

Vol. II OF II

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

---

Appeal from Charleston County

Deadra L. Jefferson, Circuit Court Judge

---

**RECEIVED**

JUL 2 2014

**S.C. Supreme Court**

NATHANIEL MCGEE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-002540

---

APPENDIX

---

DAVID ALEXANDER  
Appellate Defender

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

ATTORNEY FOR PETITIONER

ALAN WILSON  
Attorney General

ASHLEIGH R WILSON  
Assistant Attorney General

P. O. Box 11549  
Columbia, SC 29211

ATTORNEYS FOR RESPONDENT

INDEX

INDEX.....i

TRIAL TRANSCRIPT (dated March 2, 4 and 5, 2009)..... 1

APPLICATION FOR POST-CONVICTION RELIEF.....474

POST-CONVICTION RELIEF HEARING TRANSCRIPT (dated July 23, 2013)..... 524

ORDER OF DISMISSAL.....586

SENTENCE SHEET.....604

RETURN.....605

INDICTMENT.....610

COURT’S EXHIBIT# 1 (PETITIONER’S POLICE STATEMENT).....612

see: Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2053, 80 L.Ed. 2d 674 (1984);

see also: State v. McDaniel, 320 S.C. 33, 462 S.E. 2d 882 (et. App. 1995) (reversing Conviction and remanding for New Trial in sexual assault / robbery case where Solicitor used "you" or a form of "you" some forty-five times, asking the jury to put themselves in place of the victim);

It has been other circuits who have also held that Solicitor's should not violate the "Golden Rule" and see also: Darden v. Wainwright, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed. 2d 144 (1986); Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L. Ed. 2d 431 (1974); Von Dohlen v. State, supra see: State v. Caldwell, 300 S.C. 494, 504, 388 S.E. 2d 816, 822 (1990); State v. Linder, 276 S.C. 304, 278 S.E. 2d 335 (1981)

Wherefore petitioner submits that Counsel's Representation Fell below an Objective Standard of Reasonableness and But for Counsel's Unprofessional errors there's a reasonable probability that exist that the result of the proceeding would have been different had Counsel made the proper Objections.

Wherefore Applicant respectfully ask that his conviction be Reversed / and the grant of a New Trial.

ARGUMENT 6

6.) Was Trial Counsel Constitutionally Ineffective for failing to request a jury instruction on lesser included offense of Voluntary manslaughter and a denial of Due Process ?; and/or Involuntary manslaughter

FACTS

There was sufficient Evidence at trial to support a jury Verdict of manslaughter, Applicant testified at trial in his defense.

On the night of the incident at the club Fantasy the decedent again confronted Applicant about the gold chain and appellant again told him he did not have anything to do with the break-in or his gold chain being stolen R. 313, l. 18-314, l. 2. The decedent reached for a gun during the confrontation, and applicant said he reached into his back pocket and "pulled the gun out and I swung it. I don't remember pulling the trigger or anything. I just knew the gun went off". Applicant repeatedly told the jury the gun "just went off", and that he only pulled the gun out because "I knew that he was going to kill me or do something. I knew he was going to shoot me." R. 315, l. 19-316, l. 5

T. Tr. of Preliminary Hearing R. pg. 146, 19-22

19 A Right. The only thing that led us to believe  
20 that he had a gun was someone stated that -- one of the  
21 females stated that he may made a motion as if he had one  
22 himself...

T. Tr. pg. 50. lines 9-20 Opening Argument by Mr. Smiley

9 He's sorry that Jamie Reed died.  
 10 This isn't about he feels like he was some big  
 11 man for what he did. He was scared to death.  
 12 And I think the evidence will show that, But,  
 13 I believe the evidence will show that humans  
 14 react.  
 15 And in this case he reacted the way  
 16 anybody else given the same set of facts could  
 17 have or would have acted. When he believed  
 18 that Jamie was reaching for a gun he did what  
 19 he thought in that split second is the only  
 20 thing he could do.

T. Tr. pg. 151 lines 11-15 Direct Examination By Mr. Voigt:  
of States witness Tiffany Jenkins

11 Q. Was the person that you were standing  
 12 next to, the person who got shot, did he have --  
 13 did he have a gun, or did he appear to have a gun  
 14 or any weapon?  
 15 A. I do not know

T. Tr. pg. 160 lines 1-22 Cross Examination By Mr. Smiley

1 Q. And he got out and you don't know exactly  
 2 what happened when he got out?  
 3 A. No, sir.

4 Q. Okay. There's the -- the two of them

5 confronted each other, right ---

6 A. --- yes, sir ---

7 Q. --- you don't -- actually you don't know

8 because you had your back to him ---

9 A. --- I didn't say -- they was -- I don't

10 know.

11 Q. Now you don't know -- you couldn't even

12 really hear what words were exchanged, right?

13 A. No, sir.

14 Q. And then you heard a shot. Well,

15 actually you saw the gun come out and you heard a

16 shot, correct?

17 A. Yes, sir.

18 Q. So, you don't know when you said you

19 didn't see that -- when asked if the guy that got

20 shot tried to pull a gun out, you don't know. You

21 had your back turned?

22 A. Yes, sir.

Tr. T. pg. 195 lines 11-14 Direct Examination By Mr. Voigt of

states witness Frederick McCoy

11 A. My little cousin jumped outside of the

12 car. And he started -- they started exchanging

13 words, Well, I heard him exchange words with

14. Nathaniel.

T. Tr. pg. 208 lines 23 through lines 8 pg. 209 Mr. Smiley's

Direct Examination of States witness Frederick McCoy

23 Q. And then he jumped out and confronted

24 Nate, right?

25 A. Yeah.

1 Q. Okay. From where Nate was walking from,

2 right, walking up towards the car, you would go

3 past the silver car to get to the entrance of the

4 club, right?

5 A. Yeah.

6 Q. Yeah, you got to go past the car to get

7 to the club?

