. Do you

1 recognize that photograph?

2 A Yes, sir. That looks like they are standing back
3 over here where I tried to set the house on fire,
4 taking a picture into toward the living room area.

5 Q So you recognize that as the living room?

6 A Yes, sir.

7 Q And I guess that's the Christmas tree?

8 A Yes, sir.

9 Q And that (indicating) is I guess kind of the --

10 A And that's the Rebel flag on top of the T.V.

11 Q Sure. And that's the kitchen sink and a little bit
12 of those groceries; isn't that correct?

13 A I guess that would be groceries, sir.

14 MR. MADSEN: Your Honor, at this point in
15 time, the State would move State's Exhibit Number 53
16 into evidence.

17 MR. NETTLES: Without objection.

18 THE COURT: Without objection.

19 (State's Exhibit Number 53 is received into
20 evidence).

21 BY MR. MADSEN:

22 Q Let me show you what has been marked as State's
23 Exhibit Number 52 for I.D. Take a look at that.
24 Look at State's Exhibit Number 53. Do you
25 recognize what State's Exhibit Number 52 for I.D.

1 is a close-up picture of?

2 A Yeah, of the sink area.

3 Q Of the sink area?

4 A Yes, sir.

5 MR. MADSEN: Your Honor, at this point in
6 time, we would move to move State's Exhibit Number 52
7 for I.D. into evidence.

8 MR. NETTLES: Without objection.

9 THE COURT: Without objection.

10 (State's Exhibit Number 52 is received into
11 evidence).

12 BY MR. MADSEN:

13 Q And it looks that the sink, and I guess the base of
14 the faucet; isn't that correct, Mr. Burke?

15 A I think that's the sink and the stopper laying
16 beside it.

17 Q What about that right there (indicating), is that
18 the faucet?

19 A Yes, sir.

20 Q And right down there on the faucet, it looks like
21 something right at the base of that. What is that,
22 Mr. Burke?

23 A It's red. It could be rust or it could be blood.
24 I'm not sure. It's red. But if you look I think
25 that's one of those old style sinks, one when water

1 leaks around the faucet like that, it looks like
2 rust to me, sir.

3 Q When did you wash your hands, Mr. Burke?

4 A I never did.

5 Q And you admit that you attempted to burn down that
6 house; isn't that correct?

7 A Yes, sir.

8 Q And I believe that your testimony was that when you
9 left, that area that you set on fire was actually
10 on fire when you left; isn't that correct?

11 A Yes, sir, I just struck the lighter to it right
12 there.

13 Q And you would agree with me, Mr. Burke, that you
14 told Sergeant Frier there was a reason that you did
15 that; isn't that correct?

16 A That's what the statement says, yes, sir.

17 Q Are you saying that that's not what you told him?

18 A No, sir, that's not what I'm saying. That's what
19 the statement says.

20 Q So you are not denying that then, right?

21 A No, sir.

22 Q And the reason that you told him --

23 A But I also said I intended to burn the house
24 because of that other stuff that I testified to.
25 Don't leave that out just because it's not in the

1 statement.

2 Q Sure. And State's Exhibit Number 17, that's where
3 you tried to burn; isn't that right?

4 A Yes, sir.

5 Q And you told Sergeant Frier that you wanted to get
6 rid of that blood evidence; isn't that true?

7 A That's what he put on the paper, but I don't
8 remember saying it, sir.

9 Q Obviously the place didn't burn down. We know
10 that; isn't that correct?

11 A Yes, sir.

12 Q And your plan, you told Sergeant Frier was --

13 MR. NETTLES: Objection. I object to the
14 characterization of plan.

15 THE COURT: I think you can rephrase it. I
16 think you were starting to say he told Sergeant Frier
17 something.

18 BY MS. MADSEN:

19 Q You told Sergeant Frier that you wanted to make it
20 look like Jenny had left with the kids; isn't that
21 correct?

22 A I don't remember saying that, sir, but if it's in
23 the statement, as I said I didn't -- the blood
24 evidence -- I guess it would be a mixture of
25 everything. I testified that I wanted to clean it

1 up.

2 Q You would agree that you said: I thought it might
3 look like Jenny left with the kids and burned the
4 house?

5 A If it's in the statement and that's what it says,
6 but I notice it don't have quotation marks around
7 it like the other stuff does that I said.

8 Q Sure. But at some point you found out from
9 somebody that that house hadn't burned down; isn't
10 that correct?

11 A No, sir, I didn't. I didn't know that, not until
12 after I got, you know, locked up. I didn't know
13 it.

14 Q Well, at some point you knew that the Sheriff's
15 Office had the warrant for you; isn't that correct?

16 A I testified I went home the next morning, and there
17 was a warrant on the table for assault and battery
18 with intent to kill. I turned myself in.

19 Q And you would agree with me that you put Jenny's
20 dead body in that station wagon that you had,
21 right?

22 A Yes, sir, I said that.

23 Q And at some point in time, you tried to drag her
24 out around the neck; isn't that correct?

25 A No, sir, that's not correct.

1 Q Mr. Burke, can you explain how she got the ligature
2 marks around her neck then?

3 A I didn't know that she did have, sir.

4 Q So it's your testimony that you didn't do that to
5 her?

6 A If I did, I don't recall it. I told you that I
7 shot her and what happened, but I didn't -- I don't
8 remember grabbing her by the neck. I don't know if
9 they got there when I moved the body across the
10 wooded terrain. I don't know.

11 Q Let me show you State's Exhibit Number 18.

12 A Yes, sir.

13 Q What is that on the PlayStation cord?

14 A Blood.

15 Q You didn't try to use that cord and drag her out by
16 the neck?

17 A No, sir, I did not. Is that in the statement, sir,
18 that we have been relying on through this whole
19 trial? I don't think it is. I think that's your
20 assumption.

21 Q Mr. Burke, this is the car that you put her in;
22 isn't that correct?

23 A Yes, sir, that's correct.

24 Q The same one that you later, after you got rid of
25 her body, put your kids back in; isn't that

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1 correct?

2 A Yes, sir, my kids was in that car.

3 Q And you would agree with me that you took her --
4 was it some place apparently that you knew off of
5 Elbert Taylor Road; isn't that correct?

6 A Yes, sir. I testified that we had worked on a
7 house right down the street from there, and that's
8 how we knew the wooded terrain. We went -- one day
9 for lunch we was waiting for the guy to come back
10 with the key. J.J. had a four-wheel drive. He
11 said it looked like some place that when it rained,
12 him and Leaphart could go mud riding. That's why
13 that stuck out.

14 Q And when you killed her on that day on December 19,
15 Mr. Burke, tell me, how much do you think she
16 weighed?

17 A I don't know, sir. I'm not a good guess of weight.
18 Jenny was obese. She was big.

19 Q She was still a big girl then; isn't that correct?

20 A Yes, sir, that's true.

21 Q When you drug her out of that place, that's just
22 dead weight; isn't it?

23 A Yes, sir.

24 Q And you put her in this car by yourself? Is that
25 what your testimony is?

1 A Yes, sir, I struggled. It was hard but, yes, sir.

2 Q And at some point in time, you took her off that
3 Elbert Taylor Road and your testimony is that you
4 dragged her out there and buried her under those
5 sticks and leaves; isn't that correct?

6 A Yes, sir, I said I put her out there and covered
7 her up with limbs and debris. I said that.

8 Q But, Mr. Burke, there's two set of footprints out
9 there.

10 MR. NETTLES: Objection. We don't have any
11 evidence of that.

12 THE COURT: I haven't heard that.

13 MR. MADSEN: Colonel Seboe testified to it,
14 and we have some photographs that are in evidence, Your
15 Honor.

16 THE WITNESS: I don't recall that.

17 THE COURT: Wait, wait. Let me see the
18 photographs. I don't recall the testimony.

19 (Hands to Court).

20 THE COURT: Do you need to look at these,
21 Mr. Nettles?

22 MR. NETTLES: Yes, sir, I have looked at them.

23 THE COURT: That's enough to allow him to ask
24 the question anyway.

25 MR. NETTLES: I think, if I may, Your Honor,

1 it assumes a fact that is not in evidence. I think he
2 can ask -- I mean, I think there is a way he can ask
3 questions; but he is assuming a fact that is not in
4 evidence.

5 THE COURT: I understand. I will allow him to
6 ask it based on that photograph.

7 Ladies and gentlemen, let me tell you, again
8 remember, it's up to you to determine. You are the
9 finders of fact. You determine whether or not you find
10 there are two sets of footprints.

11 You decide whether or not what any previous
12 testimony on it was. Remember again anything the lawyer
13 says is not evidence. You go only on what has come from
14 the witness stand and from the documents, of course.

15 Go ahead, Mr. Madsen.

16 MS. MADSEN: Thank you, Your Honor.

17 Q Mr. Burke, as you said, you want to be as truthful
18 as possible?

19 A Yes, sir, that's true.

20 Q Who put those second set of footprints out there?

21 MR. NETTLES: Objection.

22 A I told you --

23 MR. NETTLES: Objection, assumes facts not in
24 evidence.

25 THE COURT: I understand. As I indicated, I

1 will let him ask the question based on that.

2 If the witness says there was none, ladies and
3 gentlemen of the jury, you will have to give -- decide
4 what weight to give to his answer, not the question. Go
5 ahead.

6 A If there is a second set of footprints, it must
7 have been -- I was there myself.

8 Q And you want to be as honest as possible; isn't
9 that correct?

10 A Everything else has been honest, sir. I guess you
11 are going the same place you tried to go with that
12 cord.

13 Q On State's Exhibit Number 32, do you recognize
14 that, Mr. Burke?

15 A It would look like the place where I laid the limbs
16 over the body.

17 Q And you know who is underneath this pile; don't
18 you, Mr. Burke?

19 A Yes, sir, I ain't disputed it.

20 Q And you went back and you got your kids at some
21 point in time; isn't that correct?

22 A Yes, sir. I think Brandon's statement says 30
23 minutes. It wasn't long. I told you I was in a
24 hurry to get back to my kids.

25 Q At some point in time, you eventually ended up at

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1 your aunt's house; isn't that correct?

2 A That was late at night after 11, 12.

3 Q You left your kids outside; isn't that correct?

4 A Yes, sir.

5 Q In that car?

6 A In a running car. Y'all said an unrunning car. My
7 testimony is different. The car was left running.

8 Q No, sir, I didn't testify to that. Brandon did.

9 A I don't think Brandon did. I think Scottie Frier
10 and them said that, but I don't think Brandon said
11 the car was unrunning.

12 Q You left that gun, a loaded gun, State's number 46,
13 in the car with those kids; didn't you?

14 A It was up under the driver's side seat. I didn't
15 take it with me when I left with my aunt.

16 Q I show you State's Exhibit Number 26. Do you
17 recognize that?

18 A Yes, sir, it looks like the gun in front of the
19 seat right there.

20 Q Does that gun look like it's under the seat?

21 A It's in front of it. It don't look like it's under
22 it, no, sir.

23 Q And you would agree with me that someone sitting in
24 the passenger side could see that gun, couldn't
25 they?

1 A Yeah, I guess so if they looked down there.

2 Q And you would agree with me that at some point in
3 time, you told Brandon you had talked with his
4 mother; isn't that correct?

5 A When I picked the kids back up, I did tell Brandon
6 that -- he asked how was his mom. I told him -- I
7 lied to him. I told him she was going to be all
8 right.

9 Q You told him that you had talked to her?

10 A Yes, sir.

11 Q And this was December 19, 2001; isn't that correct?

12 A Yes, sir.

13 Q And you and her had separated, when did you say,
14 June 15? Was that what your testimony was?

15 A That's the official day that she packed her stuff
16 and left, yes.

17 Q And you would admit that you told a lot of people
18 that you were going to kill her?

19 A I didn't, no. I wouldn't say that. I told a lot
20 of people I would if she took my kids, but I didn't
21 tell nobody that I was going to go kill her.

22 Q And you told Clint Addy that you knew of a place to
23 dispose of the body; isn't that true?

24 A No, sir, that's not true.

25 Q So you never told Clint Addy that you knew of a

1 place where you could put someone, and the bones
2 would go away?

3 A No, sir, I did not.

4 Q So you would agree with me that you knew about your
5 brother and your wife for five, six months, I
6 guess?

7 A Seven.

8 Q You knew about them for seven months?

9 A I first found out like the first week of June, last
10 week of May. It was December. So that's about
11 seven months.

12 Q And you never killed her during that seven months;
13 isn't that correct?

14 A No, sir, I never went to her house and bothered her
15 neither. I never went to her house and caused
16 disturbances. I didn't go around those people. I
17 stayed with my kids. I wanted to raise my kids by
18 myself. I didn't need her, but I wasn't going to
19 let them take them from me neither.

20 Q Instead you decided to take the kids' mother?

21 A No, I guess that's what you're assuming. I didn't
22 go there to kill her, but it ended up that way.

23 MR. MADSEN: That's all the questions I have.

24 THE COURT: Any redirect?

25 MR. NETTLES: No questions.

1 THE COURT: You can step down. Any other
2 witnesses?

3 MR. NETTLES: No, sir.

4 THE COURT: Ladies and gentlemen, the defense
5 has now rested their case. Is there any rebuttal from
6 the State?

7 MR. MADSEN: No, Your Honor.

8 THE COURT: That means then that all the
9 evidence in the case is now complete. The next step is
10 to have the final closings by the attorneys. Then I
11 will give an instruction on the law. In just a short
12 while here, it will be your case.

13 I have got some matters to take up with the
14 lawyers. It shouldn't take but actually a couple of
15 minutes to do. I will ask you to step to the jury room.
16 Remember, don't talk about the case while you are in the
17 jury room.

18 (The jury retires to the jury room).

19 THE COURT: The jury is secured. First any
20 motions, further motions, from the defense?

21 MR. NETTLES: Your Honor, I would renew all
22 our previous objections, especially the ones you ruled
23 against me on. I would make a motion that the
24 government, at the conclusion at this point, has not met
25 all the elements of the charges they brought.

1 THE COURT: I note the motions and would deny
2 all the motions, Mr. Nettles. Any motions from the
3 State?

4 MR. MADSEN: No, Your Honor.

5 THE COURT: Counsel, let's talk about the
6 charges if we might for a moment. Why don't we take a
7 break and let everybody mill around some. Let's go back
8 to chambers for a moment. Then we will put on the
9 record what we get. There's no need to put all this on
10 the record.

11 (Whereupon there was a recess).

12 THE COURT: Counsel, let me note that we
13 reviewed the charge to the jury. I would note that
14 there are really no objections to any parts of the
15 charge that you have, except on the murder/manslaughter.

16 As I told you, what I will do is I will charge
17 murder and manslaughter as a lesser included. I will,
18 of course, include in that use of deadly weapon as
19 evidence of malice that they can consider. Also, I will
20 consider -- I will include the felony murder rule.

21 Also, I will charge as part of the
22 manslaughter issue the language that if at the time of
23 the killing, the passions had cooled or a sufficiently
24 reasonable time to have elapsed, that's it murder and
25 not manslaughter.

1 Also, I will charge the exercise of a legal
2 right is never deemed sufficient provocation, that no
3 words, however opprobrious or bad, will constitute legal
4 provocation.

5 Also, that the Defendant's own actions, no
6 matter how outrageous or violent, cannot serve as
7 sufficient level provocation.

8 The State also asked that I include language
9 saying that if someone suspects a spouse of adultery and
10 lies in wait to catch her at it and kills her is guilty
11 of murder rather than manslaughter.

12 As I indicated, I will not charge that because
13 the evidence didn't indicate that the -- there is
14 nothing in evidence to say that the Defendant had gone
15 over to catch her in adultery. He had gone over, as I
16 understand it, to see the place where they lived.

17 Any exception to that? Anything to add or
18 take away from the charge from the State?

19 MR. MADSEN: Besides what we previously talked
20 about, no, Your Honor.

21 THE COURT: Of course, I note on this last
22 one, this is over your objection as I recall it.

23 MR. MADSEN: Yes, sir.

24 THE COURT: You wanted the spousal adultery
25 language in, but I did not do it; is that correct?

1 MR. NETTLES: And we did not feel that
2 manslaughter was appropriate.

3 THE COURT: Okay. Anything, Mr. Nettles?

4 MR. NETTLES: Nothing, Your Honor.

5 THE COURT: As I indicated, counsel, I will
6 give the jury a copy of the charge. Any exception to
7 that from the State?

8 MR. MADSEN: No, Your Honor.

9 THE COURT: From the defense?

10 MR. NETTLES: I'm sorry?

11 THE COURT: I said I will give the jury a copy
12 of the charge. I believe you had previously said you
13 agreed with that?

14 MR. NETTLES: Yes, sir.

15 THE COURT: Mr. Moses, you will open on the
16 law; is that right?

17 MR. MOSES: Just briefly, Your Honor.

18 THE COURT: With a little State versus Rogers
19 leniency included. Then Mr. Nettles and then
20 Mr. Madsen. Is the State ready?

21 MR. MADSEN: Yes, Your Honor.

22 THE COURT: Is the defense ready?

23 MR. MADSEN: Your Honor, we anticipate using
24 some poster boards as demonstrative.

25 THE COURT: Have you had a chance to look at

1 those, Mr. Nettles?

2 (Attorneys confer).

3 MR. NETTLES: Yes, sir, briefly.

4 MR. MOSES: The State is ready, Your Honor.

5 THE COURT: Bring the jury in.

6 (The jury returns to the courtroom).

7 THE COURT: All parties and attorneys are in
8 the courtroom, and all jurors have returned and are now
9 with us.

10 Ladies and gentlemen, one thing I wanted to do
11 was ask you, first of all, we are, as you know preparing
12 to go to the final stage, the final closings and the
13 charge on the law at the close of the case.

14 I realize it's 6:00 o'clock in the evening.
15 Of course, it's on Friday evening. Do any jurors have
16 any particular problems that you feel like are
17 substantial enough that they are going to be able to
18 interfere with your being able to concentrate or work as
19 a juror at this time, anybody?

20 (There is no response).

21 THE COURT: When we get through, depending on
22 the time, if any of you have a problem, just let me know
23 before you go in the jury room. I will certainly try to
24 work with you as much as I can.

25 At this time we are going to have the closing

1 statements by the attorneys, and then I will give you a
2 charge on the law. Mr. Moses will give the closing for
3 the State on the law.

4 Then, of course, Mr. Nettles will close for
5 the defense, and Mr. Madsen will have a right to respond
6 for the State. Let me ask you to please give the
7 attorneys your undivided attention. Mr. Moses.

8 **CLOSING STATEMENT**

9 MR. MOSES: Good evening, ladies and
10 gentlemen. Briefly I am going to discuss what the law
11 of murder is, and the judge will later tell you exactly
12 what the law of murder is. He will go over the other
13 charges: Burglary, arson, attempted arson, and
14 possession of a weapon during the commission of a crime.

15 I have elected not to go over that with you.
16 I am just going to talk to you about murder and another
17 charge, a charge called voluntary manslaughter. I want
18 to try to explain the difference to you.

19 Murder is the killing of any person with
20 malice aforethought, either express or implied. Malice
21 aforethought, that's a term that you hear. But what
22 does it mean?

23 Malice is defined as having ill will or
24 hostility toward another human being. Malice can be
25 inferred by the use of a deadly weapon. Malice can be

1 shown by acts of preparation. Malice can be shown by
2 evidence of prior planning.

3 Malice is a condition of the mind, ladies and
4 gentlemen. Malice is shown by someone acting with a
5 dark and evil heart, someone that is intent on doing
6 wrong and knowing it to be wrong.

7 If we prove malice, it's murder, whether the
8 Defendant meant for the victim to die or not. If we
9 prove malice, it is murder whether he intended for the
10 victim to die or not.

11 If the victim was killed with a deadly weapon,
12 you can infer malice. If there is a felony murder,
13 ladies and gentlemen, in other words, an inherently
14 dangerous felony, malice can be inferred. If a murder
15 is committed during the commission of an inherently
16 dangerous felony, malice can be inferred.

17 Malice can be formed at the very second the
18 fatal shot is fired. It doesn't have to be minutes,
19 hours, weeks. At the very second that that shot is
20 fired, malice can be inferred. If the Defendant meant
21 ill will towards the victim at the very second the shot
22 was fired, then malice can be inferred. Murder, ladies
23 and gentlemen.

24 I want to talk to you a little bit about
25 voluntary manslaughter. Voluntary manslaughter is a

1 lesser included offense of murder. Voluntary
2 manslaughter is the unlawful killing of another without
3 malice whether it's express or implied. It's the
4 killing of somebody without malice.

5 Voluntary manslaughter requires two things.
6 It must be both a heat of passion and a sufficient legal
7 provocation that must be present at the time of killing.
8 If you find that there is a heat of passion with no
9 sufficient legal provocation, murder. If you find
10 sufficient legal provocation, no heat of passion,
11 murder.

12 It's got to be both. Both a heat of passion
13 and a sufficient legal provocation must be present at
14 the time of killing. Heat of passion alone will not
15 suffice to reduce murder into voluntary manslaughter.

16 Sudden heat of passion upon sufficient legal
17 provocation that mitigates the felonious killing to
18 manslaughter must be such as would naturally disturb the
19 sway of reason and render the mind of an ordinary
20 person -- render the mind of an ordinary person --
21 incapable of cool reflection and produce what according
22 to human experience may be called an uncontrollable
23 impulse to do violence.

24 If there is no cool-down period, if it's a
25 sudden impulse and have no time to reflect on the

1 actions, that is voluntary manslaughter. Now, a
2 cool-down period can be anywhere from five minutes to
3 six months. That's voluntary manslaughter. If you find
4 malice, it's murder.

5 Voluntary manslaughter, a sufficient legal
6 provocation example would be -- and this is just one
7 example out of many -- would be if you were to walk in
8 on your spouse in the act of having a sexual
9 relationship with somebody else and your heat of passion
10 rose to such a level that you couldn't control yourself
11 and you killed them, then you have both heat of passion
12 and sufficient legal provocation if you walk in on them
13 during the act. However, if there is enough time for a
14 cool reflection period, that a reasonable person could
15 cool off, it's murder.

16 THE COURT: Mr. Nettles.

17 CLOSING STATEMENT

18 MR. NETTLES: Thank you. We came before you
19 at the beginning of this trial, and we told you that
20 Roger Dale Burke was not going to be found not guilty of
21 all counts. Roger Dale Burke took the witness stand,
22 and Roger Dale Burke told you that he was guilty of a
23 number of different crimes, a number of very serious
24 crimes.

25 After having looked at the evidence and

1 listened to Roger Dale's testimony, we feel that you are
2 going to find him guilty of burglary and you are going
3 to find him guilty of attempted arson and you are going
4 to find him guilty of a felony handgun during the
5 commission of a felony.

6 The issue has come down to this. The issue
7 has come down to whether you 12 people believe he is a
8 murderer. That's what this has come down to. When you
9 listen to -- they have just talked about the law, and
10 you will listen to the judge talk about the law. There
11 is a lot of wiggle room there. By that I mean the law
12 is designed to leave room for people like yourself to
13 decide what things mean.

14 What you decide is what he did. It's not
15 math. It's just not math. It's not two plus two equals
16 four. You have to sit here at 6:00 o'clock on a Friday
17 night and listen to all this evidence and decide what
18 you collectively believe is what he did.

19 Let me talk to you for just a second about the
20 whole notion of malice. You hear a lot of discussion
21 about it. Ultimately when you listen to it, you are
22 going to be able to decide whether his heart was full of
23 malice. You are going to allowed to decide that, and no
24 one is ever going to be able to question that.

25 In doing that, I mean, one of the things you

1 are going to look at is malice just for purposes of the
2 law. The judge is going to tell you this. Malice is a
3 wickedness. In the law malice is referred to as a term
4 of art. It goes on to describe it.

5 In other words, it is a technical term which
6 means wickedness and with which there is no just cause
7 or excuse. It is something which springs from
8 depravity, from a heart devoid of social duty and
9 fatally bent on mischief. All of us can think of people
10 that fit that definition. We read about them in the
11 paper all the time.

12 Hearts devoid of social duty, fatally bent on
13 mischief, wickedness from which there is no just cause
14 or excuse. There is no excuse for what Roger Dale did.
15 We didn't present the evidence that we presented as an
16 excuse.

17 But Roger Dale told you what was in his heart.
18 And we sat through a cross examination that did nothing
19 to change that. Roger Dale told you why he did what he
20 did, and he needs to be punished, and he needs to be
21 punished for killing his wife.

22 And the issue is: What's the appropriate
23 punishment, what is the just punishment? It's
24 manslaughter, a serious charge. This isn't a slap of
25 the wrist. This isn't having to go home and you let him

1 off on a manslaughter charge.

2 Let's be clear, there is murder and then there
3 is manslaughter, very serious charges that send a very
4 serious message to the community. It makes it very
5 clear to people that if you go in somebody's house and
6 do something like this in Lexington County, you are
7 going to be punished.

8 Ladies and gentlemen, there is something to be
9 said for the fact that it was his brother. I mean, you
10 know, when you start talking about manslaughter,
11 voluntary manslaughter -- there is murder and then there
12 is manslaughter. Those are the two most serious charges
13 we have got in our society.

14 It's the felonous taking of a life of another
15 human being -- and the judge is going to read this to
16 you again -- in sudden heat and passion upon a
17 sufficient legal provocation.

18 You heard what he went through before this
19 happened. It wasn't pretty. And who knows what that
20 would do to anyone. And it's not -- this is the last
21 chance I get to talk to you. They got to go before me,
22 and the government gets to go after me.

23 I don't know what they are going to say, and I
24 am going to have to kind of anticipate it now. But one
25 thing they might try to do is to break down what

1 happened to Roger Dale as if the only thing that
2 happened to him was one of these many events.

3 Roger Dale was on direct for a long time, but
4 it was a long story because it was a long road that he
5 had to hoe to get to where it was. If anybody tries to
6 take one thing and say:

7 Well, you know, this wasn't that bad and this
8 wasn't that bad and the fact that it was his brother,
9 that wasn't that bad. It happens all the time. The
10 fact that his family kind of blew him off, that's not
11 that bad. It's the whole package. You've got to look
12 at the whole package.

13 The law recognizes that sudden heat and
14 passion may affect one's self control for a reasonable
15 period of time. It thus temporarily disturbs the sway
16 of reason and then reduces the crime of murder to
17 voluntary manslaughter.

18 If the homicide was committed in sudden heat
19 and passion and provided there was sufficient legal
20 provocation, some legal provocation, such as would cause
21 an ordinary person of prudence, in other words, an
22 average person to become enraged or lose control of
23 himself temporarily.

24 When we start talking about sending a message
25 to the community, I mean, y'all, I am talking about a

1 man who's not a rich man; and they were taking his
2 children.

3 He thought they were going to take his
4 children. There is not a single person that the
5 government was able to bring you that doubted the fact
6 that that man loved his children.

7 That man only wanted the best that his
8 children could get. That man wanted his children to be
9 in a place where they had a chance to have a better
10 life.

11 He didn't think that's where that was going to
12 happen. He didn't think that this is where his children
13 were going to learn to be the kind of children that were
14 going to get to have a better life than him.

15 Y'all get to decide that. He is not -- this
16 isn't: Find him not guilty. You are going to look at
17 murder. The judge is going to tell you that if there is
18 a reason -- if you have got a doubt about whether it's
19 murder or manslaughter, you have got to find it's
20 manslaughter, guilty of manslaughter.

21 You are going to find him guilty of burglary.
22 You are going to find him guilty of arson. You are
23 going to find him guilty of having a gun in there.

24 His brother took his wife, his brother took
25 his kids and put them in a -- was sleeping with his wife

1 in a bedroom where they were glorifying killing people
2 because they were a different color.

3 And if that's not the kind of thing -- is that
4 the kind of thing that you think might cause that man to
5 do something that he is not proud of, kill his wife?
6 You get to decide that.

7 I'm sorry you are having to do it at
8 6:00 o'clock on Friday, and I'm sorry you are here. But
9 please don't lose sight of the fact that this is a very
10 important day for that man. Y'all are the only thing he
11 is going to have.

12 You know, we talk about putting families
13 first. He should have waited on the court hearing. He
14 should have and he admits that. This is not an excuse,
15 but this is a world where we have to accept that people
16 are human.

17 This is a world where we have to accept that
18 both love and hate make people do things they shouldn't
19 do. This is a law that recognizes that.

20 Our criminal justice system recognizes that
21 people are human, and our criminal justice system
22 recognizes that sometimes the law recognizes -- the law
23 recognizes, and the judge is going to tell you this
24 again -- the law recognizes that sudden heat and passion
25 may affect one's self control for a reasonable period.

1 It thus temporarily disturbs the sway of reason and then
2 reduces the crime of murder to manslaughter.

3 If I may, allow me the privilege to try to --
4 to try to -- anticipate what the government lawyer is
5 going to say after I sit down. If this was a planned
6 thing, he didn't do a very good job.

7 I mean, do you really think it was planned? I
8 mean, he told everybody. They want it both ways, both
9 that he told everybody he was going to kill her and then
10 he had sort of this little planned thing.

11 He was going to drive the car around back,
12 but, you know, his son was right there. He went and got
13 the body and then he turned himself in. He made a
14 series of tragically bad decisions.

15 And the question is why did he make them? Was
16 it because he had a wickedness for which there was no
17 just cause or excuse, no just cause? He thought his
18 brother was dealing in drugs.

19 And, ladies and gentlemen, this (indicating)
20 ain't heritage. This is hate. This is hate. That
21 right there is hate. No heritage about that. He
22 thought that his children were going to be raised in a
23 household full of wickedness for which there was no just
24 cause or excuse. He thought he was saving them from
25 this.

1 This is the last chance I will get to talk to
2 you. They are going to get up and talk. They have made
3 it a point of the first couple of days, there was this
4 whole thing about laying all this stuff out. We don't
5 dispute any of this.

6 That's what he told you he did. He told them
7 that, okay? It's all laid out here. We have got the
8 Christmas tree and the blood in front of it. That's
9 horrible and that's a tragedy.

10 He came there and he told you he didn't plan
11 on the kids being there. That makes sense. It's a
12 Tuesday. It's a school day. It was supposed to be his
13 brother and his wife.

14 Ladies and gentlemen, do I need to address
15 whether he tried to strangle her with the Game Boy cord?
16 I mean, does that have a slight hint of desperation?
17 How about the thing about the blood on the ceiling with
18 there not being any blood on the gun?

19 I mean, at some point the government realized
20 that they were having a problem proving murder. They
21 had to resort to things like he tried to strangle her
22 with a Game Boy cord after he had shot her five times.

23 You know, this whole thing about the blood on
24 the ceiling. Oh, yeah, jumping in a mud puddle. Why is
25 there no blood on the gun? There is no blood on

1 anything else. That just didn't make sense.

2 He told them what he did. He might have left
3 out some of the details. You know, you just can't make
4 these guys happy. He came in, he turned himself in, he
5 told them he shot her.

6 "I killed her. I killed her. I broke in the
7 house. I committed an arson."

8 But if you don't get every single itty-bitty
9 detail down right after you slept under a trailer all
10 night long and are now coming in to tell them, boy they
11 are going to hurt you with it; aren't they?

12 A guy with a ninth grade education, he sure
13 can be crossed. A guy who graduated from law school
14 made quick work of my client, didn't he? He was doing
15 the best he could. He told y'all the truth.

16 He told y'all what happened. This is a tragic
17 story, and it's not going to have a happy ending. It's
18 not. It's not. Because of what Roger Dale has admitted
19 to, it will by definition not have a happy ending.

20 But you can stop it from having a tragic
21 ending, a truly tragic ending. A tragedy is something
22 that can be stopped. You can do that. We are asking
23 you to punish him. We are asking you to punish him
24 severely for a number of very serious charges, but only
25 for what he did and only what was in his heart.

1 At the very beginning, I told you I
2 represented a burglar and I do. I represent an
3 attempted arsoner. I do. I represent a manslaughter.

4 I represent a man who justice speaks to be
5 convicted of a very serious crime for the tragedy you
6 have heard. Roger Dale Burke is guilty of manslaughter.
7 Thank you for your time.

8 THE COURT: Mr. Madsen.

9 MR. MADSEN: May it please the Court.

10 THE COURT: Yes, sir.

11 **CLOSING STATEMENT**

12 MR. MADSEN: Mr. Nettles. Mr. Moses told you
13 this case is about a man who decided on December 19th to
14 be his wife's judge, decided to be her jury. And when
15 he sentenced her on that day, he decided to be her
16 executioner.

17 We know what we did and how he decided to
18 execute her. Y'all will have his statement in back.
19 You will know what that final shot was after he decided
20 to be her judge, her jury, and her executioner. You
21 will know from his own statement.

22 What does he say? This isn't stuff that this
23 man is making up. This is stuff that he was telling.
24 Y'all get a chance to judge the credibility. Who wants
25 to be self protected up there? Who has something to

1 gain? Who has something to lose?

2 Sergeant Frier doesn't. He is taking a
3 statement. What reason does he have to lie? Mr. Burke
4 told him: Oh, I didn't tell you any of those things.
5 Why would that be? Why wouldn't he tell him all those
6 things at that point in time?

7 Y'all are smart people, and there's 12 of you.
8 Y'all know why. From his own statement he says that
9 that last shot, he tried to put it to her chest. Maybe
10 it ended up on her head.

11 Well, we know some things about how it ended
12 up on her head. We know that that gun, right here, at
13 some point in time ended up pressed against her skull.
14 That's why you have that stellate wound, and that's why
15 from the blood spatter you have blood on the ceiling.

16 Because when you put it down there and you've
17 got that bullet coming out and you've got that energy
18 coming out, there is only one thing that liquid is
19 coming out of this from and that is blood, and that
20 blood went up.

21 We know from the doctor that all these others
22 shots at various different angles, she would have lived
23 through all those. She didn't live through that head
24 wound.

25 Y'all are smart people. You can look at those

1 angles, straight down, from the side. None of them go
2 straight back in the beginning. He shoots her straight
3 back, nothing, all various different angles.

4 Is she falling down? Is she trying to get
5 back up? Is she down like this (indicating) when she is
6 getting shot? You heard the doctor, shot there
7 (indicating) on the head, bullet pulled from there
8 (indicating). The angle is going to be this way
9 (indicating).

10 Is she down below him? Is he standing above
11 her with that gun pressed on her head executing her?
12 That's malice, ladies and gentlemen. That reeks of
13 malice.

14 Mr. Moses told you about some of the ways you
15 can get malice, express or implied. Express, I will
16 kill you. Lying in wait is malice. Making plans,
17 getting the gun, going in the house with this gun,
18 practicing shooting it beforehand so you know how it
19 works.

20 This gun was ready. This gun was chambered.
21 We know, because of how many bullets are in this gun
22 when they find it, that at some point in time he has
23 reloaded.

24 We know there's 39 bullets in here. We know
25 there are six in the gun when it was found. We know

1 there's five in her. At some point in time he didn't
2 show any extra bullets. Is that just magical?

3 We know that afterwards he decided to cover up
4 the scene. You know from the testimony of the doctor
5 that she had ligature marks around the neck. Y'all know
6 what ligature marks mean. He tried to drag her out.
7 The doctor said they were after she died.

8 It makes sense. Y'all have seen the house and
9 seen a lot of the pictures. It makes sense that he
10 tried to drag her out with a chord. She is a large
11 lady. That's malice. That reeks of malice. Guns a
12 mother down in front of her kids. If that's not malice,
13 what is?

14 They want to say that they get this sudden
15 heat of passion and legal provocation from breaking into
16 a house, breaking into her house, going into her house
17 without consent.

18 Do you see those pictures later and decide
19 that that's what his provocation is? As Mr. Nettles
20 told you, you know, you are sending a message to the
21 community. Breaking into someone's house, finding
22 something that you don't like, no matter how offensive.

23 If someone is to break into Mr. Nettles' house
24 and find a Rush Limbaugh book or a bunch of Rush
25 Limbaugh memorabilia, does that person have the right to

1 say: I find this stuff so offensive, I sentence you to
2 death, that I have decided to become your judge, jury,
3 and executioner.

4 I'm not trying to say that what was on the
5 wall and Rush Limbaugh books are similar, but the
6 concept is kind of the same; isn't it?

7 We know from his own statement that he tried
8 to clean up some shell casings, don't we? That's what
9 he said, that he grabbed some shell casings, thought he
10 got them all. We know that at some point in time he
11 might have tried to clean up, and y'all are the finders
12 of the facts.

13 Does that (indicating) look like rust or does
14 that look like blood? We know from his statement that
15 he wanted to take what he had done and he wanted to get
16 rid of it and make it look like Jenny had taken those
17 kids and left.

18 But there was a problem. He knew he had
19 loaded up her place with gas, and he had known that when
20 he left, this house was on fire. But there is a
21 problem. It didn't burn.

22 When it didn't burn and it doesn't look like
23 Jenny took those kids, he has a problem. At some point
24 in time, he figures out what that problem is. That's
25 the reason he turned himself in.

1 Because it wasn't going to look like Jenny had
2 taken off with those kids. He hadn't been able to
3 destroy all that evidence. One of those multitude of
4 friends or family he had let him know that.

5 Y'all decide the credibility of the witnesses.
6 Y'all decide what lying in wait is. He testified as to
7 the reasons he told you that he moved that car behind
8 there. He just wanted to talk with her. Why did he
9 take the gun in then?

10 The judge will tell you that use of a deadly
11 weapon in and of itself is enough to infer malice from.
12 You not only have a deadly weapon here, you have one
13 loaded, one that he has practiced shooting, one that he
14 has hidden his car behind that house so she doesn't know
15 that he is there, one where he has in his hands so that
16 when she comes into that house with her two kids, they
17 don't know that he is there.

18 That is malice plain and simple. We know he
19 practiced with the gun. We know he shot her numerous
20 times. He wasn't shooting her to injure her. He was
21 shooting her to kill her, and he finished it with that
22 one right there (indicating). We know he was lying in
23 wait. That is expressed malice.

24 The judge will also tell you about what is
25 called the felony murder rule. Basically what that is

1 is that if you are committing an inherently dangerous
2 felony, which is burglary first, with that gun you can
3 infer malice and find him guilty of murder based on that
4 alone, that inherently dangerous felony that he did.

5 That is enough malice in and of itself that
6 you can do it. But you've also got that lying in wait,
7 and you also have the deadly weapon. You also have him
8 shooting the gun, getting the gun.

9 Mr. Nettles wants you to convict him of
10 manslaughter. Mr. Moses told you what manslaughter is.
11 If he would have taken that hammer and if he would have
12 killed Christopher, that is manslaughter. That is
13 sudden heat of passion upon sufficient legal
14 provocation.

15 But what do we know? He could control that.
16 We know he could control that at that point in time.
17 And are you telling me that no matter how offensive that
18 picture is, it's worse than finding out that someone has
19 done something like that to your daughter? Does that
20 make sense?

21 Is that reasonable? It is not. That is not
22 reasonable. But he could control himself. We know from
23 his friends, family, he was talking about killing her
24 for a long time; but he never did.

25 Adultery is just not a license to go out and

1 kill somebody, is it? We know he is able to control
2 himself. You heard different things. You heard his own
3 witness say what he was going to do with that body. He
4 denies that.

5 Y'all decide what weight to give. Y'all
6 decide the credibility of witnesses. Y'all decide who
7 decided to be judge, jury, and executioner.

8 You know, it's kind of interesting because he
9 kind of wants to take a bunch of stuff and throw it up
10 against the wall and let's see what sticks: Let me do
11 the adultery. That's kind of tough because he has known
12 about that seven months.