8 A. Uh huh.

#### DISCUSSION

The South Carolina Supreme Court has ruled in State v. Gilliam, 296 S.C. 395, 373 S.E. 2d 596 (1988) that both self-defense and voluntary manslaughter should be submitted to the jury when warranted by the evidence where victim threatened defendant and fired at him.

The South Carolina Supreme Court has previously held defense attorneys ineffective when they fail to advise a client of a lesser included offense

or to request one when appropriate. Kerrigan v. State, 304 S.C. 561, 406 S.E. 2d 160 (1991); Tisdale v. State, 378 S.C. 122, 662 S.E. 2d 410 (2008); Strickland v. Washington, 466 U.S. 668, 104 S.Ct. (1984)

Applicant submits that Counsel's Representation Fell below an Objective Standard of Reasonableness and But for Counsel's Unprofessional error's there's a reasonable probability that exist that the result of the proceeding would have been different had Counsel ask for a charge on Voluntary Manslaughter; and involuntary Manslaughter

Wherefore Applicant respectfully ask that his Conviction be Reversed and remanded for a New Trial as a matter of Law, see: Mathews v. U.S., Cite as 108 S.Ct. 003 (1988)

Criminal Law ~~and~~ 772(b)

Generally, a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor.

ARGUMENT 7

7.) Was Petitioner's Due Process Rights and the Right to Effective Assistance of Trial Counsel violated when Trial Counsel failed to Object to the Malice charge where the Judge should have made it clear to the Jury that they were [Free] to Accept or Reject the permissive inferences depending on its view of the Evidence.

FACTS

The Trial Judge charged the Jury with Malice charge on Trial Transcript record on Appeal Bate stamp pg. 444 lines 4 through lines 2 pg. 446

- 4 intent. The defendant is charged with murder.
- 5 The State must prove beyond a reasonable doubt
- 6 that the defendant killed another person with
- 7 malice aforethought.
- 8 Malice is hatred, ill will, or
- 9 hostility towards another person. It is the
- 10 intentional doing of a wrongful act without
- 11 just cause or excuse, and with the intent to
- 12 inflict an injury or under circumstances that
- 13 the law will infer an evil intent.
- 14 Malice aforethought does not require
- 15 that malice exists for any particular time

16 before the act is committed, but malice must  
17 exist in the mind of the defendant just  
18 before, and at the time that the act is  
19 committed. Therefore, there must be a  
20 combination of the previous evil intent in the  
21 act.

22 Malice aforethought may be expressed  
23 or inferred. These terms expressed and  
24 inferred do not mean different kinds of  
25 malice, but merely the manner in which malice  
1 may be shown to exist. That is either by  
2 direct evidence, or by inference from the  
3 facts and circumstances, which are proved.  
4 Express malice is shown when a person speaks  
5 words, which express hatred or ill will for  
6 another, or when the person prepared  
7 beforehand to do the act which was later  
8 accomplished. For example, lying in wait for  
9 a person or any other acts of preparation  
10 going to show that the deed was within the  
11 defendant's mind, would be express malice.

12 Malice may be inferred from conduct  
13 showing a total disregard for human life.  
14 Inferred malice may also arise when the deed

15 is done with a deadly weapon. A deadly weapon  
 16 is any article, instrument, or substance,  
 17 which is likely to cause death or great bodily  
 18 harm.

19           Whether an instrument has been used  
 20 as a deadly weapon depends on the facts and  
 21 circumstances in each case. The following are  
 22 examples of instruments, which may be deadly  
 23 weapons: a pistol, shotgun, rifle, dirk  
 24 dagger, knives, slingshot, metal knuckles,  
 25 razor, gasoline, or Molotov cocktails. A gun  
 1 may be a deadly weapon even if it is not  
 2 operating...

It's clear by this Erroneous Malice charge that the Judge failed to charge in the Malice charge that the Jury was Free to Accept or Reject the permissive inferences depending on its view of the Evidence; And Trial Counsel failed to object to the Malice Charge on the Accept or Reject the permissive inferences depending on its view of the Evidence, and therefore was prejudicial, as the Malice instruction constituted mandatory rebuttable presumption, rather than a permissive inference; because it in fact impermissibly shifted the burden of persuasion to Petitioner to rebut the presumption of malice by the Malice instruction to the jury in Petitioner's case.

DISCUSSION

see: State v. Peterson, cite as 335 S.E. 2d 800 (S.C. 1985)

see: State v. Wood, 282 S.C. 18, 316 S.E. 2d 573.

see: State v. Lewellyn, 281 S.C. 199, 314 S.E. 2d 326 (1984)

see also: State v. Elmore, 279 S.C. 417, 308 S.E. 2d 781 (S.C. 1983)

see: Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L. Ed. 2d 39 (1979). Strickland v. Washington, 466 U.S. 668, 104 S.Ct. (1983)

Since the Judge failed to make it clear in the above Malice charge that the jury in Petitioner's Trial was free to accept or reject these permissive inferences depending on its view of the evidence and since Trial Counsel failed to object to the Malice charge was prejudicial, as the Malice instruction is clearly erroneous, therefore petitioner submits that Counsel's Representation fell below an Objective Standard of Reasonableness and But for Counsel's Unprofessional errors there's a reasonable probability that exist that the result of the proceeding would have been different.

Wherefore, Applicant respectfully ask that his Conviction be Vacated / Reversed and the Grant of a New Trial.

ARGUMENT B

8.) Was Counsel Ineffective for failing to Object to the Self-Defense Instruction that impermissibly Shifted the Burden of proof in violation of Petitioners Protected United States Constitutional Rights and right to Due Process of Law?

FACTS

T. Tr. pg. 446 record on Appeal lines 2 - 5 Self-Defense Charge

2 . . . . The defendant has raised the  
3 defense of self-Defense. Self-defense is a  
4 complete Defense. And if [it is established]  
5, you must find the defendant not guilty.