13 Let's try that mural on the wall. But we know
14 that is kind of tough because when he finds out and the
15 guy that is standing right there who has done some
16 horrible things to his children that he can control
17 himself at that point in time. It's tough to get by
18 that. We know that he can control himself.

19 And when those two theories don't work, he
20 talks about that child custody. There is a problem with
21 that. You are going to have a copy of the charge, and
22 the judge is going to charge you on the law.

23 Y'all have a right to find the facts as you
24 find them, but you must take those facts and you must
25 apply it to the law as the judge gives it to you.

1 That's his job.

2 What do we know and what will the judge charge
3 you? He will charge you that exercising a legal right,
4 no matter how offensive to another, is never in the law
5 deemed a provocation sufficient to justify or mitigate
6 an act of violence.

7 When they are fighting over custody and she is
8 being a good mother and taking those children out first
9 and trying to find out: Okay, is he involved? If he
10 isn't, we have a hearing two days later. He is not
11 getting those kids, by the time he goes in and murders
12 her, for less than 24 hours, not even that.

13 He will go in front of a judge on that Friday.
14 The hearing is scheduled. He can't wait that long
15 because he has got murder in his heart, and he has
16 malice on his mind.

17 He decides on that day to be his wife's judge,
18 jury, and executioner. That is ill will. That is a
19 depravity of heart doing that in front of the children.
20 That is malice and that is murder.

21 We know he had gotten the children the food
22 and hadn't stopped afterward. You heard Brandon
23 testify. There is some difference in their testimony.
24 Brandon was hungry. He says he stopped off and got him
25 some stuff. Is that planning?

1 Mr. Nettles told you in his opening about
2 their last supper, knew he wasn't going to see his
3 children for awhile. I guess Mr. Burke disputes that.
4 He is just trying to take all those puzzle pieces and
5 fit them in together.

6 He can't dispute that he killed her. So he is
7 trying to pull one over on you as to why. Y'all judge
8 the credibility. Y'all heard the people from that
9 witness stand. Y'all know who has something to gain and
10 y'all know who something to lose.

11 And y'all know what is right and wrong in this
12 community. Every one here lives in Lexington County.
13 That's why you are sitting on this jury.

14 What about the phone? These phones might fall
15 and these backs might come undone. Is that battery
16 going to fall out itself? Is it going to unplug itself
17 or had he already done that because he didn't want her
18 going for the phone?

19 Mr. Burke will admit a lot, but he has to;
20 doesn't he? Like my grandfather said: The best lie
21 contains 90 percent truth, doesn't it? He can't get
22 around the forensic stuff.

23 He can't get around where her blood ended up.
24 He can't get around that that place was tried to be
25 burned down. He can't get around that she died in front

1 of the Christmas tree and that Brandon came in and saw
2 her and that he took those kids away.

3 And he disposed of that body afterwards trying
4 to get away with it. But when he took them, I think he
5 said to his aunt's house or something, he saw something
6 about blue lights and he freaked out, and he left those
7 kids there.

8 He knows at that point in time that Brandon is
9 going to tell them what he saw, and the jig is up. They
10 are going to know. He got scared. He didn't turn
11 himself in because he is a great guy. He turned himself
12 in because he knew he was caught.

13 He knew they would hunt him down, and he knew
14 that they would eventually find him because he had
15 decided to become his wife's judge, jury, and
16 executioner. He executed her with a contact wound to
17 her head.

18 On behalf of the people of Lexington County, I
19 am asking that you find this Defendant --

20 MR. NETTLES: Objection. He's a person in
21 Lexington County and he's not asking for it.

22 THE COURT: Sustained. Just rephrase it.

23 MR. MADSEN: I am asking you to find this
24 Defendant not only guilty of burglary in the first
25 degree for breaking into that house with an intent to

1 commit a crime, not only for arson or attempted arson
2 for trying to burn down that trailer to hide that
3 evidence, to find him guilty not only of possessing a
4 weapon during the commission of a violent crime, but
5 most importantly to find him guilty for murdering his
6 wife, for being her judge, her jury, and when he found
7 her guilty, her executioner.

8 That, ladies and gentlemen, is malice. That,
9 ladies and gentlemen, is why he is guilty of murder and
10 not manslaughter. This is not a voluntary manslaughter
11 case. This is a murder case. He murdered his wife and
12 he is a murderer. Thank you.

13 THE COURT: Bailiffs and deputies, please seal
14 the doors. See that no one comes in or out if you
15 would, please.

16 Let me ask, which juror is Mr. Cook?
17 Mr. Cook, I will ask if you will serve as the foreman of
18 the jury, please, sir. I will tell you in just a moment
19 what you have to do. There is no extra pay. I will
20 tell you in just a moment what you have to do, okay?

21 (Whereupon the Court charged the jury as
22 follows).

23 THE COURT: Mr. Foreman, and ladies and
24 gentlemen, as I told you, you have now heard the
25 evidence in the case. You have heard the statements of

1 the attorneys. It's now my duty to charge you with the
2 law as it applies in this case.

3 I will tell you that I am going from a written
4 text which I have prepared, and I will give you a copy
5 of this. Mr. Foreman, you will have this in the jury
6 room with you.

7 I want to be careful to tell you though to
8 consider the charge as a whole. Don't pick out one
9 piece and give it greater weight than other areas.
10 Consider all the charge as a whole, please.

11 I told you earlier that the State of South
12 Carolina charges the Defendant, Roger Dale Burke, with
13 the offenses of burglary in the first degree, they
14 charge him with murder, they charge him with attempted
15 arson, and with possession of a weapon during a violent
16 crime.

17 The indictments have been read to you before.
18 So I will not repeat the allegations contained in the
19 indictments. To the indictments the Defendant pled not
20 guilty. That places on the State the burden of proving
21 the Defendant guilty.

22 A person charged with committing a criminal
23 offense in South Carolina is never required to prove his
24 innocence. It is a vital and important rule of law, of
25 our evidence of law, that the defendant in a criminal

1 trial, no matter how serious the charges, must always be
2 presumed innocent until his guilt has been proven beyond
3 a reasonable doubt.

4 This presumption of innocence remains with the
5 Defendant at all times, throughout the trial, beginning
6 from the time of arraignment. It remains until or
7 unless a jury reaches a verdict of guilty beyond a
8 reasonable doubt.

9 It is your solemn duty as a jury if not
10 clearly convinced of his guilt beyond every reasonable
11 doubt to the contrary to acquit the Defendant.

12 What do we mean by reasonable doubt? A
13 reasonable doubt is a doubt that would cause a
14 reasonable person to hesitate to act. Proof beyond a
15 reasonable doubt is proof that leaves you firmly
16 convinced of the Defendant's guilt.

17 There are very few things in the world that we
18 know with absolutely certainty. And in criminal cases,
19 the law does not require proof that overcomes every
20 possible doubt.

21 Based on your consideration of the evidence if
22 you are firmly convinced that the Defendant is guilty of
23 the charged crime, then you must find him guilty. On
24 the other hand, if you think there is a real possibility
25 he is not guilty, you must give him the benefit of the

1 doubt and find him not guilty.

2 You sit as finders of fact in this case. I do
3 not have the right to pass upon the facts or to express
4 any opinion I might have as to the facts, nor may I
5 intimate in any way what I may think about the innocence
6 or guilt of the Defendant.

7 As finders of fact, you are also the judges of
8 the credibility. You are the sole judges of the
9 credibility or, in other words, the believability of all
10 the witnesses who have testified in this case.

11 In passing on their credibility, you may
12 consider a number of factor, such as a witness's
13 demeanor, forthrightness, consistency, their knowledge
14 of the facts, bias, and corroboration by other evidence
15 in this case. You certainly do not do so by counting up
16 the number of witnesses who may have testified for each
17 side.

18 Throughout this process you have but one
19 single objective, and that is to seek the truth
20 regardless of the source from which it may have come.
21 You do so bearing in mind that you must give the
22 Defendant the benefit of every reasonable doubt.

23 You also heard the testimony of a witness who
24 had special knowledge, skill, experience, training or
25 education in a particular field and who gave his opinion

1 as an expert in the matter in which he was skilled.

2 In determining the weight to be given to an
3 opinion of an expert, you should consider the
4 qualifications and credibility of the expert and the
5 reasons given for his opinion. Remember I told you, you
6 are not bound by his opinion. Give it weight, such
7 weight, if any, to which you deem it entitled.

8 There are two types of evidence generally
9 presented during a trial. One is direct evidence and
10 the other is circumstantial evidence. Direct evidence
11 is the testimony of a person who claims to have actual
12 knowledge of a fact, such as an eyewitness.
13 Circumstantial evidence is proof of a chain of facts and
14 circumstances which indicate the existence of a fact in
15 issue.

16 Now, the law makes absolutely no distinction
17 between the weight or value to be given to either direct
18 or circumstantial evidence, nor is a greater degree of
19 certainty required for circumstantial evidence than it
20 is for direct evidence.

21 You should weigh all the evidence in the case
22 and after doing so, if you are not convinced of the
23 guilt of the Defendant beyond a reasonable doubt, you
24 must find him not guilty.

25 Now, the State also introduced a statement

1 which they allege was made by the Defendant. While the
2 Court determines the admissibility of the statement, it
3 is up to you as the jury to determine the existence of
4 the statement and the voluntariness of the statement and
5 the weight of any alleged statement given by the
6 Defendant.

7 I will tell you what we mean by that. You
8 must make the ultimate determination, first of all, of
9 whether or not the Defendant made the alleged statement
10 or any part of the alleged statement.

11 If you find and determine that he did make it
12 or did make the statement, then you must determine
13 whether it was voluntary. If you determine it was
14 voluntary, then you would decide what weight, if any, to
15 be given to the statement of the Defendant.

16 You must carefully scrutinize all of the
17 surrounding circumstances before giving any weight to
18 any alleged statement. You must be satisfied beyond a
19 reasonable doubt that the statement was made by the
20 Defendant, and that it was uninfluenced by any promise
21 of reward or threat of harm.

22 If you find beyond a reasonable doubt that an
23 alleged statement was made voluntarily, then the next
24 thing you would decide is what weight, if any, should be
25 given to the statement. If you find the statement, of

1 course, was not voluntary, then in that event you must
2 not consider the statement for any purpose.

3 The same Constitution and law which make you
4 the finders of fact make me instructor of the law. I am
5 required by the Constitution to do what I'm doing right
6 now.

7 You must accept the law as I give it to you as
8 correct. If I am wrong about anything, there is a time
9 and a place for it to be corrected. But for today's
10 purposes you must accept it as correct.

11 Let's talk here about the elements of each of
12 the charges against Mr. Burke. The first is burglary in
13 the first degree. Burglary in the first degree is a
14 statutory offense.

15 What I mean by that is our legislature has
16 passed a law which sets forth the elements of burglary
17 in the first degree, and it gives us certain
18 definitions.

19 So then in order for the State to prove the
20 Defendant guilty beyond a reasonable doubt, they must
21 prove each of the elements beyond a reasonable doubt.
22 Remember every element must be proven beyond a
23 reasonable doubt.

24 These elements are as follows. They must
25 prove first that the Defendant was involved. Second,

1 that he entered a dwelling. A dwelling means the living
2 quarters of a building which is used or is normally used
3 for sleeping, living or lodging by any person.

4 They must prove that he did so without
5 consent, which means to enter a building without the
6 consent of a person who is in lawful possession or
7 ownership or control of the building.

8 Fourth, they must prove that he do so with
9 intent to commit a crime therein. It is necessary that
10 the criminal intent existed at the time of the entering,
11 and it is not enough that the intent was formed after
12 the entry. On the other hand, where the intent exists
13 at the time of entry, it is not a defense that the
14 intent was abandoned afterward.

15 The reason is that the entry with criminal
16 intent completes the crime of burglary. Of course,
17 proof of intent must necessarily rest on the inferences
18 you make from the conduct of the Defendant.

19 Now, in addition to these four elements, the
20 State must also prove one of the following elements.
21 There are four others. They don't have to prove all
22 four. They have to prove the first four, but they do
23 not have to prove all of these next four, only one.

24 Those four are: That while in the house, the
25 Defendant was armed with a deadly weapon or explosive.

1 Two, that the Defendant caused physical injury to
2 someone.

3 Three, that the Defendant used or threatened
4 to use a dangerous object or, four, that the Defendant
5 displayed what was or appeared to be a pistol or other
6 firearm. Again, any of the elements proven must be
7 proven beyond a reasonable doubt.

8 Let's talk about the charge of murder. Our
9 legislature has defined murder as follows: Murder is
10 the killing of any person with malice aforethought,
11 either express or implied. Again, murder is the killing
12 of any person with malice aforethought, either express
13 or implied.

14 I will tell you first that under our law any
15 greater offense may include a lesser offense. That
16 sounds -- while it may sound complicated, what it simply
17 mean is this. The charge of murder may also include the
18 lesser offense of voluntary manslaughter.

19 Even though manslaughter is not charged in the
20 indictment, you may consider it if you find that the
21 facts fit that charge rather than the charge of murder.
22 So let me first define for you the law of murder. Then
23 I will define the law of voluntary manslaughter.

24 In order to convict on murder, the State must
25 prove not only that Mr. Burke killed Mrs. Burke, they

1 must also prove beyond a reasonable doubt that he did so
2 with malice aforethought.

3 Now, in the law malice is referred to as a
4 term of art. In other words, it's a technical term. It
5 means wickedness. It means there was no just cause or
6 excuse. It is something which springs from depravity,
7 from a heart devoid of social duty and fatally bent upon
8 mischief. That's what malice is.

9 Now, remember I told you that malice has to be
10 express or implied. The terms express or implied do not
11 mean different kinds of malice but rather the manner in
12 which the malice may be shown to exist.

13 In other words, malice can be proven by direct
14 evidence or it can be proven by inferences from the
15 facts and circumstances which are proven. And while the
16 law does not require that malice shall exist for any
17 particular length of time before the commission of the
18 act in question, it simply must be aforethought.

19 There must be then a combination of the
20 previous evil intent and the act which produces the
21 fatal result. Proof of malice may be express or direct,
22 such as where there is, for example, evidence of
23 previous threats or evidence of lying in wait. In other
24 words, circumstances which show directly that an intent
25 to kill existed.

1 But the circumstances of many homicides will
2 prevent the possibility of offering this kind of
3 evidence of the existence of malice. So out of
4 necessity the law says that malice may be inferred under
5 certain circumstances even if think there is no direct
6 evidence as to what was in the Defendant's heart and
7 mind.

8 Malice may be inferred from the willful,
9 deliberate, and intentional doing of an unlawful act
10 without just cause or excuse. But even if you find the
11 circumstances established by the evidence create an
12 inference of malice, you still may freely reject that
13 inference.

14 It is always for you the jury to say whether
15 or not under all the evidence that malice, in fact,
16 has been established by the State beyond a reasonable
17 doubt.

18 Malice may also be implied from the willful,
19 deliberate, and intentional doing of an unlawful act
20 without just cause or excuse or from the use of a deadly
21 weapon.

22 Now, the resulting implication only permits
23 rather than requires you to infer malice. This
24 permissive inference, as we call it, is of an
25 evidentiary nature. Again, the implication does not

1 require you to infer malice, it only permits you to do
2 it.

3 In other words, the inference of malice from
4 use of a deadly weapon is simply an evidentiary fact to
5 be taken into consideration by you as the jury, along
6 with all of the other evidence in the case. It is to be
7 given such weight as you the jury determine it should
8 receive.

9 The inference of malice may be drawn from
10 proof of the use of a deadly weapon if you conclude that
11 it's proper after considering all of the facts and
12 circumstances in evidence.

13 We also have a rule called the felony murder
14 rule. That means that if one intentionally kills
15 another during the commission of a felony, an
16 implication of malice may arise.

17 Again, if facts are proved beyond a reasonable
18 doubt that are sufficient to raise an inference of
19 malice to your satisfaction, then this evidentiary --
20 this inference again is simply an evidentiary fact to be
21 taken into consideration by you the jury.

22 You take it into consideration, along with all
23 the other evidence, and you give to it such weigh as you
24 determine it should receive.

25 That is the law on the charge of murder. As I

1 told you, you may consider, instead of murder, you may
2 consider the lesser included charge of voluntary
3 manslaughter.

4 What do we mean by voluntary manslaughter?
5 You know I previously told you again that the
6 indictment -- while it's not in the indictment, you may
7 consider voluntary manslaughter.

8 Manslaughter is the unlawful killing of a
9 human being without malice, express or inferred. You
10 will notice that what distinguishes voluntary
11 manslaughter from murder is the absence of malice.
12 Again, what distinguishes voluntary manslaughter from
13 murder is the absence of malice.

14 In other words, before you can convict the
15 Defendant of murder, you must find that the State proved
16 beyond a reasonable doubt that malice existed; but it is
17 not necessary for a conviction of voluntary
18 manslaughter. So then the difference between murder and
19 voluntary manslaughter is whether the Defendant acted
20 with malice.

21 Voluntary manslaughter is defined as the
22 felonious taking of a life of another human being in
23 sudden heat of passion upon a sufficient legal
24 provocation.

25 Again, voluntary manslaughter is the

1 felonious taking of a life of another human being in
2 sudden heat of passion and upon a sufficient legal
3 provocation.

4 The law recognizes that sudden heat of passion
5 may affect one's self control for a reasonable time
6 period, and it thus temporarily disturbs the sway of
7 reason and thereby reduces the crime of murder to
8 voluntary manslaughter if the homicide was committed in
9 sudden heat and passion and provided there was
10 sufficient legal provocation.

11 Now, sufficient legal provocation must be such
12 as would cause a person of ordinary reason and prudence,
13 in other words, an average person to become enraged or
14 to lose control of himself temporarily.

15 I also charge you that words, no matter how
16 bad will not -- no words, no matter how bad, will
17 constitute legal provocation which is necessary to
18 reduce a killing from murder to manslaughter.

19 Exercise of a legal right, no matter how
20 offensive to another, is never considered sufficient
21 legal provocation to mitigate an act of violence.
22 Further, the Defendant's own actions, no matter how
23 outrageous or violent, cannot serve as sufficient legal
24 provocation.

25 If the sudden heat and passion had cooled or

1 if there was sufficient time for the passion to cool,
2 then the killing would be attributed to malice and not
3 to the heat of passion. Of course, the amount of
4 cooling time would depend on whether there was time for
5 a reasonable person to cool off.

6 I told you, again, this is a lesser included
7 offense. If you as jurors have a reasonable doubt as to
8 whether the State has met its burden of proof and shown
9 all the elements of the crime of murder, you would then
10 consider the lesser included offense of manslaughter.

11 Then, of course, if you have a reasonable
12 doubt as to whether the State has shown all the elements
13 of manslaughter, you would find the Defendant not
14 guilty.

15 Of course, you may find the Defendant guilty
16 of one of these or none of them, but you may not find
17 him guilty of more than one. In other words, you would
18 find the Defendant either not guilty or guilty of
19 voluntary manslaughter or guilty of murder, only one or
20 none.

21 Now, I am going to explain to you the law
22 known as arson. Again, the Defendant is charged with
23 attempted arson. I will then explain the law as it
24 defines attempt.

25 Arson is the intentional and malicious burning

1 of a dwelling house in which people live or those
2 buildings within the yard used in connection with the
3 dwelling house.

4 This is defined by the Code of Laws of South
5 Carolina. There are two elements of the crime of arson.
6 The State has the burden, as in all crimes, of proving
7 each of these elements beyond a reasonable doubt, two
8 elements.

9 First, the State must prove beyond a
10 reasonable doubt the actual burning of the dwelling
11 house referred to in the indictment. This does not mean
12 that the structure has to be entirely consumed. It is
13 enough if there is an actual lighting or igniting
14 causing some part of the material of which the building
15 is constructed to be charred.

16 Second, the burning must be the willful and
17 malicious act of the Defendant and not the result of an
18 accident. The term willful or willfully implies a
19 design or an intent and a purpose, a deliberation if you
20 will, determination, a premeditation to commit an act
21 which is wrongful or prohibited by law. It is the
22 intentional and deliberate doing of a wrongful act, the
23 doing of a forbidden act purposefully in violation of
24 law.

25 I told you about malice a moment ago.

1 Remember that malice or the term malice or maliciously
2 imports wickedness and excludes just cause and excuse.
3 It springs from depravity, from a heart devoid of social
4 duty and fatally bent on mischief.

5 Remember I told you malice may be implied or
6 presumed from the willful, deliberate, and intentional
7 doing of an unlawful act without just cause or excuse.
8 However, even if the facts established by the evidence
9 are sufficient to raise an inference of malice, then
10 such presumption is rebuttable; and it is always for you
11 as the jury to determine whether under all the evidence
12 malice has, in fact, been established beyond a
13 reasonable doubt.

14 Remember the Defendant is not charged with
15 arson but with attempted arson. An attempt is an act
16 done in part execution of a design to commit a crime.
17 There must be an intent that the act shall be committed
18 and an act done not in full execution but in pursuance
19 of the intent.

20 An attempt is distinguished from preparation
21 to commit it and also from the intent to commit. The
22 law does not punish the mere entertainment of criminal
23 intent. To bring the law into action, it is necessary
24 that some act must be done in pursuance of the intent
25 immediately and directly tending to the commission of

1 the crime.

2 An act which, should the crime be perpetrated,
3 would constitute part and parcel of the transaction but
4 which does not reach to the accomplishment of the
5 original intent because it is prevented or voluntarily
6 abandoned.

7 The last charge is possession of weapon during
8 the commission of a violent crime. I will tell you that
9 a person is guilty of this crime if during the
10 commission or while attempting to commit a violent
11 crime, they are in possession of a firearm or visibly
12 display what appears to be a firearm.

13 A firearm is defined as any machine gun,
14 automatic rifle, revolver, pistol or any weapon which
15 expels a projectile.

16 So therefore if you find the Defendant guilty
17 of murder or burglary or arson and you find the State
18 has proven beyond a reasonable doubt that the Defendant
19 was also in possession of a firearm or displayed what
20 appeared to be a firearm, then you must find him guilty
21 of the crime of possession of a firearm during a violent
22 crime.

23 Mr. Foreman, and ladies and gentlemen, you
24 been selected as fair and impartial jurors. You have
25 been sworn to impartially try and determine the facts of

1 the case.

2 When you comply and when you have done this,
3 then you will have complied with your oath to do so; and
4 no one will have a right to criticize your verdict. You
5 will have fully discharged your duty as jurors.

6 You must not be influenced by opinions or
7 expressions or ideas which you may have heard outside of
8 the courtroom, but you must decide this case from the
9 testimony you have heard from the sworn lips of the
10 sworn witnesses, along with the other evidence
11 introduced.

12 You must not be influenced or swayed by any
13 type of passion, prejudice or improper sympathy for or
14 against any of the parties. You have no friends to
15 reward. You have no enemies to punish. Both parties
16 are entitled to a fair trial at your hands.

17 Now, on each of these, except one, there are
18 two possible verdicts which you may find. Of course, on
19 the burglary charge, you may find the Defendant not
20 guilty or you may find him guilty.

21 On the attempted arson, you may find him not
22 guilty or you may find him guilty. On possession of a
23 weapon during a violent crime, you may find him not
24 guilty or you may find him guilty.

25 Again, as I told you, on the murder charge,

1 there are three possibilities. You may find him not
2 guilty, you may find him guilty of voluntary
3 manslaughter or you may find him guilty of murder.

4 You should not consider the order in which I
5 give any of these. One simply has to be stated first.
6 You should not take into account the fact that the
7 Defendant is charged with more than one crime. He is
8 entitled to a fair trial on each charge and must not be
9 prejudiced by the fact there is more than one charge
10 against him.

11 As to each charge, you should consider whether
12 the State has proven the elements of that charge. Your
13 verdict must be a unanimous verdict. In other words, it
14 must be agreed upon by all 12 of you.

15 Mr. Foreman, it's your duty to preside over
16 the deliberations. When the jury arrives at a unanimous
17 verdict, you would then write it on a verdict form --
18 and we are going to have a verdict form go in with you.
19 I have prepared the verdict forms that we will send.

20 As to each charge, there will be a separate
21 verdict form. Take one charge at the time, and on each
22 one write whether you find him not guilty or guilty,
23 sign it, and date it. When you have done that with all
24 of the charges, then you can knock on the door and we
25 will take the verdict.

1 I will also tell you that if you have any
2 questions in the meantime, you can do so in one of two
3 ways. You can either knock on the door, and we will let
4 you come out with the entire jury and ask the question
5 or you can just send us a note. I will let you decide
6 how you want to do it. It's up to you, Mr. Foreman.

7 I am going to ask that you all retire to the
8 jury room, but let me also tell you for the last time:
9 Don't start talking about the case just yet. Don't
10 begin deliberating until we send word.

11 I have got some matters to go over with the
12 attorneys. Once we have done that, we are going to send
13 all the evidence back to you, along with a copy of this
14 charge and the verdict forms.

15 We will give specific instructions when you
16 begin deliberating, but don't do that just yet. With
17 that in mind, let me ask you to step to the jury room,
18 please.

19 (The jury retires to the jury room).

20 THE COURT: The jury is secured. Any
21 exception to the charge from the State?

22 MR. MADSEN: No exception to the charge.

23 THE COURT: Except as before, I assume; right?
24 You had one exception, I think.

25 MR. MADSEN: Beside those. The only other

1 thing, I just want to make sure, Judge, that if you are
2 going to send that charge back on page 11, I think it
3 says sudden legal provocation.

4 THE COURT: That was a typo. Do you have any
5 problem with me just doing it interlinear or do you want
6 me to print it again?

7 MR. MADSEN: No, I don't have a problem with
8 striking it.

9 MR. NETTLES: I don't have any problem with
10 you striking it.

11 MR. MADSEN: Then I just wanted to make sure
12 at the top of page 12 are those ones that I had
13 requested? The no words, the exercise of a legal right,
14 and his own actions.

15 THE COURT: Right.

16 MR. MADSEN: I assumed they were. I just
17 wanted to make sure.

18 THE COURT: On mine it is, that's correct. It
19 is on page 12. Any exceptions, Mr. Nettles?

20 MR. NETTLES: No, sir.

21 THE COURT: Let me ask you to get with the
22 court reporter, please, and go over -- oh, one thing,
23 counsel. I had told you earlier I was going to send the
24 indictments.

25 I tell you what. I think the last criminal

1 trial we did the jury had a question. They came in and
2 I had sent the indictments for them to use. The first
3 question the forelady had was: Some of the evidence
4 isn't the same as what's in the indictment.

5 Of course, that kind of scared me because they
6 were looking at the indictment as evidence. I have
7 thought about it. I am going to send verdict forms in
8 for each one.

9 MR. MADSEN: That's fine.

10 THE COURT: Each one of you take a look at
11 these also.

12 (Pause).

13 THE COURT: As I understand, the bailiffs have
14 everything to go back to the jury, along with the
15 verdict forms and a copy of the charge. Do all of you
16 agree that everything the bailiffs have is appropriate
17 to go to the jury, from the State?

18 MR. MADSEN: Yes, sir.

19 THE COURT: Defense?

20 MR. NETTLES: Yes, sir.

21 THE COURT: Madame Court Reporter, here is the
22 charge. Mark it as a Court's Exhibit, please.

23 (Court's Exhibit Number 3 is marked for
24 purposes of the record).

25 THE COURT: Bailiffs, if you would go ahead

1 and do that. Bring the alternate jurors out, please.

2 The jury has the case at 7:18.

3 (The alternates return to the courtroom and
4 are excused).

5 (The jury commences its deliberation at
6 7:18 p.m.)

7 THE COURT: We are in recess subject to the
8 call of the jury, counsel.

9 (The following occurred at 7:57 p.m.)

10 THE COURT: Counsel, the jury has a question.
11 As you know, they want to hear the evidence or the
12 testimony about the tank with the caustic solution in
13 it. The court reporter has it.

14 What we will do is we will just let her start
15 playing it until the jury says stop. They will know
16 what they want to hear. Any objection to that from the
17 State?

18 MR. MADSEN: Nothing from the State, Your
19 Honor.

20 THE COURT: Defense?

21 MR. NETTLES: Nothing from the defense, Your
22 Honor.

23 THE COURT: Bring the jury. For the record it
24 is Mr. Addy's testimony, I think it was.

25 (The jury returns to the courtroom).

1 THE COURT: All parties and attorneys are in
2 the courtroom, and all jurors have returned.

3 Mr. Foreman, I understand that you want to
4 hear part of Mr. Addy's testimony about the tank with
5 the caustic solution; is that correct?

6 FOREMAN: Yes, sir.

7 THE COURT: The court reporter has found that
8 part. What she is going to do is just play it back.
9 You tell me when you are ready to stop it. Okay.

10 FOREMAN: Yes, sir.

11 (Court Reporter's Note: The following
12 testimony was played for the jury during the direct
13 examination of Clint Addy).

14 *****

15 Q And during that period of time, the Defendant was
16 kind of talking about something that he was going
17 to do with Jenny; wasn't he?

18 A Yeah.

19 Q He was talking about how he was going to kill her,
20 wasn't he?

21 A Yeah, but I said it to my wife. I said it to my
22 wife, too, because I was going through marital
23 problems myself.

24 Q But you didn't end up doing it, did you?

25 A No, we both talked like that.

1 Q But now when Dale was talking about killing his
2 wife, it kind of even went a little bit further
3 than that; didn't it?

4 A Yeah.

5 Q He talked about a place that he could dispose of
6 the body, didn't he?

7 A At one time we talked about that.

8 Q And what you know of that place was like a big drum
9 or something like that, I guess, that had like
10 4,000-gallons of some kind of chemical in it; isn't
11 that right?

12 A Yes.

13 Q And Dale new about that because he had apparently
14 done some kind of electrician work or something out
15 there; isn't that right?

16 A Yeah, he wired up the building.

17 Q And that big 4,000-gallon chemical thing, according
18 to Dale, had some kind of chemical in there that
19 when you put a body in there, it would not only get
20 rid of all your skin --

21 A I said that.

22 Q So you knew that it had something that would get
23 rid of skin, bones and all that?

24 A Yeah.

25 Q But the Defendant was telling you about how he

1 could get rid of her that way; isn't that correct?

2 A We both was talking about it as if --

3 Q And that's even going to be --

4 MR. NETTLES: Objection, Your Honor. How
5 about let him finish his answer.

6 THE COURT: Yes, sir, let him finish.

7 BY MR. MADSEN:

8 Q I'm sorry, go ahead.

9 THE COURT: Were you through?

10 A We both was talking about it as if like it wasn't a
11 serious thing. It was like, you know, I have said
12 many times I'm going to kill somebody, and I don't
13 mean it. I knew that he never meant it because all
14 he ever did was talk junk.

15 Q Kind of hard to say that he never --

16 A And everybody talks like that. Everybody in this
17 courtroom will talk like that.

18 Q It's kind of hard to say though that he didn't mean
19 it; isn't that true, Mr. Addy?

20 A Now I agree with that, but back then I wouldn't
21 have said that.

22 Q And when he talked about putting Jenny in that
23 caustic chemical to get rid of her, she wasn't the
24 only one that was going to go in there; isn't that
25 true?

- 1 A Yeah.
- 2 Q Who else, Mr. Addy?
- 3 A His cousin, the one that molested his kids.
- 4 Q Who else besides that?
- 5 A I can't remember right now.
- 6 Q Come on, Mr. Addy.
- 7 A Show me my statement and I will tell you.
- 8 Q What's that?
- 9 A Show me my statement and I will tell you.
- 10 Q Let me ask you this. You remember that this talk
- 11 was so serious that you kind of remember on the
- 12 19th that you called law enforcement -- actually, I
- 13 guess, Mike Ratliff who was up here, who you kind
- 14 of know and work with or something, he told you
- 15 that Jenny and the kids were missing; isn't that
- 16 true?
- 17 A Yeah, he come to a bar I was at.
- 18 Q He told you that. And you kind of knowing what the
- 19 Defendant had said in the past, you called law
- 20 enforcement; didn't you?
- 21 A Yeah, I was concerned.
- 22 Q And you called law enforcement and you told them
- 23 how he had worked on that big gray tank; isn't that
- 24 right?
- 25 A I said -- yeah, I said we had talked about it.

1 Q Let me show you something and ask you, that area
2 that is highlighted, do you remember kind of having
3 that conversation with law enforcement?

4 A Yeah.

5 Q And do you remember what you said it would do to
6 bones?

7 A Yep.

8 Q And do you remember saying what was that on the
9 line after that?

10 A Yes, I remember saying that now, his kids, but...

11 Q So he just wasn't going to put his wife in that
12 tank is what he told you that you told law
13 enforcement, right?

14 A Yeah. I mean, he said it but it didn't mean
15 nothing.

16 Q But who else was he going to put in that tank?

17 A I could say I will kick somebody's ass in this
18 courtroom, but that doesn't mean I will do it.
19 Everybody says stuff like that.

20 Q That's not my question, Mr. Addy. My question is
21 this. Who else did he tell you and you tell law
22 enforcement that he was also going to put in that
23 tank?

24 A His kids.

25 MR. MADSEN: That's all the questions I have.

1 THE COURT: Any redirect?

2 MR. NETTLES: None, Your Honor.

3 *****

4 (Court Reporter's Note: No further testimony
5 was played).

6 FOREMAN: That's all we needed.

7 THE COURT: That's all, Mr. Foreman?

8 FOREMAN: Yes, sir.

9 THE COURT: Let me ask you to return to the
10 jury room and continue deliberating, please.

11 (The jury retires to continue its
12 deliberation at 8:03 p.m.)

13 THE COURT: The jury is secured. Any
14 exception to that procedure from the State?

15 MR. MADSEN: No, Your Honor.

16 THE COURT: Defense?

17 MR. NETTLES: None, Your Honor.

18 THE COURT: It is now 8:05. Again, we are in
19 recess subject to the call of the jury. Coconut, here
20 is the note from the jury.

21 (Court's Exhibit Number 4 is marked for
22 purposes of the record).

23 (Whereupon there was a recess).

24 (The following occurred at 8:55 p.m.)

25 THE COURT: I understand the jury has a

1 verdict. Plaintiff, are you ready to take the verdict?
2 The State, excuse me. We were talking about civil cases
3 back there.

4 MR. MADSEN: Yes, Your Honor.

5 THE COURT: Is the defense ready?

6 MR. NETTLES: The defense is ready, Your
7 Honor.

8 THE COURT: Let's bring the jury in.

9 (The jury returns to open court to report its
10 verdict).

11 THE COURT: All parties and attorneys are in
12 the courtroom, and all jurors have returned. Madame
13 Clerk.

14 CLERK: Mr. Foreman, have you reached your
15 verdicts?

16 FOREMAN: Yes, ma'am.

17 CLERK: Please pass them up by the bailiff.

18 (Hands to Court).

19 THE COURT: All the verdict forms are in
20 proper form. Go ahead and publish them, please.

21 (Whereupon the verdicts of the jury are
22 published as follows).

23 CLERK: Indictment 2002-GS-32-3278, the State
24 versus Roger Dale Burke, as to the charge of murder, we
25 the jury in the above-captioned matter unanimously find

1 the Defendant, Roger Dale Burke, guilty of murder.

2 Indictment 2002-GS-32-3280, the State versus
3 Roger Dale Burke, as to the charge of attempt to commit
4 arson, we the jury in the above-captioned matter
5 unanimously find the Defendant, Roger Dale Burke,
6 guilty.

7 Indictment 2002-GS-32-3281, the State versus
8 Roger Dale Burke, as to the charge of burglary in the
9 first degree, we the jury in the above-captioned matter
10 unanimously find the Defendant guilty.

11 Indictment 2002-GS-32-3279, the State versus
12 Roger Dale Burke, as to the charge of possession of a
13 weapon during the commission of a violent crime, we the
14 jury in the above-captioned matter unanimously find the
15 Defendant, Roger Dale Burke, guilty.

16 Mr. Foreman, and ladies and gentlemen, if this
17 so be your verdicts, please indicate by raising your
18 right hand.

19 (All jurors so indicate).

20 CLERK: All hands were raised, Your Honor.

21 THE COURT: Poll the jury, please, Madame
22 Clerk.

23 CLERK: As I call your name, please hold your
24 hand up so I can recognize you, please.

25 I will ask you: As to the verdicts, were

1 these your verdicts in the jury room? Please respond.

2 Then I will say: Are these still your verdicts? Please
3 respond.

4 Kenneth Riddle.

5 JUROR: Yes.

6 CLERK: As to the verdicts, were these your
7 verdicts in the jury room?

8 JUROR: Guilty.

9 CLERK: Are they still your verdicts?

10 JUROR: Yes.

11 CLERK: Allen Cook, as to the verdicts, were
12 these your verdicts in the jury room?

13 JUROR: Yes.

14 CLERK: Are they still your verdicts?

15 JUROR: Yes.

16 CLERK: James Gantt, as to the verdicts, were
17 these your verdicts in the jury room?

18 JUROR: Yes.

19 CLERK: Are they still your verdicts?

20 JUROR: Yes.

21 CLERK: Tony Bell, as to the verdicts, were
22 these your verdicts in the jury room?

23 JUROR: Yes.

24 CLERK: Are they still your verdicts?

25 JUROR: Yes.

1 CLERK: Norman Counts, as to the verdicts,
2 were these your verdicts in the jury room?

3 JUROR: Yes, ma'am.

4 CLERK: Are they still your verdicts?

5 JUROR: Yes, ma'am.

6 CLERK: William Brown, as to the verdicts,
7 were these your verdicts in the jury room?

8 JUROR: Yes, ma'am.

9 CLERK: Are they still your verdicts?

10 JUROR: Yes.

11 CLERK: John Anderson, as to the verdicts,
12 were these your verdicts in the jury room?

13 JUROR: Yes.

14 CLERK: Are they still your verdicts?

15 JUROR: Yes.

16 CLERK: Christine Wright, as to the verdicts,
17 were these your verdicts in the jury room?

18 JUROR: Yes.

19 CLERK: Are they still your verdicts?

20 JUROR: Yes.

21 CLERK: Barri Gorton, as to the verdicts, were
22 these your verdicts in the jury room?

23 JUROR: Yes, ma'am.

24 CLERK: Are they still your verdicts?

25 JUROR: Yes, ma'am.

1 CLERK: John Goldie, as to the verdicts, were
2 these your verdicts in the jury room?

3 JUROR: Yes.

4 CLERK: Are they still your verdicts?

5 JUROR: Yes.

6 CLERK: Nance Shope, as to the verdicts, were
7 these your verdicts in the jury room?

8 JUROR: Yes, ma'am.

9 CLERK: Are they still your verdicts?

10 JUROR: Yes.

11 CLERK: Lee Peyton, as to the verdicts, were
12 these your verdicts in the jury room?

13 JUROR: Yes, ma'am.

14 CLERK: Are they still your verdicts?

15 JUROR: Yes.

16 CLERK: All jurors are polled, Your Honor.

17 THE COURT: Thank you, ma'am. All jurors have
18 been polled and indicated this was their verdict in the
19 jury room and is still their verdict.

20 Counsel, are there any motions before we
21 release the jury from the State?

22 MR. MADSEN: None from the State, Your Honor.

23 THE COURT: From the defense?

24 MR. NETTLES: No, sir.

25 THE COURT: I will take other motions later.

1 MR. NETTLES: No, sir.

2 THE COURT: Mr. Foreman, and ladies and
3 gentlemen, thank you for participating with us. We
4 realize that we have taken you out of your homes and
5 your normal surroundings for most of the week and have
6 kind of brought you into a world that you are really not
7 used to. It's something new for you and different.

8 But we appreciate the fact that you handled it
9 well. You have been very conscientious about your
10 duties as a jury, and you have been good to work with, a
11 good reaction about everything the way it has happened.

12 This, of course, ends your jury duty. You
13 have our thanks. We are going to let you go now. You
14 are free to go. You have to leave the badges with the
15 bailiff, but you are free to go.

16 If you would like to stay for sentencing, you
17 are welcome to. What you can do is just go around and
18 come back in the back door around there. But if you
19 want to go, you can also go. Thank you again. We
20 appreciate it.

21 (The jury is excused).

22 THE COURT: Any motions before sentencing from
23 the State?

24 MR. NETTLES: Your Honor, I will make the
25 normal motions we make at this point, motion to set

1 aside the verdict and renew all of our objections.

2 THE COURT: I note the motion and, of course,
3 would have to deny the motions at this time. Again,
4 anything from the State?

5 MR. MADSEN: As far as?

6 THE COURT: Motions.

7 MR. MADSEN: No motions.

8 THE COURT: Thank you, sir. Are you ready for
9 sentencing?

10 MR. NETTLES: Yes, sir.

11 THE COURT: Ready?

12 MR. MADSEN: Yes, Your Honor.

13 THE COURT: Come on around.

14 (Pause).

15 THE COURT: Anything from the State before
16 sentencing?

17 MR. MADSEN: Yes, Your Honor. This is Wendell
18 Amick. He was the victim's father. I believe at the
19 appropriate time he would like to address the Court.

20 THE COURT: This would be appropriate. Go
21 ahead, please, sir.

22 MR. MADSEN: Thank you, Your Honor.

23 MR. AMICK: Your Honor, my daughter was a very
24 loving person. Even though we had our ups and downs
25 just like any other parents and their children do, she

1 was a very loving person and a very hard-working person.

2 I had heard that she was leaving Dale because
3 he wouldn't work. I heard that about eight months to a
4 year before this happened. Out of the love for my
5 grandchildren and how he scarred their hearts for the
6 rest of their lives, I pray that you give him the
7 maximum sentence provided by the State.

8 THE COURT: Thank you. Anything else,
9 Solicitor?

10 MR. MADSEN: Your Honor, as you know -- and
11 Your Honor has sat on numerous murder trials. None of
12 them are good -- but I can't imagine factually anything
13 worse than coming into someone's home and gunning them
14 down in front of their children like that. Because of
15 that, Your Honor, the State would respectfully request
16 that you give this Defendant a life sentence.

17 THE COURT: Anything, Mr. Nettles?

18 MR. NETTLES: Your Honor, I would just point
19 out that, you know, if we are going to sentence him to
20 life for the children, that seems to be a logic that I
21 have a hard time following.

22 In terms of every murder case I have ever been
23 in, when it comes to sentencing, it's the worst murder
24 case that they have done. There's some redeemable
25 qualities in this man, and there is something about him

1 that has brought a lot of people in here today to try to
2 help him.

3 He does need to be punished and he realizes
4 that. I believe that Roger Dale has got some things
5 that he would like to say to you, too.

6 THE COURT: Yes, sir. Mr. Burke.

7 THE DEFENDANT: Yes, Your Honor. I agree with
8 what Wendell, Mr. Amick, said except for the fact that
9 Jenny was leaving me because I wouldn't work. I had my
10 own business, and for the first time in his life I was
11 actually doing the best for myself and my kids.

12 Jenny worked at Pirelli. I was making more
13 money than actually I knew what to do with. As far as
14 the relations from the kids, Your Honor, if I could,
15 they witnessed a bad thing, Your Honor.

16 But I got cards while I'm sitting here in jail
17 doing a crime that those kids have a hard time
18 accepting. As you heard Brandon say, Your Honor, even
19 though he has been through this, he still lives his dad.

20 MR. NETTLES: Your Honor, Mr. Burke has asked
21 those be passed up.

22 (Hands to Court).

23 THE DEFENDANT: Your Honor, this is Brandon's
24 writing. Those are his words. I haven't seen the kids
25 since the day this happened.

1 Your Honor, I'm 31 years old. I realize the
2 minimum you could sentence me to is a straight 30.
3 That's day for day. That's 27 years. That will make me
4 an old man.

5 Your Honor, I would like to request just one
6 chance, even though they will be old, to be with my
7 kids. Your Honor, if I'm sentenced to life, I can't
8 bring Jenny back, and I'm sorry for that. I am sorry
9 for what I done.

10 But I haven't lied about anything. I couldn't
11 risk losing them, and I hope -- I was a godly man and I
12 am still trying to be that way. I just hope the good
13 Lord above will take care of my kids.

14 I can rest assured that they will not be
15 raised up in that, and I am sorry for that as well. I
16 ask that if you sentence me to life, Your Honor, it
17 won't bring her back. I'm sorry for that.

18 But I'm not the person that the State has
19 tried to make me out to be. Keep in mind, Your Honor,
20 I'm not Bill Nettles. I'm not a smooth-talking lawyer.
21 I just can say what's on my heart.

22 In 2001 I won coach of the year for Amber's
23 T-ball team, but this wasn't a one-shot fluke, Your
24 Honor. I done it in 2000, 2001, as I mentioned, '99,
25 '98 and, '97. Those are all baseball pictures where I

1 coached, not just Brandon, but my little girl in T-ball.

2 I am sorry for not only Jenny's family, I am
3 sorry for my family. I am sorry but I know in my heart,
4 Your Honor, what caused this. I don't agree with it
5 myself, but at that time Mr. Amick did understand. He
6 knew I loved my kids. Although him and Jenny had
7 problems, he loved his, too.

8 I would just ask that you sentence me to the
9 minimum as provided by law. And once again, I'm sorry
10 for everybody here, and I'm sorry for Wendell's loss.
11 Even though it's my loss as well. I loved Jenny and I
12 never will stop.

13 MR. NETTLES: Your Honor, I would point out,
14 as he said, he is 31 years old. I would point out that
15 he has had no prior record. Have you ever even been
16 arrested?

17 THE DEFENDANT: I was arrested one time, Your
18 Honor. Because if I might bring up, the same guy that
19 was involved in this, my brother, he jumped on somebody
20 at a store; and I stood there and watched it.

21 Well, the guy couldn't go back and tell his
22 people that my brother whipped his tail by his self. So
23 he made a lie up on me, and I was found not guilty in a
24 trial by a court of the law because somebody lied on me.

25 The biggest thing I've ever had is a speeding

1 ticket, Your Honor. That was a six-point ticket I got
2 through Gilbert because I was the coach, and I was
3 running late for ball practice. And that is the truth.

4 I have to leave it up to your decision now.
5 Once again I will say, as you know, I can bring this up
6 now. I had an in-chambers meeting with you some year
7 ago, on March 3rd, 2003.

8 THE COURT: With me?

9 THE DEFENDANT: In your chambers at the old
10 courthouse. If you might remember -- I will refresh
11 your memory. Me and me Brad Kirkland, which was my
12 prior lawyer at that time, and I had some conflicts with
13 the Public Defender's Office; and you relieved
14 Mr. Kirkland as my attorney.

15 At that time you appointed Mr. Bill Nettles as
16 my attorney. Your Honor, I believe if I would have had
17 a decent attorney that actually cared what my kids were
18 being brought up in, I don't believe we would be here
19 today neither.

20 I'm not saying they went and pulled the
21 trigger. I done that. But no matter what you sentence
22 me to, not only have I met a good man, and he is not
23 just a lawyer, Bill has become my friend.

24 I am very satisfied with Bill Nettles, and I
25 thank you for granting that motion a year ago and giving

1 me the best. Somebody has already said it -- I wish I
2 could have came up with it.

3 But an inmate once said about Bill Nettles in
4 a lawyer magazine: When I get to heaven, if they have
5 lawyers there, at judgment day I want to be represented
6 by Bill Nettles. I will be represented by the best.
7 Thank you, Your Honor, and I'm sorry.

8 THE COURT: I certainly understand that. Of
9 course, I have tried a number of cases with Mr. Nettles.
10 Within the last couple of days, I think the most common
11 remark I have had from people was how good Mr. Nettles
12 has been here in the courtroom. So I certainly would
13 echo those remarks, too. No question he has done a
14 marvelous job in representing you. He always does that.
15 That's not unusual for him.

16 Based on the circumstances, Mr. Burke, I am
17 required to sentence -- I am not required -- but it's an
18 appropriate policy to sentence according to what the
19 jury has come up with as you know.

20 In this case they have found you guilty of
21 murder, along with -- and, of course, you had admitted
22 guilt on the other charges. The issue was on the murder
23 or the manslaughter.

24 Again, I thought you had a very good case for
25 the manslaughter. Bill did a superb job of representing

1 you on it, and it could have gone either way. But as
2 you know, the jury found you guilty of murder.

3 THE DEFENDANT: Yes, sir.

4 THE COURT: And, of course, unfortunately
5 they found you guilty of murder in association with some
6 other extremely serious charges. By their
7 interpretation of the facts, I am bound to sentence
8 along those lines.

9 On the murder charge, I am going to have to
10 order that you be committed to the Department of
11 Corrections for the term of your natural life.

12 On the burglary charge, for a term of 30
13 years. On the arson charge, for a term of 20 years.
14 And on the possession of weapon, for a term of five
15 years.

16 These sentences will run concurrently with
17 each other. I don't know how effective it is, but I
18 also will order that you be given credit for time
19 served. In the event there is ever any change in the
20 sentences, that would also be affected, too. But
21 anyway, good luck to you.

22 *** END OF REQUESTED TRANSCRIPT OF RECORD ***
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C E R T I F I C A T E

I, the undersigned L. Coconut Pantsari, Official Reporter for the Eleventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete Transcript of Record of all the proceedings had and the evidence introduced in the trial of the captioned cause, relative to appeal, in the Criminal Court for Lexington County, South Carolina on the 23rd through the 25th and the 27th days of August, 2004.

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

December 20, 2004



Court Reporter

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 239(d)(2), SCACR.

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

The State, Respondent,

v.

Roger Dale Burke, Appellant.

Appeal From Lexington County
Marc H. Westbrook, Circuit Court Judge

Unpublished Opinion No. 2007-UP-042
Submitted January 2, 2007 – Filed January 24, 2007

APPEAL DISMISSED

Assistant Appellate Defender Robert M. Dudek, of
Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief
Deputy Attorney General John W. McIntosh, Assistant
Deputy Attorney General Donald J. Zelenka, all of
Columbia; and Solicitor Donald V. Myers, of Lexington,
for Respondent.

PER CURIAM: Roger Dale Burke appeals his convictions and sentences to life imprisonment for murder, thirty years for burglary, twenty years for attempted arson, and five years for possession of a weapon. His counsel contends the trial court erred in allowing a written statement to be entered when the signed statement contained summary of their conversation. After a thorough review of the record and counsel's brief pursuant to Anders v. California, 386 U.S. 738 (1967) and State v. Williams, 305 S.C. 116, 406 S.E.2d 357 (1991), we dismiss^[1] Burke's appeal and grant counsel's motion to be relieved.

APPEAL DISMISSED.

HEARN, C.J., and KITTREDGE and WILLIAMS, JJ., concur.

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

FORM 5

ORIGINAL
RECEIVED

STATE OF SOUTH CAROLINA

County of Lepington

FILED

IN THE COURT OF COMMON PLEAS

2007 MAY 18 P 3:42

MAY 11 2007

Roger Dale Burkett # 304613

Full name and prison number (if any) of Applicant

Referred to PCR
Answered _____

v.

APPLICATION FOR

State of South Carolina

POST-CONVICTION RELIEF

2007-CP32-1784

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 B.R.C. - Mur. A-184-4460 Broad River Rd. - Columbia, South Carolina 29210
2. Name and location of Court which imposed sentence Lepington County General Sessions - Lepington, South Carolina 29072
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 02-BS-32-3278 murder
 - (b) 02-BS-32-3279 poss. of weapon-violent crime
02-BS-32-3280 attempted arson

- (c) 02-45-32-3281 burglary first-degree
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) August 27, 2004 life-30,20, and 5 years
- (b) _____
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty 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. The South Carolina Court of Appeals
- ii. The South Carolina Court of Appeals
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Appeal dismissed
- ii. Petition for Rehearing denied
- iii. _____
- (c) the date of each such result:
- i. January 24, 2007
- ii. March 22, 2007
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. 2007-UP-042
- ii. N/A
- 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) Prosecutorial misconduct
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) See Initial Brief, hereto affixed.
- (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) all grounds in (10) are first time challenged
- (b) _____
- (c) _____
17. Were you represented by an attorney at any time during the course of:
- (a) your arraignment and plea? N/A
- (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. William Nettles, Esquire
Georgetown County Bar
- ii. Robert M. Dudak, Esquire
Richland County Bar
- iii. _____
- (b) the proceedings at which each such attorney represented you:
- i. trial and sentencing
- ii. direct appeal
- iii. _____

ORIGINAL

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

conviction and sentence vacated or
reversed and remanded for new trial

SCL

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

no

2007-CP32-1784

STATE OF SOUTH CAROLINA)

County of Lexington)

VERIFICATION

I, Roger Dale Burke #304613, 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.

Roger Dale Burke

SWORN to and subscribed before me this 3RD
 day of MAY, 2007.

Joseph R. Mordylchinski (L.S.)
 Notary Public

My Commission Expires: 3-20-16

SETH A. CANTING
 CLERK OF COURT
 LEXINGTON, SC

2007 MAY 18 P 3:42

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 FILED

ORIGINAL

2007-CP32-1784

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

I, Roger Dale Burke #304613, 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.

Roger Dale Burke
Applicant

SWORN or affirmed to and subscribed before me this
3rd day of May, 2007.

Jay R. Kuzelinski
Notary Public

My Commission Expires: 3-20-16

DEPT. A. CLERKING
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State Of South Carolina
County Of Lexington

In The Court Of Common Pleas
Case No: 2002-GS-32-3278-3281:
C/A No: _____

Rodger Dale Burke, #304613,

Applicant,

VS.

State Of South Carolina,

Respondent.

Initial Brief Of Applicant :

Submitted, This 3 Day Of May, 2007.

Respectfully Submitted By,

Rodger Dale Burke

Rodger Dale Burke #304613

B.R.C.I., Murray A-184

4460 Broad River Road

Columbia, S.C. 29210

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Rule 407, SCACR

Constitutional Issues:

S.C. Const. Art.1, Sect.14

S.C. Const. Art.5, Sect.21

U.S. Const. Amend. Five

U.S. Const. Amend. Six

U.S. Const. Amend. Fourteen

Issues Presented :

Issue A : Was defence counsel ineffective in failing to place objections to the state's opening argument and misconduct at trial ?

Issue B : Was defense counsel ineffective in failing to present an insanity defense ?

Issue C : Did the Solicitor's actions amount to prosecutorial misconduct ?

Issue D : Was defence counsel ineffective in failing to place objections to the state's inherently prejudicial final summation ?

Issue E : Was defense counsel ineffective in failing to place objections or take exceptions to the trial courts erroneous malice instruction ?

Statement of The Case :

The applicant was indicted by the Lexington County Grand Jury during the September 2002 term for the offences of murder (02-GS-32-3278), burglary first degree (02-GS-32-3281), Attempted arson (02-GS-32-3280), and possession of a weapon during the commission of a violent crime (02-GS-32-3279) (Tr. p.605). He proceeded to trial on August 23-25, and 27, 2004, before the Honorable Marc H. Westbrook and a jury. William Nettles represented the applicant. Solicitors Robert Madsen and Marriion Moses represented the state. (Tr.p.1)

On August 27, 2004, the jury found applicant guilty as charged. (Tr.p.589, line 23-p.590, line 15). Judge Westbrook sentenced applicant to confinement in terms of life for murder, thirty (30) years for burglary first-degree, twenty (20) years for attempted arson, and five (5) years for possession of a weapon. (Tr.p.602, lines 9-15).

A timely notice of appeal was filed on September 2, 2004, and the appeal was perfected by Robert M. Dudek of the Columbia Appellate Defense office. On January 24, 2007, the South Carolina Court of Appeals dismissed the appeal. State v. Rodger Dale Burke, up.op.no 2007-UP-042. A timely Petition for Rehearing was filed on February 6, 2007, and denied on March 22, 2007.

This Post-Conviction Relief Application, with Initial Brief now follows.

Issue A : Argument :

Issue A : Was defense counsel ineffective in failing to place objection to the State's opening argument and misconduct at trial ?

Factual Basis :

In opening argument; right from first instance, Solicitor Moses stated, " Judge, jury, and executioner. Ladies and gentlemen, on December 19, 2001, the defendent, Rodger Dale Burke, took it upon himself to be the judge, to be the jury, and to be the executioner of his ex-wife, Jenny Burke." (Tr.p.59, lines 19-23). "It was a cold December morning, six days before Christmas." (Tr.pp.59, line 25-p.60, line 7).

"Little Brandon, is standing there, watches his dad pull out a .380 - caliber pistol and shoot his mother in the chest." (Tr.p.60, lines 21-23). Little Brandon was the State's 13 year old child witness and first to take the stand. (Tr.pp.77, line 25-p.78, line 4).

"The defendant, he shoots Jenny Burke again and again. She falls dead right next to the Christmas tree." (Tr.p.61, lines 3-6).

"He leaves his children sitting there by the pond on that cold day. He leaves his children in the car, no car running, no heat, it's cold." (Tr.pp.61, lines 18-19; p.62, lines 12-13).

"Ladies and gentlemen, on December 19, 2001, the Defendent took it upon himself to the judge of his ex-wife. He was her jury. And when he convicted her he sentenced her to death." (Tr.p.62, lines 14-17; See, also, Tr.p.85, lines 23-25).

The Solicitor's opening argument was intentionally designed to draw the emotions of the jury in order to gain an easy conviction based upon their emotions more so than fact. It was also play to a play to gain sympathy for the victim and the children in order to draw the bias and prejudice of the jury towards the Defendent; as well as to open the door for the elusion of it in final summation by Solicitor Madson, and to improper conduct during trial.

Issue A : Cont.

To make matters even worse, defense counsel stated, "you are going to convict my client of burglary, having a firearm, and arson." (Tr.pp.64, line 24-p.65, line 11).

"His wife left him for his brother, and they were trying to take the kids and move the kids in with his brother. That made the man think not exactly right." (Tr.pp.66, line 24-p.67, line 2).

"There will soon be some horrible autopsy, there will be some horrible picture. You are going to see some pictures that will make--that y'all don't see. (Tr.p.67, lines 6-8). These remarks by defense counsel had the affect of telling the jury that his client was guilty of all offenses charged, including murder. If only one single juror was affected by the Solicitor's opening argument of defense counsel's remarks, then the verdict is as unfair, as if all were.

The Trial :

During direct examination of Dr. William Armstrong, the Solicitor asked, "Can you explain the term homicide to the jury?" The Dr. responded, "Homicide is the death of a person caused by the action of someone else." (Tr.p.258, lines 15-20).

It was only assumption that the blood stains at the crime scene were those of the victim. Officer Scottie Frier admitted that he was not even sure a test was performed on these stains and he could not truthfully say it was the victim's blood or even human blood. (Tr.pp.279, lines 19-p.282, line 10; p.286, lines 16-23; p.287, line 23-p.288, line 4; p.288, lines 16-23; p.289, lines 6-12; p.290, lines 18-23). That was a very substantial factor at trial, as the Defendent had no prior impeachable convictions. (Tr.p.295, line 13-16). When reviewed in that light, the Solicitor's opening argument and defense counsel's prejudicial remarks in regard to his client are even more inherently prejudicial.

In regard to cross-examination of the witness, Frances Marie Burke, by the Solicitor. See: (Tr.pp.318, line 25-p.319, line 17).

Issue A : Cont.

During cross-examination of Clint Addy, the Solicitor elicited testimony that the "Defendent intended to put his kids in a caustic chemical tank with his wife and his brother." (Tr.pp.330, line 22-p.331, line 1).

Solicitor Moses elicited incriminating responses with the questions, "It would be a pretty dangerous situation, the children in the woods by themselves, right behind the pond, in an unrunning car for hours and hours, or a loaded gun where they can see it unsupervised." (Tr.pp.337, line 23-p.338, line 25).

The Solicitor further elicited incriminating remarks that "indicated the Defendent was involved in the molestation of his own children", and the fact that, "his wife didn't hurt or cause any physical harm to him." (Tr.pp.348, line 16-p.350, line 23).

Solicitor asked the witness, Almon Anderson, "Mr. Anderson, you are testifying because you want to help the Defendent out; isn't that true?" (Tr.p.381, lines 16-19).

The Solicitor insinuated that the Defendent practiced up with the gun before the incident had occurred. (Tr.p. 484, lines 3-18).

The Solicitor insinuated that the Defendent washed the blood off his hands in the kitchen sink. (Tr.pp.518, line 13-p.519, line 1). However, the record reflects that Billy Joe Storey could have been the person whom left the blood in the kitchen sink. See:(Tr.p.102, lines 17-19), and See: (Statement of 12/19/2001, Jason Lesphart). That characterization by the Solicitor was an intended orchestrating to the jury that the Defendant was a cold-blooded murderer, to show a nexus to the murder.

The Solicitor indicated the ligature marks around the victim's neck came from the Defendant dragging the body with a cord. (Tr.pp.522, lines 1-20).

The Solicitor further insinuated that someone helped the Defendant place the body in the woods and cover it up. (Tr.pp.524, line 2-p.526, line 12; See, also, Tr.p.529, lines 12-22).

Issue A : Cont.Law Analysis :

Opening arguments and misconduct of the nature have been universally held to be improper and highly impermissible by our court. U.S. v. Young, 470 U.S.1,18,105 S.Ct. 1038(1985); U.S. v. Hawkins, 76 F.3d 545 (4th Cir. (1996); U.S. v. Wilson, 135 F.3d 291 (4th Cir. 1998).

Our State Courts have long upheld that some principle of law and justice. State v. Jones, 466 S.E.2d 773-74 (Ct. App.1996); State v. Reese, Jr., supra. (Ct.App. April 29, 2001).

The error here is indeed, not harmless beyond a reasonable doubt. U.S. v. Golding, 168 F.3d 700,702 (4th Cir. 1999); Berger v. U.S., 55 S.Ct.629(1935), Rule 407, SCACR.

If only one juror was affected by it, then the verdict is as unfair, as if all were. U.S. Const. Amend. Six.

For defense counsel to give up the ghost; not even placing one sinle objection to such an opening argument, and further adding prejudice to it by his own remarks constitutes ineffective assistance at it's worst; which indeed, undermines the proper functioning of the adversarial trial process. Butler v. State, 286 S.C. 441, 442, 334, S.E.2d 813, 814 (1985); Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052 at 2064 (1984). Counsel's performance was highly deficient and the applicant here was prejudiced because of it. Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625; Strickland, 466 U.S. at 688, 104 S.Ct. at 2065, 2066 (1984). This trial was not a fair one. State v. Bryant, 354 S.C. 390, 581 S.E.2d 157 (2003) The outcome of this trial cannot be relied upon as having produced a just result. Donnelly v. De Christoforo, 416 U.S. 637, 648-49, 94 S.Ct. 1868, 40 L.Ed.2d 431, 440 (1974); U.S. Const. Amend. Fourteen; S.C. Const. Art.1, Sect.14.

The applicant is entitled to a reversal in this instant case.

Issue B : ArgumentIssue B : Was defense counsel ineffective in failing to present an insanity defence?Factual Basis :

Defense counsel stated, "His wife left him for his brother, and they were trying to take the kids and move the kids in with his brother. That made a man think not exactly right." (Tr.pp.66, line 24-p.67, line 2).

The court stated, "Some form of dementis or disturbance defence or something ?" Defense responded, "It's not dementia. The Solicitor and I talked about that ." (Tr.pp.141, line 19-p.142, line 5).

Defense counsel erred in forming his own opinion in that regard, as he was not trained in that area, as the following factors clearly reflect. Counsel was indeed ineffective in failing to argue a diminished compacity or insanity defense in his client's behalf. His client was certainly in an unstable mental and emotional stage when the physical act was committed.

The report by officer Frier, dated December 20, 2001, clearly states, "suspect is armed, dangerous, and suicidal. See : (Attachment A).

Officer Scottie Rice Frier further stated at trial, "We were aware that the Defendant's wife had taken up with his brother, and that the dynamics of such a scenario caused officers some grave concerns." (Tr.pp.208, line 20-p.209, line 22).

Michael Ratliff testified, "He was a totally different person after Jenny left him for his brother J.J. He pretty much shut most of his friends out. He did not get much family support from his parents because J.J. was the youngest of the family." (Tr.pp.304, line 13-p.305, line 25).

The Defendant told him, "that he couldn't live without his kids, and if she took his kids, he would probably kill her." (Tr.pp.306, line 5-p.307, line 9; p.308, line 2-p.310, line 22). "I knew it was tearing him apart, but it never crossed my mind he would actually do it. He had never been a violent person". (Tr.pp.307, lines 7-9; p.312, line 12-p.313, line 3).

Frances Marie Burke testified, "that her brother Christopher molested the Defendant's daughter Amber, that he did not know about it until his wife, Jenny called and told him about it, and that the Defendant had no part of the molestation." (Tr.pp.316, lines 2-13; p.318, lines 11-24).

Issue B : Cont.

Clint Addy testified, "there was a change in Dale after she lefted him for his brother. He would not eat and would argue with his friends. He talked about disposing of Jenny's body, his brother, and Christopher in a caustic chemical tank." (Tr.pp.326, line 9-p.330, line 9).

Cynthia Marie Anderson testified, "the Defendant was very emotionally upset after his wife left him for his brother and he did not want his kids to be in the type of environment going on at his brother's home." (Tr.pp334, line 21-p.335, line 6).

Terry Allen Anderson testified, "When his wife left him, he lost weight and was emotional all the time. He would break down and cry sometimes. He was just going through a real tough time." (Tr.pp.341, lines 1-9; p.351, line 3-p.352, line 12).

Jane Simpson, a nurse, testified, "After his wife left him for his brother, it tore Dale apart. He would come to my house and he would sit and cry. He would be so emotional that he would jerk so bad that he would shake my kitchen table. He was just tore up because he loved Jenny. He loved Jason, his brother. He loved he parents. He was losing--his whole life was just falling apart." (Tr.pp.356, line 21-p.357, line 5).

"His wife Jenny was very depressed because her mother had died and Dale was upset over it. They were going through a grieving process." (Tr.pp.357, line 12-p.358, line 15). "The Defendant was having some respiratory problems, but could not afford to go to the doctor. She advised him to go to mental health because he needed help." (Tr.pp.358, line 16-p.359, line 22)

Almon Odell Anderson testified, "He was temporarily insane in my opinion when this thing happened." (Tr.p.391, lines 16-17).

The Defendant testified, "It was supposed to be himself, his brother and his wife." (Tr.pp.457, line 22-p.459, line 1; p.459, lines 21-23).

In final summation, defense counsel stated, "It was supposed to be his brother and his wife." (Tr.p.546, lines 10-13).

At least two people thought the Defendant needed mental help, a trained nurse and a close male friend.

There was certainly a question of mental competency as to the Defendant's "Mens Reas" at the time of the crime.

Issue B : Cont.Law Analysis :

Deminished compacity or insanity is an affirmative defense which the State must disprove. State v. Hartfield, 300S.C.469, 388S.E.2d 802 (1990); State v. Grimes, 292 S.C. 204, 355 S.E.2d 538 (1887); U.S. v. Mason, 52 F.3d 1286, 1292-93 (4th Cir. 1995); Dusky v. U.S., 362 U.S. 402 (1960); Pate v. Robinson, 383 U.S. 375, 385 (1966).

When the facts of the case clearly show the defense exists; as they do here, the failure of the counsel to present such a defense constitutes ineffective assistance of counsel. Wiggins v. Smith, 539 U.S. 510, 123 S.Ct 2527, 2529, 156 L.Ed.2d 471(2003).

Insanity or dementia cannot be overcome in a sufferers mind by any amount of evidence. State v. Hann, 196 S.C. 211, 12 S.E.2d at 720; State v. Moore, 241 S.C. 487, 129 S.E.2d at 330; Becton v. Barnett, 290 F.2d at 1190 (4th Cir. 1990).

Furthermore; the Defendant had left in his vehicle a suicide note to his father in which he stated, "he was going to kill his brother, his wife, and himself," but that note or fact was not brought out or introduced at trial. That brings to bear three vital factors. First, if that note was destroyed then due process was violated, because it was exculpatory. State v. Singleton, 319 S.C. 312, 460 S.E.2d 573 (1995). Second, if the State did not turn the note over to the Defense in Discovery, then the Brady Rule was violated. State v. Kennerly, 331 S.C. 442, 503 S.E.2d 214 (S.C.App. 1998). Third, if defense counsel was aware of or had that note and did not use it in mitigation at trial in his client's behalf, then counsel was indeed ineffective. Wiggins v. Smith, 539 U.S. 510 (2003).

Either way; the applicant is entitled to a reversal in this particular case.

Issue C : Argument :Issue C : Did the Solicitor's actions amount to prosecutorial misconduct?Factual Basis :

During cross-examination of the witness, Clint Addy, the Solicitor elicited testimony, "that the Defendant intended to put his kids in a caustic chemical with his wife." (Tr.pp.330, line 22-p.331, line 1).

During deliberations, the jury sent out a note in which they requested to hear that testimony again, and it was replayed, (Tr.pp.582, line 10-p.583, line 13; p.587, lines 8-24). A short time later, the jury found the Defendant guilty on all offenses. The court stated, "I thought you had a very good case for the manslaughter." (Tr.p.601, lines 22-25).

Law Analysis :

Sometimes, a witness can poison a Defendant's fair trial by his testimony; specifically if the Defendant denies the allegation, as the Defendant did at trial in this case. The testimony elicited by the Solicitor encouraged the jurors to "abandon their impartiality," as it did here, because it places the jurors in the victim's shoes, especially when it is eluded to in final summation. Such testimony and argument tends to completely destroy all sense of impartiality of the jurors and it's effect is to arouse passion and prejudice. "It is not, and can never be harmless error," because it deprives the jurors of their focus on the evidence involved, allowing a decision based upon emotion, biases, and prejudices, not fact. It deprives the defendant of the juror's independent ability to evaluate and analyze credibility, believability, and fact; which in turn, denies the defendant a fair trial proceeding, as well as due process. The Solicitor's actions here; did constitute prosecutorial misconduct. State v. Jones, 466, S.E.2d 773, 774 (Ct.App. 1996); State v. Reese, *supra*. (Ct.App. April 29 2001); Rule 22.

The applicant is entitled to a reversal.

Issue D : Argument :

Issue D : Was defense counsel ineffective in failing to place objection to the State's inherently prejudicial final summation ?

Factual Basis :

Solicitor Madsen in final summation stated, " Mr. Moses told you this case is about a man who decided on December 19th to be his wife's judge, decided to be her jury. And when he sentenced her on that day, he decided to be her executioner. We know what he did and how he decided to execute her." (Tr.pp.548, lines 12-18; p.551, line23-p.552, line 6). See, also, (Tr.p.557, lines 6-13).

The Solicitor then bolsters the State's case in-chief by incriminating remarks upon fact and evidence not presented at trial. (Tr.p 551, lins 3-13).

The Solicitor then goes forward; not only to vouch for officer Frier's credibility, but also he pits the Defendant's testimony against that of the officer. (Tr.pp. 548 line 22-p.549, line6; p.553, lines 5-9).

The Solicitor attacks and destroys the defense theory in regard to the lesser-included offense manslaughter. (Tr.pp.554, line 15-p.555, line 18; p.556, lines 17-20).

To top that off; the solicitor tells the jury, "The best lie contains 90 percent truth, doesn't it?" (Tr.p.557, lines 19-22; and See: Tr.pp.558, line 8-p.559, line 12).

Law Analysis :

Here, the burden of proof was shifted from the state to the Defendant. Sandstrom v. Montana, 442 U.S.510, 514 (1979); Boyd v. French, 147 F.3d 319 (4th Cir. 1998); State v. Gathers, 369 S.E.2d 140 (1988).

The State cannot vouch for the credibility of its own witnesses, as the Solicitor did here, and it may not pit testimonies of one witness against the other, as the Solicitor did here. State v. Rudd, 355 S.C. 221, 565 S.E.2d 281 (2002); Mathews v. State, 565, S.E.2d at 766 (2002); State v. King, 561 S.E.2d 640 (2002).

Issue D: Cont.

Furthermore, a Solicitor may not insinuate that a Defendant is a liar, nor may he call him a liar. U.S. v. Loayza, 107 F.3d 257 (4th Cir. 1997).

Defense counsel was ineffective in failing to place objection to the inherently prejudicial final summation. State v. Shuler, 545 S.E.2d 805 (2001); State v. Kelly, 540 S.E.2d 851 (2001).

When the opening argument is considered in conjunction with the final summation, and defense counsel's failure to place objections to either one, it cannot be harmless beyond a reasonable doubt.

The fairness of this trial should be well scrutinized. State v. Bryant, 581 S.E.2d 157 (2003).

The applicant is entitled to a reversal.

Issue E: Argument :

Issue E: Was defense counsel ineffective in failing to place objections or take exceptions to the trial court's erroneous malice instruction?

Factual Basis:

The trial court instructed the jury, "Malice may also be implied from the willful, deliberate, and intentional doing of an unlawful act without just cause or excuse or from the use of a deadly weapon." (Tr.p.569, lines 18-21).

Law Analysis :

The malice instruction to the jury allowed them to presume from the Defendant's intentional acts and from the use of a deadly weapon that he was guilty of murder which precluded any finding of manslaughter by the jury. Gibson v. State, 355 S.C. 429, 586 S.E.2d 119, 124 S.Ct. at 1439 (2003).

Our Supreme Court has enunciated a proper malice instruction and has more than once, cautioned the bench that only slight deviations in the charge would be acceptable. The deviations in the charge given here were not just slight, and it was misleading, as well as confusing to the jury. State v. Torrence, 305 S.C. 45, 405 S.E.2d 315 (1991). If or when exposure to unconstitutional instructions improperly influences only one juror, the verdict is unfair, as if all were. Here, there is a very substantial likelihood, that the jury reached its verdict based upon an erroneous understanding of the law. Sullivan v. Louisiana, 113 S.Ct. 2078 (1993). U.S. Const. Amend. Six. Defense counsel erred.

The Applicant is entitled to a reversal.

Conclusion:

For the legal reasons and principles cited in this Post-Conviction Relief Application, with Initial Brief, the conviction and sentence should be vacated, reversed for new trial, or judgement of acquittal entered.

Wherefore, Applicant does forever pray.

2007-CP32-1784

Respectfully Submitted By,

Rodger Dale Burke

Rodger Dale Burke # 394613

B.R.C.I., Mirray A-184

4460 Broad River Rd.

Columbia, S.C. 29210

FILED

2007 MAY 18 2 342

BETH A. JARVIS
CLERK OF COURT
LEXINGTON SC

State of South Carolina
County Of Lexington

FILED

In The Court of Common Pleas

Case No: 2002-GS-32-3278-3281 :

2007 MAY 18 3:42

C/A No: _____

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

☞ Rodger Dale Burke, #304613,

Applicant,

VS.

State of South Carolina,

Respondent.

2007-CP32-1784

Motion To Address All Issues :

Now comes the Applicant Rodger Dale Burke #304613, by and through this Court Appointed attorney, who ask this Honorable Court to require the attorneys involved in this Post-conviction Relief Action and any Amendment thereof to be meticulous in the preparation of any "Order" prepared in this matter.

Specifically, the Applicant requests that each and every issue within the Post-Conviction Relief Application and any Amendment thereof, at the hearing, be addressed in the "Order" of the Court to issued at the conclusion of the Evidentiary Hearing in this matter.

The Applicant requests this Motion pursuant to S.C. Code, §17-27-80. Citing, Pruitt v. State, 423 S.E.2d 127 (1992); Bryon v. State, 493 S.E.2d 500 (1997).

Wherefore, Applicant request the Motion be granted

Sworn To Before Me This 3RD Day of MAY, 2007.

Notary public For South Carolina: Joseph R. Mandy

My Commission Expires: 3-20-16

Respectfully Submitted BY,

Rodger Dale Burke

Rodger Dale Burke #304613

B.R.C.I. Murray A-184

4460 Broad River Road

Columbia, S.C. 29210

State Of South Carolina
County of Lexington

IN The Court Of Common Pleas

Case No: 2002-GS-32-3278-3281:

C/A No: _____

FILED

Rodger Dale Burke, #304613,

2007 MAY 18 2 3:42

Applicant,

State Of South Carolina,

BETNA CARRIGG
CLERK OF COURT
LEXINGTON SC

Respondent,

Certificate Of Services:

I, the Applicant in the above captioned matter, do hereby under oath and penalty of perjury certify that I have served copies of the same documents to the below listed parties upon this exact date.

(1) Mr. Henry D. McMaster
Attorney General
P.O. Box 11549
Columbia, S.C. 29211-1549

(2) Office Of The Clerk
Lexington County
139 E. Main St., Rm. 107
Lexington, S.C. 29072-3456

Sworn To Before Me This 3rd Day Of MAY, 2007.

Notary Public For South Carolina: Joyce R. [Signature]

My Commission Expires: 3-20-16

Respectfully Submitted By,

Rodger Dale Burke
Rodger Dale Burke #304613

B.R.C.I., Murray A-184

4460 Broad River Road

Columbia, S.C. 29210

2007-C P32-1784

FORM 5

ORIGINAL^{SC}

STATE OF SOUTH CAROLINA)

County of Lexington)Roger Dale Burr #304613)

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

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS FILED 4/1

2007 JUN -5 A 8:41

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

APPLICATION FOR

POST-CONVICTION RELIEF

2007-CP32-1965

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 B.R.C.C. - Mur. A-184-4460 Broad River Rd. - Columbia, South Carolina 29210
2. Name and location of Court which imposed sentence Lexington County General Sessions - Lexington, South Carolina 29072
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 02-65-32-3278 murder
 - (b) 02-65-32-3279 poss. of weapon-violent crime
02-65-32-3280 attempted arson

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JUN 5 2007
Tex. Co. C.C.P., G.S. & P.C.

- (c) 02-45-32-3281 Murphy First-Degree
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) August 27, 2004 Life-30, 20, and 5 years
- (b) _____
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty 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. The South Carolina Court of Appeals
- ii. The South Carolina Court of Appeals
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Appeal dismissed
- ii. Petition for Rehearing denied
- iii. _____
- (c) the date of each such result:
- i. January 24, 2007
- ii. March 22, 2007
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. 2007-KP-042
- ii. N/A
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) N/A
- (b) _____

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 Tex. CO. CLERK, C.S. & EC.

- (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) Prosecutorial misconduct
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) See Initial Brief, hereto affixed.
- (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. _____

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 Lex. Co. C.C.C.P., C.S. & H.C.

(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) all grounds in (10) are first time challenged
 (b) _____
 (c) _____

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

(a) your arraignment and plea? N/A
 (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. William Nottles, Esquire
Lexington County Bar
 ii. Robert M. Duda, Esquire
Rickland County Bar
 iii. _____

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

i. trial and sentencing
 ii. direct appeal
 iii. _____

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

conviction and sentence vacated or
reversed and remanded for new trial

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

no

2007-CP32-1965

ORIGINAL

SC

STATE OF SOUTH CAROLINA

County of Lexington

VERIFICATION

I, Roger D. Burke #304613, 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.