This herein issued raised is Burden Shifting as the Petitioner don't have to establish anything in Self-Defense in a Murder Case; where it is a Jury Question as to Self-Defense; This herein challenge instruction is contradictory and confusing.

DISCUSSION

see: Thomas V. Leake, Cite as 725 F.2d 246 (1984)  
instructions regarding burden of proof were so inherently contradictory and confusing as to rise to level of Constitutional infirmity.

see also: In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L. Ed. 2d 368 (1970).

It's clearly Established Law that the Federal Court ruled in Thomas V. Leake, cite as 725 F.2d 246 (1984)

Ide at pg. 247; See: Sandstrom v. Montana, supra

Because we think that, read in context, the charge to the jury regarding self-defense was constitutionally inadequate; Instructions regarding Burden of Proof were so inherently contradictory and confusing as to rise to level of constitutional infirmity. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. (1984)

Petitioner submits that if he has to [Establish Self-Defense] that a reasonable Juror could have interpreted this Erroneous Jury Instruction as a Matter of Clearly Established Federal Law and as a Matter of Law that the Petitioner had to [Establish Self-Defense] when this Change would automatically shift the Burden of Proof to the Petitioner to refute. As a matter of Law and clearly Established Federal Law this structural Error calls for the Grant of a New Trial.

see: S.C. Const. Art. V. § 21 (Judges shall not charge juries in respect to matters of [Fact] But shall declare the [Law])

ARGUMENT 10

10.) Was Petitioner's Due Process Rights and the Right to Effective Assistance of Trial Counsel violated when Trial Counsel failed to Object to the Malice charge that is a UnConstitutional impermissible comments on the matters of Fact verses declaring the Law? Giving the Jurors Examples of Malice?

ARGUMENT 11

11.) Was Petitioner's Due Process Rights and the Right to Effective Assistance of Trial Counsel violated when Trial Counsel failed to Object to the Malice charge that is a UnConstitutional impermissible comment on the Facts since Petitioner was charged with lesser included offense/Self-Defense in Murder Prosecution and the Judge Charge the Jury that they could infer malice from the use of a deadly weapon? S.C. Const. art. V, § 21 says (Judges shall not charge juries in respect to matters of fact, but shall declare the law)

FACTS ARGUMENT 10

Since Argument 10 And Argument 11 is based on the same issue as far as impermissibly commenting on the Facts in violation of S.C. Const. art V, § 21 and 6<sup>th</sup> Amendment to the Effective Assistance of Counsel the Facts & Discussion is herein incorporated together but Petitioner ask that each question be [ruled] on by the court, seperately. 32.

T. Tr. pg. 445 lines 22 through pg. 446 lines 3

22 [examples of instruments], which may be deadly  
 23 weapons: a [pistol], shotgun, rifle, dirk  
 24 dagger, knives, slingshot, metal knuckles,  
 25 razor, gasoline, or Molotov Cocktail. A gun  
 1 may be a deadly weapon even if it is not  
 2 operating. The defendant has raised the  
 3 defense of self-defense. Self-defense is a

Petitioner submits since there was two different versions as to Evidence submitted to the Jury it was UnConstitutional to charge the Jury on Facts; Judge is suppose to declare the Law.

### DISCUSSION

The Trial Judge improperly charged the Jury in respect to matters of fact; the South Carolina Constitution Art. V. § 21 states as follows:

§ 21 Charge to jury: Judges shall not charge juries in respect to matters of fact, but shall declare the law.

Therefore Trial Counsel was Ineffective for failing to object to the Erroneous Malice Charge in three Areas, because the Judge should have made it clear to the jury that the jury was Free to Accept or reject the permissive inferences depending on its view of the Evidence.

and the States whole contention/case was an example of expressed malice / permissive inference therefore the malice charge and example given by the Trial Judge was Prejudicial; lying in wait; acts of preparation only even more prejudicial to petitioner whenever Trial Judge improperly gave his malice instruction in violation of Petitioner's Constitutional rights; The Malice instruction given to his Jury was a violation of his Due Process rights and effective Assistance of Counsel because Attorney failing to Object to the Malice charge which prejudiced Petitioner as the instruction constituted a mandatory presumption rather than a permissive Inference

see: Flowers v. Blackburn, Cite as 779 F. 2d 1115 (5<sup>th</sup> Cir. 1986)

see also: Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L. Ed. 2d 39 (1979)

see: State v. Peterson, Cite as 335 S.E. 2d 800 (S.C. 1985)

State v. Woods; 316 S.E. 2d 673; 282 S.C. 18,

State v. Lewellyn, 314 S.E. 2d 326, 281 S.C. 199 (1984)

State v. Elmore, 279 S.C. 417, 308 S.E. 2d 781 (S.C. 1983)

State v. Belcher, Opinion No. 26729 Oct. 12, 2009

Because the Evidence presented a jury question on Self-Defense. Petitioner asserts it was error to charge the jury that it may infer malice from the use of a deadly weapon, since there was Evidence presented that would reduce, mitigate, excuse or justify the alleged Homicide. See: S.C. Const. Art. V. § 21

Mullaney v. Wilbur, 421 U.S. 684, 703-04 (1975)

under see: generally: Teague v. Lane, 489 U.S. 288 (1989)

Petitioner submits that his Facts to his case fall within the (two) Exceptions of Generally: (1) the new interpretation places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe or places a certain category of punishment for a class of defendants because of their status or offense beyond the power of the criminal law-making authority to proscribe, or (2) the new interpretation significantly improves the pre-existing fact finding procedures which implicate the fundamental fairness of the Trial and without which the likelihood of an accurate conviction is seriously diminished.

see: Yates v. Aiken, Cite as 108 S.Ct. 534 (1988)

see also: Francis v. Franklin, Cite as 105 S.Ct. 1965 (1985)

see: Morissette v. United States, 72 S.Ct. 240, 255, 96 L.Ed. 288 (1952)

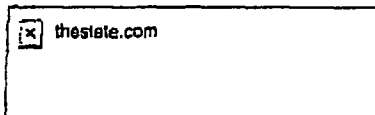
see: Patterson v. New York, 97 S.Ct. 2319, 2329, 53 L. Ed. 2d 281 (1977)

see: Strickland v. Washington, 466 U.S. 668, 695, 104 S.Ct. 2052, 2068, 80 L.Ed. 2d 674 (1984)

see: In re Winship, [397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L. Ed. 2d 368 (1970)].