Roger Dale Burke

SWORN to and subscribed before me this 3rd
day of MAY, 2007.

Joseph R. Mordyluski (L.S.)
Notary Public

My Commission Expires: 3-20-16

A TRUE COPY
JUN 5 2007
CLERK OF COURT
LEXINGTON SC

BETH A. CARRIG
CLERK OF COURT
LEXINGTON SC

JUN -5 A 8:41

FILED

Revised 3/2003

2007-CP32-1965

ORIGINAL

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

I, Roger D. Bunde #304613, 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.

Roger Dale Bunde
Applicant

SWORN or affirmed to and subscribed before me this

3rd day of MAY, 2007.

Joseph R. Modjeski
Notary Public

My Commission Expires: 3-20-16

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750 CA
Lex. Co. O.E.C.P. U.S. & F.C.

BETH A. CARRIG
CLERK OF COURT
LEXINGTON SC

1 2007 JUN -5 A 8:42

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FILED

"Attachment A"

LEXINGTON COUNTY SHERIFF'S DEPARTMENT

Wanted / Missing Person Worksheet

NCIC



* Requires Extradition
approval from Solicitor's
Office

Entry Type

IN-STATE ONLY

Solicitor's Office has Approved Extradition

Solicitor name: _____

Investigator

S. Ficker

Case #

0191805

Authorized by: _____

Date: 12/20/01

Suspect Information

* This Information is to be taken from the Warrant (not Rap Sheet - DL etc) *

Name

BURKE

First

Roger

Middle

Date

Race

W

Sex

M

Date

of Birth 7/24/73

Place of Birth

(State) SC

Hgt

Wgt

Hair

Eyes

5'6

160

Bco

Blu

Alias(s)

(1)

FBI # (Rap Sheet)

698292286

(2)

Social Security #

246-21-3283

(3)

Driver's License #

004082869 State SC Yr Exp

Unique Scars / Marks / Tattoos

TAT UL ARM

TAT UR ARM

Offense

Warrant #

Warrant Date

ABWIK

G-643301

12/20/01

Special Considerations

Yes

No

Unknown

Armed

☒☐☐

Dangerous

☒☐☐

Suicidal

☒☐

M 62602

054

For Missing Person

Date Last Seen

12/19/01

Clothing Description: Shirt

Pants

Shoes

Coat

Misc.

Vehicle Description: Color

Yr

Make

Model

Tag #

State

Miscellaneous Information

Weapons, Possible Destinations, Etc:

Subject is believed to be Armed with a
handgun

2007-CP32-1965

ORIGINAL

SCL

State Of South Carolina

County Of Lexington

In The Court Of Common Pleas

Case No: 2002-GS-32-3278-3281:

C/A No: _____

Rodger Dale Burke, #304613,

Applicant,

VS.

State Of South Carolina,

Respondent

Initial Brief Of Applicant :Submitted, This 3 Day Of May, 2007.A TRUE COPY
Lex. Co. C.C.C.P., G.S. & E.C.

Respectfully Submitted By,

Rodger Dale Burke

Rodger Dale Burke #304613

B.R.C.I., Murray A-184

4460 Broad River Road

Columbia, S.C. 29210

FILED
1 2007 JUN -5 A 8:42
BETH A. CARRIG
CLERK OF COURT
LEXINGTON SC

2007-CP32-1985

ORIGINAL

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BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

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2007-CP32-1965

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Issues Presented :

Issue A : Was defence counsel ineffective in failing to place objections to the state's opening argument and misconduct at trial ?

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Issue B : Was defense counsel ineffective in failing to present an insanity defense ?

Issue C : Did the Solicitor's actions amount to prosecutorial misconduct ?

Issue D : Was defence counsel ineffective in failing to place objections to the state's inherently prejudicial final summation ?

Issue E : Was defense counsel ineffective in failing to place objections or take exceptions to the trial courts (erroneous malice instruction) ?

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Statement of The Case :

The applicant was indicted by the Lexington County Grand Jury during the September 2002 term for the offences of murder (02-GS-32-3278), burglary first degree (02-GS-32-3281), Attempted arson (02-GS-32-3280), and possession of a weapon during the commission of a violent crime (02-GS-32-3279) (Tr. p.605). He proceeded to trial on August 23-25, and 27, 2004, before the Honorable Marc H. Westbrook and a jury. William Nettles represented the applicant. Solicitors Robert Madsen and Marriion Moses represented the state. (Tr.p.1)

On August 27, 2004, the jury found applicant guilty as charged. (Tr.p.589, line 23-p.590, line 15). Judge Westbrook sentenced applicant to confinement in terms of life for murder, thirty (30) years for burglary first-degree, twenty (20) years for attempted arson, and five (5) years for possession of a weapon. (Tr.p.602, lines 9-15).

A timely notice of appeal was filed on September 2, 2004, and the appeal was perfected by Robert M. Dudek of the Columbia Appellate Defense office. On January 24, 2007, the South Carolina Court of Appeals dismissed the appeal. State v. Rodger Dale Burke, up.op.no 2007-UP-042. A timely Petition for Rehearing was filed on February 6, 2007, and denied on March 22, 2007.

This Post-Conviction Relief Application, with Initial Brief now follows.

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Issue A : Argument :

Issue A : Was defense counsel ineffective in failing to place objection to the State's opening argument and misconduct at trial ?

Factual Basis :

In opening argument; right from first instance, Solicitor Moses stated, " Judge, jury, and executioner. Ladies and gentlemen, on December 19, 2001, the defendent, Rodger Dale Burke, took it upon himself to be the judge, to be the jury, and to be the executioner of his ex-wife, Jenny Burke." (Tr.p.59, lines 19-23). "It was a cold December morning, six days before Christmas." (Tr.pp.59, line 25-p.60, line 7).

"Little Brandon, is standing there, watches his dad pull out a .380 - caliber pistol and shoot his mother in the chest." (Tr.p.60, lines 21-23). Little Brandon was the State's 13 year old child witness and first to take the stand. (Tr.pp.77, line 25-p.78, line 4).

"The defendant, he shoots Jenny Burke again and again. She falls dead right next to the Christmas tree." (Tr.p.61, lines 3-6).

"He leaves his children sitting there by the pond on that cold day. He leaves his children in the car, no car running, no heat, it's cold." (Tr.pp.61, lines 18-19; p.62, lines 12-13).

"Ladies and gentlemen, on December 19, 2001, the Defendent took it upon himself to the judge of his ex-wife. He was her jury. And when he convicted her he sentenced her to death." (Tr.p.62, lines 14-17; See, also, Tr.p.85, lines 23-25).

The Solicitor's opening argument was intentionally designed to draw the emotions of the jury in order to gain an easy conviction based upon their emotions more so than fact. It was also play to a play to gain sympathy for the victim and the children in order to draw the bias and prejudice of the jury towards the Defendent; as well as to open the door for the elusion of it in final summation by Solicitor Madson, and to improper conduct during trial.

To make matters even worse, defense counsel stated, "you are going to convict my client of burglary, having a firearm, and arson." (Tr.pp.64, line 24-p.65, line 11).

"His wife left him for his brother, and they were trying to take the kids and move the kids in with his brother. That made the man think not exactly right." (Tr.pp.66, line 24-p.67, line 2).

"There will soon be some horrible autopsy, there will be some horrible picture. You are going to see some pictures that will make--that y'all don't see. (Tr.p.67, lines 6-8). These remarks by defense counsel had the affect of telling the jury that his client was guilty of all offenses charged, including murder. If only one single juror was affected by the Solicitor's opening argument of defense counsel's remarks, then the verdict is as unfair, as if all were.

The Trial :

During direct examination of Dr. William Armstrong, the Solicitor asked, "Can you explain the term homicide to the jury?" The Dr. responded, "Homicide is the death of a person caused by the action of someone else." (Tr.p.258, lines 15-20).

It was only assumption that the blood stains at the crime scene were those of the victim. Officer Scottie Frier admitted that he was not even sure a test was performed on these stains and he could not truthfully say it was the victim's blood or even human blood. (Tr.pp.279, lines 19-p.282, line 10; p.286, lines 16-23; p.287, line 23-p.288, line 4; p.288, lines 16-23; p.289, lines 6-12; p.290, lines 18-23). That was a very substantial factor at trial, as the Defendent had no prior impeachable convictions. (Tr.p.295, line 13-16). When reviewed in that light, the Solicitor's opening argument and defense counsel's prejudicial remarks in regard to his client are even more inherently prejudicial.

In regard to cross-examination of the witness, Frances Marie Burke, by the Solicitor. See: (Tr.pp.318, line 25-p.319, line 17).

Issue A : Cont.

During cross-examination of Clint Addy, the Solicitor elicited testimony that the "Defendent intended to put his kids in a caustic chemical tank with his wife and his brother." (Tr.pp.330, line 22-p.331, line 1).

Solicitor Moses elicited incriminating responses with the questions, "It would be a pretty dangerous situation, the children in the woods by themselves, right behind the pond, in an unrunning car for hours and hours, or a loaded gun where they can see it unsupervised." (Tr.pp.337, line 23-p.338, line 25).

The Solicitor further elicited incriminating remarks that "indicated the Defendent was involved in the molestation of his own children", and the fact that, "his wife didn't hurt or cause any physical harm to him." (Tr.pp.348, line 16-p.350, line 23).

Solicitor asked the witness, Almon Anderson, "Mr. Anderson, you are testifying because you want to help the Defendent out; isn't that true?" (Tr.p.381, lines 16-19).

The Solicitor insinuated that the Defendent practiced up with the gun before the incident had occurred. (Tr.p. 484, lines 3-18).

The Solicitor insinuated that the Defendent washed the blood off his hands in the kitchen sink. (Tr.pp.518, line 13-p.519, line 1). However, the record reflects that Billy Joe Storey could have been the person whom left the blood in the kitchen sink. See:(Tr.p.102, lines 17-19), and See: (Statement of 12/19/2001, Jason Lesphart). That characterization by the Solicitor was an intended orchestrating to the jury that the Defendant was a cold-blooded murderer, to show a nexus to the murder.

The Solicitor indicated the ligature marks around the victim's neck came from the Defendant dragging the body with a cord. (Tr.pp.522, lines 1-20).

The Solicitor further insinuated that someone helped the Defendant place the body in the woods and cover it up. (Tr.pp.524, line 2-p.526, line 12; See, also, Tr.p.529, lines 12-22).

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Issue A : Cont.Law Analysis :

Opening arguments and misconduct of the nature have been universally held to be improper and highly impermissible by our court. U.S. v. Young, 470 U.S.1,18,105 S.Ct. 1038(1985); U.S. v. Hawkins, 76 F.3d 545 (4th Cir. (1996); U.S. v. Wilson, 135 F.3d 291 (4th Cir. 1998).

Our State Courts have long upheld that some principle of law and justice. State v. Jones, 466 S.E.2d 773-74 (Ct. App.1996); State v. Reese, Jr., supra. (Ct.App. April 29, 2001).

The error here is indeed, not harmless beyond a reasonable doubt. U.S. v. Golding, 168 F.3d 700,702 (4th Cir. 1999); Berger v. U.S., 55 S.Ct.629(1935), Rule 407, SCACR.

If only one juror was affected by it, then the verdict is as unfair, as if all were. U.S. Const. Amend. Six.

For defense counsel to give up the ghost; not even placing one sinle objection to such an opening argument, and further adding predjudice to it by his own remarks constitutes ineffective assistance at it's worst; which indeed, undermines the proper functioning of the adversarial trial process. Butler v. State, 286 S.C. 441, 442, 334, S.E.2d 813, 814 (1985); Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052 at 2064 (1984). Counsel's performance was highly deficient and the applicant here was prejudiced because of it. Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625; Strickland, 466 U.S. at 688, 104 S.Ct. at 2065, 2066 (1984). This trial was not a fair one. State v. Bryant, 354 S.C. 390, 581 S.E.2d 157 (2003) The outcome of this trial cannot be relied upon as having produced a just result. Donnelly v. De Christoforo, 416 U.S. 637, 648-49, 94 S.Ct. 1868, 40 L.Ed.2d 431, 440 (1974); U.S. Const. Amend. Fourteen; S.C. Const. Art.1, Sect.14.

The applicant is entitled to a reversal in this instant case.

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Issue B : ArgumentIssue B : Was defense counsel ineffective in failing to present an insanity defence?Factual Basis :

Defense counsel stated, "His wife left him for his brother, and they were trying to take the kids and move the kids in with his brother. That made a man think not exactly right." (Tr.pp.66, line 24-p.67, line 2).

The court stated, "Some form of dementis or disturbance defence or something ?" Defense responded, "It's not dementia. The Solicitor and I talked about that ." (Tr.pp.141, line 19-p.142, line 5).

Defense counsel erred in forming his own opinion in that regard, as he was not trained in that area, as the following factors clearly reflect. Counsel was indeed ineffective in failing to argue a diminished compaciti or insanity defense in his client's behalf. His client was certainly in an unstable mental and emotional stage when the physical act was committed.

The report by officer Frier, dated December 20, 2001, clearly states, "suspect is armed, dangerous, and suicidal. See :(Attachment A)..

Officer Scottie Rice Frier further stated at trial, "We were aware that the Defendant's wife had taken up with his brother, and that the dynamics of such a scenario caused officers some grave concerns." (Tr.pp.208, line 20-p.209, line 22).

Michael Ratliff testified, "He was a totally different person after Jenny left him for his brother J.J. He pretty much shut most of his friends out. He did not get much family support from his parents because J.J. was the youngest of the family." (Tr.pp.304, line 13-p.305, line 25).

The Defendant told him, "that he couldn't live without his kids, and if she took his kids, he would probably kill her." (Tr.pp.306, line 5-p.307, line 9; p.308, line 2-p.310, line 22). "I knew it was tearing him apart, but it never crossed my mind he would actually do it. He had never been a violent person". (Tr.pp.307, lines 7-9; p.312, line 12-p.313, line 3).

Frances Marie Burke testified, "that her brother Christopher molested the Defendant's daughter Amber, that he did not know about it until his wife, Jenny called and told him about it, and that the Defendant had no part of the molestation." (Tr.pp.314, lines 2-13; p.318, lines11-24).

Issue B : Cont.

Clint Addy testified, "there was a change in Dale after she left him for his brother. He would not eat and would argue with his friends. He talked about disposing of Jenny's body, his brother, and Christopher in a caustic chemical tank." (Tr.pp.326, line 9-p.330, line 9).

Cynthia Marie Anderson testified, "the Defendant was very emotionally upset after his wife left him for his brother and he did not want his kids to be in the type of environment going on at his brother's home." (Tr.pp.334, line 21-p.335, line 6).

Terry Allen Anderson testified, "When his wife left him, he lost weight and was emotional all the time. He would break down and cry sometimes. He was just going through a real tough time." (Tr.pp.341, lines 1-9; p.351, line 3-p.352, line 12).

Jane Simpson, a nurse, testified, "After his wife left him for his brother, it tore Dale apart. He would come to my house and he would sit and cry. He would be so emotional that he would jerk so bad that he would shake my kitchen table. He was just tore up because he loved Jenny. He loved Jason, his brother. He loved he parents. He was losing--his whole life was just falling apart." (Tr.pp.356, line 21-p.357, line 5).

"His wife Jenny was very depressed because her mother had died and Dale was upset over it. They were going through a grieving process." (Tr.pp.357, line 12-p.358, line 15). "The Defendant was having some respiratory problems, but could not afford to go to the doctor. She advised him to go to mental health because he needed help." (Tr.pp.358, line 16-p.359, line 22)

Almon Odell Anderson testified, "He was temporarily insane in my opinion when this thing happened." (Tr.p.391, lines 16-17).

The Defendant testified, "It was supposed to be himself, his brother and his wife." (Tr.pp.457, line 22-p.459, line 1; p.459, lines 21-23).

In final summation, defense counsel stated, "It was supposed to be his brother and his wife." (Tr.p.546, lines 10-13).

At least two people thought the Defendant needed mental help, a trained nurse and a close male friend.

There was certainly a question of mental competency as to the Defendant's "Mens Reas" at the time of the crime.

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Issue B : Cont.Law Analysis :

Deminished compacity or insanity is an affirmative defense which the State must disprove. State v. Hartfield, 300S.C.469, 388S.E.2d 802 (1990); State v. Grimes, 292 S.C. 204, 355 S.E.2d 538 (1887); U.S. v. Mason, 52 F.3d 1286, 1292-93 (4th Cir. 1995); Dusky v. U.S., 362 U.S. 402 (1960); Pate v. Robinson, 383 U.S. 375, 385 (1966).

When the facts of the case clearly show the defense exists; as they do here, the failure of the counsel to present such a defense constitutes ineffective assistance of counsel. Wiggins v. Smith, 539 U.S. 510, 123 S.Ct 2527, 2529, 156 L.Ed.2d 471(2003).

Insanity or dementia cannot be overcome in a sufferers mind by any amount of evidence. State v. Hann, 196 S.C. 211, 12 S.E.2d at 720; State v. Moore, 241 S.C. 487, 129 S.E.2d at 330; Becton v. Barnett, 290 F.2d at 1190 (4th Cir. 1990).

Furthermore; the Defendant had left in his vehicle a suicide note to his father in which he stated, "he was going to kill his brother, his wife, and himself," but that note or fact was not brought out or introduced at trial. That brings to bear three vital factors. First, if that note was destroyed then due process was violated, because it was exculpatory. State v. Singleton, 319 S.C. 312, 460 S.E.2d 573 (1995). Second, if the State did not turn the note over to the Defense in Discovery, then the Brady Rule was violated. State v. Kennerly, 331 S.C. 442, 503 S.E.2d 214 (S.C.App. 1998). Third, if defense counsel was aware of or had that note and did not use it in mitigation at trial in his client's behalf, then counsel was indeed ineffective. Wiggins v. Smith, 539 U.S. 510 (2003).

Either way; the applicant is entitled to a reversal in this particular case.

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Issue C : Argument :

Issue C : Did the Solicitor's actions amount to prosecutorial misconduct?

Factual Basis :

During cross-examination of the witness, Clint Addy, the Solicitor elicited testimony, "that the Defendant intended to put his kids in a caustic chemical with his wife." (Tr.pp.330, line 22-p.331, line 1).

During deliberations, the jury sent out a note in which they requested to hear that testimony again, and it was replayed, (Tr.pp.582, line 10-p.583, line 13; p.587, lines 8-24). A short time later, the jury found the Defendant guilty on all offenses. The court stated, "I thought you had a very good case for the manslaughter." (Tr.p.601, lines 22-25).

Law Analysis :

Sometimes, a witness can poison a Defendant's fair trial by his testimony; specifically if the Defendant denies the allegation, as the Defendant did at trial in this case. The testimony elicited by the Solicitor encouraged the jurors to "abandon their impartiality," as it did here, because it places the jurors in the victim's shoes, especially when it is eluded to in final summation. Such testimony and argument tends to completely destroy all sense of impartiality of the jurors and it's effect is to arouse passion and prejudice. "It is not, and can never be harmless error," because it deprives the jurors of their focus on the evidence involved, allowing a decision based upon emotion, biases, and prejudices, not fact. It deprives the defendant of the juror's independent ability to evaluate and analyze credibility, believability, and fact; which in turn, denies the defendant a fair trial proceeding, as well as due process. The Solicitor's actions here; did constitute prosecutorial misconduct. State v. Jones, 466, S.E.2d 773, 774 (Ct.App. 1996); State v. Reese, supra. (Ct.App. April 29 2001); Rule 22.

The applicant is entitled to a reversal.

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Issue D : Argument :

Issue D : Was defense counsel ineffective in failing to place objection to the State's inherently prejudicial final summation ?

Factual Basis :

Solicitor Madsen in final summation stated, " Mr. Moses told you this case is about a man who decided on December 19th to be his wife's judge, decided to be her jury. And when he sentenced her on that day, he decided to be her executioner. We know what he did and how he decided to execute her." (Tr.pp.548, lines 12-18; p.551, line23-p.552, line 6). See, also, (Tr.p.557, lines 6-13).

The Solicitor then bolsters the State's case in-chief by incriminating remarks upon fact and evidence not presented at trial. (Tr.p 551, lins 3-13).

The Solicitor then goes forward; not only to vouch for officer Frier's credibility, but also he pits the Defendant's testimony against that of the officer. (Tr.pp. 548 line 22-p.549, line6; p.553, lines 5-9).

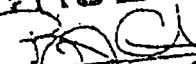
The Solicitor attacks and destroys the defense theory in regard to the lesser-included offense manslaughter. (Tr.pp.554, line 15-p.555, line 18; p.556, lines 17-20).

To top that off; the solicitor tells the jury, "The best lie contains 90 percent truth, doesn't it?" (Tr.p.557, lines 19-22; and See: Tr.pp.558, line 8-p.559, line 12).

Law Analysis :

Here, the burden of proof was shifted from the state to the Defendant. Sandstrom v. Montana, 442 U.S.510, 514 (1979); Boyd v. French, 147 F.3d 319 (4th Cir. 1998); State v. Gathers, 369 S.E.2d 140 (1988).

The State cannot vouch for the credibility of its own witnesses, as the Solicitor did here, and it may not pitt testimonies of one witness against the other, as the Solicitor did here. State v. Rudd, 355 S.C. 221, 565 S.E.2d 281 (2002); Mathews v. State, 565, S.E.2d at 766 (2002); State v. King, 561 S.E.2d 640 (2002).

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Issue D: Cont.

Furthermore, a Solicitor may not insinuate that a Defendant is a liar, nor may he call him a liar. U.S. v. Loayza, 107 F.3d 257 (4th Cir. 1997).

Defense counsel was ineffective in failing to place objection to the inherently prejudicial final summation. State v. Shuler, 545 S.E.2d 805 (2001); State v. Kelly, 540 S.E.2d 851 (2001).

When the opening argument is considered in conjunction with the final summation, and defense counsel's failure to place objections to either one, it cannot be harmless beyond a reasonable doubt.

The fairness of this trial should be well scrutinized. State v. Bryant, 581 S.E.2d 157 (2003).

The applicant is entitled to a reversal.

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Issue E: Argument :

Issue E: Was defense counsel ineffective in failing to place objections or take exceptions to the trial court's erroneous malice instruction?

Factual Basis:

The trial court instructed the jury, "Malice may also be implied from the willful, deliberate, and intentional doing of an unlawful act without just cause or excuse or from the use of a deadly weapon." (Tr.p.569, lines 18-21).

Law Analysis :

The malice instruction to the jury allowed them to presume from the Defendant's intentional acts and from the use of a deadly weapon that he was guilty of murder which precluded any finding of manslaughter by the jury. Gibson v. State, 355 S.C. 429, 586 S.E.2d 119, 124 S.Ct. at 1439 (2003).

Our Supreme Court has enunciated a proper malice instruction and has more than once, cautioned the bench that only slight deviations in the charge would be acceptable. The deviations in the charge given here were not just slight, and it was misleading, as well as confusing to the jury. State v. Torrence, 305 S.C. 45, 405 S.E.2d 315 (1991). If or when exposure to unconstitutional instructions improperly influences only one juror, the verdict is unfair, as if all were. Here, there is a very substantial likelihood, that the jury reached its verdict based upon an erroneous understanding of the law. Sullivan v. Louisiana, 113 S.Ct. 2078 (1993). U.S. Const. Amend. Six. Defense counsel erred.

The Applicant is entitled to a reversal.

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Conclusion:

For the legal reasons and principles cited in this Post-Conviction Relief Application, with Initial Brief, the conviction and sentence should be vacated, reversed for new trial, or judgement of acquittal entered.

Wherefore, Applicant does forever pray.

Respectfully Submitted By,

Rodger Dale Burke
Rodger Dale Burke # 394613

B.R.C.I., Mirray A-184

4460 Broad River Rd.

Columbia, S.C. 29210

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State of South Carolina
County Of Lexington

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In The Court of Common Pleas

Case No: 2002-GS-32-3278-3281 :

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C/A No: _____

Ⓜ Rodger Dale Burke, #304613, BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

Applicant,

VS.

State of South Carolina,

Respondent.

Motion To Address All Issues :

Now comes the Applicant Rodger Dale Burke #304613, by and through this Court Appointed attorney, who ask this Honorable Court to require the attorneys involved in this Post-conviction Relief Action and any Amendment thereof to be meticulous in the preparation of any "Order" prepared in this matter.

Specifically, the Applicant requests that each and every issue within the Post-Conviction Relief Application and any Amendment thereof, at the hearing, be addressed in the "Order" of the Court to issued at the conclusion of the Evidentiary Hearing in this matter.

The Applicant requests this Motion pursuant to S.C. Code, §17-27-80. Citing, Pruitt v. State, 423 S.E.2d 127 (1992); Bryon v. State, 493 S.E.2d 500 (1997).

Wherefore, Applicant request the Motion be granted

Sworn To Before Me This 3RD Day of MAY, 2007.

Notary public For South Carolina: Joseph R. Hurdleski

My Commission Expires: 3.20.16

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Respectfully Submitted BY,

Rodger Dale Burke

Rodger Dale Burke #304613

B.R.C.I. Murray A-184

4460 Broad River Road

Columbia, S.C. 29210

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State Of South Carolina
County of Lexington

IN The Court of Common Pleas

FILED

Case No: 2002-GS-32-3278-3281:

C/A No: _____

Rodger Dale Burke, #304613,

2007 JUN -5 A 8:44

Applicant,

State Of South Carolina,

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

Respondent,

Certificate Of Services:

I, the Applicant in the above captioned matter, do hereby under oath and penalty of perjury certify that I have served copies of the same documents to the below listed parties upon this exact date.

(1) Mr. Henry D. McMaster
Attorney General
P.O. Box 11549
Columbia, S.C. 29211-1549

(2) Office Of The Clerk
Lexington County
139 E. Main St., Rm. 107
Lexington, S.C. 29072-3456

Sworn To Before Me This 30th Day Of MAY, 2007.

Notary Public For South Carolina:

Joseph D. Dwyer

My Commission Expires: 3-20-16

Respectfully Submitted By,

Rodger Dale Burke

Rodger Dale Burke #304613
B.R.C.I., Murray A-184
4460 Broad River Road
Columbia, S.C. 29210

A TRUE COPY
JUN 5 2007
SCL & F.C.

STATE OF SOUTH CAROLINA)

COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS

2007-CP-32-1784

Roger Dale Burke, # 304613,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

RETURN

Respondent, making its Return to the application for post conviction relief (PCR) filed May 18, 2007, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. Applicant was indicted at the September 2002 term of the Lexington County Grand Jury for murder (02-GS-32-3278), possession of firearm or knife during the commission of a violent crime (02-GS-32-3279), attempting to commit arson (02-GS-32-3280), burglary- 1st degree (02-GS-32-3281). William N. Nettles, Esquire, represented him. On August 23, 2004, Applicant underwent trial, pursuant to which he was found guilty. He was sentenced by the Honorable Marc H. Westbrook to life for murder, five (5) years for possession of a firearm, twenty (20) years for attempted arson and thirty (30) years for burglary.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Burke, Op.

No. 2007-UP-042 (S.C. Ct. App. filed January 24, 2007). Applicant filed a Petition for Rehearing which was denied by order of the South Carolina Court of Appeals on March 22, 2007.

Attached herewith and incorporated herein by reference are the records of the Lexington County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the trial transcript, the order of the South Carolina Court of Appeals denying Applicant's direct appeal and the order denying Applicant's Petition for Rehearing. Any of the above not so attached will be forwarded upon receipt.

II.

In his current application, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel; and
2. Prosecutorial misconduct.

III.

Respondent interprets each of Applicant's allegations to be claims that he received ineffective assistance of counsel. In a post-conviction relief action, Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, Id.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered

adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, Id. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, *citing* Strickland. Second, counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Respondent submits that Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

The State therefore requests that this Court convene an evidentiary hearing solely on the issue of ineffective assistance of counsel. As to all other allegations, the State moves for summary dismissal pursuant to S.C. Code Ann. § 17-27-70 on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

V.

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

VI.

WHEREFORE, having made its Return, the State requests that a hearing be held.

Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

DANIEL E. GRIGG
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

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

August 27, 2007.

ORIGINAL

FILED

2009 APR 24 P 4: 00

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

TO: Honorable Judge William P. Keesley
Post Office Box 10
Edgefield, South Carolina 29824

Date: March 3, 2009

RE: Roger Dale Burke v. The State; Post-Conviction relief;
CASE NO. 2007-CP-32-1965

Dear Honorable William P. Keesley, (1st Cir. Chief Administrative Judge),

Please kindly and respectfully note that the above-named post-conviction relief application was filed with the Lexington County Clerk of Court on June 5, 2007. However, I have not received a response from the State, nor have I received a notice or an order appointing PCR Counsel to represent me. I have since submitted correspondence to the Lexington County Office of Clerk of Court and have not been provided with this information. It's been more than eighteen months since I filed my application for post-conviction relief. I need a copy of the State's response and a copy of the order appointing PCR Counsel reflecting the name and mailing address of the attorney in order that I may contact him/her to discuss the particulars of my case so that I can adequately present my issues in court, prior to the hearing. I would certainly appreciate it if you would assist me in obtaining this critical information from the Office of the Clerk of Court. Thank you.

Sincerely & Respectfully,

Roger Dale Burke #304613

ORIGINAL

STATE OF SOUTH CAROLINA

JUDGMENT IN A CIVIL CASE

COUNTY OF LEXINGTON

CASE NO: 2007CP3201784

FILED

IN THE COURT OF COMMON PLEAS

2009 APR 24 P 4: 00

Roger Dale Burke vs. State Of South Carolina

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SCCHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other:
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy: ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

IT IS ORDERED AND ADJUDGED:

☐ See attached order;☐ Statement of Judgment by the Court:

That case 2007-CP-32-1965 be combined for trial with 2007-CP-32-1784. Duplicate Post Conviction Relief Packets were filed two weeks apart. Attorney Jefferson Turnipseed was appointed to represent the applicant and will represent him on both applications.

Dated at Lexington, South Carolina, this 23rd day of April, 2009.

Court Reporter:

William P. Clardy
PRESIDING JUDGE -

This judgment was entered on the n/a, and a copy mailed first class this 30th day of April 2009, to attorneys of record or to parties (when appearing pro se) as follows:

Jefferson D. Turnipseed Turnipseed & Assoc.
P.O. Box 11601 Columbia, SC 29211-1601

ATTORNEY(S) FOR THE PLAINTIFF(S)

Gregory P. Jones, Jr. SC Attorney General's
Office PO Box 11549 Columbia, SC 29211

ATTORNEY(S) FOR THE DEFENDANT(S)

Beth A. Carrigg

Beth A. Carrigg - Clerk of Court

SCRPC APP-24/FORM 4

FILED

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
 COUNTY OF LEXINGTON 2009 NOV 23 A 11: 01

Roger Dale Burke, #304613

BETH A. CARRISSE Case No.: 2007-CP-32-1784
 CLERK OF COURT

Plaintiff,

vs.

State of South Carolina,

Respondent.

ORDER FOR CRIMINAL RESPONSIBILITY
 AND CAPACITY TO CONFORM EVALUATION
 (M'NAUGHTEN)

This matter is before me for an order requiring Plaintiff Robert D. Burke, convicted of murder (02-GS-32-3278), possession of firearm or knife during the commission of a violent crime (02-GS-32-3279), attempting to commit arson (02-GS-32-3280), and burglary - First Degree (02-GS-32-3281), to submit to an evaluation for criminal responsibility and capacity to conform conduct to the requirements of the law on or about December 19, 2001, pursuant to S.C. Code Ann. § 17-24-10 (1976). Plaintiff has requested an evaluation in this PCR action to determine whether his trial attorney was ineffective in failing to explore and pursue an insanity defense.

BASIS FOR ORDER. I have considered the showing made in support of the motion requesting this evaluation and find plaintiff's mental state at the time of the alleged crime(s) will likely be at issue in this proceeding.

This order is issued for the following reasons: Plaintiff Roger D. Burke has asserted in his PCR Application and Initial Brief of Applicant, that his trial counsel was ineffective in failing to explore and pursue an insanity defense.

THEREFORE, IT IS ORDERED: Because the Department of Mental Health has statutory responsibility for custody and control of individuals determined not guilty by reason of insanity,

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Plaintiff shall be examined and observed at an appropriate facility of the Department of Mental Health by one or more examiners to determine whether Plaintiff is criminally responsible pursuant to S.C. Code Ann. § 17-24-10(A) (1976) for conduct on or about December 19, 2001.

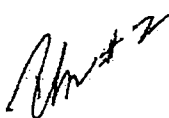
2009 NOV 23 AM 11:01

BETH A. CARRIGG

CLERK OF COURT
LEXINGTON SC

If Plaintiff is believed to be criminally responsible by the designated examiners, Plaintiff shall be further examined to determine whether, because of mental disease or defect, Plaintiff lacked sufficient capacity to conform conduct to the requirements of the law on or about December 19, 2001 pursuant to S.C. Code Ann. § 17-24-20(A) (1976).

COMPLIANCE DEADLINE/TRANSPORT FOR EVALUATION. The examining facility shall schedule the ordered examination as soon as possible and no later than sixty (60) days from the receipt of this order by the Department of Mental Health, this time being necessary to gather required records. If Plaintiff is currently free on bond or personal recognizance, Plaintiff is responsible for making transportation arrangements to attend the examination. In the event Plaintiff does not appear at the scheduled examination, upon written notice of such failure by the Department of Mental Health to the Sheriff of the county in which this case arose, Plaintiff shall be taken into custody by the Sheriff and held until an examination can be scheduled and completed, and thereafter shall be released. Plaintiff's bond or bail is hereby revoked to the extent necessary to carry out the provisions of this order, and upon completion of the examination and release of Plaintiff, any previous bail or bond issued by the Court shall remain in effect. If Plaintiff is in custody at the time of the scheduled examination, the Sheriff is hereby authorized and required to transport Plaintiff to and from the examination, arriving at the examining facility at the time established by confirmed appointment with the staff of the examining facility. In the event Plaintiff is in custody of a law enforcement agency other than a Sheriff's department, nothing herein prevents such agency from



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carrying out the provisions of this order.

2009 NOV 23 A 11: 01

PROCEDURE IF LACK OF COMPETENCY IS INDICATED. If, during the course of the criminal responsibility and capacity to conform evaluation scheduled pursuant to this Order, the examiner finds indications that Plaintiff may not be competent to stand trial pursuant to S.C. Code Ann. § 44-23-410 (1976) and State v. Blair, 275 S.C. 529, 273 S.E.2d 536 (1981), the examiner shall terminate the criminal responsibility and capacity to conform evaluation, issue no report thereon, and by written communication recommend to the Court that a competency to stand trial evaluation should be ordered. Further, the examiner should state whether, in the examiner's opinion, such lack of competency is due to a mental illness or, in the alternative, mental retardation or a related disability. A copy of this written communication shall be sent to the Plaintiff's attorney and the Attorney General's office.

AUTHORIZATION FOR INPATIENT EVALUATION. In the event examiners from the Department of Mental Health determine Plaintiff requires an inpatient examination, upon written notice to this Court from the director of the Department of Mental Health or his designee, Plaintiff shall be committed to an appropriate facility of the Department of Mental Health for no more than fifteen (15) days for examination and observation related to Plaintiff's criminal responsibility and capacity to conform. If the examination and observation of Plaintiff has not concluded at the end of the initial inpatient fifteen (15) days, Plaintiff may be kept in the continued custody of the Department of Mental Health for an additional period not to exceed fifteen (15) days, provided the director of the examining facility or his designee notifies this Court in writing. The issuance of an additional Court order allowing for the inpatient commitment(s) discussed in this paragraph is not necessary.

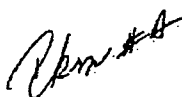
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DETENTION BEYOND EVALUATION PERIOD. If, in the judgment of Department of Mental Health examiners, Plaintiff is in need of immediate hospitalization or inpatient treatment, upon written request to this Court from the director of the examining facility, Plaintiff may be detained by the Department of Mental Health in a suitable facility for so long as deemed clinically necessary or until a hearing on the matter may be conducted by this Court. An additional Court order shall be necessary for ongoing pre-trial inpatient detention of Plaintiff as discussed in this paragraph.

ACCESS TO EXAMINER'S REPORT. The Department of Mental Health is an independent entity, conducting this evaluation pursuant to Court order, and is not aligned with any party before the Court. It is the intention of the State of South Carolina to provide Plaintiff an adequate opportunity for mental status investigation when the Plaintiff's mental condition is seriously in question pursuant to Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087 (1985), either before or after Plaintiff formally asserts the insanity defense.

The purpose of the following provisions controlling access to the examiner's report is to strike a balance between Plaintiff's right to explore the possibility of an insanity defense and prosecution's right to respond if such defense is raised. If Plaintiff is requesting evaluation prior to asserting the defense of insanity, the evaluation shall be confidential until such time as Plaintiff elects to assert the insanity defense. If Plaintiff or prosecution is requesting evaluation after Plaintiff's formal assertion of the insanity defense pursuant to Rule 5(f) of the South Carolina Rules of Criminal Procedure, or both parties are requesting the evaluation by consent, the evaluation shall not be confidential and both defense counsel and the prosecutor shall be provided a copy of the examiner's report. In either case, ownership of the examining agency's files shall be vested with the examining



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agency.

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(A) Ex parte evaluation requested by defendant prior to assertion of insanity defense.BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

If Plaintiff has requested an evaluation to determine whether the insanity defense may be viable, the examiner's report shall not be provided to the prosecution and shall not be admissible as evidence in any Court proceedings. The prosecution may not discover any portion of the evaluation files. Any written report resulting from the evaluation shall be considered confidential and provided only to defense counsel, and shall be provided within ten (10) days of all examinations or the conclusion of the inpatient examination period. Examiners and agency staff may not be compelled to testify regarding statements made during the criminal responsibility and capacity to conform examination for any purpose unless and until Plaintiff asserts the defense of insanity. However, as a condition of accepting the evaluation provided by the State of South Carolina, Plaintiff expressly waives any and all confidentiality privileges associated therewith if Plaintiff subsequently asserts the insanity defense. In such case, the evaluation shall no longer be confidential, and all parties' access to the evaluation report shall be controlled by paragraph (B) below.

(B) Evaluation requested by either party after assertion of insanity defense.

Because the assertion of the insanity defense places Plaintiff's mental status at issue, either party may discover any portion of the evaluation files upon presentation of a Court order authorizing such or a release authorization signed by Plaintiff. Both the prosecutor and defense counsel shall be provided a copy of the examiner's report within ten (10) days of the conclusion of all examinations or the inpatient examination period. The evaluation report may be admissible as evidence in subsequent hearings concerning Plaintiff's criminal responsibility and capacity to conform. However, the report shall be inadmissible in any other proceedings except as expressly permitted by South

Am #5

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Carolina law. Examiners and agency staff may not be compelled to testify regarding statements made during the criminal responsibility and capacity to conform examination for any purpose other than on the issue of criminal responsibility and capacity to conform. Also, statements made during the examination may not be used to impeach Plaintiff at trial. Hudgins v. Moore, 337 S.C. 333, 524 S.E.2d 105 (1999).

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BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

(C) Evaluation Requested by Consent of Both Parties.

By consent, the parties may request evaluation at anytime, regardless of whether the insanity defense has been asserted by the Plaintiff. The procedures and rules for this examination shall be the same as outlined in paragraph (B) above; however, in the event Plaintiff does not assert the insanity defense, the examiner's report shall not be admissible for any reason, nor shall the contents of the evaluation files be used for any purpose.