Wherefore the Applicant respectfully ask that his Conviction be reversed as a Matter of Clearly Established Federal Law and a Matter of State Law and Constitution to the United States; Due Process; S.C. Constitution. Grant of New Trial

FORTIOR  
EXHIBIT



Back to web version

Wednesday, Oct 28, 2009

Posted on Tue, Oct. 13, 2009

## New trial sets precedent

By SEANNA ADCOX  
The Associated Press

The S.C. Supreme Court on Monday overruled decisions on more than two-dozen murder and assault cases dating to 1894 when it ordered a new trial for a 42-year-old man convicted of killing his cousin.

In overturning the 2006 murder conviction of Johnny Rufus Belcher, the high court set a precedent for cases involving weapons and self-defense arguments. Belcher is serving a 30-year sentence in the Memorial Day 2004 shooting death of Fred Suber, who was shot and killed during a family cookout in Laurens County.

The jury could have chosen murder, voluntary manslaughter or self-defense. The high court said the jury was inappropriately told it could infer the death involved malice because a gun was used.

Defense attorney Rauch Wise argued it's an unfair assumption when both people are armed.

The high court agreed, saying the malice inference should no longer be used when the defense gives evidence that, if believed, would justify the actions of someone charged with murder or assault and battery with intent to kill.

"It has long been the practice for trial courts in South Carolina, as sanctioned by this court, to charge juries in any murder prosecution that the jury may infer malice from the use of a deadly weapon," Justice John Kittredge wrote in the unanimous decision.

But after reviewing historical cases, the justices found it "is no longer good law in South Carolina where evidence is presented that would reduce, mitigate, excuse or justify the homicide."

The decision listed 25 known cases between 1894 and 2006 that it overrules.

The justices note the decision applies to cases pending on appeal or not yet final. None of those 25 cited cases have an appeal pending, said Mark Plowden, a spokesman for Attorney General Henry McMaster.

The state's high court noted Belcher's 2006 trial revealed conflicting versions of what happened.

Prosecutors argued that after Belcher intervened in an argument between Suber and another man at the cookout, Belcher got a gun from that man and fatally shot Suber without justification.

But Belcher's defense presented evidence that after the argument was settled, Suber confronted Belcher with a pistol, and Belcher then ran to the other man's truck to get a gun and fired it as Suber was approaching, gun in hand.

Wise said the case "quickly illustrates" the unfairness of implied malice. He said the ruling Monday puts the state "back on track" with court rulings from more than a century ago.

"When you have a case in which both people are armed with a firearm, why is the jury told they can infer malice from use of the defendant's weapon only?" he said.

He said the ruling won't affect the overwhelming majority of cases involving firearms, but he called it significant for attorneys with self-defense cases, because the jury won't be told upfront to infer malice.

But it's still the jury's job to decide whether a case is murder or self-defense.

"It's not an opinion that makes the government's job insurmountable either," Wise said. "If self-defense is not proven, the state can still get a conviction."

Jerry Peace, the lead prosecutor for Abbeville, Greenwood, Laurens and Newberry counties, said he will likely try Belcher again next year. He called the opinion a "big change."

Previously, in any case involving a shooting, judges granted prosecutors' request that the jury be told they can infer malice.

"We can always argue the fact they used a weapon shows malice," he said. "What it does is prohibits the judge from giving the instruction."

© 2009 TheState.com and wire service sources. All Rights Reserved. <http://www.thestate.com>

The Belcher decision overruled decisions on more than two-dozen murder and assault cases dating to 1894 and 2006 and the decision listed 25 known cases between that time frame and none of those 25 cases had a pending Appeal or not yet final said Mark Plowden, a spokesman for the Attorney General Henry McMaster.

#### CONCLUSION

WHEREFORE, the Applicant respectfully ask for the Grant of New Trial for all of the issues complained of in this Application and Memorandum of Law in Support of. It's clear by the Facts and Arguments and the Record / Trial Transcript that the Applicant was denied his Protected 6<sup>th</sup> Amendment Rights under the United States Supreme Court Clearly Established Law and United States Constitution and South Carolina Constitution and the Right to Due Process of Law.

Respectfully Submitted,

15/ Nathaniel McGee

Nathaniel McGee, # 333 534.

Applicant pro se

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
 COUNTY OF CHARLESTON )  
 ) C/A No. \_\_\_\_\_  
 )  
 Nathaniel McGee, # 333534 )  
 ) Applicant, ) MOTION TO ADDRESS ALL  
 ) vs. ) ISSUES PRESENTED Pursuant  
 ) State of South Carolina ) TO: S.C. Code Ann §17-27-80  
 ) Respondent, )  
 )

Comes Now, Nathaniel McGee, # 333534, who respectfully asks this Honorable Court to direct the Attorney General's office to Address [all] issues presented, Pursuant to S.C. Code Ann §17-27-80, as decided by the South Carolina Supreme Court in Prait V. State, 423 S.E. 2d 127. That each and every issue presented be Addressed at any P.C.R. Hearing that is held according to Bryson V. State, 493 S.E. 2d 500 (1997).

Petitioner further asks that each and every issue raised herein be Addressed by the Court, at any hearing that is held and that this Court direct that all issues be Addressed in Order issued by this Court.

For the requested, Petitioner respectfully prays.

Respectfully Submitted,  
 /s/ Nathaniel McGee  
 Nathaniel McGee, # 333534  
 Applicant pro se

STATE/ OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
 COUNTY OF CHARLESTON )  
 ) C/A NO. 2012-CP-10-3986  
 Nathaniel McGee, # 333534 )  
 Applicant, )  
 vs. )  
 State of South Carolina, )  
 Respondent, )

CERTIFICATE  
 OF  
 SERVICE

FILED  
 2012 JUN 19 AM 10:33  
 JULIE A. ALLEN  
 CLERK OF COURT

I Nathaniel McGee, # 333534, herein, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing Attachment to 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 and was also mailed along/ attached to application for Post-Conviction Relief; on the date of notary.

SWORN TO AND SUBSCRIBED before me  
 On this 14<sup>th</sup> day of June, 2012  
 s/ Ludreen Bennett  
 Notary Public for South Carolina

s/ Nathaniel McGee  
 Nathaniel McGee, #333534  
 Applicant

MY COMMISSION EXPIRES: May 26, 2020

Verbatim Copy/File

Julie S. Armstrong, Clerk of Court  
 Charleston County Clerk's Office  
 100 Broad Street suite 106  
 Charleston, S.C. 29401-2258

June 14, 2012

Re: PCR Application

Dear Mr. Armstrong,

Enclose is a PCR Application to be filed in your office. Please forward back to me the case number in this case of action. Thank you for your assistance, I am

Sincerely,

Nathaniel Meeker  
 Nathaniel Meeker #333534  
 Lieber Corr. Inst.  
 Post Office Box 205  
 Ridgeville, S.C. 29472

STATE OF SOUTH CAROLINA	)	IN THE FAMILY COURT
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	
Nathaniel McGee,	)	CASE NO. 2012-CP-10-3986
	)	
APPLICANT,	)	
	)	
VS.	)	TRANSCRIPT OF RECORD
	)	
State of South Carolina.	)	
	)	
	)	

July 23, 2013

Charleston, South Carolina

B E F O R E:

The Honorable Deadra L. Jefferson

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

Jessica L. Means, Esquire  
for the Applicant

Ashleigh R. Wilson, Esquire  
for the State

I N D E X

PCR Hearing -- 4

W I T N E S S E SAPPLICANT WITNESSES:James Watson Smiley, IV

Direct Examination by Ms. Means -- 4

Cross-Examination by Ms. Wilson -- 24

Redirect by Ms. Means -- 38

Laree Hensley

Direct Examination by Ms. Means -- 40

Nathaniel McGee

Direct Examination by Ms. Means -- 46

Cross-Examination by Ms. Wilson -- 52

STATE WITNESSES:James Watson Smiley, IV

Recall Examination by Mr. Wilson -- 57

CERTIFICATION OF TRANSCRIPT -- 62

Look for an original signature in blue ink on the certification sheet to verify that the court reporter has certified the transcript you are viewing.

If you need an additional copy of this transcript or a sealed transcript or if opposing counsel requires a copy of the transcript, you should contact the court reporter.

Certification will satisfy Rule 80, Stenographic Report of Transcript as Evidence.

E X H I B I T S

<u>COURT NO.</u>	<u>DESCRIPTION</u>	<u>MARKED</u>
1	North Charleston Police Dept Statement of T. Wright	57

1 THE COURT: This is Nathaniel McGee versus the State.  
2 2012-CP-10-3986. The applicant is represented by Jessica  
3 Means. The State is represented by Ashleigh Wilson. Is the  
4 applicant ready to proceed?

5 MS. MEANS: Yes, Your Honor.

6 THE COURT: Is the State ready to proceed?

7 MS. WILSON: Yes, Your Honor.

8 THE COURT: You may proceed.

9 MS. MEANS: Thank you, Your Honor.

10 THE COURT: You are welcome.

11 MS. MEANS: May it please the court. I call James  
12 Smiley to the stand.

13 THE COURT: Mr. Smiley, if you would come to the stand.  
14 (Whereupon, witness was duly sworn.)

15 THE CLERK: Please state your full name, spelling your  
16 last name for the record.

17 MR. SMILEY: James Watson Smiley, IV; S-M-I-L-E-Y-I-I.

18 THE COURT: You may proceed.

19 JAMES WATSON SMILEY, IV, having  
20 first been duly sworn, testified as follows:

21 **DIRECT EXAMINATION BY MS. MEANS OF MR. SMILEY:**

22 Q. Good morning, Mr. Smiley.

23 A. Good morning.

24 Q. Do you know my client, Mr. McGee?

25 A. Certainly.

1 Q. And you -- he was retained by you to represent him in  
2 the underlying case?

3 A. I was retained, yes.

4 Q. And were you the attorney involved at the jury trial  
5 during jury trial selection?

6 A. I was.

7 Q. After the jury was selected, was there a day break in  
8 between?

9 A. (No response.)

10 Q. In between the trial commencing and after the jury was  
11 selected?

12 A. I vaguely recall that.

13 Q. Okay. Do you recall having a colloquy with Judge  
14 Harrington about being in a trial the day before jury  
15 selection?

16 A. Certainly. I know I came out of a five-day trial right  
17 before Nathaniel's case.

18 Q. And you had that break after jury selection in order  
19 to give you some time before you began Mr. McGee's trial?

20 A. Right. Basically to flush out what I had just finished  
21 doing and make sure I had everything in order in my head for  
22 Nathaniel's case.

23 Q. Thank you. Did you interview any witnesses pursuant to  
24 your client's instructions; did he offer any witnesses for  
25 you to investigate?

1 A. We talked about Terrell Wright in some detail. I spoke  
2 with Fredrick McCoy in some detail. That would be -- I  
3 spoke with Tiffany Jenkins prior to trial but not till  
4 trial. But that would be the extent of the people I spoke  
5 to.