MEDICAL PROVIDERS/SCHOOLS MUST RELEASE NECESSARY RECORDS.

Department of Mental Health examiners conducting the evaluation may need clinical and school records concerning Plaintiff to assist in forming an opinion. It is therefore ordered, upon presentation by the Department of Mental Health of this order with a written request for specific records attached thereto, that any physician or clinician, licensed health care facility, licensed health care provider, or any school district is hereby authorized and required to furnish copies of all records concerning Plaintiff to the Department of Mental Health.

COUNSEL REQUIRED TO FURNISH NECESSARY RECORDS. Upon written request from the Department of Mental Health, counsel for Plaintiff and the State of South Carolina shall furnish to the agency such records and information in counsel's possession as the agency requests,

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BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

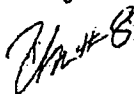
including but not limited to copies of law enforcement reports, investigations, witness statements, statements by Plaintiff (both written and electronic), Plaintiff's medical records, and prior psychiatric or psychological evaluations of Plaintiff. Nothing herein shall be construed to require counsel to divulge any information, documents, notes, or memoranda that are protected by attorney-client privilege or work-product doctrine.

DUTIES OF DEFENSE COUNSEL. Unless the prosecution is the party moving for this evaluation, counsel for Plaintiff has the responsibility to file, serve, and transmit this order as outlined in the final paragraph below. Counsel for Plaintiff does not have the right to attend any clinical interview scheduled pursuant to this Order, nor does Plaintiff have a constitutional right to compel counsel's attendance. State v. Hardy, 283 S.C. 590, 325 S.E.2d 320 (1985). The Court recognizes, however, that circumstances may arise through which the Department of Mental Health may request counsel's attendance to facilitate the examination. In the event that such a determination is made, the Department of Mental Health may request counsel's attendance in writing, and counsel's level of participation shall be prescribed by the Department of Mental Health's written evaluation protocol. In this event, because of the substantial number of individuals awaiting examination, such interviews cannot be rescheduled, postponed, or canceled to accommodate counsel except upon presentation to the Department of Mental Health of a written statement from a circuit court judge that counsel's attendance is required in Court at the time the examination is scheduled. Whether or not counsel for Plaintiff is requested to attend the clinical interview, counsel for Plaintiff must meet with Plaintiff prior to the interview to discuss this Court order, the evaluation process, the clinical interview, Plaintiff's rights with regard to the clinical interview, and penalties associated with non-appearance and noncooperation. Failure to comply with these requirements may

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result in sanctions for Plaintiff's counsel. Plaintiff's refusal to participate at the interview because of the absence of counsel will be deemed non-cooperation. Failure of Plaintiff to cooperate or participate in the interview may result in cancellation of the interview and exponents being unable to offer an opinion on criminal responsibility and capacity to conform. Failure to cooperate may further result in the case being called for trial without completion of the evaluation, and may result in Plaintiff being prohibited from presenting expert testimony on the issue of insanity or waiver of the insanity defense.

FILING, SERVICE, AND TRANSMITTAL OF ORDER. It is the responsibility of counsel for the party requesting the evaluation to file and serve this order as outlined herein. In the event the evaluation has been requested by consent, or the moving party cannot be determined, defense counsel shall be responsible. After being signed by the Court, the original order without attachments shall be immediately filed with the Clerk of Court and a certified copy served upon the opposing party. Further, within five (5) business days, a certified copy of this order, together with the attachments listed at the end of this order, must be served upon the Department of Mental Health at the address listed below. To expedite commencement of the evaluation process and scheduling of the clinical interview, counsel is instructed to immediately contact the Department of Mental Health to advise of the issuance of this order and forthcoming service upon the agency:



Evaluation Order Service Address for the Department of Mental Health

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2009 NOV 23 A 11: 04

Forensic Evaluation Service Paralegal
S. C. Department of Mental Health
CBHS Forensic Center
7901 Farrow Road
Columbia, S.C. 29203-3220
(803) 935-5540 (Phone)
(803) 935-5544 (Fax)
Email: FES-PARALEGAL@SCDMH.ORG

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

AND IT IS SO ORDERED.

R. Knox McMahon
Honorable R. Knox McMahon

Lexington, South Carolina
Date: *20 Nov 2009*

A. West Lee, Esquire
Assistant Attorney General

Post Office Box 11549
Address

Columbia, SC 29211-1549
City, State, Zip

803-734-3970
Telephone

Email

Jefferson D. Turnipseed, Esquire
Counsel for Plaintiff

Post Office Box 11601
Address

Columbia, SC 29211
City, State, Zip

803-252-9000
Telephone

Email

ORIGINAL

LMC

STATE OF SOUTH CAROLINA
IN THE
COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

ORIGINAL TO BE FILED
WITH THE CLERK
OF COURT

ROGER DALE BURKE 304613,) C/A No. 2007-CP-32-1784,
APPLICANT,)
v.) ORIGINALLY FILED AS 2007-CP-32-1965
STATE OF SOUTH CAROLINA,) MOTION FOR IN CAMERA
RESPONDENT.) HEARING TO CONSIDER RELIEVING
) POST-CONVICTION COUNSEL AND
) APPOINTING SUBSTITUTE COUNSEL

COMES NOW THE APPLICANT, ROGER DALE BURKE, PRO SE,
WHO MOVES HEREBY FOR THE CONVENING OF AN IN CAMERA
HEARING AT THE EARLIEST POSSIBLE TIME FOR THE SOLE PURPOSE
OF CONSIDERING HIS CONTEMPORANEOUS

MOTION TO RELIEVE POST-CONVICTION COUNSEL
AND TO
SUBSTITUTE COUNSEL.

2010 FEB 18 P 2:43
BETH A. CARRIG
CLERK OF COURT
LEXINGTON, SC

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APPLICANT FURTHER REQUESTS ANY PORTION OF SAID HEARING
WHICH MAY IMPLICATE HIS ATTORNEY-CLIENT PRIVILEGE BE
CONDUCTED OUTSIDE THE PRESENCE OF ANY AND ALL REPRESENTATIVES
FOR THE STATE.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Roger Dale Burke

FEBRUARY 4, 2010

ROGER DALE BURKE 304613

BREX MO-236

4460 BRAD RIVER ROAD, COLUMBIA, SC 29210-4012

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2007CP3201784

SCANNED

FILED
2009 SEP 14 3:12
BETH A. CARRIGG
CLERK OF COURT
LEXINGTON, SC

Roger Dale Burke vs. State Of South Carolina

CHECK ONE:

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other.
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j) SCRCP; ☐ Bankruptcy.
- ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
- ☐ Other: _____

IT IS ORDERED AND ADJUDGED:

☐ Statement of Judgment by the Court;

See attached order;

Motion granted to relieve Jefferson Turnipseed, as counsel for Roger Burke. Clerk of Court's office will appoint new counsel as directed.

Court Reporter.

 14-Sept-10
PRESIDING JUDGE - HONORABLE KNOX MCMAHON

This judgment was entered on the NA, and a copy mailed first class this 13th day of September 2010, to attorneys of record or to parties (when appearing pro se) as follows:

Jefferson D Turnipseed Turnipseed & Assoc.
P.O. Box 11601 Columbia, SC 29211-1601

Daniel E. Grigg SC Attorney General's Office
PO Box 11549 Columbia, SC 29211
A West Lee Office Of The SC Attorney General
PO Box 11549 Columbia, SC 292111549

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Beth A. Carrigg

SCRCP APP-24/FORM 4

Beth A. Carrigg - Clerk of Court

1 STATE OF SOUTH CAROLINA

IN THE CIVIL COURT

2 COUNTY OF LEXINGTON

3
4 ROGER DALE BURKE,

5 Plaintiff,

6 -vs-

7 STATE OF SOUTH CAROLINA,

8 Defendant.

TRANSCRIPT OF RECORD

07-CP-32-1784

9
10
11 April 26, 2012
12 Lexington, South Carolina

13
14 B E F O R E:

15 HONORABLE CLIFTON NEWMAN, Judge.

RECEIVED

16 SEP 26

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

18 DAVID W. MELNYK, Esquire
Attorney for the Plaintiff

19 KAELOE E. MAY, Asst. Attorney General
20 Attorney for the State

SC OFFICE OF
APPELLATE DEFENSE

21
22
23 L. COCONUT PANTSARI, R.P.R.
24 Circuit Court Reporter
25

INDEX

Motion Hearing 04/26/12	3
Ruling of the Court	11
Certificate	13

INDEX OF WITNESSES

(Court Reporter's Note: There was no direct or cross examination of any witnesses.)

INDEX OF EXHIBITS

(Court Reporter's Note: No exhibits were marked or received into evidence.)

1 (The following proceedings are reported on
2 April 26, 2012.)

3 THE COURT: Ms. May.

4 MS. MAY: Your Honor, the next case we would
5 like to call is Roger Dale Burke versus the State,
6 2007-CP-32-1784.

7 MR. MELNYK: Your Honor, David Melnyk on
8 behalf of Mr. Burke.

9 THE COURT: Mr. Melnyk.

10 MR. MELNYK: Your Honor, there are, I think,
11 maybe two issues that are somewhat related that may need
12 to be brought up. One relates to a prior order in this
13 case where Mr. Burke had been instructed to undergo a
14 mental evaluation through the Department of Mental
15 Health.

16 This case was -- that was with Mr. Burke's
17 previous attorney, and it was his previous attorney's
18 request that the order be issued. That mental
19 evaluation has not happened and it's because Mr. Burke
20 has decided he does not want the Department of Mental
21 Health to be involved in this case.

22 So I believe -- and counsel, I'm sure, would
23 agree with me -- that the order that requires that
24 evaluation says that if Mr. Burke doesn't cooperate with
25 that or he doesn't want go forward with that, then that

1 order can be withdrawn. I believe that might be the
2 Attorney General's position, that the order should be
3 withdrawn.

4 Related to that, Your Honor, to the mental
5 health of my client, both now -- but more importantly at
6 the time of preparing for this trial and at the time of
7 the events that led up to this trial -- I do believe
8 that the issue of having a psychologist or psychiatrist
9 involved in this case is very important.

10 I have explained that to Mr. Burke and
11 explained to him that there was an order of the Court
12 that did set that up through the State's assistance.
13 Mr. Burke, since the incidents that led to where we are,
14 has not had any help or support from any family members
15 or really any friends up until about three or four weeks
16 ago when there was a speaker that came and spoke at the
17 chapel where Mr. Burke works at the Department of
18 Corrections.

19 It turns out the speaker is a former principal
20 of Mr. Burke's, middle school or high school, I believe.
21 He indicated he was going to be willing to help and able
22 to help Mr. Burke have a private psychologist or
23 psychiatrist take a look at this case.

24 That, again, has only been within the past few
25 weeks, Your Honor. This is an old case, a 2007 case,

1 and it has been continued, as far as I know, once at
2 least because of a change in counsel where I was
3 appointed.

4 Also, Your Honor, it has been continued, I
5 believe, on a few occasions because of either my
6 conflict in the schedule or the schedule of Mr. Nettles.
7 So this case has been continued multiple times.

8 I am fully aware of that, fully aware of its
9 age and the fact that something has to be done at some
10 point; however, for quite some time, Your Honor, the
11 issue of having some type of mental health evaluation
12 done or approach in this case has been something the
13 Court has been aware of.

14 Mr. Burke did not take advantage of the
15 opportunity that his previous attorney had set up, but
16 Mr. Burke now does have -- not himself but because of
17 this assistance from a private individual -- does have
18 the means to have his own paid-for psychologist or
19 psychiatrist to assist with the case.

20 So therefore, Your Honor, I would respectfully
21 request that the matter be continued to allow that to
22 happen. It's my understanding from talking to Mr. Burke
23 that they are supposed to meet this weekend at the
24 Department of Corrections.

25 Mr. Burke is currently at Broad River Road

1 Correctional, and I believe the psychiatrist involved is
2 also here in Columbia, who already has all of the court
3 transcript, already has everything that was provided to
4 him, I believe, again, just a week or so ago, maybe two
5 weeks ago.

6 So I am not asking for an extended period of
7 time, but since this issue has been brought up and has
8 been addressed by the Court before, I would like a
9 little bit of additional time to allow Mr. Burke's now
10 private psychiatrist -- I think it's actually a
11 psychologist and psychiatrist, Your Honor, that may be
12 involved to allow that to happen so that we can be fully
13 prepared for the hearing.

14 THE COURT: All right. Ms. May.

15 MS. MAY: Your Honor, I would respectfully
16 disagree against a continuance. This case was filed in
17 2007. Mr. Burke has had multiple -- more than two
18 attorneys. He has been appointed one. That attorney
19 was relieved. He was appointed another one, and I
20 believe Mr. Melnyk was substituted in.

21 He has had two opportunities for a mental
22 health evaluation. He has refused to cooperate at both
23 of those, and we have got letters from the Department of
24 Mental by the doctors documenting his refusal to
25 cooperate.

1 He has had plenty of time to look for an
2 independent psychiatric evaluation. I just think this
3 case has dragged on for too long, and the State is
4 prepared to go forward today.

5 MR. MELNYK: Your Honor, I certainly don't
6 dispute the time that is involved. The issue of
7 Mr. Burke has been the means, and that means has just
8 become available.

9 I certainly don't mean to spring this upon the
10 Court or the Attorney General's Office, but I am just
11 becoming aware of this, as Mr. Burke is essentially just
12 becoming aware of this opportunity as well.

13 THE COURT: Ms. May, anything else?

14 MS. MAY: I would also like to make a motion
15 to have the order for the criminal responsibility
16 evaluation withdrawn. There is a clause in the order
17 that allowed for the applicant, if he refuses to
18 participate and cooperate, that the order may be
19 withdrawn.

20 MR. MELNYK: Your Honor, I have no objection
21 to that order being withdrawn, as I believe it simply
22 relates to the South Carolina Department of Mental
23 Health evaluation that was being set up.

24 That, of course, is what Mr. Burke has decided
25 not to cooperate with, decided not to go forward with

1 for various reasons or whatever reason, Your Honor; but
2 I don't believe withdrawing that order should prevent
3 Mr. Burke, now that he has the means to do it, from
4 getting his own independent evaluation.

5 THE COURT: Are you talking about the order
6 signed by Judge McMahon?

7 MS. MAY: Yes, Your Honor.

8 MR. MELNYK: Yes, Your Honor.

9 THE COURT: Well, let's see what it says.
10 This matter is before Judge McMahon for an order
11 requiring Mr. Burke, who has been convicted of murder
12 and other charges, to submit to an evaluation for
13 criminal responsibility and capacity to conform.

14 The plaintiff has requested an evaluation in
15 this P.C.R. action to determine whether his "trial"
16 attorney -- people do that, write trail instead of trial
17 -- his trial attorney was ineffective in failing to
18 explore and pursue an insanity defense.

19 Pursuant to that showing, the plaintiff has
20 asserted in his P.C.R. that his trial counsel was
21 ineffective to explore and pursue an insanity defense,
22 and the Mental Health Department is ordered to examine
23 him.

24 There is the timeline for scheduling it, an
25 authorization for inpatient, if necessary, for the

1 examination report. So now in essence what you want is
2 a substitute order allowing it to be done privately as
3 opposed to the Department of Mental Health?

4 MR. MELNYK: Yes, Your Honor. I wouldn't
5 ask that but for the fact my client has indicated that
6 that is already set up and ready to go with a
7 psychiatrist.

8 I believe, based on my client's application
9 and based on my own review of the file, the issue of
10 whether or not that type of defense should have been
11 presented is fairly crucial to his P.C.R. case, which I
12 believe is why his former attorney tried to set that up,
13 and at that point that was the only option that
14 Mr. Burke had.

15 MS. MAY: Your Honor, also, I believe one of
16 the doctors' letters, he stated that Mr. Burke alleged
17 that an evaluation may not even be needed. I just think
18 his decision is flip-flopping.

19 THE COURT: Do you think Mr. Burke is seeking
20 to delay this or what?

21 MS. MAY: The first evaluation was in May of
22 2010. He refused to cooperate. We got it scheduled
23 again for February of 2012. He refused to cooperate.

24 MR. MELNYK: Your Honor, the letter -- and I
25 agree that's what it says. I received a copy of it as

1 well -- it references case law that that was, I believe,
2 Mr. Burke making his own legal determinations, which
3 that's why he has counsel to do that.

4 He is an intelligent man, but from speaking
5 with him and from the fact that I am here today saying
6 we have an independent private psychiatrist and
7 psychologist --

8 THE COURT: Well, does he has the records
9 already?

10 MR. MELNYK: Yes, Your Honor.

11 THE COURT: He does have the records already?

12 MR. MELNYK: Yes, Your Honor, or he has
13 everything, as far as I know, that is needed.

14 THE COURT: Well, in effect if I deny the
15 motion for continuance, the net effect would be striking
16 his claim of ineffective assistance for failure to
17 present the insanity defense. Wouldn't that be the net
18 effect of that?

19 MR. MELNYK: Of denying the motion? Yes, Your
20 Honor.

21 THE COURT: If I were to deny -- in effect, I
22 would be denying the P.C.R.

23 MS. MAY: No, Your Honor. He has many other
24 allegations.

25 MR. MELNYK: There are other allegations, Your

1 Honor, but those are -- the other allegations are some
2 prosecutorial misconduct that they are, quite honestly,
3 minor in my opinion compared to this.

4 THE COURT: Then I would be striking the
5 primary allegation of the P.C.R.?

6 MR. MELNYK: Yes, Your Honor. There are other
7 allegations, but that is the primary one.

8 THE COURT: Considering that Mr. Burke is safe
9 and secure at the Department of Corrections, what harm
10 would it be, other than the inconvenience? You have
11 Mr. Nettles on the other side. He is now "the" U.S.
12 Attorney for the State of South Carolina.

13 MR. NETTLES: A U.S. attorney, Your Honor.

14 THE COURT: So it would be inconveniencing
15 him with his busy schedule. So you will be in a back in
16 a few months anyway, Ms. May, on this case or another
17 one.

18 MS. MAY: Yes, Your Honor.

19 THE COURT: Mr. Melnyk is the one moving.

20 Mr. Burke, do you want a continuance too?

21 MR. BURKE: Yes, sir.

22 THE COURT: I am going to continue it so
23 that -- you can put in the order one final continuance,
24 one last time, or whatever you would like to say, but I
25 think if that is the basis for this claim -- and Judge

1 McMahon based his finding on that.

2 He says, The order is issued for the following
3 reasons: Plaintiff has asserted in his P.C.R. that his
4 trial counsel was ineffective in failing to explore and
5 pursue an insanity defense.

6 So if he is checked out by the doctor and the
7 doctor says there is no basis for claiming that, that
8 might help shorten the trial or shorten the hearing.

9 MR. MELNYK: Yes, Your Honor.

10 THE COURT: And if it's just the opposite, then
11 that is an issue. So I will grant the continuance.

12 MR. MELNYK: Thank you, Your Honor.

13 *** END OF REQUESTED TRANSCRIPT OF RECORD ***

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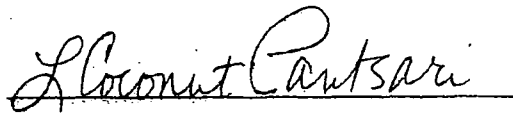
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C E R T I F I C A T E

I, the undersigned L. Coconut Pantsari, Official Reporter for the Eleventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete Transcript of Record of all the proceedings had and the evidence introduced in the hearing of the captioned cause, relative to appeal, in the Civil Court for Lexington, South Carolina on the 26th day of April, 20012 .

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

August, 24, 2013



Court Reporter

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS

ROGER DALE BURKE,

07-CP-32-1784

APPLICANT,

-vs-

TRANSCRIPT

STATE OF SOUTH CAROLINA,

RESPONDENT.

AUGUST 14, 2012.
LEXINGTON, S. C.

BEFORE:

HONORABLE W. JEFFREY YOUNG, JUDGE.

APPEARANCES:

DAVID W. MELNYK, ESQUIRE
Columbia, S. C.
Attorney for Applicant.

KAELOE E. MAY, ESQUIRE
S. C. Attorney General's Office
Attorney for Respondent.

RECORDED BY:
L. COCONUT PANTSARI
COURT REPORTER.

TRANSCRIBED BY:
CAROLE R. SHEALY
COURT REPORTER.

I N D E X

WITNESSESDIRECTCROSSREDIRECTRECROSS

FOR APPLICANT:

1.	Roger Dale Burke	4	56	64	66

FOR DEFENDANT:

1.	William Nettles	68	83		

1 **(WHEREUPON, THE FOLLOWING PROCEEDINGS ARE**
2 **REPORTED ON AUGUST 14, 2012.)**

3 THE COURT: This is the case of Roger Dale Burke,
4 Number 304613, vs. State of South Carolina, under docket
5 number 2007-CP-32-1784. Present and appearing representing
6 the applicant is David Melynk?

7 MR. MELNYK: Melynk.

8 THE COURT: Melynk. And Kaelon May is present
9 representing the State of South Carolina. Are we ready to
10 proceed?

11 MS. MAY: Yes, Your Honor.

12 MR. MELNYK: Yes, Your Honor.

13 THE COURT: All right. You may call your first
14 witness.

15 MR. MELNYK: May it please the Court, Your Honor.

16 THE COURT: Yes.

17 MR. MELNYK: We call the applicant, Roger Dale
18 Burke.

19 **WHEREUPON, ROGER DALE BURKE,**
20 **HAVING BEEN DULY SWORN, TESTIFIED AS FOLLOWS:**

21 CLERK: Have a seat and state your name for the
22 record.

23 MR. BURKE: Roger Dale Burke.

24 THE COURT: You may proceed, sir.

25 MR. MELNYK: Thank you, Your Honor. May it

ROGER DALE BURKE: DIRECT EXAMINATION BY MR. MELNYK

4

1 please the Court.

2 THE COURT: Yes, sir.

3 DIRECT EXAMINATION BY MR. MELNYK:

4 Q. Mr. Burke, are you here today having filed an
5 application for post-conviction relief?

6 A. Yes, sir.

7 Q. And was the application, was it completed by you?

8 A. Yes, sir.

9 Q. And, within that application, you have several grounds
10 of relief that you are seeking. Is that correct?

11 A. Yes, sir.

12 Q. Okay. And were you represented by an attorney at all
13 times related to the underlying trial that is now filed,
14 that you've now filed this application?

15 A. Yes, sir.

16 Q. Okay. And who was your attorney?

17 A. Bill Nettles.

18 Q. And this was a trial and not a plea. Correct?

19 A. Yes, sir.

20 Q. Okay. Did you participate in preparing for the trial
21 in any way---

22 A. Yes, sir.

23 Q. ---as best you could?

24 A. The best I could.

25 Q. Did you have the opportunity to meet with Mr. Nettles

1 about your case prior to going to trial?

2 A. Yes, sir, numerous times.

3 Q. In your application, you assert that Mr. Nettles was
4 ineffective in his assistance, was ineffective in his
5 representation of you for several reasons. Correct?

6 A. Yes, sir.

7 Q. All right. The first one then we would like to talk
8 about is actually in your pleadings as issue B stating that
9 Mr. Nettles was ineffective for not presenting or pursuing
10 the possibility of an insanity defense.

11 A. Yes, sir.

12 Q. Upon what do you base that allegation?

1. 13 A. Case law, *Becton v. Barnett*.

14 Q. Well, specifically, having to do with your case, why
15 do you feel that Mr. Nettles should have pursued an
16 insanity defense?

17 A. Because my state of mind was brought forth into
18 question plenty of times during the trial as it proceeded.

19 Q. Can you give me any examples of that?

20 A. Yes, sir.

21 Q. Okay.

22 A. During opening statements by Mr. Nettles on line 24,
23 page 64, line 1, page 65, through line 11, Mr. Nettles
24 tells the jury, by evidence, they will find his Defendant
25 guilty. Line 17 through 20, page 65, Mr. Nettles says that

ROGER DALE BURKE: DIRECT EXAMINATION BY MR. MELNYK

6

1 made a man not think exactly right. The Defendant's state
2 of mind--- It's my belief that Defendant's state of mind
3 was brought to light by defense counsel.

4 MR. MELNYK: And, Your Honor, Mr. Burke is
5 referencing line and page in the official transcript from
6 the trial. It is my understanding that the Court already
7 has, as a part of the official record, a complete copy of
8 the transcript.

9 THE COURT: I do have a copy of the transcript.
10 I sure do.

11 MR MELNYK: And I apologize. I didn't make
12 copies of each one of these pages that he's referencing.
13 It was my assumption---

14 THE COURT: I'll just underline them as he goes
15 through.

16 Q. Mr. Burke, are there any other examples, either in the
17 trial transcript or from your recollection, that would show
18 other instances where your mental state at the time this
19 crime happened was a factor?

20 A. Yes, sir. Witness Brandon Burke, which is my son, in
21 direct, Mr. Madsen asked him--- On page 83, line 11 through
22 13, the witness testifies that the Defendant asked him does
23 he think that the Defendant was right for shooting his
24 mother. The witness said, no, it was not, it was not
25 right. The record reflects that the Defendant believed

1 what he did was right if you take that into question.

2 Q. Okay. And I will continue to ask. Any other examples
3 that you have?

4 A. Yes, sir. On page 141, lines 23 through 24, the Judge
5 says, some form of dementia or disturbance defense. Trial
6 counsel states it's not dementia, the solicitor and I
7 talked about that.

8 Q. So do you believe that the fact that Mr. Nettles had
9 conversations with the Solicitor's Office and actually
10 briefly in open court about your mental state, about your
11 dementia, do you believe that Mr. Nettles was considering
12 that as an issue?

13 A. Well, I didn't know it at the time. I trusted Bill
14 with everything. But, for Bill to say that he talked to
15 the Solicitor about it, they both had to see that
16 something--- Something brought it to their mind to even
17 discuss it. They had to see something to even discuss the
18 matter. And then, furthermore, a lawyer cannot rely on his
19 own belief about a mental, about a defendant's mental
20 condition.

21 Q. Well, do you have--- Okay. And I understand. But do
22 you have any other examples, from the trial transcript or
23 from your recollection, where you feel that Mr. Nettles was
24 aware or should have been aware that this insanity defense
25 or mental health issue was something that should have been

ROGER DALE BURKE: DIRECT EXAMINATION BY MR. MELNYK

8

1 explored?

2 A. Yes, sir. Counsel admits he really didn't know what
3 his defense is, which led me to believe that he was not
4 prepared to defend me.

5 Q. All right. Now, are you referencing something in the
6 transcript?

7 A. Yes, sir. On page 142, line 2, the Court, which was
8 the Judge, says, the Defendant was disturbed. At that time
9 the Honorable Marc Westbrook told the Court, I mean,
10 preserved the record, that he saw that I was disturbed.
11 And disturbed can only be explained by a qualified
12 professional.

13 Q. All right. Mr. Burke, if you would continue going
14 through the transcript to the extent that you're able to
15 and to the extent there is any additional information
16 showing, again, that your mental state was an issue.

17 A. Yes, sir. In Defendant's motion of discovery, a
18 missing person report filed by Detective Frier lists the
19 suspect as suicidal. This brings mental issues to view.
20 Bill, getting the motion of discovery, he would've had
21 that; so he would've known, even before we had the trial,
22 that something arose or when there was--- When--- Before I
23 ever turned myself in early in the case before they knew
24 anything, it had already come to light that he was
25 suicidal.

1 Q. Are you aware of whether or not Mr. Nettles received a
2 copy of all the discovery in this case?

3 A. I'm sure he did. They asked him at trial, and he said
4 the State was very good at giving him everything. I got my
5 copy when they sent me my copy of the motion of discovery.

6 Q. Okay. And so do you believe that Mr. Nettles would
7 have seen this report, as you described it, that's marked
8 with a check box next to it for suicidal?

9 A. Yes, sir.

10 Q. All right. What else, Mr. Burke?

11 A. On page 209, lines 11 through 17, testimony by Witness
12 Frier that the dynamics of such a scenario caused a grave
13 concern. Excuse me. On page 209, line 11 through 17. For
14 the detective to try to explain the dynamics to cause a
15 grave concern is showing that they were trying to deal with
16 something, that something snapped in the Defendant.

17 Q. Okay. And Scottie Frier, that's whose testimony you
18 were reading, who is he?

19 A. He was the lead detective on the case.

20 Q. Do you know if Mr. Nettles had any conversations with
21 Mr. Frier prior to this case or prior to trial?

22 A. I'm not sure. I don't--- I'm not sure.

23 Q. Are you aware of whether or not, in any discovery that
24 Mr. Nettles or you would have received, that there's any
25 statement or indication by Mr. Frier about this concern

1 about the scenario that caused such a, that caused this
2 matter?

3 A. It came out. It came out in his testimony at trial.

4 Q. Okay. So what other evidence do you have to support
5 your position here? Are there any other trial transcript
6 portions?

7 A. Mr. Nettles called Michael Ratliff to the stand to
8 testify for the Defendant.

9 Q. And where are you referencing now, Mr. Burke? Excuse
10 me for interrupting.

11 A. Page 307, lines 6 through 9, Mr. Ratliff testified
12 that the situation was tearing the Defendant apart. Page
13 304, lines 18 through 19, he testified that---

14 THE COURT: Hold on. I've got to get there.

15 A. Oh, excuse me, Your Honor.

16 THE COURT: The first one was 307?

17 A. Three hundred seven, lines 6 through 9, Your Honor.

18 THE COURT: All right. The other one was 302?

19 A. Three hundred four, lines 18 through 19.

20 MS. MAY: Your Honor, do you have a copy of the
21 initial brief of the applicant in your materials because

22 all the passages Mr. Burke is pointing out in the pages and
23 lines are referenced in there?

24 THE COURT: Oh, okay. Yes, I do have his
25 argument.

1 MR. MELNYK: Yes, Your Honor. I apologize. I
2 should have mentioned that as well.

3 THE COURT: All right.

4 MR. MELNYK: May I proceed, Your Honor?

5 THE COURT: You may.

6 Q. And, Mr. Burke, who is Michael Ratliff?

7 A. He was a--- He was a friend that I had known since
8 sixth or seventh grade. We eventually worked together. A
9 best friend.

10 Q. Is that someone that--- Well, let me ask it this way.
11 How--- Do you know how Mr. Nettles came to call him as a
12 witness in your case?

13 A. I didn't question Mr. Nettles.

14 Q. Well, how did Mr. Nettles even know who Michael
15 Ratliff was?

16 A. I might've told him that was my friend or something,
17 but I think he had a P.I. to investigate. I'm not sure
18 how.

19 Q. Okay. But Mr. Nettles certainly had the opportunity
20 to communicate in whatever fashion he was doing it with
21 Mr. Ratliff prior to the trial---

22 A. I guess so.

23 Q. ---as far as you know?

24 A. Yes, sir.

25 Q. Okay. So do you believe that the issue of your mental

1 status is something that could have been discussed between
2 Mr. Ratliff and either Mr. Nettles or Mr. Nettles' private
3 investigator?

4 A. It could have been. But I know it was, that the
5 witness testified to some degree at trial that it tore the
6 Defendant apart, which is me.

7 Q. All right. Well, moving on then, any other examples
8 in the transcript that you would like to bring to the
9 Court's attention?

10 A. Yes, sir. Starting with Mr. Ratliff on page 312,
11 lines 19 through 22, he said that the Defendant said things
12 in expression of anger because he was hurt. Again, to me,
13 he was--- He was describing that the situation was tearing,
14 you know, the Defendant apart, he was hurt and, you know,
15 it was really bearing on me at that time. Also, he called
16 Mr. Addy, Clint Addy, on page 324, lines 10 through 25; and
17 Mr. Addy testified that the Defendant dropped weight,
18 argued with his friends, we thought he was blowing off
19 steam, he lost weight and wouldn't eat, it was like the
20 only thing that he cared about was his kids. After reading
21 this, I realized that, to some degree, Mr. Addy's testimony
22 was showing symptoms of some types of mental illness.

23 Q. And who is Mr. Clint Addy?

24 A. He was a good--- He was a good friend of mine that I
25 grew up with since about fourth grade.

1 Q. And, again, you believe, or do you believe, that his
2 statements are additional evidence showing that there was a
3 potential mental issue that should have been investigated?

4 A. Yes, sir. He also testified on page 587, lines 21
5 through 24, that the Defendant was going to put his kids in
6 a tank to harm them; but he just got through telling the
7 jury how much that I loved my kids. It's kind of--- It was
8 kind of conflicting if this testimony was believed because
9 the jury asked to hear that part of the testimony again;
10 and that's when they rendered their verdict. I don't
11 remember that I said that then; but, if I would've said
12 something like that, how can you love your kids so much
13 that you would do something bad to protect them? But, in
14 the very next breath, the same witness says that you
15 intended to harm them. If that is true, then I definitely
16 would've had to have been, you know--- Something was going
17 on.

18 Q. But--- And to clarify, you're not a medical doctor,
19 are you?

20 A. Yes, sir. Oh, no, sir, I'm not. Excuse me.

21 Q. You are not a psychologist?

22 A. No, sir, I'm not.

23 Q. And are you a psychiatrist?

24 A. No, sir.

25 Q. Do you have any educational background in the

1 diagnosing and treatment of mental conditions of any kind?

2 A. No, sir, other than being able to read and understand
3 what I read about, about the situations.

4 Q. Okay. Any other examples in the transcript?

5 A. Yes, sir. Cynthia Anderson--excuse me, Your Honor--
6 testified on page 333, line 2, the witness testified, if
7 she would've known the Defendant was serious, she would've
8 tried to get him help. Again, to me, this whole time this
9 was going on, people noticed things. Of course, I didn't
10 notice none of it. If I was suffering from mental illness
11 at that time, if you're truly mentally ill, then you don't
12 have the ability to see that you have a problem. But, for
13 her to testify that she wished she would've got me help,
14 she, she must have sensed that something was wrong.

15 Q. And Cynthia Adams or Anderson is another friend of
16 yours?

17 A. Yes, sir. As a matter of fact, that's the fiancé of
18 my best, another best friend who testified later on, Terry
19 Anderson.

20 Q. Okay. Mr. Burke, if you could continue please with
21 your next example.

22 A. She testified that the Defendant was a good father on
23 page 333, line 8, and that he looked at, and that she
24 looked at that because her dad was no good, that my main
25 concern was my kids. The witness testified, when Dale's

1 wife left him, he was very emotional, but his main concern
2 was his kids' well-being; and that's on page 335. And she
3 says--- She goes on to say he was concerned of the
4 environment his wife and brother were in. You know, the
5 whole time--- This happened over a seven-month period, and
6 it's just one thing after another.

7 Q. And your next example is Terry Anderson?

8 A. Yes, sir. Terry Anderson, on page 341, lines 5
9 through 9, the witness testified that the Defendant lost
10 weight and was very emotional all the time. The witness
11 testified that we would be having fun, then suddenly the
12 Defendant would just break down and cry, he was going
13 through a real tough time. The witness testified the
14 Defendant did everything possible to be the best father he
15 could be, he was the best dad he could've been. I didn't
16 realize, you know, when they were up here testifying in
17 this same courtroom, that some of the things that they were
18 testifying to, once again, are symptoms of different mental
19 illnesses and can only be explained by an expert to give an
20 evaluation. Go on?

21 Q. Yes, sir. Any other examples?

22 A. Yes. Mr.--- The same witness, Mr. Anderson, testified
23 that the victim told him at the hospital that she was
24 taking the kids from him. The witness testified that it
25 tore the Defendant apart. That's on page 343, lines 18

1 through 25.-

2 Q. And, Mr. Burke, I know it seems to be difficult for
3 you to continue to go through this, but I need you to
4 continue with your next example, please.

5 A. Yes, sir. On page 343, lines 20 through 22, the
6 witness testified that he was real bad emotional all the
7 time, he wouldn't eat and he couldn't sleep, it was tearing
8 him apart, once again, bringing to light that something was
9 going on. Terry Anderson goes on, on page 343, lines 20
10 through 25, the Defendant told witnesses about--- The
11 Defendant told witnesses, told Mr. Anderson, about dreams
12 about losing his kids, he could not live without his kids,
13 his kids meant everything in the world to him. Dreams
14 is--- Dreams with delusions is some type of mental illness.
15 And, once again, I'm not qualified as an expert, but I know
16 it's symptoms of different ones. On page 349, lines 23 to
17 25, Mr. Anderson testified that the victim was using the
18 molestation of his children to take his kids away from him,
19 because it happened at my house.

20 Q. And, just to be clear, this molestation he was talking
21 about, there was no accusation of you molesting anyone.

22 A. No, sir. My cousin--- My cousin had came down from
23 North Carolina to live with me--she was a female--to stay
24 as my live-in babysitter because I'd done run out of money.
25 I couldn't afford to pay a babysitter. And her brother

1 came to the house after my mom and dad made him leave their
2 house because of an argument. And, about three months
3 after he was out there, three or four months later, he did,
4 he molested my kids; and, subsequently, that's why I was
5 going to lose them.

6 Q. Mr. Burke, if you would please continue, making sure
7 that we're citing the page and the line number.

8 A. Yes, sir. I forgot where I was. Excuse me, Your
9 Honor.

10 Q. Are you ready to talk about Jane Simpson?

11 A. No, sir. I've got one more thing, that Mr. Anderson
12 testified that the Defendant worried, on page 351, line 5,
13 about losing his kids. A lot of stuff was happening. He
14 testified that the Defendant couldn't sleep. Then Jane
15 Simpson, on page 355, lines 19 through 21, testified that
16 Dale and Jenny was one of the most wonderful couples they
17 had ever met in their life, Dale and Jenny were very superb
18 in every way and wonderful parents. The witness testified
19 that Jenny left Dale for his brother, page 356, line 23.
20 The witness stated that it tore Dale apart. The witness
21 testified that Dale would come to her house and sit and
22 cry, he would be so emotionally disturbed that he would
23 jerk so bad he would shake her kitchen table. And that's
24 on page 354, line 25, and page 357, lines 1 through 3.

25 COURT REPORTER: Did you say Jane or James?

1 A. Jane.

2 COURT REPORTER: I'm sorry. Thank you. Excuse
3 me, Judge. Go ahead.

4 A. She goes on to say that he was just torn up because he
5 loved Jenny and, on page 357, lines 4 through 5, his whole
6 life was just falling apart. Once again, you know, they're
7 attempting to describe that something has happened over the
8 course of these seven months and nobody is stepping in to
9 do nothing; but, of course, maybe they--- I don't know.
10 Ms. Simpson went on, on page 358, the witness testified
11 that the Defendant's condition changed after Jenny left the
12 home, lines 10 through 25--excuse me; that's 16 through 25,
13 Your Honor--Dale came to my house and he had the children
14 with him. The witness stated she had, she had never saw a
15 person so torn up, he was wheezing really bad. The witness
16 asked the Defendant what was wrong and advised him to go to
17 the doctor. The Defendant stated he didn't have the money,
18 he was crying and said, Jane, it would be better off if me
19 and the kids were dead than to have to live to go through
20 this and the kids begging for their mother to come home and
21 she won't come. That's page 359, lines 1 through 4, Your
22 Honor. Once again, I don't remember saying that. Jane is
23 a good Christian lady. If she said that at trial, it's
24 golden in my book. But, if I said that I would hurt my
25 kids, I didn't care about me, but I didn't--- Something had

1 to be wrong. If you knew how much I loved those kids,
2 something would have to be wrong. And, once again, I'm not
3 a doctor. Excuse me, Your Honor. But something would have
4 to be wrong. The witness testified, on page 359, lines 5
5 through 9, she told the Defendant that you have no right to
6 think of murder, God gives life. She informed the
7 Defendant he needed help, she told him to go get mental
8 help.