6 Q. And at any time did Mr. McGee talk to you about Mr.  
7 Wright testifying on his behalf in his defense?

8 A. Yes, he did.

9 Q. And you chose not to use him?

10 A. That was a tactical decision.

11 Q. But he was present -- you had subpoenaed him or you had  
12 him present ---

13 A. He was available to testify, yes.

14 Q. Thank you.

15 THE COURT: What was that witness's name? I'm sorry.

16 MR. SMILEY: Terrell Wright.

17 THE COURT: Thank you, sir.

18 BY MS. MEANS:

19 Q. And did you have an opportunity to read Mr. Wright's  
20 statement?

21 A. I'm familiar with his statement. Yes.

22 Q. And just for the record, the statement would have been  
23 the one to the North Charleston Police Department?

24 A. Detective Elmore, I believe it was that Terrell had  
25 talked about being at the drag strip earlier and coming to

**THIS PAGE INTENTIONALLY  
LEFT BLANK**

1 Club Fantasy with Nathaniel, separate cars parked in  
2 separate places. It was in the parking lot when Nathaniel  
3 approached the door. When the shots started firing, he also  
4 produced a gun, fired it. He told Detective Elmore that he  
5 fled the scene and I think he told him that he discarded the  
6 gun in the reservoir off of North Rhett. And Detective  
7 Elmore did a cursory search for the gun and was able to find  
8 it.

9 Q. And you indicated you spoke to Mr. Wright on one  
10 occasion?

11 A. To the best of my recollection that I did.

12 Q. And off of that one meeting and despite your client's  
13 opposition to your position in having Mr. Wright present,  
14 you chose not to have Mr. Wright testify on your client's  
15 behalf at the trial?

16 A. That's correct.

17 Q. Did you review the evidence that was presented --  
18 discovery rather, the discovery process, was that presented  
19 to you by the solicitor's office?

20 A. Certainly.

21 Q. And that was you had an opportunity to review that well  
22 before your trial?

23 A. Absolutely. I had spoken with Nathaniel about the case  
24 in detail before the trial.

25 Q. And did you go and see him and review the evidence?

1 A. Certainly.

2 Q. Do you recall what you reviewed with him?

3 A. I went over the self defense case. A lot of the case  
4 that -- of the self defense case was going to be presented  
5 by prior difficulties that had occurred with the victim, so  
6 we talked about that in detail.

7 As the case that they presented, I talked to him about  
8 the video. I talked to him about the two young ladies that  
9 were going to be possibly called. I talked to him about the  
10 cousin, Fredrick McCoy, in the car and what he would say.  
11 And then I talked to Nathaniel about what he would say. And  
12 so we went over the case, yes.

13 Q. But the physical evidence that rather in the  
14 discoverable information that was given to you, did you go  
15 through that with Mr. McGee?

16 A. Page by page, no.

17 Q. Do you recall there being a video?

18 A. Yes.

19 Q. What was on that video?

20 A. Not a lot. It was a very poor video. Not much could  
21 be seen on that video. It was left to interpretation. I  
22 thought the video was fairly worthless.

23 Q. And did you review that video with Mr. McGee?

24 A. No, I did not.

25 Q. The first time Mr. McGee saw that video was during his

1 trial, correct?

2 A. That's correct.

3 Q. And as you stated, it was unclear what was on the  
4 video?

5 A. It was indecipherable by anyone, whether you were  
6 present or not.

7 Q. You couldn't make out any individuals, any vehicles in  
8 the video?

9 A. You could make out some vehicles. Of course I knew  
10 which vehicles were which. You could not see Nathaniel's  
11 car. His car was parked in the back of the lot.

12 Q. And was the video in color or black and white?

13 A. It was pretty much black and white. It was very washed  
14 out, real scratchy. You could see the car that the decedent  
15 was in come into the lot. So you could not make the  
16 identities of anybody off the video.

17 Q. And it was not a very well lit parking lot, correct?

18 A. That's correct.

19 Q. However, you didn't object to the admission into  
20 evidence of this video when the solicitor offered it for  
21 evidence?

22 A. Not to the video itself, no.

23 Q. And the solicitor used this video during his closing  
24 argument, correct?

25 A. He did.

1 Q. And the solicitor gave a play by play of his own  
2 personal depiction of what was on that video, correct?

3 A. That's correct.

4 Q. And also during the closing by the solicitor, you did  
5 not make any objections?

6 A. No. And in retrospect, in reviewing the transcript and  
7 reading over it, I had fought with Mr. Voight during the  
8 presentation of evidence about his depiction of what was in  
9 the video. He in fact had made a written transcript, for  
10 the lack of a better word, of what he thought the video  
11 depicted and I had argued against that. And that wasn't  
12 allowed.

13 However, Mr. Voight at that point in time basically  
14 just turned that written interpretation into an oral  
15 dissertation to the jury and I did not object.

16 And in retrospect, this is a real close case. All of  
17 our decisions that we made in this case were to get an  
18 acquittal, and we thought -- I thought that we had  
19 successfully done that before the jury came back.

20 So being such a close case and given the fact that Mr.  
21 Voight's oral description was damning, I probably --- not  
22 probably, I should have objected in closing. I did not.

23 Q. Now let's discuss your opening statement. During the  
24 trial you mistakenly called your own client by the victim's  
25 name, correct?

1 A. Wouldn't be the first or the last time in my 20 years  
2 of doing it. But I think it was --- I didn't realize I had  
3 done it at the time and didn't do it intentionally.

4 Q. And not only had you done it one time mistakenly, it  
5 was done multiple times throughout the trial; correct?

6 A. About three times, four times. Yeah.

7 Q. And your client addressed this with you?

8 A. Yeah, he did. And I --- I mean, lots of names go on  
9 but if I put the wrong name. But it's certainly that the  
10 jury knew who I was speaking of when I made my reference.  
11 Did I correct it on the record, no.

12 Q. Now let's discuss the jury charges. You were going to  
13 have Judge Harrington instruct the jury on voluntary  
14 manslaughter at one point during the trial, correct?

15 A. We had discussed it, yes.

16 Q. And at the end of presentation of evidence you changed  
17 your mind and you did not have her instruct; you only had  
18 her instruct on self defense

19 A. I did not request a voluntary or an involuntary charge.

20 Q. However there was evidence to support a voluntary  
21 manslaughter charge, correct?

22 A. A jury could have found some evidence that a voluntary  
23 manslaughter, yes.

24 Q. And during the judge's presentation of the self defense  
25 charge there were some references made that almost shifted

1 the burden to your client and you made no objections, did  
2 you?

3 A. Yeah, I didn't notice that until Nathaniel in his brief  
4 pointed it out, in his PCR brief, Your Honor. And it does  
5 make reference to the fact that in the jury charge it shifts  
6 the burden. And I didn't object. And I think it is a  
7 misstatement of the law.

8 THE COURT: Which is? I need you to be specific and  
9 tell me what it is you are referring to.

10 MR. SMILEY: And I am going to tell you which argument  
11 he is referring to in his PCR application, Your Honor.  
12 Because I think he --- actually did a pretty good job of it.  
13 And it's on Page 29 of his application, Your Honor,  
14 Argument 8.

15 And it said I was ineffective for failing to object to  
16 the self defense instruction that impermissibly shifted the  
17 burden and in the -- in the self defense charge. And I  
18 assume he is taking that from the transcript direct.  
19 Because I did not go back and check it but ---

20 THE COURT: Did you actually read the charge? When you  
21 say in hindsight you should -- and I apologize. I will let  
22 you get back on track.

23 MR. SMILEY: But, Your Honor ---

24 THE COURT: When you say that you in hindsight you  
25 should have objected, did you actually read the charge from

1 the transcript or are you just going on what he says in his  
2 document?

3 MR. SMILEY: I'm reading what he has in his argument,  
4 number eight. I have not gone back to the trial transcript.  
5 But I can do that now if you'd like.

6 THE COURT: Yeah, ---

7 MR. SMILEY: Yes, ma'am.

8 THE COURT: --- I think any testimony should be based  
9 on ---

10 MR. SMILEY: Sure.

11 THE COURT: --- the actual record, not his  
12 interpretation.

13 MR. SMILEY: Well, he did a good job. Four  
14 forty-six ---

15 MS. MEANS: Lines two through five.

16 MR. SMILEY: I've got it.

17 MS. MEANS: Thank you.

18 MR. SMILEY: Your Honor, I'm looking at Page 446 of the  
19 trial transcript starting on Line 2. And it does say: The  
20 defendant has raised the defense of self defense. Self  
21 defense is complete defense. And if - and this is the key  
22 words - and if established, you must find the defendant not  
23 guilty.

24 THE COURT: That's our standard instruction.

25 MR. SMILEY: Well ---

1 THE COURT: Doesn't the end of it say that the State  
2 must disprove self defense beyond a reasonable doubt and  
3 that's their burden?

4 MR. SMILEY: Yes, ma'am. And the next line, 6 through  
5 12, does say the burden of disproving self defense by proof  
6 beyond --- the State has the burden. If you have a  
7 reasonable doubt, you must find them not guilty. But the  
8 statement that ---

9 THE COURT: But that is straight out of South  
10 Carolina's Supreme Court ---

11 MR. SMILEY: Yes, ma'am, I'm just telling you that is  
12 that line that if it is established is -- that's ---

13 THE COURT: Well, he does have to establish it. It is  
14 an affirmative defense.

15 MR. SMILEY: We have to raise it. Yes, ma'am.

16 THE COURT: You have to raise it, but you have to  
17 present some evidence of it and then it's the State's burden  
18 to disprove it. The defendant doesn't have any burden. But  
19 if established doesn't mean he has to establish it. It just  
20 means if established.

21 MR. SMILEY: Yes, ma'am. I'm not disagreeing with you.  
22 I'm just saying that when he presented the argument that  
23 says if it is established, I agree we have to present the  
24 evidence. And in this case ---

25 THE COURT: Well, not necessarily. It could come up in

1 any context. It could come up during the direct examination  
2 of a state -- by a state. Self defense comes up in many  
3 contexts. It doesn't ---

4 MR. SMILEY: Quite frankly, in this case is through the  
5 cross-examine of the nation of the State's witnesses. This  
6 case --- my opening argument, as I told Nathaniel, shot the  
7 person, that this was a self -- self defense case. It was  
8 whether it was a justified homicide or not.

9 So we started from the very beginning with that. And  
10 there was ample evidence in the record that we raised the  
11 issue. And reading his argument, I'm not -- I can't  
12 disagree with him that if it is established is if that -- I  
13 don't know if that's correct.

14 THE COURT: It's a correct statement ---

15 MR. SMILEY: Yes, and I'm not the judge, Judge -- Your  
16 Honor. I'm just telling you that ---

17 THE COURT: This standard is straight from the Supreme  
18 Court precedent.

19 MR. SMILEY: Yes, ma'am.

20 THE COURT: Because self defense can be -- and I'm just  
21 jumping in to track it just because I want to be clear about  
22 what you're saying. Because hindsight is a funny thing.  
23 Things can look different in hindsight than they actually  
24 are. But self defense can be raised in the context of the  
25 defendant's statement that the State introduced. The

1 defense doesn't have to say anything.

2 MR. SMILEY: Well, yes, ma'am. Once it's raised ---

3 THE COURT: It can be raised by anybody.

4 MR. SMILEY: Your Honor, I am not disagreeing with you  
5 in this case.

6 THE COURT: No, I just wanted clarity on your  
7 testimony.

8 MR. SMILEY: And believe me, this case -- I've done  
9 plenty of armchair-quarterbacking because I thought  
10 Nathaniel -- we had presented quite a good self-defense  
11 case.