9 THE COURT: Do you need a tissue?

10 A. Thank you, Your Honor.

11 (PAUSE.)

12 A. The witness testified, on page 359, lines 5 through 9,
13 that you have no right to think about murder and God gives
14 life. She informed the Defendant he needed help, she told
15 him to go get mental help. Once again, you know, she
16 testified on page 359, lines 13 through 17, she stated
17 there's a free place to go get help, because the Defendant
18 didn't have any money. The witness testified that the
19 Defendant said, if he did that, they will use it against
20 him in his custody battle for his children. For the
21 witness to say that she told me to go get mental help, she
22 must, she must've seen something to make her see that,
23 going through this seven-month period of this, to me,
24 tragic ordeal with losing my wife to my brother and
25 everything else involved, she must've seen that it was to

1 the point that I needed some type of professional help.

2 Q. All right. Mr. Burke, the next example that you have,
3 please?

4 A. The witness testified that there were times that he
5 would bring the kids to her house because of fighting or
6 problems that may bring the police. The witness testified
7 that the Defendant told her he was being threatened, page
8 360, lines 1 through 4. I do remember being threatened,
9 and I don't really remember by who. I was--- I was hearing
10 voices and things I just can't explain. On page 361, lines
11 12 through 19, the Judge ruled it would go to the
12 Defendant's state of mind. I think that was after an
13 objection and--- But the Judge's statement right there,
14 once again, even the Judge said--- He had to be thinking
15 something's wrong, you know, if the Judge questioned your
16 state of mind.

17 Q. And, Mr. Burke, I don't know if you have the
18 transcript there in front of you. But that was in
19 response, was it not, to a question to Jane Singleton by
20 Mr. Nettles, did you ever hear Jenny threaten Dale?
21 And is that what you are referring to that the State then
22 objected to?

23 A. Yes, sir.

24 Q. Thank you.

25 A. And the Judge--- The part that stuck out to me, the

1 Judge said he would allow it for the state of, you know, it
2 would go to his state of mind.

3 Q. All right. Mr. Burke, do you have any other examples?

4 A. Yes, sir. The witness testified, on page 362, by the
5 end of September or October, Dale was pushed up, pushed up
6 against a wall. To me, it was like, once again, they're---
7 She's describing that he felt he had no other place to
8 turn, you know, what's life going to throw at me next kind
9 of deal. She just like best explained he didn't know what
10 he was doing.

11 Q. All right. And then is there further testimony on the
12 same page by Ms. Singleton that you would like to offer to
13 the Court?

14 A. Yes, sir. The witness testified, on lines 4 through
15 9, that his nerves were shot, he cried all the time, he
16 would come to her house and couldn't keep his conversation
17 straight, he would go to tell her something and get off on
18 another subject, his phone got cut off, he was in very,
19 very bad shape. The witness testified the Defendant was
20 afraid to get help because it would hurt him in his custody
21 battle. Once again, when she said that he couldn't keep
22 his conversation straight and would go to tell her
23 something and get off on another subject, that is different
24 symptoms of mental illness described at, brought forth at
25 trial by the witnesses that Mr. Nettles put up.

1 Q. All right. Mr. Burke, do you have any other examples?

2 A. Yes, sir. Almond Anderson. I'm going to call him
3 Dale because I didn't know his name was Almond until I seen
4 it on the transcript. But Mr. Anderson, in direct by Mr.
5 Nettles on page 368, lines 4 through 9, the witness
6 testified that the Defendant was a very good man and that
7 there was nothing he loved more than his kids. The witness
8 testified he just didn't like to hear people say bad things
9 about the Defendant, he's a good man. The witness
10 testified that the Defendant was a good worker and his
11 family was everything to him, there was nothing more
12 important to the Defendant than his family. The witness
13 testified, on page 371, lines 14 through 17, when the
14 Defendant's wife moved in with his brother, the big problem
15 began. The witness testified about the drug environment
16 his brother and his wife had and that the Defendant didn't
17 want his kids in that environment. The witness testified
18 that it really affected the Defendant that he lost his wife
19 to his brother. The witness went on to testify, on page
20 373, lines 1, the Defendant was more so of a dad than
21 anybody he ever knew. The witness was asked, how did it
22 affect the Defendant after a cousin molested his kids.
23 Just Mr. Nettles' question and the way he worded it there
24 makes it look like he's looking for, he's looking for an
25 answer that he already knew and something was causing the

1 Defendant to not act right. I've got to remember where I
2 was. The witness, Mr. Anderson, testified, on page 377,
3 lines 1 through 12, the Defendant was a very good daddy,
4 the Defendant just was a really great person. The witness
5 said he never met a better person. The witness testified,
6 on page 378, lines 6 through 7, the Defendant was driven to
7 the point the man was not in his right mind. Now, I can
8 tell you Mr. Anderson is not a doctor, but I worked for the
9 man for nine years--well, actually we worked for somebody
10 else--and he knew me before all this happened. Why he's
11 not qualified to make that determination. He brought the
12 Defendant's state of mind at trial, you know, just by, just
13 by his testimony. The witness testified, on page 383,
14 lines 15 through 25, that nobody should stay with nobody
15 they don't love but she shouldn't have dumped him with all
16 the bills, if he hadn't paid all the bills on the house and
17 whatever, where was he going have a place to stay, and then
18 DSS would come in and take his kids from him, and that's
19 the exact reason the man is here today, he didn't want to
20 lose his kids, he didn't want his kids in a bad
21 environment. The witness testified, on page 386, lines 13
22 through 18, his attempt to explain my actions. To him, by
23 him knowing me, does his attempt to explain something bad
24 like this that happened--- He--- To me, you know, it shows
25 that something was wrong.

1 Q. Again, Mr. Burke, all these witnesses we've been
2 talking about were witnesses, or were they witnesses, that
3 Mr. Nettles put on the stand in your defense?

4 A. Yes, sir.

5 Q. Okay. These were not the State's witnesses?

6 A. No, sir. Mr. Nettles called every one of these
7 witnesses.

8 Q. All right. What would you like to refer to next in
9 the transcript?

10 A. The witness went on to testify, this man was so
11 distressed after the rape or whatever, molestation of the
12 kids, he was so distressed that he couldn't work, he could
13 not work, this man was torn up because his kids were hurt.

14 Q. And, when you said this witness, are you still
15 referring to---

16 A. Mr. Anderson, yes, sir.

17 Q. Almond Anderson?

18 A. Yes, sir. Yes, sir. The witness' testimony, again,
19 trying to, trying to describe the effect that the
20 molestation on my children had on me at that time was
21 causing some type, some type of mental illness because my
22 work was impaired. Where I'd never had nobody never say
23 nothing about me working, you know, now my work was being
24 impaired. Undoubtedly, according to Mr. Anderson, he could
25 not work. He's describing really that I was so tore up, as

1 mentioned before, that I just, like I couldn't function
2 with normal duties. And, on page 388, the witness
3 testified that the Defendant would come to his shop and
4 would be pacing the floor and pace the floor, he was in bad
5 shape. And then, at that point, the transcript reflects
6 that he actually blurted out in court and made a statement.
7 He said, honestly, I apologize to you, I seen you needed
8 help, and I didn't help you.

9 Q. All right. Mr. Burke, are you going to continue then
10 with Ms. Anderson's testimony?

11 A. Yes, sir. On page 391, Mr. Anderson, lines 5 through
12 8, the witness testified that the Defendant was going to
13 lose his kids, it would be better for it all to be over
14 with and the kids to be put in a home where they can be
15 adopted by decent people. The witness testified the man
16 didn't purposefully kill his wife, I don't know all the
17 legal stuff, I'm not a lawyer, I don't know about none of
18 this stuff. The witness testified the Defendant was
19 temporarily insane, in his opinion, when this happened.
20 The things that Mr. Anderson saw and testified to at trial
21 can only be explained by an expert. But in his, his
22 knowing the different me than all this chaos is kind of
23 like he's talking about a different person than he knew.
24 But, once again, if the witness thought that something was
25 wrong with the Defendant, just like Mr. Nettles did earlier

1 when he, when he said the man was not in his right mind,
2 it's no doubt that the issue was there. And, of course, I
3 didn't realize all this at the time because I just didn't
4 realize. And, to me, you know, it raises issues as to the
5 Defendant's mental state at the time of the crime. The
6 witness testified, at this point in time, the Defendant
7 wasn't actually sure what he was doing. And that can only
8 be explained by an expert. And then, going on, I, Roger
9 Burke, in direct by Mr. Nettles, page 431, lines 13 through
10 18, the Solicitor---

11 Q. If I can interrupt you. I apologize for one second.
12 Before we move on to your testimony---

13 A. I'm sorry.

14 Q. I apologize. Mr. Ratliff, Mr. Addy, Ms. Anderson,
15 Mr. Anderson, Mr. Almond Anderson, Ms. Simpson, Ms.
16 Singleton, those were all witnesses that were called by
17 Mr. Nettles on your behalf. Correct?

18 A. Yes, sir.

19 Q. Okay. And were they all friends and acquaintances of
20 yours?

21 A. Yes, sir, they were friends. Jane was just the next
22 door neighbor; but, yeah, she was kind of like the grandma
23 that ain't related.

24 Q. Do you know--- Were any of these witnesses called for
25 the purposes of disputing any of the factual allegations of

1 the State as to the crime itself?

2 A. No, sir. They were--- Excuse me. They did not
3 dispute--- Actually, their testimony is really an attempt
4 to explain why a good person would do something as bad as I
5 did.

6 Q. So do you believe that's why Mr. Nettles put those
7 people on the stand, to try to explain what happened?

8 A. Yes, sir, or to show that, to show that the situation
9 of this whole ordeal--and we're talking about the seven
10 months, not just, you know, one situation--the whole ordeal
11 affected me at that time.

12 Q. So do you think that these people were put on the
13 stand specifically to discuss your mental state in the
14 period of time leading up to your actions?

15 A. It would appear, but I can't testify to that. I know
16 that's what came out at trial.

17 Q. All right. So do you believe that Mr. Nettles knew
18 what these people were going to say when he asked them
19 these questions?

20 A. I'm sure--- I'm sure he did. A lawyer don't never
21 know, ask a question he don't already know the answer to.

22 Q. So do you believe that Mr. Nettles was aware that your
23 mental health and well-being and your knowledge or your
24 mental knowledge of what you were doing or weren't doing
25 was an issue that he wanted the jury to hear?

1 A. Yes, sir. He had to be aware. Like I said earlier,
2 when he had the report that listed me as suicidal and even
3 admitted on the record, as we touched on earlier, that him
4 and the Solicitor discussed dementia or insanity, whichever
5 word, they discussed it. And, for them to discuss it, they
6 had to see something. We're not talking about fishing
7 because ain't none of us going fishing today. There had to
8 be something that they saw to discuss the possibility of
9 it.

10 Q. Well, Mr. Burke, when I interrupted you just a few
11 minutes ago, I believe you were getting ready to continue
12 in the trial transcript.

13 A. Yes, sir.

14 Q. If you would, please, give your next example.

15 A. Roger Burke, which is me, in direct by Mr. Nettles, on
16 page 431, lines 13 through 18--- I done covered that, Your
17 Honor. Sorry. But, because of the effect it had on the
18 Defendant is what the Judge said right there. He ruled
19 that he would allow the testimony not for what was said but
20 because of the effect that it had on the Defendant. And
21 his--- Once again, the Judge was seeing that something was
22 affecting the Defendant or he wouldn't have stated, worded
23 it that way. On page--- I have page 448, lines 2 through
24 6, that I testified that I felt it would better if me and
25 my wife were both dead and the kids would have a better

1 chance with some decent people to take care of them than it
2 would be for me to, for me to let, knowing me as a father,
3 let them kids be raised in that environment. And that
4 attempt to explain what I done, I stand by that today. I
5 can only--- That's the way I felt it about then; that's the
6 way I feel now. It don't make it--- It don't make it
7 right. But, if I think, if something in my mind thinks I'm
8 right, no amount of evidence is going to change that.

9 Q. Mr. Burke, if you would continue, please, with your
10 next example.

11 A. When state of mind was at question, lines 9 through
12 11, it states that the Defendant put the gun to his head
13 and said, this is what you want, bitch. It shows the
14 Defendant was suicidal and possibly insane at the time of
15 the crime. Like I said, after leaving me for my brother,
16 you know, they cost me my land, my house, my family
17 deserted me because, I mean, by it being my brother, it
18 tore the whole family apart, kind of alienated friends
19 that--- And really I didn't--- I didn't really have nobody.
20 It was just me and the kids. I was--- I learned later on--
21 of course, I didn't realize it then--the depression and
22 stuff that I was going through right then in different
23 instances, it was just all building up in me. And it kind
24 of explains like a snap which can only be explained by a
25 professional. But, if I put the gun to my head and it

1 shows that I was suicidal or possibly insane at the time of
2 the crime, if I felt that way, then something had to be
3 going on mentally.

4 Q. Well, Mr. Burke, if you would, please, if you have any
5 additional examples from the transcript, if you would
6 continue and give the next one, please.

7 A. On page 450, lines 10 through 19, I testified that I
8 was looking for my brother to kill him and take my own
9 life. And that shows an unstable mind set.

10 Q. All right. Mr. Burke, the next example?

11 A. On page 450, lines 21 through 25, the Defendant
12 testified that I had a conversation with my son, Brandon,
13 Brandon asked why did he shoot momma. The Defendant said,
14 I couldn't lose y'all, Brandon, I couldn't let her take
15 y'all kids from me. This brings up Defendant's state of
16 mind and capacity to distinguish right from wrong, to try
17 to explain to a ten-year-old why you just killed their
18 mother, you know. If I felt--- Once again, if I felt I was
19 doing the right thing, no amount of evidence can overcome
20 that; and that's backed up by case law, *State v. Hahn*. On
21 page 451, lines 4 through 5, Brandon made his dad promise
22 not to hurt himself which means that he, my son, actually
23 sensed that I was suicidal. On page 452, lines 1 through
24 4, the Defendant testified he tried to cover up because
25 Brandon didn't want to lose his dad and he didn't want to

1 lose them. It'd sunk in what I had done. If it sunk--- If
2 it sunk in, then I wasn't really aware of the incident at
3 the time of the crime. The ability to distinguish right
4 from wrong, to me, was brought back into issue. On page
5 457, lines 23 through 25, the Defendant testified, I
6 couldn't let my kids be brought up in that. The Defendant
7 said he would be better off dead. To me, the insanity or
8 dementia defense arises as to Defendant's state of mind at
9 the time of the crime. And the witness testified on page
10 459, lines 21 through 25, that God spared his and his
11 brother's life because it was my intention to kill him and
12 me. The way things shook out wasn't the way that I wanted
13 it. There was--- I was supposed to go there to the house
14 to meet and, when him and her come in, kill both of them
15 and myself. My mom was supposed to have the kids that day.
16 When I met Jenny at the schoolhouse earlier that morning,
17 there was a big ruckus that went on; and she told me to
18 kill myself, you son-of-a-bitch. And, after all these
19 seven months, not a bad idea. So I--- But my intention was
20 to kill me and him. And then, once again, that shows, if
21 somebody is suicidal and he's done went to these extremes,
22 there's no turning back.

23 Q. All right. Mr. Burke, if you would continue. Do you
24 have any more examples from the transcript?

25 A. On page 514, lines 11 through 14, the Defendant

1 testified that he made a bad mistake as a father, I thought
2 I was doing what I thought to be the right thing which
3 turned out to be the wrong thing. Even though I said that,
4 I still don't know if I believe that myself because I know
5 the situation that is going on now within some of the
6 people that was involved in that that I wouldn't want my
7 kids a part of to this day. And, on page 540, during
8 closing arguments by the defense attorney, Mr. Nettles, he
9 stated to the jury, there is no excuse for what Roger Dale
10 did, we didn't present the evidence or excuse. Now, that
11 stuck out to me that my analysis of it was he presented the
12 evidence to show the state of mind of the Defendant at the
13 time of the incident. And insanity is a legal defense when
14 evidence supports it as it does in this case. Closing
15 arguments by Mr. Nettles continue, on page 541, lines 18
16 through 20, you heard what he went through before this
17 happened, and it wasn't pretty and who knows what that
18 would do to anyone. You know, I think Bill, that part
19 right there, he's saying anybody in this place right now
20 could go through--- And that's Bill talking. He says, who
21 knows what that would do to anyone, even Bill Nettles.

22 He didn't leave himself excluded from that. And it
23 describes--- His own words describe that I thought what I
24 was doing was right. And, on page 542, lines 7 through 23,
25 he really describes the possibility of insanity. He said,

1 lose control of himself temporarily. Once again, Your
2 Honor, it's describing a snap. You pull a dog's tail long
3 enough--it ain't never bit nobody--you pull it long enough,
4 he's going to bite you to a point a life was taken and many
5 more were to be took. And still it brings to mind--- I
6 think he can't--- He can't explain why he said, who knows
7 what that'll do to anyone.

8 Q. Anything else, Mr. Burke?

9 A. Yes, sir. On page 544 and 545, Defense attorney says,
10 he made a series of bad decisions, he thought he was saving
11 his kids from this. Once again, this was--- Disturbance of
12 mind was at issue. Bill attempted to explain to anyone
13 within the sound of his voice that, if you look at it, the
14 Defendant actually thought he was protecting and saving his
15 kids from these things. And, on page 546, even the
16 prosecutor for the State, on page 544, tells the jury that
17 the Defendant could have controlled himself and think
18 right. Your Honor, under my analysis, *Becton v. Barnett*
19 says that only a qualified psychologist can make that
20 determination and that counsel is ineffective if he does
21 not investigate. He---

22 COURT REPORTER: What's the name of that case
23 again?

24 A. *Becton v. Barnett*.

25 COURT REPORTER: Thank you. I'm sorry. Go

1 ahead.

2 A. And remember, don't forget, the fact that he discussed
3 with Bill my state of mind and decided that I was all
4 right.

5 Q. Mr. Burke, when you say he discussed, who are you
6 referring to?

7 A. The prosecution for the State. Excuse me.

8 Q. Now, Mr. Burke, any more examples in the trial
9 transcript?

10 A. Yes, sir. On page 598, the Defendant states that,
11 after being convicted of murder, after I was already
12 convicted and the jury had already ruled, on lines 14 and
13 15, I told the Judge that I can rest assured that they will
14 not be raised up in that environment. Even after I was
15 already found guilty, I still stood by and even attempted
16 to explain to the Judge that I thought what I done was
17 right if you look at it in that light and I could rest
18 assured they would not be raised up in that; and they're
19 not. And it promptly shows that he thought he was doing
20 the right thing. Insanity definition is being able to
21 distinguish legally and morally right from legally and
22 morally wrong. And my understanding, legally but morally,
23 was it right for me to let my kids be raised up in an
24 environment like that with the things I knew was going on.
25 But, either way, it brought the issue into evidence that it

1 should have been investigated.

2 Q. Mr. Burke, had you ever, prior to, well, at any time
3 in your life prior to this trial or to these actions
4 that led up to this trial, had you been treated for mental
5 illness?

6 A. No, sir, never.

7 Q. Have you--- Had you ever seen a psychologist or
8 psychiatrist?

9 A. No, sir.

10 Q. During the seven-month period you described, were
11 there several of your close friends that said you did need
12 help?

13 A. Yes, sir.

14 Q. Now, since you've been incarcerated, have you had the
15 assistance of any mental health professionals?

16 A. Yes, sir. I had an incident at the prison working at
17 Prison Industries. We was working on a dangerous machine,
18 and we had a guy who lost his hand in the machine, and I'm
19 the one who cut the machine off. And eventually, about a
20 month later, he lost his life behind it. And, when he lost
21 his hand, me witnessing it, I can't describe to this day

22 how hard that was. No Freddie Krueger movie, nothing, can
23 describe what that looked like. And, at that time--I guess
24 he was probably called by the Department of Corrections--
25 anyway, they sent Dr.--well, he's not a doctor; he's the

1 mental health counselor at the prison--Patrick Carter to
2 kind of talk to me and make sure that I was all right and,
3 you know, see how things affected me and all because it was
4 a really traumatic deal. And I kind of blame myself in a
5 way even though I wasn't even--- I had walked outside to
6 turn off the machine, and I heard him holler; and, when I
7 came back in there to the machine, his hand was down inside
8 of it.

9 MS. MAY: Your Honor, I would like to object at
10 this point. I don't know what this has to do with what
11 happened at trial.

12 THE COURT: Sustained.

13 MR. MELNYK: Thank you, Your Honor.

14 Q. Mr. Burke, do you believe that Mr. Nettles was
15 ineffective in his representation of you because he did not
16 pursue the insanity defense?

17 A. Yes, sir.

18 Q. Do you know or what do you think Mr. Nettles should
19 have done in order to present the insanity defense?

20 A. He should've--- He should've had an expert to examine
21 me and see if I was all right because I was most certain to
22 be found guilty if I went to trial. My own statement--- I
23 got on the stand and said I did it. How could I not be
24 found guilty? The only defense that was going to help in
25 any way was if an insanity defense prevailed which was the

1 only avenue that offered a ray of promise.

2 Q. And, to the best of your knowledge, did Mr. Nettles
3 ever set up a time for you to be evaluated prior to
4 trial by a mental health professional?

5 A. No, sir.

6 Q. Mr. Burke, do you believe that it's reasonable that,
7 had an insanity defense been presented, do you think it's
8 reasonable to expect the outcome of the trial could have
9 been different?

10 A. Yes, sir. My reason for belief is because the defense
11 lawyer and prosecutor for the State, they both argued my
12 state of mind during closing arguments to the jury in some
13 degree, but the jury couldn't take none of that into
14 consideration because they wasn't instructed by the jury
15 that they could do so.

16 Q. Weren't instructed by the---

17 A. By the Judge. Excuse me. They were--- They were
18 just, is he guilty, is he not guilty, or a lesser-included
19 offense of manslaughter.

20 Q. Mr. Burke, I believe that that covers your argument on
21 failing to present and to pursue the insanity defense.

22 But, before we move on, is there anything else that you
23 would like to add specifically as to that particular claim?

24 A. Excuse me.

25 (PAUSE.)

1 A. I think that's it.

2 THE COURT: Now, why don't we--- This is a good
3 place to take a recess. Why don't we take a ten-minute
4 recess?

5 MR. MELNYK: Yes, Your Honor. Thank you.

6 A. Thank you. Your Honor, may I step down?

7 THE COURT: Yes, sir. The Court will be in
8 recess until, let's say, 12:00 noon.

9 MR. MELNYK: Thank you, Your Honor.

10 (WHEREUPON, THERE IS A RECESS.)

11 THE COURT: You may continue, sir.

12 MR. MELNYK: Thank you, Your Honor. May it
13 please the Court?

14 THE COURT: Yes, sir.

15 Q. Mr. Burke, we know--- Now, we're going to move on to
16 the other issues that you raised in your application. Do
17 you have a copy of your application up there with you?

18 A. Yes, sir.

19 Q. Okay. Issue A is---

20 A. Excuse me. I don't have it. It's on--- My copy's on
21 the table.

22 MR. MELNYK: Your Honor, may I approach to hand
23 him a copy?

24 THE COURT: You may, yes, sir.

25 Q. (Hands document to witness.) Mr. Burke, I just handed

1 you a copy of your application.

2 A. Yes, sir, now I do.

3 Q. Can you tell me what is listed as issue A, please?

4 A. Was defense counsel ineffective in failing to place
5 objections to the State's opening argument and misconduct
6 at trial.

7 MR. MELNYK: May it please the Court, Your Honor.
8 It's my understanding that you do have a copy of the
9 application---

10 THE COURT: I do.

11 MR. MELNYK: ---and it would be in the first
12 allegation that we just went through. The vast majority of
13 the page and line numbers that Mr. Burke cited were also
14 included in this. And there were a few additional ones.
15 That's why I did want to go through the entire thing. If
16 it pleases the Court and the Court would be willing to
17 consider, instead of reading through every single one of
18 these, if the Court will crave reference to them as an
19 overall part of the argument, we can perhaps summarize a
20 little bit.

21 THE COURT: Do you have any objection to that,
22 Ms. May?

23 MS. MAY: No, Your Honor.

24 THE COURT: Okay. Because that may make it
25 quicker.

1 MR. MELNYK: Thank you, Your Honor.

2 Q. Mr. Burke, you list, in your application, you list
3 several instances of statements that you believe were
4 inappropriate for the State to make during its opening
5 argument.

6 A. Yes, sir.

7 Q. Okay. If you would, just give--- And they're in
8 there. But just give an example of one of them for me that
9 you believe is the most egregious.

10 A. In opening argument right from the first instance,
11 Solicitor Moses stated, judge, jury and executioner,
12 Ladies and gentlemen, on December 19, 2001, the Defendant,
13 Roger Dale Burke, took it on himself to be the judge, to be
14 the jury and to be the executioner of his ex-wife, Jenny
15 Burke. Trial page--- I don't have to say that?

16 Q. Well, just go ahead. Go ahead.

17 A. And, with that being said, the evidence showed right
18 from the get-go in opening arguments that they didn't say,
19 we're going to prove anything. They knew that he did the
20 killing; and that brings, that brought more emotion from
21 the jury. I think it was an attempt to arouse the jury,
22 you know, more on emotion more so than fact.

23 Q. Mr. Burke, were you aware at the time, or did you hear
24 from the Judge, that the jury is not to consider
25 opening statements or closing statements as evidence?

1 A. No, sir. If he said that, I--- Well, I still think it
2 plants a seed whether they can consider it or not.

3 Q. Do you believe, in this case, that the Solicitor went
4 beyond what would be considered allowable in the way that
5 he characterized any potential evidence, the way that he
6 characterized the case?

7 A. Yes, sir.

8 Q. And do you believe that Mr. Nettles should have
9 objected to the strong language that the Solicitor was
10 using?

11 A. Yes, sir. I think it was an attempt to because they
12 knew some of the good things that were going to be said
13 about me, you know. It was a way for the State to bolster
14 their case, so to speak, and even outright lie and
15 exaggerate to make the Defendant look like a liar, you
16 know, and just a cold, heartless person.

17 Q. Do you believe that the Solicitor's opening statements
18 had an effect on the jury?

19 A. Yes, sir, I do.

20 Q. Do you believe that Mr. Nettles should have objected
21 to all that language again?

22 A. Yes, sir, I do.

23 Q. And, again, you don't know whether the Judge would've
24 sustained that objection or denied the objection, do
25 you?

1 A. I don't know.

2 Q. Do you believe it's reasonable to assume that the
3 outcome of the trial would have been different, that the
4 Judge would've sustained that objection?

5 A. Yes, sir, I think, I think it could have. Like I
6 said, I'm not up on the law, but I've researched it; and I
7 think it was an issue for them to inflame the jury,
8 especially when you allude to it in closing arguments.

9 Q. But you believe it was an issue at least that Mr.
10 Nettles should have objected to?

11 A. Yes, sir.

12 Q. Moving on then from the opening statement by the
13 Solicitor, were there instances during the trial in chief,
14 during the State's case, where you feel that the Solicitor
15 went out of bounds, said things, you know, they shouldn't
16 have said?

17 A. Yes, sir, I do. Can I explain?

18 Q. Yes, please.

19 A. In the State's case, when I got on the stand, the
20 State asked, showed a picture of a bloody sink and asked me
21 when did I wash my hands. I said that I didn't wash my
22 hands. And I didn't. I knew that I didn't wash my hands.
23 But they showed a bloody, a picture of a bloody sink with
24 blood in the bottom of it where it appeared to be blood, I
25 think was my testimony, and blood on the handle. After---

1 After the trial--and I didn't realize it until I was
2 preparing and looking--the two other witnesses that showed
3 up to the crime scene and gave statements--- Three people
4 showed up. Only one was called by the State. The two
5 people that were not called to the stand, in their
6 statements to the police, they said--- One said, I stuck my
7 finger in the blood; and the other one said, I touched it.
8 It's--- It was common knowledge, to me at least, if you
9 touch, if you arrive at a crime scene and touch what
10 appears to be blood, that you would go wash it off, wipe it
11 on your clothes or do something. But they made the
12 statement that they did stick their finger in the blood for
13 the, for--- And that's in the motion of discovery, their
14 statements. That is or was a part--- Their statements was
15 in the discovery. And I think that the--- I think that's
16 prosecutorial misconduct where he could have introduced a
17 lie to inflame the jury when his own, when their own two
18 witnesses that they didn't call admitted to touching the
19 blood where I denied it.

20 Q. Okay. And do you believe that Mr. Nettles should
21 have, in some way, objected or brought that to the Court's
22 attention or addressed it in his opening and closing or
23 closing statement?

24 A. Yes, sir, I do. I believe he should've been--- He had
25 the option to show the--- He didn't have the option to show

1 their statements saying they touched it because they were
2 never put on the stand, but he did have--- He did have
3 evidence that could have shown that the State was possibly
4 introducing incriminating evidence not true in fact.

5 Q. And do you believe that, had that other evidence been
6 presented, do you believe that, or if Mr. Nettles had
7 objected to what you are saying is prosecutorial
8 misconduct, do you believe that would have had a, created a
9 different outcome in the case potentially?

10 A. I believe it was a better chance for maybe the
11 manslaughter conviction. It would show--- It was just
12 trying to show the cold, heartless, that it was just cold,
13 heartless, you know. I really can't explain exactly, but I
14 do think it was intentionally done that way to gain an easy
15 conviction and make the Defendant just look worse than he
16 should, than he really is.

17 Q. Okay. Any other--- Well, you, in your application,
18 you also--- And we'll just skip over here because they're
19 very similar issues. So we're skipping over to issue D.
20 That, again, is where you allege that defense counsel, Mr.
21 Nettles, was ineffective for failing to object to the
22 State's final summation. Is that--- Are we essentially
23 making the same argument here but we're just talking about
24 the summation, the closing arguments, as opposed to the
25 opening?

1 A. Yes, sir.

2 Q. Okay. What, specifically, do you believe Mr. Nettles
3 should have objected to during the State's final summation?

4 A. The opening part of Mr. Madsen's final summation when
5 he told the jury, when he said that Mr. Moses told the
6 jury, this case is about a man who decided on December 19th
7 to be his wife's judge, to be her jury and, when he
8 sentenced her on that day, he decided to be her
9 executioner, we know what he did and how he decided to
10 execute her. I think that was prosecutorial misconduct
11 because there, without the possible--- There really was no
12 defense given. It was the--- The jury was to consider did
13 he do it or did he not. Well, he got on the stand and
14 said, I went and killed my ex-wife. So, once again, I
15 think the Solicitor went overboard in making him out to
16 just be something that he wasn't, and especially when he
17 alluded to it from the opening arguments. It was never a
18 fact of did he, did I do this. And I felt like he was
19 inflaming the jury, and I feel like Bill should have
20 objected to that.

21 Q. And do you believe the fact that he didn't object was
22 ineffective assistance of counsel?

23 A. Yes, sir, I believe it is.

24 Q. Okay. And do you believe that, had he objected and
25 presumably, I suppose, had it been sustained, that that

1 would have had a different effect potentially on the
2 outcome of the trial?

3 A. I think it could have been, but I can't--- I can't be
4 certain. I think it's--- I think it's very possible.

5 Q. Okay. It's at least reasonably possible?

6 A. Yes, sir.

7 Q. And then, moving on to issue C, again because it
8 refers to prosecutorial misconduct, but, specifically, you
9 know, did--- Was Mr. Nettles ineffective for not addressing
10 the issue? That's when you were talking about the cross
11 examination of Mr. Addy?

12 A. Yes, sir.

13 Q. Okay. Why is that important? Why do you bring that
14 out specifically?

15 A. Because, to this day, I can't understand why Bill
16 might would know this and still put this guy on the stand
17 to, as Bill's own witness. You know, he started off good
18 when he was saying these good things; but I believe he
19 poisoned, you know, Bill's--- And I think that the
20 prosecution elicited this testimony because I don't believe
21 it was true.

22 Q. Okay. But what, specifically, are you alleging there
23 that was ineffective assistance of counsel?

24 A. In the issue C argument, I have it, did the
25 Solicitor's actions amount to prosecutorial misconduct, on

1 issue C. That's not really something I raised as
2 ineffective. I felt that the Solicitor's actions was
3 prosecutorial misconduct.

4 Q. Do you believe that it rose to the level such that Mr.
5 Nettles should have objected to it or should have raised it
6 as an issue at trial?

7 A. I guess he could have. It's a very issue--- It's the
8 very issue that my guilt was found on because the jury
9 deliberated for a long time and come back to ask to hear
10 that part of the testimony; and that part of the testimony,
11 when they got to that, that's enough. And they believed---
12 I believe they reached their verdict on that testimony and
13 not, you know, not just the facts of the case and the
14 instructions that the Judge gave them. They reached their
15 decision on emotion, and I think that the prosecutor did it
16 intentionally. I also know that there never was a
17 statement where Mr. Nettles, I mean, where Mr. Addy had
18 signed. He had witnessed, according to the transcript,
19 that he was at a bar and somebody come and told him
20 something and they didn't know what but something had
21 happened at the time. And I think he called the Sheriff's
22 Department and just told them over the phone, through a
23 phone call; but it never was signed as a statement, but he
24 told them that I was going to harm my children by putting
25 them in a tank full of solution. I don't--- To this day, I

1 don't know where that came from. I think Bill could be
2 ineffective for that; but then, again, maybe Bill's not
3 because he didn't know, you know.

4 Q. Well, Mr. Burke, before we move to issue E, which I
5 believe is the final issue that you have alleged, is there
6 anything else you would like to add in reference to your
7 allegations of Mr. Nettles' ineffective assistance of
8 counsel for not objecting to anything that was either
9 stated or asked by the State in this case? Is there
10 anything you would like to add that's not contained in your
11 argument or contained within your application?

12 A. Yes, sir. Go back to issue D. And I think this is
13 very relevant; I do. The Solicitor then bolsters the
14 State's case in chief by incriminating remarks upon the
15 facts and evidence not presented at trial, trial transcript
16 page 551, lines 3 through 13. The Solicitor then goes
17 forward not only to vouch for Officer Frier's credibility,
18 but also he pits the Defendant's testimony against that of
19 the officer.

20 Q. Do you know specifically--- Going back to remarks
21 about the facts and evidence not based on trial, what
22 specifically are you referring to? Do you recall?

23 A. Yeah. He--- I'm getting confused. Hold on. I'm
24 talking about where he, in closing arguments, when he
25 vouched for Officer Frier's credibility and also compared

1 it up against the Defendant's and he vouched for the
2 credibility. And I raise this issue according to case law
3 that backs it up. And he goes on and tells the jury,
4 during closing arguments, the best lie contains 90 percent
5 truth. Case law says that he can't call the Defendant a
6 liar. And so he's saying 90 percent of what happened in
7 that trial was true but the other 10 percent wasn't. I
8 think--- I definitely think that Bill should have objected
9 to that because I think it had, it had to have an effect on
10 the jury.

11 Q. Mr. Burke, then issue E, you state, was defense
12 counsel ineffective in failing to place objections or
13 taking exceptions to trial court's erroneous malice
14 instruction. Explain again, please, to the Court why you
15 believe that was ineffective assistance of counsel.

16 A. As it says, outlines, but it also says, citing Arnold
17 v. Evatt, it held that the implied malice portion of the
18 Court's instruction and---

19 COURT REPORTER: Wait a minute. Say that again.
20 It held what?

21 A. The case held that the implied malice portion of the
22 Court's instruction denied Arnold his due process right by
23 erroneously shifting the burden of proof as to malice from
24 the prosecution to the Defendant. And that's--- That's
25 definitely what happened in this case. Not only was the

1 jury handicapped because of what they could consider by
2 what was not done at trial and certainly the insanity
3 defense and maybe at least exploring it, but also to not---
4 They were--- The malice portion of the Judge's
5 instructions, Bill should've objected to that because I do
6 think it shifted the burden to prove that I didn't act for,
7 act with malice the way that it was, the implied malice
8 part of the instructions. And the Court said, I cite
9 several cases in that as well.

10 Q. Did you have any discussion with Mr. Nettles prior to
11 the Judge giving the charges to the jury about how these
12 charges would be worded?

13 A. No, sir.

14 Q. Do you have any legal training that would allow you to
15 do that?

16 A. No, sir. Bill's--- Bill's a great attorney, and I---
17 That's what attorneys do.

18 Q. So this allegation, this is from your own research and
19 your own examination of the trial transcript?

20 A. Yes, sir. And researching the issue, it did--- It's
21 been held in other cases to follow up, to--- In P.C.R.'s,
22 it's been held to meet the criteria in *Strickland v.*
23 *Washington* under both prongs.

24 Q. So do you believe that Mr. Nettles' failure to object
25 to the specific wording of the malice instruction falls

1 below the standard, acceptable standard, for an attorney in
2 his position?

3 A. Yes, sir, I do. And also it's in the transcripts,
4 and I can't tell you the exact page where the Judge makes
5 the statement that they need to talk back and they don't
6 need to put certain things on the record. They discussed
7 what they was going to charge the jury in private, and I
8 think--- You know, I don't know what was said behind the
9 doors. You know, I don't---

10 Q. Do you believe that, if he had objected to the wording
11 of this malice instruction that was then charged, that was
12 then read to the jury, do you believe that, had what you
13 would think to be a proper charge been read, would have had
14 a reasonable difference or made a difference in the case?

15 A. Yes, sir. I think the malice portion--- It's possible
16 to confuse the jury because they could have reached the
17 manslaughter part. But, during the jury instruction, just
18 because he had a gun and he went there, that's malice, we
19 proved it and that's murder, I feel that that did--- By all
20 means, I felt like that Bill should've objected to that.

21 Q. Okay. And that's really also what I was going to ask
22 you next is what is important in your understanding of the
23 malice charge, and I believe you just answered that. Mr.
24 Burke, we have gone over a lot of allegations here this
25 morning. Taken individually and again taken together or

1 taken together, do you believe they show Mr. Nettles'
2 ineffective assistance of counsel?

3 A. Yes, sir, I do.

4 Q. And do you believe that, if there is a finding by this
5 Court that that would be the case on one or all of them or
6 any of them, that, had Mr. Nettles not been ineffective,
7 that it's reasonable to assume the outcome of the case
8 would have been different?

9 A. Yes, sir, I do, especially on issue B, the insanity
10 defense, and the malice instruction specifically. Just by
11 case law and my research, I haven't really seen anything
12 where it couldn't be ruled in my favor. It may be, but---
13 And case law proves--and I'm sure we'll get into all that
14 later on--that, in *Becton v. Barnett*, it does say that Bill
15 was ineffective for not exploring an insanity defense; and
16 I haven't seen it anywhere, especially when the issue
17 arose.

18 Q. Well, Mr. Burke, then is there anything else that you
19 would like to add?

20 A. Yes, sir. There was a situation that happened where
21 they brought at trial--and I hope I am doing this right,
22 Your Honor--where Mr. Nettles had tried--- The State had
23 put in some pictures. The detectives took pictures of the
24 crime scene; and, at that crime scene, he snapped a
25 picture, and it was moved into evidence. Well, in that

1 small picture, Bill moved to allow a blow-up of that
2 picture which the detective for the Department, I mean--
3 excuse me--for Lexington County actually took at the crime
4 scene, and Bill moved it into evidence and wanted to blow
5 it up where you could see the whole picture and not just a
6 small shot. And there was a big thing, and it starts---
7 Your Honor, if you--- It starts around 138. Excuse me.
8 Hold on. Let's back up to---

9 Q. Well, Mr. Burke, before you continue, is this another
10 allegation of ineffective assistance of counsel?

11 A. No, sir. This is--- This is an issue that I think
12 Bill proved the case, proved the case of--excuse me--of a
13 photograph or mural that was entered into evidence and his
14 attempt to explain why I did what I did because of the
15 circumstances of that picture. And, basically, in short,
16 the Judge eventually allowed, after, you know, arguments
17 from both sides of why it should--- But the part I wanted,
18 I was going to talk about, was at page 142, lines 7 through
19 18. And Bill goes on to describe that, during his argument
20 to the Judge, that the State was trying to show that
21 everything was just hunky dory, and it's even listed that
22 the stockings were all hung by the chimney with care, in
23 his own words. But then, at that point, he went on and he
24 said, and they're trying to show this as being the ideal
25 household and it was the perfect place for children to be

1 raised and, for some reason, my client came in there and
2 killed people. Lines 15 through 18, the situation in that
3 household was a very different place. The fact of what my
4 client saw was going on in that household disturbed him.
5 Once again, he's describing that something's going on and
6 that it disturbed me. And his attempt, the way it's
7 explained in country language like to me, Bill is really
8 saying, something that he saw made him snap and do what he
9 did and it was very--- And, you know, to me, it's still an
10 issue; it's another--- That was the--- I couldn't prove the
11 drugs and the drinking. I knew. I knew, and I couldn't do
12 nothing. I knew, but my hands were tied because I didn't
13 have pictures of it. But there was a picture introduced
14 where this was a house where they had a mural of the clan
15 in the bedroom, and the Judge ruled--- The Judge eventually
16 let it into evidence where they have a tree hanging over in
17 front of a mural. It's like--- It's not a mirror; it's
18 like a mural; and it's showing--- And that's what I'm
19 getting at--- And Bill--- And they had a mural that had a
20 person hanging from a tree; and Bill is using that to sway,
21 to tell the Judge during their argument that it, my
22 knowledge of what was going on, caused me to snap
23 basically.

24 Q. Mr. Burke, are you stating that this is another
25 instance that would show your mental state, going to issue

1 B, where you believe that Mr. Nettles was ineffective for
2 not asserting or pursuing or even investigating the
3 insanity defense? Is that---

4 A. Yes, sir. And it was the way--- The way Bill said it,
5 he's pretty much telling the Judge why it's relevant,
6 you know. He's saying, they want to make things look this
7 a way when actually it's this a way; and he's making---
8 He's really making a--- He's putting forth an excuse, or
9 whatever he wants to call it, of why his client could go in
10 there and do something as bad as he did.

11 Q. All right. Mr. Burke, is there anything else that you
12 would like to add?

13 A. I'd just like to tell the Judge--- And, you know, this
14 is nothing personal against Bill. Bill Nettles is a great
15 attorney, but case law backs it up. Bill made a mistake
16 here. Bill should've investigated the insanity defense.
17 Everybody that's ever known Bill loves him, and I love the
18 man to this day. You know, if I was ever on the street and
19 needed an attorney, I'd call Bill Nettles; and I even said
20 so in the trial transcript. But Bill made a mistake. I
21 had no other defense; I did it. I was supposed to be dead.

22 When I put the gun to my head and pulled the trigger, it
23 didn't happen three times. That's why there was extra
24 casings on the floor. And I went out to the car, and
25 that's when I told the kids to get in. I intended---

1 Brandon came through the back door and said, daddy, no.

2 You know, it wasn't ever supposed to go this far.

3 Q. Mr. Burke, if there's nothing else, if you would
4 please answer any questions that the Court or the State may
5 have.

6 A. Yes, sir.

7 THE COURT: Ms. May?

8 MS. MAY: May it please the Court, Your Honor.

9 **CROSS EXAMINATION BY MS. MAY:**

10 Q. Mr. Burke, I have a few questions. Did you ever raise
11 the issue of pursuing an insanity defense with Mr. Nettles?

12 A. No, sir. No, ma'am. Excuse me. Sorry about that.

13 Q. So you never asked Mr. Nettles about an insanity
14 defense or what it was?

15 A. No, sir. No, ma'am. I'm sorry. No, ma'am, I didn't.

16 Q. You've been answering his questions for a while.
17 Okay. And, earlier in this P.C.R. application, there was
18 actually an order for a criminal responsibility exam
19 pursuant to *McNaughton*. Is that correct?

20 A. Yes, ma'am.

21 Q. Okay. But that exam was never conducted. Correct?

22 A. Yes, ma'am; I mean, no, ma'am, it never was.

23 Q. So you had the opportunity to submit to an exam that
24 you claim your attorney was ineffective for not pursuing?

25 A. No, no, that's not what I'm saying. If you'll read

1 the Judge's order which has been stricken [sic] since
2 then--- Excuse me. I dropped mine. I wanted to read from
3 it, please. Sorry. It's a small spot for such a big guy.
4 No, ma'am. My reason being, in the evaluation--- We came
5 here for a hearing, the first hearing; and my first
6 attorney, Mr. Turnipseed, asked for this evaluation which
7 means that we asked for it. And, after going back and
8 researching it---

9 Q. Excuse me, sir. Can I interrupt you? You did, or did
10 you, join your attorney in asking for that?

11 A. My attorney asked for it, and he asked me, you know,
12 did I--- The Court said, is this what you want, and I said
13 yes; on that day, I said yes. And then, after considering
14 this, I realized, after researching and getting the Judge's
15 order, that it was not, it was not admissible in court
16 whether it hurt me or helped me. And my state of mind at
17 the time of the crime and the several months before is
18 what was at issue. Mental competency was never the issue.
19 It was criminal responsibility at the time of the crime,
20 and---

21 Q. That was part of that order. Correct?

22 A. What's that?

23 Q. That was part of that order?

24 A. Yes. But, like I said, as it says here, the access to
25 the examiner's report--- It says the purpose of the

1 following provisions controlling access to the examiner's
2 report is to strike a balance between Plaintiff's right to
3 explore the possibility of an insanity defense and
4 prosecution's right to respond if such defense is raised.
5 Here, the defense was never raised at trial. It goes on to
6 say that if Plaintiff is the one requesting the evaluation
7 prior to asserting the insanity defense. Bill never
8 asserted the insanity defense. That's why we're here. The
9 ineffective claim is that he should've did so. It says
10 that the evaluation shall be confidential until such time
11 as the Plaintiff elects to assert the insanity defense. I
12 cannot assert the insanity defense now because I still got
13 a conviction on me which is what I am fighting for right
14 now, to assert the insanity defense as I believe it
15 applies. Also, under the ex parte part of the Judge's
16 order, it says, if Plaintiff has requested the evaluation
17 to determine whether the insanity defense may be viable,
18 the examiner's report shall not be provided to the
19 prosecution and shall not be admissible as any evidence in
20 any court proceeding. Whether it hurt me or whether it
21 helped me, according to this order and my ability to read
22 and understand what I read, the Judge wouldn't allow it
23 either way. At least that's what the order says.

24 Q. Did you discuss your understanding of the order with
25 your attorney?

1 A. No. That's the--- That's the reason we had the first
2 conflict where Mr. Turnipseed was removed from the case.
3 He wanted to go through with it, and I understand my right
4 that I didn't have to. I didn't have to because he--- That
5 would've been an ineffective claim to me. I don't feel
6 that I had to. My issue is whether Bill should've done it,
7 and case law's going to back that up.

8 Q. Okay. Earlier, you testified that you helped
9 participate in preparing your case for trial?

10 A. Do what?

11 Q. You testified earlier that you helped, you
12 participated in preparing your case for trial?

13 A. I don't remember saying I helped prepare for it
14 because I never told Bill nothing to do.

15 Q. You said you participated in preparing your case for
16 trial?

17 A. I don't remember saying that, but I didn't--- I didn't
18 do--- I trusted Bill to do everything. He came to see me
19 plenty of times. He said, look, we're going to trial; and,
20 you know, I didn't know--- At the time, I didn't know
21 nothing. I'm not a lawyer. I didn't know nothing about

22 the insanity defense. I didn't know it was viable. I
23 didn't understand all this until it came out at trial.

24 Q. Okay. But I'm just saying, overall, you didn't do
25 anything to help to prepare your case for trial?

1 A. If Bill asked--- If Bill asked me something that he
2 needed to know, I told him. But I didn't file no paperwork
3 or do nothing. Bill did the trial. That's what Bill was
4 appointed to do.

5 Q. Okay. And I believe you stated at some point you were
6 hearing voices?

7 A. Yes, ma'am. Yes, ma'am.

8 Q. Did you ever tell anybody that?

9 A. I don't know if I really understood it as much then as
10 I do now. I think--- I think--- I think to some degree it
11 just didn't come out, but I do know I was having what I
12 think to be delusions, you know, and hearing voices.

13 Q. But did you ever tell anybody that you were hearing
14 voices?

15 A. I think I did tell Terry. I think I did tell Terry.
16 I think that's where he got the part where he said I was
17 being threatened. I'm not sure how it all ties in, but
18 I---

19 Q. Okay. Did you ever tell Mr. Nettles that you had
20 heard these voices at some point?

21 A. I don't think--- I don't think I did.

22 Q. And, with respect to all of the witnesses that you
23 discussed in issue B about your showing that an insanity
24 defense should have been pursued, did you know prior to the
25 trial that those witnesses were going to testify in your

1 behalf?

2 A. I really didn't. Bill asked me anybody to talk to,
3 and I just give the only people that I knew, and--- But I
4 didn't know what they were going to say at trial. I didn't
5 know what Bill was going to ask them. But, to me, I
6 believe that's the strongest part of my argument here is
7 that Bill knew, that's why he put them there.

8 Q. Did you provide Mr. Nettles with the names of these
9 witnesses who he ended up calling for trial?

10 A. I'm sure--- I'm sure I did. He got them somehow. It
11 probably was me.

12 Q. Okay. But you had no idea what they were going to
13 testify about?

14 A. No, ma'am, I did not.

15 Q. You didn't discuss that with Mr. Nettles?

16 A. No. Me and Bill never discussed it, and it was kind
17 of like he raised the issue about my state of mind without
18 arguing it---

19 Q. Did you---

20 A. ---is really the way that I look at it.

21 Q. Did you ever ask him what witnesses he was going to
22 call for trial?

23 A. I don't--- I don't think I did. I trusted Bill. And,
24 like, as I said a while ago, I still trust Bill and I would
25 hire him again. But I let Bill be the lawyer. I didn't

1 try to step in and tell Bill how to do his job.

2 Q. I understand. And you stated that you received a copy
3 of the discovery prior to the trial. Is that correct?

4 A. Yes, ma'am.

5 Q. Okay.

6 A. And Bill didn't--- Bill wasn't my lawyer then. The
7 Public Defender's Office was. And the cousin that molested
8 my two kids a week before, this led to this. He was
9 already with--- A week apart we went to jail, and he was
10 already with the Public Defender's Office. And, when they
11 realized that he had already been there, at that time, they
12 realized they had to reappoint another attorney. And I
13 had a roommate who had Mr. Nettles as an attorney, and I
14 wrote--- And I had asked the roommate about the possibility
15 would Bill represent me because I knew Bill was considered
16 one of the best lawyers in the southeast, not just the
17 State, and he---

18 Q. Okay. I understand. I just wanted to know. Did you
19 receive a copy of your discovery---

20 A. Yes, ma'am.

21 Q. ---prior to your trial?

22 A. Yes, ma'am.

23 Q. Okay. And I may have misstated this. But I thought
24 you said that, in the discovery materials that you
25 referenced earlier, the sheet that stated you were

1 suicidal---

2 A. Yes, ma'am.

3 Q. ---was that in the discovery materials?

4 A. Yes, ma'am. I got a copy laying right there, over
5 there beside Mr. Melnyk.

6 Q. Okay. So you were aware of that document prior to the
7 trial?

8 A. Yes, ma'am. But, once again--- Matter of fact,
9 lawyers even tell clients, I'm the lawyer, you're the one
10 in trouble. I let Bill do what Bill does.

11 Q. And, with respect to the malice instruction that the
12 Court gave to the jury, the passage that you have cited in
13 issue E I believe, that wasn't the entire instruction on
14 malice. Correct? That's just the portion that you quoted?

15 A. Yes, ma'am.

16 Q. Okay. And, if you look at the transcript, the entire
17 malice instruction spans from page 568 to 570?

18 A. Yes, ma'am.

19 Q. Okay. And, specifically, on page 569, lines 8 through
20 13 and 22 through 25, the Court tells the jury that malice
21 may be inferred rather than it's required to be inferred.

22 Is that correct?

23 A. I haven't got there yet. But, if you say it does, the
24 Judge ain't going to let you lie, so---

25 Q. And, on page 529, lines 12 through 13, the Court

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1 instructed the jury that they could freely reject any
2 inference of malice?

3 A. If it says that.

4 Q. Okay. Do you still think that the malice instruction
5 was incorrect?

6 A. I do think part--- It doesn't have to be all. If only
7 one juror is affected by any part and it shifted the
8 burden, then, yes, he should've objected to it.

9 Q. I have no further questions. Thank you.

10 THE COURT: Any redirect?

11 MR. MELNYK: Just very briefly, Your Honor, if it
12 please the Court.

13 **REDIRECT EXAMINATION BY MR. MELNYK:**

14 Q. Mr. Burke, you were asked, on cross examination, you
15 were asked about whether or not there was an order ordering
16 a criminal responsibility evaluation.

17 A. Yes, sir.

18 Q. And can you explain again exactly why you didn't have
19 that done? And that was to be provided by the State?

20 A. Right. My attorney--- My attorney asked--- He
21 originally asked for a private investigator, a private---
22 He asked for the Judge to submit to funding at the first
23 hearing, and the Judge said he wouldn't submit to funding,
24 he would get the State to do it, to do the evaluation. And
25 after researching and getting the Judge's order is when I

1 realized that it wouldn't even be relevant according to---
2 Unless the Judge's order was wrong, it wouldn't even be
3 an issue if it hurt me or if it helped me. I had to prove
4 my argument. I think it undermines my whole issue. I
5 think--- My issue was that Bill Nettles should have had me
6 evaluated where it's very likely that it could've had an
7 outcome on the trial by not guilty by reason of insanity or
8 guilty but mentally ill. Both of those defenses would've
9 been a very different charge and sentence than the life and
10 55 that I have right now.

11 Q. And was it your opinion, after reading the order
12 again, that it wouldn't have mattered what the result was
13 because your reading of the order was that no one could, no
14 court could look at it anyway?

15 A. Right. I felt--- I felt it was a strategy, an attempt
16 conjured up by my attorney along with the State at the
17 time, Ms., which it wasn't Ms. May then, it was Mr., I
18 think his name was Mr. Wes Lee at the time. I think it was
19 conjured up to try to, to try to smooth in whether it,
20 whether it, you know, if it did go against my belief. But
21 I had--- I think it should have been--- And, like I said,
22 I'm only raising the issue. I didn't know prior to trial.
23 I'm really--- After getting ready to prepare my P.C.R., I
24 learned some things along the way researching the law that
25 led me to believe that Bill was ineffective for not doing

1 so.

2 Q. Thank you, Mr. Burke.

3 MR. MELNYK: No further questions, Your Honor.

4 THE COURT: Any recross?

5 MS. MAY: Just one question, Your Honor.

6 **RECROSS EXAMINATION BY MS. MAY:**

7 Q. Mr. Burke, did you discuss your understanding of the
8 order for your mental evaluation with your attorney?

9 MR. MELNYK: I'll object to a discussion he had
10 with a prior P.C.R. attorney. It might be privileged
11 information.

12 MS. MAY: I'm asking the substance.

13 THE COURT: It's not privileged.

14 MR. MELNYK: Thank you, Your Honor.

15 A. Yeah. I--- After I got the order, I told him I would
16 not take the evaluation and told him my concerns of why.
17 And he told me, you have to. And I told him, according to
18 the order, I don't have to because it's not relevant and I
19 felt that it was conjured up to make it, well, okay, yeah,
20 Bill should've, Bill should have had him evaluated but,
21 since the State found this, it would've been a harmless
22 error. As it stands right now, we have my state of mind at
23 issue, and Bill had a chance to explore it and he didn't.

24 Q. I understand. Nothing further.

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

1 MR. MELNYK: Your Honor, nothing further from the
2 Applicant.

3 THE COURT: All right. What's your wish? Do
4 y'all want to proceed or do y'all want to break for lunch?
5 It makes no difference. This is the last thing we have
6 today. We can move right on and then we'll be done. Or do
7 you want to break for lunch?

8 MS. MAY: I'm ready to go forward.

9 THE COURT: Let's go forward. We're all here.
10 We'll move forward.

11 MR. MELNYK: Thank you, Your Honor.

12 THE COURT: I'll tell you what. Why don't we
13 take a five-minute break and then come back.

14 MR. MELNYK: Yes, Your Honor. Thank you.

15 (WHEREUPON, THERE IS A RECESS.)

16 THE COURT: All right. Ms. May, you may call
17 your first witness.

18 MS. MAY: Your Honor, the State would like to
19 call Mr. Nettles.

20 THE COURT: All right.

21 WHEREUPON, WILLIAM N. NETTLES,

22 HAVING BEEN DULY SWORN, TESTIFIED AS FOLLOWS:

23 CLERK: Have a seat and state your name for the
24 record.

25 MR. NETTLES: My name is William N. Nettles.

1 DIRECT EXAMINATION BY MS. MAY:

2 Q. Mr. Nettles, thank you for being here today.

3 A. Thank you for having me.

4 Q. Just a few background questions. How long have you
5 been practicing law?

6 A. Since 1992.

7 Q. And how much of that time has been in the area of
8 criminal law?

9 A. Almost all of it.

10 Q. And do you recall when you were appointed?

11 A. I mean, I don't remember the date, but I do remember
12 being appointed.

13 Q. Okay. And were you able to meet with Mr. Burke
14 multiple times?

15 A. Yes.

16 Q. And what would y'all discuss in your initial meetings
17 with him when you were first appointed.

18 A. His case.

19 Q. What would that--- What would that entail?

20 A. Well, you know, we went over the discovery; and, as he
21 said, there was--- We developed some testimony, so--- And,

---22 by develop, I mean he gave me information. I had an
23 investigator. I had a female investigator on the case, I
24 believe, who went out and interviewed the witnesses.

25 Q.. And did--- Was--- Did you receive the discovery

1 materials from the previous attorney, Mr. Nettles, or did
2 you file a motion for those?

3 A. That's a good question. I don't know. I mean, I--- I
4 mean, I felt like I got all the discovery. It might've
5 been a combination of both.

6 Q. Okay. And you stated you had hired a private
7 investigator?

8 A. Yes.

9 Q. Okay. And she--- What was her role in helping to
10 prepare Mr. Burke's case?

11 A. Right. She--- I believe she met with Roger Dale and
12 I together. I think she met with Roger Dale individually.
13 And then her job was to go out and interview witnesses.
14 And I think she was the person that was primarily
15 responsible for developing the witnesses that testified as
16 to Roger Dale's emotional state leading up to, you know,
17 the shooting.

18 Q. Okay. And did Mr. Burke identify those witnesses for
19 the private investigator?

20 A. Yes.

21 Q. And can you just briefly characterize the facts of the
22 case?

23 A. Sure. I mean, my take on it was that Roger Dale was
24 in a very, very bad situation. He was involved in a very,
25 very ugly divorce or separation. I can't remember what his

1 status was at the time. He felt that his kids were very
2 much in danger. He felt that the current situation and the
3 current environment that they were being raised in, that
4 being the home of his brother, was a very toxic
5 environment; and I think it weighed on him very heavily.

6 Q. And, just by way of background, what was the situation
7 that led to the divorce proceedings?

8 A. You know, I can't remember all that, but, again, I do
9 know it was all very--- It was acrimonious.

10 Q. And did you discuss Mr. Burke's version?

11 A. I mean, I'd like to think so. I mean, that certainly
12 was my goal.

13 Q. And you reviewed the discovery materials with Mr.
14 Burke?

15 A. Yes.

16 Q. Did you review your private investigator's, the
17 findings---

18 A. Yes.

19 Q. ---her findings with Mr. Burke?

20 A. Yes.

21 Q. And could you briefly characterize the State's
22 evidence in the case or do you recall?

23 A. Well, I mean, the State's--- Well, I mean, the problem
24 was that, you know, one of his children, Brandon I believe
25 is his name, was present when she was shot; and so, you

1 know, it was pretty compelling evidence. And the issue, it
2 seemed to me, was never who but why. And so, yeah, they
3 had very compelling evidence of who, but I felt that the
4 best that we could hope for was why.

5 Q. And did you discuss your understanding, that
6 understanding with Mr. Burke, that the issue wasn't who, it
7 was why?

8 A. Right.

9 Q. And, with regard to developing a trial strategy---

10 A. Right.

11 Q. ---did the insanity defense ever come into play?

12 A. No. I mean, I didn't see it as a viable defense.

13 Q. Did y'all discuss the possibility of an insanity
14 defense?

15 A. Yeah. I mean, I don't think so. I mean, my
16 understanding of--- My understanding of the legal
17 definition of an insanity defense I just don't, I didn't
18 think warranted it.

19 Q. And Mr. Burke has alleged that the testimony of all
20 these witness shows that an insanity defense should have
21 been pursued?

22 A. Right.

23 Q. Is that--- Did the witnesses' testimony, do you
24 believe, provide a basis for an insanity defense?

25 A. I guess that's ultimately up to--- It's for the Judge

1 to decide. But, at the--- You know, I mean, if I would've
2 thought--- And let me tell you this. And I don't want to
3 undermine his P.C.R. or anything. But, I mean, you know, I
4 really thought the world of Roger Dale and, if I would've
5 thought that--and I still do-- and, if I would've thought
6 that an insanity defense had, would have furthered his
7 case, I would have done it. Now, I could be wrong; but, I
8 mean, that was--- I felt all along, and I still think, that
9 manslaughter was the best we could hope for.

10 Q. And when you interviewed the witnesses that Mr. Burke
11 suggested to you, did you develop the strategy that you
12 were going to use them to show his state of mind?

13 A. Yes.

14 Q. Okay.

15 A. I mean, I was not altogether certain that we were
16 going to be able to make it admissible, and so I was
17 pleasantly surprised when all that was admissible. I
18 had--- You know, I mean, I was prepared for the event that
19 the Judge was not going to allow it and that they were all
20 going to be proffered for purposes of appeal.

21 Q. And, prior to trial, did you discuss what these
22 witnesses' testimony would be with Mr. Burke?

23 A. I mean, you never know what a witness is going to say
24 if you don't get a chance to take their deposition unless
25 they're on the stand. And there's no doubt there were some

1 surprises; but, you know, the--- We had a belief as to what
2 the general nature of the testimony was going to be.

3 Q. And did you discuss the overall trial--- Could you
4 describe the overall trial strategy?

5 A. Yeah, we were--- We were looking for manslaughter;
6 and, you know, I mean, Roger Dale and I had some candid
7 discussions about that, and it was--- You know, I mean,
8 given the quality of evidence that the government had, I
9 think it would've been--- I think he would've lost any
10 credibility to argue that he didn't shoot her and that he
11 didn't, you know--- But, I mean--- And I felt the best we
12 could do was to be honest with the jury, which is my hope
13 they believed we were, in saying, you know, that this
14 wasn't, that he did, in fact, shoot her but it was just a
15 matter of why and that this was something less than murder.

16 Q. Did you discuss your trial strategy with Mr. Burke?

17 A. Oh, yes. I mean, to get up in an opening statement
18 and say that your client is not going to be found, there's
19 no way for a jury essentially--- I can't remember what I
20 said. But, essentially, the jury is going to find him
21 guilty. It was just kind of a matter of why. You know, it
22 was just something you have to clear, and I did clear it,
23 with Roger Dale.

24 Q. Did you ever consider hiring any experts for Mr.
25 Burke's defense in any area?

1 A. No. I mean, no. I mean, did I consider it? I mean,
2 did I consider the discovery as--- You know, when you read
3 discovery, you're always looking for whether you may need
4 an expert or not. I didn't think we needed one.

5 Q. Okay. And was Mr. Burke kept apprised of the status
6 of his case and the status of the evidence that was coming
7 in?

8 A. I'd like to think so. I mean, I visited with him
9 regularly.

10 Q. And did--- Was he engaged in helping prepare his
11 defense?

12 A. I mean, as a client, yeah.

13 Q. Were you able to interview any of the, I guess,
14 investigating officers that ended up testifying at trial?

15 A. I doubt it. I don't think I got to do that.

16 Q. Let me go through some of the specific allegations.

17 MS. MAY: Your Honor, may I approach?

18 THE COURT: You may.

19 Q. I'll give you this just to reference. I'm just going
20 to touch on a few issues. With regard to issue A on page
21 59, lines 19 through 23, Mr. Burke is complaining that
22 Solicitor Moses' opening statement to the jury was
23 inflammatory and that you should have objected.

24 A. Right.

25 Q. All right. Reading that passage now, do you find it

1 objectionable on any grounds?

2 A. I mean, I didn't think it was terribly effective,
3 so, I mean, I didn't object.

4 Q. Okay. And Mr. Burke--turn to page 518--I believe he
5 referred to the Solicitor insinuated that he washed off,
6 washed the blood off his hands in the kitchen sink and that
7 Mr. Burke had asserted that this was false evidence.

8 A. Say that one more time?

9 Q. Mr. Burke has alleged that the Solicitor insinuated
10 that he washed the blood off his hands in the kitchen
11 sink.

12 A. Right.

13 Q. And Mr. Burke is claiming that that was false
14 evidence, not in evidence.

15 A. Right.

16 Q. It was rather the statement of two people who did not
17 testify.

18 A. Right.

19 Q. Do you believe the Solicitor was presenting false
20 evidence in his statement about the blood?

21 A. I mean, if he asked the question to assume facts that
22 weren't in evidence, I should have objected; but, if he---
23 Do I believe he was insinuating? I mean---

24 Q. Do you believe that's what he was doing, assuming
25 facts not in evidence?

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1 A. I think he was just asking a question, and it probably
2 wasn't a very well thought-out question.

3 Q. And, with regard to the testimony of I believe it was
4 Mr. Anderson on page---

5 MS. MAY: I'm sorry. Beg the Court's indulgence,
6 Your Honor.

7 THE COURT: Yes, ma'am.

8 (PAUSE.)

9 Q. I'm sorry. Okay. On page 330, I believe it was Mr.
10 Addy's testimony about the caustic chemical tank.

11 A. Right.

12 Q. And did you interview Mr. Addy prior to trial?

13 A. I did not, but the investigator did.

14 Q Okay. Were you--- Did Mr. Addy inform you of this
15 discussion between him and Mr. Burke?

16 A. You know, I think that I, if my memory serves me
17 correctly, I did not know about that from the interview.
18 But what I do think happened was I think that the
19 government or the State went and spoke with him and the
20 State shared with me that he was going to say that. But I
21 felt--- You know, I just didn't believe--- I mean, I felt
22 that, while he was--- While I knew that he may say that, I
23 felt that the other evidence that he was saying was much
24 better and, on some level, I think it showed a certain
25 amount of credibility, that he was willing to, you know,

1 just be forthright and truthful. And I just didn't think
2 anybody would ever believe that Roger Dale Burke would put
3 his kids in acid; and, you know, I mean, I felt that it
4 also sort of showed, you know, just how distraught he was.
5 I mean, I don't think there was any doubt he loved those
6 kids.

7 Q. And did you inform Mr. Burke that he was possibly
8 going to testify?

9 A. I don't remember that one way or the other.

10 Q. And I believe you said in your answer, but do you
11 think that statement harmed Mr. Burke's defense?

12 A. Well, it surely didn't help it; but I would think that
13 the--- I would think that the vast majority, that you kind
14 of had to do a cost-benefit analysis. And I believe that
15 there was a lot of good things that Mr. Addy had to say and
16 that we just kind of had to take the good with the bad.

17 Q. And, with regards to Mr. Burke's issue E, failing to
18 present an insanity defense, it was your trial strategy to
19 use these witnesses to show his state of mind and to show
20 that he was stressed and possibly not in a normal state of
21 mind?

22 A. Well, I mean, I think it was, yeah. I mean, I think
23 it was more to show that what propelled him to do this was
24 not malice but grief. I mean, you know, for murder, you
25 have to have a heart devoid of all social instincts and

1 fatally bent on mischief and that the quality, I mean, even
2 if it was malice, that the quality of malice was a less
3 dark form of malice than a heart devoid of all social
4 instincts and fatally bent on mischief.

5 Q. Do you feel that you were able to accomplish, to
6 elicit that through the testimony?

7 A. Apparently not. But, I mean, I think--- I mean, I
8 will say that I thought the Judge gave us more leeway than
9 I had originally expected. And I will say this, I mean,
10 and I'm not being flippant. I do think that the Judge--- I
11 think that we were able to get--- I was pleasantly
12 surprised at the amount of evidence that we were able to
13 get before the jury.

14 Q. And you were able to--- The Judge gave the
15 manslaughter instruction. Right?

16 A. Right.

17 Q. And, with respect to some of the State's arguments in
18 closing, on page 548 where Solicitor Moses refers to Mr.
19 Burke being his wife's judge and he sentenced her on that
20 day, that passage on page 548, lines 12 through 18---

21 A. That's the thing about judge/jury? I don't know. I
22 mean---

23 Q. Do you think there's anything---

24 A. With all respect to those lawyers, I just didn't think
25 it was effective. I mean, I thought it sounded a bit

1 cliché.

2 Q. But there was not a basis to object?

3 A. I didn't see a reason to object to it.

4 Q. And did you believe that the Solicitor, in part of his
5 summation, was vouching for the credibility of any of the
6 witnesses?

7 A. I didn't see it; but, I mean, if the Judge finds me
8 wrong---

9 Q. And, with regard to the Solicitor's statement about
10 the best lie contains 90 percent truth---

11 A. Right.

12 Q. ---do you think that the Solicitor was calling Mr.
13 Burke a liar with that statement?

14 A. Golly, if most of my clients would've been ninety 90
15 percent truthful, we'd be a whole lot better off. So, no,
16 I didn't think--- I didn't think that was---

17 Q. And---

18 A. And, I mean, I could be wrong, I'm certain. That's
19 what we have the judge for.

20 Q. With respect to the malice instruction, have you had a
21 chance to review it?

22 A. I really haven't.

23 Q. Do you recall, when the Judge read it, hearing
24 anything objectionable?

25 A. I don't--- I mean, I don't have any memory of hearing

1 the malice instruction and thinking there was anything
2 wrong.

3 Q. And did you--- Prior to trial, you and Mr. Burke
4 discussed his right to testify?

5 A. Yeah.

6 Q. And was that decision made that he would testify
7 during the trial or was that part of the strategy overall?

8 A. I would--- I mean, it would be my practice, if my
9 memory serves me correctly, you know, that, once we decided
10 that there was a possibility that he was going to testify,
11 we prepared him for it. And, obviously, the ultimate
12 decision--- I mean, we didn't mention it in opening
13 statement. And it's always a decision that I think you
14 need to not make until you're actually in trial. But we
15 knew that it was a possibility; and we ultimately decided,
16 or he ultimately decided on advice of counsel and I thought
17 it was a good idea, for him to do it. And I encouraged him
18 to do it; but, obviously, it was his decision.

19 Q. And do you recall if there were ever any plea offers
20 made?

21 A. You know, I don't recall one way or the other. I
22 don't know.

23 Q. Do you recall if you ever tried to negotiate or tried
24 to seek a---

25 A. Now, my memory was I think, if I remember correctly,

1 Roger Dale wanted to go to trial; and I was perfectly
2 willing to go to trial.

3 Q. Was there anything that Mr. Burke asked you to do that
4 you weren't able to do?

5 A. Other than getting found guilty of manslaughter, none
6 that I can think of, no.

7 Q. And, prior to representing Mr. Burke, had you had any
8 experience in an insanity defense, using an insanity
9 defense at trial or researching it?

10 A. Yeah. I mean, I think I had done a fair amount of
11 competency work at the time where we had--- I mean, I've
12 done cases where people were not competent to stand trial,
13 and I have done--- You know, I had been involved in a
14 number of trials where mental health issues were very
15 prevalent.

16 MS. MAY: Beg the Court's indulgence.

17 THE COURT: Yes, ma'am.

18 (PAUSE.)

19 Q. During your investigation, did you--- I believe Mr.
20 Burke might have stated this. But had he ever been seen
21 for any reason by a mental health professional?

22 A. I don't think so.

23 Q. And do you recall if either you or your investigator
24 went to the scene of the crime?

25 A. I didn't. I don't know whether she did.

1 Q. And do you feel that you had sufficient time to
2 prepare Mr. Burke's case?

3 A. Yeah, I mean, I felt like--- I mean, I didn't feel
4 rushed.

5 Q. And I believe that Mr. Burke gave a statement. Is
6 that correct? And y'all had a *Denno* hearing?

7 A. *Jackson v. Denno* hearing. I think he did. And, if he
8 did, I'm sure we had a *Jackson v. Denno* hearing. I can
9 check the record. I don't know. I'm looking at the
10 witness list, I mean, the exhibit list, and there's a
11 defendant's statement, 167 to 179, so it appears there was
12 a statement.

13 Q. And do you--- And you would have discussed that
14 statement with Mr. Burke---

15 A. Right.

16 Q. ---prior to trial?

17 A. Right. Yeah, here. There's a Scottie Frier--I'm
18 looking at page 23--in camera direct examination: And, on
19 December 20th of 2001, did you have occasion to be involved
20 in this case; Yeah; Did you have an opportunity to speak
21 with Mr. Burke; Yes, I took a statement.

22 Q. I think I have one final question. Was there
23 anything, in the discovery materials or in your discussions
24 with Mr. Burke and your interviews with the witnesses, that
25 led you to think an insanity defense was a viable defense?

1 A. I mean, you know, based on the information I had at
2 the time, I didn't think that, you know--and, I mean, I
3 could be wrong--but I just didn't think that it was there.
4 I mean, I--- But, like I said, I could be wrong; but I
5 didn't see it at the time.

6 Q. Is there anything you care to, anything else you care
7 to tell the Court?

8 A. No. I enjoyed representing Roger Dale. He's a real
9 good guy.

10 Q. I have no further questions. Thank you.

11 THE COURT: Yes, sir. Your cross examination.

12 MR. MELNYK: May it please the Court, Your Honor.

13 THE COURT: Yes, sir.

14 **CROSS EXAMINATION BY MR. MELNYK:**

15 Q. Mr. Nettles, I know we've met. I'm David Melnyk. I'm
16 representing Mr. Burke in this case.

17 A. Yes. How are you doing?

18 Q. I have a few questions for you. During the time that
19 you represented Mr. Burke, he was always in the County
20 Jail, wasn't he?

21 A. The Lexington County Detention Center, yes.

22 Q. He was never out on bond?

23 A. No.

24 Q. Okay. And, at least during a portion of that time, he
25 was also on suicide watch over there. Is that correct?

1 A. I won't argue, but it wouldn't surprise me. I'll say
2 that.

3 Q. And---

4 A. That might have been--- Because there was a period of
5 time that he had appointed counsel or the Public Defender's
6 Office for a while when he first got there for a while, and
7 then I took over. So there was a period of time that he
8 was in jail that he very well could've been on suicide
9 watch that I didn't know about. So I just can't speak to
10 that.

11 Q. Okay. And didn't the two of you discuss the suicide
12 note that he had left in his car?

13 A. We could have. It wouldn't surprise me.

14 Q. Okay. And you've testified, I believe--and correct me
15 if I'm wrong--that you knew and, in fact, told the jury
16 that he was going to be found guilty of something.

17 A. Right.

18 Q. And, in fact, the entire trial strategy was to take
19 the malice out of it and try to get a manslaughter---

20 A. Right.

21 Q. ---conviction. Correct?

22 A. Right.

23 Q. And that's why you called the witnesses that you did
24 which really didn't observe anything about the crime itself
25 but just discussed his mental state.

1 A. Right.

2 Q. I'm aware, through your answers to direct, of your
3 training and experience as an attorney. Do you have any
4 medical education?

5 A. No.

6 Q. Do you have any sort of degree in psychology or
7 psychiatry?

8 A. Have any what?

9 Q. Have a degree---

10 A. No.

11 Q. ---in psychology---

12 A. No.

13 Q. ---or psychiatry?

14 A. No.

15 Q. Have you ever--- You made the decision, didn't you, to
16 not have a mental evaluation done?

17 A. Right.

18 Q. And that mental evaluation would have or potentially
19 could have gone towards his capacity to stand trial or also
20 intent, criminal intent. Correct?

21 A. I guess the mental evaluation would have--- I mean, it
22 could've--- The parameters of the mental evaluation
23 could've been dictated. We could've dictated that, so,
24 yeah. I mean, if that's what we had dictated, we could've
25 asked the doctor--- I mean, we could've set parameters on

1 what we wanted the doctor to look at.

2 Q. And you had previously been involved in cases--I think
3 you said maybe some capital cases or other cases--in which
4 the defendant's mental state, mental status or mental
5 health, was an important factor. Correct?

6 A. Right.

7 Q. You didn't have, at the time you represented Mr.
8 Burke, any more or less medical training to determine
9 mental status than you did when you had those other cases,
10 did you?

11 A. No. I mean, if there was any, it was not appreciable.

12 Q. Did you, in those other cases, make any sort of
13 clinical determination as to your client's mental health or
14 capacity?

15 A. I think that sometimes--- Well, yeah, I mean, I always
16 made a decision about whether I thought they needed to be
17 evaluated or not.

18 Q. No, I don't mean whether they should be evaluated or
19 not. I mean an actual clinical determination of a mental
20 illness.

21 A. A diagnosis?

22 Q. Yes, sir.

23 A. No.

24 Q. So you relied upon other folks with that appropriate
25 training to do that, didn't you?

1 A. I would rely on another person to make a diagnosis.

2 Q. And a diagnosis is made, isn't it, by whoever the
3 health professional is gathering all the facts and
4 information they deem relevant to make that decision.
5 Correct?

6 A. Right.

7 Q. And, in your job as a defense attorney, you're also
8 gathering facts and information that you deem to be
9 relevant. Correct?

10 A. Well, I think you can only determine whether it's
11 relevant as you're gathering it, so I would think that you
12 gather it and then decide whether it's relevant.

13 Q. Yes, sir, I agree with that. And, in this case, you
14 testified on direct that the important issue here was not
15 what happened but the why.

16 A. Right.

17 Q. Wouldn't you agree that, if a mental evaluation had
18 been done and let's say that mental evaluation came back
19 and said there was no capacity issue, there was no, you
20 know, insanity issue but it did perhaps show severe
21 depression, it did perhaps show severe stress, it did show
22 some type of disorder, wouldn't you agree that could've
23 been evidence that could've been used to go towards the
24 manslaughter, to go towards the lack of malice?

25 A. Yes, but the problem would've been then the government

1 would've gotten to examine him which would've meant I
2 would've had to sent him over to Bull Street which would've
3 meant they would've got to spend four days with him. And
4 the theory of the case was that, by doing it through lay
5 testimony, I was able to get in front of the jury what was
6 going on in his mind without exposing him to a State
7 evaluation.

8 Q. And that was based, in part, on your lay opinion of
9 his mental health.

10 A. No. It was based on my professional opinion as a
11 lawyer that, even if they had come back with the
12 depression, that even if my expert had come back with
13 depression, that then that would've, if I would've asserted
14 that as a defense, that then the State would've gotten a
15 crack at having him evaluated.

16 Q. Okay. So, at the very worse, there would've been
17 conflicting opinions as to his mental health. Is that
18 correct?

19 A. Right. If I don't--- If I don't put up an expert at
20 all, then there's no conflicting--- I mean, there was---
21 The record was un--- The government had absolutely no
22 evidence that he was anything other than depressed. So I
23 felt that we were minimizing our exposure.

24 MR. MELNYK: Beg the Court's indulgence,
25 Your Honor.

1 THE COURT: Yes, sir.

2 (PAUSE.)

3 MR. MELNYK: No further questions, Your Honor.

4 THE COURT: Thank you. Any redirect, Ms. May?

5 MS. MAY: No, Your Honor.

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

7 A. Thank you.

8 (WITNESS LEAVES THE WITNESS STAND.)

9 THE COURT: Any other witnesses, Ms. May?

10 MS. MAY: No, Your Honor.

11 THE COURT: Any rebuttal?

12 MR. MELNYK: No, Your Honor.

13 THE COURT: All right. I'll take this matter
14 under advisement. This may take me longer than the other
15 ones. I'll rule within thirty days.

16 MR. MELNYK: Yes, Your Honor. Your Honor, the
17 only thing that I would--- The case--- Mr. Burke referenced
18 a case several times on direct examination..

19 THE COURT: I think my law clerk has that. That
20 was a Federal case, and we've got the State case.

21 MR. MELNYK: Yes, Your Honor. And there actually
22 were two cases, Becton v. Barnett, and what he was
23 referring to was the 1990 case. Thank you, Your Honor.

24 THE COURT: Thank you.

25 MS. MAY: Your Honor, I'm sorry. May I present

1 just two cases for the record, just the cites?

2 THE COURT: Yes, certainly.

3 MS. MAY: The first one is *State v. Lewis*; it's
4 case number 328 S.C. 273, 494 S.E.2d 115. And the second
5 one is *Lee v. State*; it's case 396 S.C. 314, 721 S.E.2d
6 442. And those go towards the insanity defense and
7 allegations.

8 THE COURT: All right. And what I'll also do is
9 I'll give both parties ten days to give me any other legal
10 authority that you may come across.

11 MS. MAY: Thank you, Your Honor.

12 THE COURT: Thank you.

13 MR. MELNYK: Thank you, Your Honor.

14 **WHEREUPON, HEARING CONCLUDED.**

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C E R T I F I C A T E

I, the undersigned CAROLE R. SHEALY, Official Court Reporter for the Eleventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned cause, as recorded by L. Coconut Pantsari, relative to appeal, in the Court of Common Pleas for Lexington County, South Carolina, on the 14th day of August, 2012.

I do further certify that I am neither of kin, counsel or interest to any party.

November 26, 2012.



CAROLE R. SHEALY

ORIGINAL

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

FILED

Case No. 2007-CP-32-1784

2013 JUN 19 A 11:13

Roger Dale Burke,
S.C.D.C. No. 304613

BETH A. CHANNING
CLERK OF COURT
LEXINGTON, SC

Applicant,

ORDER OF DISMISSAL

v.

State of South Carolina,

Respondent.

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed May 18, 2007. Respondent made its return on August 27, 2007. An evidentiary hearing into the matter was convened on August 14, 2012, at the Lexington County Courthouse. Applicant was present at the hearing and was represented by David W. Melnyk, Esquire. Respondent was represented by Kaelon E. May, Esquire, of the South Carolina Attorney General's Office.

At the hearing, Applicant testified on his own behalf. Trial counsel, William N. Nettles, Esquire, was present and testified. This Court also had before it the records of the Lexington County Clerk of Court, the transcript of the proceedings against Applicant, Applicant's records from the South Carolina Department of Corrections, and the exhibits entered into evidence at the hearing.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. Applicant was indicted at the September 2002 term of the Lexington County Grand Jury for murder (02-GS-32-3278), possession of firearm or knife during the commission of a violent crime (02-GS-32-3279), attempting to commit



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arson (02-GS-32-3280), and burglary- 1st degree (02-GS-32-3281). William N. Nettles, Esquire, represented him. On August 23, 2004, Applicant underwent trial, pursuant to which he was found guilty. He was sentenced by the Honorable Marc H. Westbrook to life for murder, five years for possession of a firearm, twenty years for attempted murder and thirty years for burglary.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Burke, Op. No. 2007-UP-042 (S.C. Ct. App. filed January 24, 2007). Applicant filed a Petition for Rehearing which was denied by order of the South Carolina Court of Appeals on March 22, 2007.

At the August, 14, 2012, evidentiary hearing, Applicant alleged that he was being held unlawfully pursuant to the following allegations of ineffective assistance of counsel: (1) failure to pursue an insanity defense; (2) failure to object to the solicitor's opening statement; (3) failure to object to a question posed by the solicitor on cross-examination; (4) failure to object to testimony given by a defense witness; (5) failure to object to a jury charge; (6) failure to object to the solicitor's closing statement.

II. APPLICABLE LAW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases: The courts presume that counsel rendered adequate

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assistance and made all significant decisions in the exercise of reasonable professional judgment.

Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief.

Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

FILED
2013 JUN 19 A 11:13
BETH A. CAMPBELL
CLERK OF COURT
LEXINGTON, SC

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

III. SUMMARY OF TESTIMONY

At the PCR hearing, Applicant alleged trial counsel was ineffective for failing to pursue an insanity defense. Applicant stated trial counsel had numerous consultations with him in preparation for trial. Applicant stated he participated in trial counsel's pre-trial preparations. Applicant stated he provided names of persons to investigate to trial counsel, but never requested trial counsel call any particular witnesses to testify at trial. Applicant stated that he trusted trial counsel and would hire him again. Applicant stated his first attorney desired Applicant undergo a criminal responsibility evaluation that Applicant found unnecessary. Applicant stated he was pleased to have trial counsel substituted on his case because he believed trial counsel was one of the best criminal defense lawyers in the Southeast. Applicant stated family problems precipitated his mental health issues. Applicant stated he

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was unable to understand the extent of his illness at the time of trial. Applicant stated that he killed his wife because he did not want to lose custody of his children and was unable to distinguish right from wrong. Applicant stated that he was increasingly experiencing depression at the time of the offense. Applicant stated he was hearing voices prior to trial but did not share the occurrences with trial counsel. Applicant testified he never received mental health treatment. Applicant testified trial counsel did not arrange a competency evaluation for Applicant. Applicant stated that numerous witnesses testified at trial to the extent of his emotional instability. Applicant stated trial counsel brought his state of mind into the forefront at trial. Applicant testified that although trial counsel called numerous witnesses at trial to testify to Applicant's state of mind, trial counsel erroneously did not present an insanity defense. Applicant stated that he was not qualified as a mental health expert.

Applicant alleged trial counsel was ineffective for failing make objections at various junctures during trial. Applicant stated trial counsel was ineffective for failing to object to the solicitor's opening statement when the solicitor analogized Applicant as an executioner and for failing to object when the solicitor did not explain the State's burden of proof.

Applicant alleged trial counsel was ineffective for not objecting to prosecutorial misconduct. Applicant stated two crime scene officers inspected the murder scene. Applicant stated he received an incident report in discovery that indicated that one officer touched the blood. Applicant stated trial counsel was ineffective for not objecting to a question posed by the solicitor on cross-examination regarding whether Applicant washed the blood from his hands after killing his wife.

Applicant alleged trial counsel was ineffective for failing to object to prosecutorial misconduct regarding an alleged Rule 5 ScrimP violation. Applicant stated that a defense witness, Frank Addy, upon cross-examination provided testimony regarding Applicant's designs to harm his children by "putting them in solution." Applicant stated that he was not provided notice of any statements on the



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matter by Frank Addy in discovery. Applicant testified he told trial counsel that Frank Addy would be a beneficial witness but was unaware that he would testify adversely.

Applicant alleged trial counsel was ineffective for failing to object to the trial judge's jury instruction on inferred malice. Applicant stated the instruction improperly shifted the burden of proof. However, Applicant stated the trial judge charged the jury that it may but was not required to infer malice from the use of deadly weapon.

Last, Applicant alleged trial counsel was ineffective for failing to object to the solicitor's closing argument. Applicant testified the solicitor vouched for a State's witness, Officer Frier's, credibility. Applicant testified the solicitor pitted Officer Frier's credibility against Applicant's lack of credibility. Applicant additionally stated the solicitor told the jury that Applicant was a liar.

At the PCR hearing, trial counsel testified. Trial counsel obtained discovery from Applicant's previous attorney and that he hired a private investigator. Trial counsel met with Applicant on numerous occasions. Trial Counsel stated Applicant did not entertain guilty plea negotiations.

Trial counsel discussed an insanity defense with Applicant but did not find the defense viable in Applicant's case. Trial counsel stated Applicant was distraught at the time of the offense because he was coping with an acrimonious divorce proceeding. However, trial counsel did not find Applicant's disposition, stemming from his familial problems when he killed his wife, warranted an insanity defense. Trial counsel stated Applicant never expressed a desire to proceed to trial on an insanity defense. Trial counsel stated an expert witness would not have been beneficial in presenting Applicant's defense. Trial counsel stated he would have presented an insanity defense if he reasoned it had merit.

Trial counsel testified his trial strategy was to show the jury the offense was not committed with malice. It was trial counsel's objective to obtain an acquittal on the murder charge. Trial counsel

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stated overwhelming evidence of guilt proved Applicant killed his wife and ensured a conviction for manslaughter at the minimum. Trial counsel executed his strategy by calling witnesses Applicant provided who could testify to Applicant's grief-stricken state at the time of the offense. Trial counsel stated he was pleasantly surprised to have been able to introduce beneficial testimony regarding Applicant's state of mind he believed to be inadmissible. Trial counsel testified he discussed his trial strategy at length with Applicant.

Trial counsel stated the solicitor's alleged inflammatory opening statements did not warrant an objection. Next, trial counsel testified the solicitor's cross-examination of Applicant was proper. Trial counsel stated the solicitor's question was supported by facts in evidence. Trial counsel was aware witness Frank Addy might provide some adverse testimony. Trial counsel's private investigator interviewed the witness and the solicitor disclosed Frank Addy's potential harmful testimony. Trial counsel stated the benefits of having Frank Addy testify outweighed the minimal harm. Trial counsel stated the notion was irrational that Applicant would harm his children by placing them in a pool of acid. Trial counsel testified the solicitor's closing argument was proper. Trial counsel stated the solicitor did not vouch for a State's witnesses during his closing argument. Last, regarding Applicant's assertion trial counsel was ineffective for failing to object to an improper jury charge, trial counsel testified he did not recall finding the inferred malice instruction objectionable at the time of trial.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court reviewed the Clerk of Court records regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and documents from the prior proceedings, the exhibits introduced

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into evidence at the hearing, and legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

This Court finds trial counsel's testimony more credible than Applicant's testimony. Trial counsel thoroughly investigated and prepared Applicant's case for trial. This Court finds trial counsel adequately investigated potential witnesses and defenses provided by Applicant.

This Court finds Applicant failed to meet his burden to prove trial counsel was ineffective for failing to present an insanity defense at trial. This Court finds Applicant had an opportunity to undergo a competency and criminal responsibility evaluation, but declined to do so on his own volition prior to trial counsel's substitution on his case. First, this Court finds Applicant's claim is based on speculation and is inherently unreliable. A PCR applicant cannot show that he was prejudiced by counsel's failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence. Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995) This Court finds trial counsel's testimony credible that after diligent investigation, he decided not to pursue an untenable insanity defense.

Second, this Court finds the trial strategy pursued by trial counsel was valid. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). See also Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005). This Court finds trial counsel was an accomplished and renowned capital defender and that trial counsel had abundant experience on presenting mental health defenses. This Court particularly finds trial counsel's testimony compelling regarding his trial strategy to negate malice. By pursuing this strategy, trial counsel precluded the solicitor from utilizing experts in rebuttal to his presentation of Applicant's case.

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This Court finds Applicant failed to meet his burden to prove trial counsel was ineffective for calling Frank Addy to testify at trial. This Court finds trial counsel's decision to call Frank Addy as a witness reasonably aligned to his trial strategy. Frank Addy testified to Applicant's emotional instability prior to the murder. (Tr. 320-5). Frank Addy additionally testified Applicant had lost weight and had made irrational statements regarding executing a murder. On cross-examination, Frank Addy testified he never believed Applicant would kill his entire family by placing them in acid. (Tr. 330). This Court finds the benefits derived to Applicant's case from Frank Addy's testimony overshadowed the alleged detriment.

This Court finds Applicant's allegation that counsel was ineffective for failing to object to the solicitor's opening statement is without merit. The proper inquiry is not whether the solicitor's remark was undesirable or condemnable, but whether the comment "so infected the trial with unfairness as to make the resulting conviction a denial of due process." State v. Bennett, 369 S.C. 219, 232, 632 S.E.2d 281, 288 (2006) (quoting Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986)). The solicitor's executioner comment was merely descriptive of the offense charged, murder. (Tr. 59). Furthermore, the comment was supported by testimony of Applicant's son who witnessed Applicant kill the victim. (Tr. 78).

This Court finds Applicant's allegation that trial counsel was ineffective for not objecting to various closing statements made by the solicitor is without merit. This Court agrees with trial counsel that the solicitor did not improperly pit witnesses or vouch for a State witnesses' credibility. See Gichrhrst v. State, 350 S.C. 221, 565 S.E.2d 281 (2002). When discussing motives of the trial witnesses, the solicitor did not convey a personal opinion nor make any assurances regarding the credibility of the State's witnesses. Furthermore, the solicitor's statements were confined to the evidence and testimony presented at trial.

This Court finds Applicant's allegation that trial counsel was ineffective for not objecting to the solicitor's cross-examination of Applicant regarding the blood in the sink is wholly without merit. This Court finds the question was proper and inferable from evidence presented at trial.

Last, this Court finds Applicant's allegation that trial counsel was ineffective for failing to object to the implied malice jury instruction is without merit. Applicant's trial occurred in 2004 prior to State v. Belcher. See State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). Importantly, Belcher specifically precludes retroactive application. Id. Therefore, pre-Belcher jury charge was not improper.

Furthermore, this Court finds Applicant failed to prove Strickland's second prong on the above allegations. Overwhelming evidence of guilt supported Applicant's conviction. Where there is overwhelming evidence of guilt, a trial counsel's deficient representation will not be prejudicial. Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1994). First, Applicant confessed to committing the murder. (Tr. 269). Second, the forensic pathologist testified to the cause of death and he catalogued the physical evidence linking Applicant to the offense. (Tr. 249-58). Last, Applicant's son testified to witnessing the murder. (Tr. 78).

All Other Claims

Except as discussed above, this Court finds that the Applicant affirmatively waived the remaining allegations set forth in his application at the hearing. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BMI, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address these issues at the hearing indicates a voluntary and intentional relinquishment of his right to do so. Therefore, any and all

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remaining allegations are denied and dismissed.

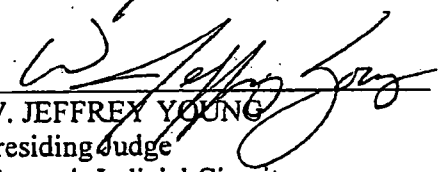
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CONCLUSION

Based on all the forgoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of Respondent

AND IT IS SO ORDERED this 6 day of June, 2013.


W. JEFFREY YOUNG
Presiding Judge
Eleventh Judicial Circuit

Sunter, South Carolina

ARREST WARRANT

G-643317 **G-643317**

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of
Lexington

THE STATE
against

ROGER DALE BURKE

Address: **GILBERT, SC 29123**

Phone: **M** Race: **W** Height: **5-6** Weight: **000**

DL State: **DE** Agency OR# **3200**

DOB: **L. C. S. D.**
Prosecuting Agency: **DETECTIVE FRIER**

Offense: **MURDER**

Code/Ordinance Sec: **16-3-10** Change Code: **119**

This warrant is CERTIFIED FOR SERVICE in the
☐ County/ ☐ Municipality of

The accused
is to be arrested and brought before me to be
dealt with according to law.

Signature of Judge (L.S.)

Date:

RETURN

A copy of this warrant was delivered to
defendant **ROGER DALE BURKE**
on **12 DEC 2001**

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

BRUCE RUTLAND
650 KNOX ABBOTT DR.
CAYCE, SC 29033
803-796-7100

STATE OF SOUTH CAROLINA
☒ County/ ☐ Municipality of
Lexington

AFFIDAVIT

Form Approved by
S.C. Attorney General
July 20, 1980
SCOA 618

Personally appeared before me the affiant **DETECTIVE SCOTTIE FRIER** who
being duly sworn deposes that says that defendant **ROGER DALE BURKE**
did within this county and state on **12/19/2001** violate the criminal laws of the
State of South Carolina (or ordinance of ☐ County/ ☐ Municipality of)
in the following paragraph **MURDER 1005**
DESCRIPTION OF OFFENSE:

I further state that **DEFENDANT** is probably guilty 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 OR ABOUT DEC. 19, 2001, ROGER DALE BURKE DID MALICIOUSLY
SHOOT AND KILL HIS ESTRANGED WIFE JENNY A. BURKE WITH A .380 CAL.
PISTOL. THAT DALE BURKE HAD UNLAWFULLY ENTERED THE VICTIMS HOME
WHILE ARMED WITH SAID DEADLY WEAPON AND WAS HIDING WITHIN THE
HOME UPON HER ARRIVAL. THAT AFTER KILLING SAID VIC., BURKE
REMOVED THE BODY AND ATTEMPTED TO BURN DOWN THE HOME IN AN
ATTEMPT TO DESTROY EVIDENCE. DEF. HAS CONFESSED TO THE SAME.
THIS INCIDENT TOOK PLACE ON LANE DR. WITHIN LEX. CO. SC.

Sworn to and subscribed before me
on **12/21/2001**

Signature of Issuing Judge (L.S.)
SCOTT D. WHITTLE

STATE OF SOUTH CAROLINA
☒ County/ ☐ Municipality of
Lexington

ARREST WARRANT

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

It appearing from the above affidavit that **ROGER DALE BURKE** is responsible grounds to believe that
on **12/19/2001** defendant **ROGER DALE BURKE**

did violate the criminal laws of the State of South Carolina (or ordinance of) as set forth below:
☐ County/ ☐ Municipality of
DETECTION OF OFFENSE: 16-3-10
MURDER

Now, therefore, you are empowered and directed to arrest the said defendant and bring him or her before
me forthwith to be dealt with according to 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.

Signature of Issuing Judge (L.S.)
Judge Code: **900**
Judge's Address: **LEXINGTON, SC 29072**
Judge's Telephone: **951-2542**
Issuing Court: ☒ Magistrate ☐ Municipal ☐ Circuit

WITNESSES

LCSD

Frier

ARREST WARRANT NUMBER

G-643317

ACTION OF GRAND JURY

INDICTMENT

Clyde Hunt Jr.

Foreperson of Grand Jury

Date: *9/9/02*

VERDICT

Guilty

Foreperson of Petit Jury

Al R. Leach

Date:

27-Aug-04

DOCKET NO. 2002-GS-32-*3228*

The State of South Carolina

County of LEXINGTON

COURT OF GENERAL SESSIONS

SEPTEMBER TERM 2002

THE STATE

vs.

ROGER DALE BURKE

CDR# 116

Indictment for

MURDER
§16-3-10

DONALD V. MYERS, SOLICITOR

ALBUQUERQUE COUNTY
CLERK OF COURT
JUL 10 2002

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

INDICTMENT FOR
MURDER
§16-3-10

At a Court of General Sessions, convened in SEPTEMBER, 2002 the Grand Jurors of LEXINGTON County present upon their oath:

MURDER §16-3-10

That **ROGER DALE BURKE**, did in Lexington County, on or about December 19, 2001, willfully, feloniously and with malice aforethought, kill the victim, **Jenny A. Burke**, by means of shooting the victim with a pistol, and Jenny A. Burke died in Lexington County as a proximate result of the gunshot wounds inflicted by Roger Dale Burke, in violation of Section 16-3-10 of the South Carolina Code of Laws of (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)

COUNTY OF LEXINGTON)

THE STATE,)

VS.)

ROGER DALE BURKE,)

DEFENDANT.)

IN THE COURT OF GENERAL SESSIONS

2002-GS-32-3278

JURY VERDICT

As to the charge of Murder, we, the jury in the above-captioned matter, unanimously find the Defendant, Roger Dale Burke:

☐ Not Guilty☐ Guilty of Voluntary Manslaughter☒ Guilty of Murder

Foreman

Lexington, South Carolina

August 27, 2004

A TRUE COPY
JURY
Lex. Co. C.C.C.P., G.S. & F.C.

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Lexington
STATE VS.

INDICTMENT/CASE#:

202 GS- 32 - 3278AKA: Roger Dale BurkeAW#: 6643317Race: WSex: MAge: 31Date of Offense: 12-17-01DOB: 12-17-01SS#: 16-3-10S.C. Code §: 16-3-10CDR Code #: 0111116

Address: _____

City, State, Zip _____

DL# _____

SID# _____

☐ CASE RESTORED

SENTENCE

☐ PLEA ☒ TRIALIn disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS
TO: MURDERin violation of § 16-3-10 of the S.C. Code of Laws, bearing CDR Code # 0111116☐ NON-VIOLENT☒ VIOLENT☒ SERIOUS☒ MOST SERIOUS☐ 17-25-45The charge is: ☐ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST: _____

Solicitor

Defendant

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of LIFE 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: 8/27/04☒ 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.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ 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 99

\$14-1-211(A)(2) (DUI Surcharge) \$100 \$ _____

\$56-5-2995 (DUI Assessment) \$12 \$ _____

\$35.13 (Public Def/Prob) \$500 \$ _____

\$73.3, 1B TP (Law Enforce. Funding) \$25 \$25 99

\$33.7, 1B TP (Drug Court Surcharge) \$100 \$ _____

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

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

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

TOTAL \$125 99

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, \$35.13 TP
Requires \$500 be paid to Clerk during probation.PRESIDING JUDGE Mark H. ...Judge Code: 0180/1/2Sentence Date: 8/27/04Court Reporter: ...Clerk of Court Deputy Clerk, ...

White - Clerk

Green - Corrections

Canary - Probation

Pink - Defendant

SCCA/217 (7/2003)

WITNESSES

LCSD

Frier

ARREST WARRANT NUMBER

STRAIGHT INDICTMENT

ACTION OF GRAND JURY

Clyde Hunt Sr.

For person of Grand Jury
Date: 9/19/02

VERDICT

Guilty

Ally Seal
For person of Petit Jury
Date: 27-Aug-04

DOCKET NO. 2002-GS-32- *3279*

The State of South Carolina

County of LEXINGTON

COURT OF GENERAL SESSIONS

SEPTEMBER TERM 2002

THE STATE

vs.

ROGER DALE BURKE

CDR# 549

Indictment for

POSSESSION OF FIREARM OR KNIFE
DURING THE COMMISSION OF A
VIOLENT CRIME
§16-23-490

DONALD V. MYERS, SOLICITOR

A TRUE COPY
JUL 1 2003
Lex. Co. Clerk's Office

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)) INDICTMENT FOR
POSSSESSION OF FIREARM OR KNIFE DURING
THE COMMISSION OF A VIOLENT CRIME
§16-23-490

At a Court of General Sessions, convened in SEPTEMBER, 2002 the Grand Jurors of LEXINGTON County present upon their oath:

**POSSESSION OF FIREARM OR KNIFE
DURING COMMISSION OF A VIOLENT CRIME
§16-23-490**

That **ROGER DALE BURKE**, did in Lexington County on or about December 19, 2001, possess a firearm during the commission of a violent crimes, to wit: Murder, in violation of Section 16-23-490 of the South Carolina Code of Laws of 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)

COUNTY OF LEXINGTON)

THE STATE,)

VS.)

ROGER DALE BURKE,)

DEFENDANT.)

IN THE COURT OF GENERAL SESSIONS

2002-GS-32-3279

JURY VERDICT

As to the charge of Possession of a Weapon During Commission of a Violent Crime, we, the jury in the above-captioned matter, unanimously find the Defendant, Roger Dale Burke:

() Not Guilty

(✓) Guilty

Ally R. Cook
Foreman

Lexington, South Carolina

August 27, 2004

TRUE COPY
JURY
LEX. CO. C.C. & F.G.

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Lexington
STATE VS

INDICTMENT/CASE#:

2002 -GS- 32 32-79

A/W#:

Date of Offense:

S.C. Code §:

CDR Code #:

☐ CASE RESTORED

SENTENCE

☐ PLEA ☒ TRIAL

AKA:

Race:

Sex:

Age:

DOB:

SS#:

Address:

City, State, Zip

DL#

SID#

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADSTO: Lesser Included Offense Violent Crimein violation of § 13-17-01 of the S.C. Code of Laws, bearing CDR Code # 0151819☒ NON-VIOLENT☒ VIOLENT☐ SERIOUS☐ MOST SERIOUS☐ 17-25-45The charge is: ☐ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.The plea is ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Solicitor

Defendant

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 3 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: 8/27/04☒ 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.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ OrderedTotal: \$ plus 20% fee: \$

Payment Terms:

☐ set by SCDPPPS

Recipient:

*Fine:

\$14-1-206 (Assessments 107.5%)

\$14-1-211(A)(1) (Conv. Surcharge)

\$14-1-211(A)(2) (DUI Surcharge)

\$56-5-2995 (DUI Assessment)

\$35.13 (Public Def/Prob)

\$73.3, 1B TP (Law Enforce. Funding)

\$33.7, 1B TP (Drug Court Surcharge)

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

\$56-5-2942(J) (Vehicle Assessment)

3% to County (if paid in installments)

TOTAL

\$	\$
\$	\$
\$100	\$100
\$100	\$
\$12	\$
\$500	\$
\$25	\$25
\$100	\$
\$50	\$
\$40/ea	\$
\$	\$
\$25	\$

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, §35.13 TP
Requires \$500 be paid to Clerk during probation.

PRESIDING JUDGE

Judge Code:

Sentence Date:

0101612
8/27/04

ARREST WARRANT

G-643319 **G-643319**

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of
Lexington

THE STATE
against

ROGER DALE BURKE

Address: GILBERT, SC 29123

Phone: RD

DL State: M Race: W Height: 5-6 Weight: 100

DOB: DL# Agency OR# 3200

Prosecuting Agency: L. C. S. D.

Prosecuting Officer: DETECTIVE FRIER

Offense: ARSON/ATTEMPTED

Code/Ordinance Sec: 16-11-110 Offense Code: 24

This warrant is CERTIFIED FOR SERVICE in the
☐ County/ ☐ Municipality of

The accused
is to be arrested and brought before me to be
dealt with according to law.

Signature of Judge

Date:

RETURN

A copy of this arrest warrant was delivered to
defendant ROGER DALE BURKE

on 12/21/2001

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

BRUCE RUTLAND
650 KNOX ABBOTT DR.
CAYCE, SC 29033
803-796-7100

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of
Lexington

A F F I D A V I T

Personally appeared before me the affiant DETECTIVE SCOTTIE FRIER who
being duly sworn deposes and says that defendant ROGER DALE BURKE

did within this county and state on 12/19/2001 violate the criminal laws of the
State of South Carolina for ordinance of ☐ County/ ☐ Municipality of Lexington

In the following particulars:
DESCRIPTION OF OFFENSE: ARSON/ATTEMPT TO COMMIT

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

THAT ON OR ABOUT DEC. 19, 2001 ROGER DALE BURKE DID MALICIOUSLY
SHOOT AND KILL HIS ESTRANGED WIFE JENNY A. BURKE WITH A .380 CAL.
PISTOL. THAT DALE BURKE HAD UNLAWFULLY ENTERED THE VICTIMS HOME
WHILE ARMED WITH SAID DEADLY WEAPON AND WAS HIDING WITHIN THE
HOME UPON HER ARRIVAL. THAT AFTER KILLING SAID VIC., BURKE
REMOVED THE BODY AND ATTEMPTED TO BURN DOWN THE HOME IN AN
ATTEMPT TO DESTROY EVIDENCE. DEF. HAS CONFESSED TO THE SAME.
THIS INCIDENT TOOK PLACE ON LANE DR. WITHIN LEX. CO. SC.

Sworn to and subscribed before me
on 12/21/2001

Signature of Issuing Judge
SCOTT D. WATKINS (L.S.)

STATE OF SOUTH CAROLINA
☒ County/ ☐ Municipality of
Lexington

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF 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 12/19/2001 defendant ROGER DALE BURKE

did violate the criminal laws of the State of South Carolina (or ordinance of Lexington) as set forth below:

☐ County/ ☐ Municipality of
**DESCRIPTION OF OFFENSE: 16-11-110
ARSON/ATTEMPT TO COMMIT**

Now, therefore, you are empowered and directed to arrest the said defendant and bring him or her before
me forthwith to be dealt with according to 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.

Judge's Address: LEXINGTON, SC 29072

Signature of Issuing Judge
SCOTT D. WATKINS (L.S.)

Judge's Telephone: 951-2542

Judge Code: ABG

Issuing Court: ☒ Magistrate ☐ Municipal ☐ Circuit

ORIGINAL

WITNESSES

LCSD

Filer

ARREST WARRANT NUMBER

G-643319

ACTION OF GRAND JURY
JUDGE BYLL

Clyde Hunt Sr.

Forfeiture of Grand Jury
Date: 1/9/02

VERDICT

Guilty

Forfeiture of Petit Jury

Wm. J. Tack

Date:

27-May-04

DOCKET NO. 2002-GS-32- *3280*

The State of South Carolina

County of LEXINGTON

COURT OF GENERAL SESSIONS

SEPTEMBER TERM 2002

THE STATE

vs.

ROGER DALE BURKE

CDR# 76

Indictment for

ATTEMPT TO COMMIT ARSON

§16-11-190

DONALD V. MYERS, SOLICITOR

TRUE COPY
JUL 10 2002
CLERK OF COURT

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

INDICTMENT FOR
ATTEMPT TO COMMIT ARSON
§16-11-190

At a Court of General Sessions, convened in SEPTEMBER, 2002 the Grand Jurors of LEXINGTON County present upon their oath:

ATTEMPTED ARSON
§16-11-190

That **ROGER DALE BURKE**, did in Lexington County, on or about December 19, 2001, willfully and maliciously attempt to cause an explosion, set fire to, burn, or cause to be burned or aid, counseled, or procured the burning of a dwelling house, or structure designed for human occupancy, to wit: the defendant did attempt to set fire to home belonging to Jenny A. Burke, in violation of §16-11-110 (B) of the South Carolina Code of Laws of 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)
COUNTY OF LEXINGTON)

IN THE COURT OF GENERAL SESSIONS

2002-GS-32-3280

THE STATE,)

VS.)

JURY VERDICT

ROGER DALE BURKE,)

DEFENDANT.)

As to the charge of Attempt to Commit Arson, we, the jury in the
above-captioned matter, unanimously find the Defendant, Roger Dale Burke:

() Not Guilty

(✓) Guilty


Foreman

Lexington, South Carolina

August 27, 2004

ALL COPY
Lex. CO. C.C.P. G.S. & F.C.

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Lexington
 STATE VS.
Roger D Barke
 AKA:
 Race: W Sex: M Age: 31
 DOB: SS#:
 Address:
 City, State, Zip Greenville SC
 DL# SID#

INDICTMENT/CASE#: 2002 GS 32 3280
 A/V#: 6643319
 Date of Offense: 12-18-01
 S.C. Code §: 16-11-190
 CDR Code #: 0101716
☐ CASE RESTORED
 SENTENCE
☐ PLEA ☒ TRIAL

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADSTO: Attempt to Commit Arsonin violation of § 16-11-190 of the S.C. Code of Laws, bearing CDR Code # 0101716
☐ NON-VIOLENT ☒ VIOLENT ☒ SERIOUS ☐ MOST SERIOUS ☐ 17-25-45
The charge is: ☐ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST

Solicitor

Defendant

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
 for a determinate term of 20 days/months/years ☐ 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: 8/27/04
☒ 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.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ 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	\$
35.13 (Public Def/Prob)	\$500	\$
73.3, 1B TP (Law Enforce. Funding)	\$25	\$25.00
33.7, 1B TP (Drug Court Surcharge)	\$100	\$
50-21-114(BUI Breath Test Fee)	\$50	\$
56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
% to County (if paid in installments)	\$	\$
OTAL		\$125.00

Thomas H. Combs
 Clerk of Court/Deputy Clerk.

Court Reporter: Centra

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, \$35.13 TP
 Requires \$500 be paid to Clerk during probation.

PRESIDING JUDGE

Judge Code: D 112/11 6 12Sentence Date: 8/27/04

Blue - Clerk

Green - Corrections

Canary - Probation

Pink - Defendant

SCCA/217 (7/2003)

mv 0872w

ARREST WARRANT

G-643318

STATE OF SOUTH CAROLINA

☒ County ☐ Municipality of
Lexington

 THE STATE
against

ROGER DALE BURKE

FUGITIVE, SC 290127

Phone: _____ SSN: _____

Sex: M Race: W Height: 5-6 Weight: 200

DL State: _____ DL# _____

DOB: _____ Agency OR#: 3200Prosecuting Agency: L. C. S. D.Prosecuting Officer: DETECTIVE FRIEROffense: BURGLARY FIRST DEGREEOffense Code: 21Code/Ordinance Sec: 16-11-311
 This warrant is CERTIFIED FOR SERVICE in the
☐ County/ ☐ Municipality of

 The accused
 is to be arrested and brought before me to be
 dealt with according to law.

Signature of Judge

(L.S.)

Date: _____

RETURN

 A copy of this arrest warrant was delivered to
 defendant ROGER DALE BURKE
 on 12 DEC 2001

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

 BRUCE RUTLAND
 650 KNOX ABBOTT DR.
 CAYCE, SC 29033
 803-796-7100

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of
Lexington

AFFIDAVIT

Personally, appeared, before me

the affiant DETECTIVE SCOTTIE FRIER

with

being duly sworn, deposes and says that defendant ROGER DALE BURKEdid within this county and state on 12/19/2001 violate the criminal laws of the

State of South Carolina for

in the following particulars: 1st DMSDescription of Offense: BURGLARY FIRST DEGREE
 I further state, that there is a 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 OR ABOUT DEC. 19, 2001 ROGER DALE BURKE DID MALICIOUSLY SHOOT AND KILL HIS ESTRANGED WIFE JENNY A. BURKE WITH A .380 CAL. PISTOL. THAT DALE BURKE HAD UNLAWFULLY ENTERED THE VICTIMS HOME WHILE ARMED WITH SAID DEADLY WEAPON AND WAS HIDING WITHIN THE HOME UPON HER ARRIVAL. THAT AFTER KILLING SAID VIC., BURKE REMOVED THE BODY AND ATTEMPTED TO BURN DOWN THE HOME IN AN ATTEMPT TO DESTROY EVIDENCE. DEF. HAS CONFESSED TO THE SAME. THIS INCIDENT TOOK PLACE ON LANE DR. WITHIN LEX CO. SC.

Sworn to and subscribed before me on 12/21/2001

Signature of Affiant

L.C.S.D.

Affiant's Address 521 GIBSON RD

LEXINGTON, SC 29012

Affiant's Telephone 951-2481

LEXINGTON, SC 29012

951-2481

Signature of Issuing Judge

(L.S.)

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of
Lexington

ARREST WARRANT

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

If appearing from the above affidavit that there are reasonable grounds to believe that

on 12/19/2001 defendant ROGER DALE BURKE

did violate the criminal laws of the State of South Carolina (or ordinance of _____) as set forth below:

☐ County/ ☐ Municipality of
Lexington
DESCRIPTION OF OFFENSE: 16-11-311

BURGLARY FIRST DEGREE

Now, therefore, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of his execution, or as soon thereafter as is practicable.

Signature of Issuing Judge

(L.S.)

Judges Address 521 GIBSON RD

LEXINGTON, SC 29012

Judge Code: 886Judges Telephone 951-2542Issuing Court: ☒ Magistrate ☐ Municipal ☐ Circuit

ORIGINAL

WITNESSES

LCSD

Frier

ARREST WARRANT NUMBER

G-643318

ACTION OF GRAND JURY

Clyde Hunt Sr.

Foreperson of Grand Jury

Date: 9/19/02

VERDICT

Guilty

Foreperson of Petit Jury

Wm. J. Cook

Date:

27-Aug-04

DOCKET NO. 2002-GS-32-*3281*

The State of South Carolina

County of LEXINGTON

COURT OF GENERAL SESSIONS

SEPTEMBER TERM 2002

THE STATE

vs.

ROGER DALE BURKE

CDR# 79

Indictment for

BURGLARY FIRST DEGREE

§16-11-311

DONALD V. MYERS, SOLICITOR

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

INDICTMENT FOR
BURGLARY FIRST DEGREE
§16-11-311

At a Court of General Sessions, convened in SEPTEMBER, 2002 the Grand Jurors of LEXINGTON County present upon their oath:

BURGLARY IN THE FIRST DEGREE

§16-11-311

That **ROGER DALE BURKE**, did in Lexington County on or about December 19, 2001, willfully and unlawfully enter the dwelling of Jenny A. Burke, Drive, Pelion, SC, without consent and with the intent to commit a crime therein and the defendant, when in effecting entry or while in the dwelling or immediate flight therefrom, he or another participant in the crime was armed with a deadly weapon or explosive and/or caused physical injury to a person who is not a participant in the crime and/or used or threatened the use of a dangerous instrument and/or displayed what appeared to be a knife, pistol, revolver, rifle, shotgun, machine gun or other firearm, in violation of Section 16-11-311 of the South Carolina 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

COUNTY OF
STATE

VS.

AKA:

Race:

Sex:

Age:

DOB:

SS#:

Address:

City, State, Zip

DL#

SID#

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#:

2002

-GS-

32

3251

AW#:

R6P3318

Date of Offense:

12-17-01

S.C. Code §:

16-11-311

CDR Code #:

0101717

☐ CASE RESTORED

SENTENCE

☐ PLEA ☒ TRIALIn disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADSTO: Burglaryin violation of 16-11-311 of the S.C. Code of Laws, bearing CDR Code # 0101717☐ NON-VIOLENT☒ VIOLENT☐ SERIOUS☒ MOST SERIOUS☐ 17-25-45The charge is: ☐ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand JuryThe plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Solicitor

Defendant

Attorney for Defendant

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: 8/27/04☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-16-40 to be calculated and applied by the State Department of Corrections.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

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

Payment Terms:

☐ set by SCDPPPS

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, \$35.13 TP
Requires \$500 be paid to Clerk during probation.

PRESIDING JUDGE

Judge Code:

Sentence Date:

Recipient:

*Fine:

\$14-1-206 (Assessments 107.5%)

\$14-1-211(A)(1) (Conv. Surcharge)

\$14-1-211(A)(2) (DUI Surcharge)

\$56-5-2995 (DUI Assessment)

\$35.13 (Public Def Prob)

\$73.3, 1B TP (Law Enforce. Funding)

\$33.7, 1B TP (Drug Court Surcharge)

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

\$56-5-2942(J) (Vehicle Assessment)

3% to County (if paid in installments)

TOTAL

Thomas A. Conroy
Clerk of Court/Deputy Clerk

Court Reporter: E. F. F. F.