12 THE COURT: You may continue. And you can ask any  
13 questions as a result of my questions if you feel it's  
14 necessary.

15 MS. MEANS: Thank you, Your Honor.

16 THE COURT: You're welcome.

17 BY MS. MEANS:

18 Q. Let's go back to the witnesses that you had  
19 interviewed. Did you receive -- excuse me. Retract that.  
20 You have received a copy of Terrell Wright's statement,  
21 correct?

22 A. Yes. It did ---

23 Q. You did get to look at that?

24 A. Yes.

25 Q. And the other individuals that you named, I think ---

1 A. Sierra Smith, she didn't --- she was not present for  
2 trial. I don't know that they were asked to produce her.

3 Q. Did she provide a statement?

4 A. She did at the time of the incident. She basically --  
5 she put an I.D. on Nathaniel but didn't see the shooting.  
6 It was Ms. Tiffany Jenkins I believe is the other young lady  
7 is she couldn't I.D. Nathaniel but then again said that that  
8 person that was in that position fired the gun. That's my  
9 recollection of it.

10 She had trouble pointing Nathaniel out and saying  
11 that's the fellow that shot the gun from my --- or pulled  
12 the gun. That's my recollection.

13 Q. Thank you. So you had statements from Tiffany Jenkins,  
14 Sierra Smith, and Terrell Wright; correct?

15 A. Certainly.

16 Q. And those were never given to my client before trial?

17 A. I don't provide copies of discovery to my clients in  
18 the jail for a number of reasons, a jailhouse snitch being  
19 high on the list, especially when I know it's a trial.

20 I had discussed their testimony. Had I provided one or  
21 said hey, read over exactly what they say; no, I did not. I  
22 didn't know that it was necessary. I had a pretty good idea  
23 how this case should -- was going to be presented. I didn't  
24 see those as our problems. Actually I thought the case went  
25 quite well. I thought our problem was getting the prior

1 difficulties in. As it turned out, we were able to get all  
2 of that in. And so that's where our focus was.

3 Because none of the witness by themselves would  
4 exonerate Nathaniel nor would they inculcate him. They were  
5 all incomplete.

6 Q. Did you ever go to the jail that he was incarcerated in  
7 to view the evidence with him so you didn't have to worry  
8 about a jailhouse snitch?

9 A. Yes. I sat down with Nathaniel at the jail several  
10 times and went through this is our case, this is the State's  
11 case.

12 And every case I did is I ask my client at the  
13 beginning very little. I get the discovery from the State.  
14 I read through it. I summarize and find what is pertinent.  
15 I go out to the jail. I sit down and say here is their  
16 case. So I have the discovery. I talk about what their  
17 case is. And then he and I talk about our possible  
18 defenses.

19 And he --- I asked him some pointed questions that I  
20 needed some answers to. And that's how I go about preparing  
21 a case.

22 Q. Let's go back to the closing statement by the  
23 solicitor. During his closing statement he made a number of  
24 references to the jury, you, your; but you didn't make any  
25 objections to any of that, did you?

1 A. In retrospect it was a mistake. It was -- I mean one  
2 of the founding things that we're taught from the beginning  
3 is that when you make an argument to the jury you can't ask  
4 them to take the shoes of the victim.

5 And in fact in reading back through the transcript, it  
6 appears that Mr. Voight on several times asked him to, and I  
7 did not object.

8 And like at the beginning, as I said, this was a really  
9 close case. So I think any of those things could have been  
10 unduly prejudicial to Mr. McGee. I should have objected and  
11 did not.

12 THE COURT: What page specifically are you referring  
13 to, Ms. Means?

14 MR. SMILEY: If you will give me -- give me -- or Ms.  
15 Means, the ---

16 MS. MEANS: I'm sorry. I have the CD version.

17 MR. SMILEY: I've got it. I've got it.

18 MS. MEANS: So I think my page numbers might be  
19 different.

20 MR. SMILEY: Do you have his applications? Because it  
21 helps me get to the transcript.

22 THE COURT: I do, but ---

23 MR. SMILEY: Okay.

24 THE COURT: ---I want -- I've read it, but I need to  
25 know ---

1 MR. SMILEY: Yes, ma'am.

2 THE COURT: I need the record to be clear exactly where  
3 in the transcript you are referring to.

4 MR. SMILEY: He does it in several different pages. It  
5 starts on Page 1, trial transcript, Page 125, I believe.

6 MS. MEANS: Line 23.

7 MR. SMILEY: Yeah. Trial transcript, Page 125,  
8 Line 23. Let me make sure. I've got to find it, Your  
9 Honor, because that's not quite matching up. Those don't  
10 match up and so I'm going to have to look at the trial  
11 transcript for a moment.

12 MS. MEANS: That's fine.

13 MR. SMILEY: If you could help me, Ms. Means, it sure  
14 would be good.

15 MS. MEANS: And, Your Honor, if it would help the Court  
16 and the witness, I believe it is Volume 3 of 3.

17 MS. WILSON: They have like higher numbers on the top  
18 right corner because this came from the record on appeal.  
19 So it would be like in the 400's. And then the bottom  
20 number ---

21 MR. SMILEY: Thanks.

22 MS. WILSON: --- that's in the 100's is the actual  
23 volume.

24 MR. SMILEY: I got you.

25 THE COURT: My question is ---

1 MR. SMILEY: Yes, ma'am.

2 THE COURT: It's not for my benefit. I need the record  
3 to be clear.

4 MR. SMILEY: I ---

5 THE COURT: You can't make a generalized statement that  
6 he made those statements ---

7 MR. SMILEY: Yes, ma'am.

8 THE COURT: --- when it's specifically in the record  
9 where he said it.

10 MR. SMILEY: Four eleven at the top, one twenty-five at  
11 the bottom of the trial's transcript, Line 23. It starts --  
12 that's the starting of his closing argument on where it just  
13 says here we are at Club Fantasy. I don't think -- and then  
14 he goes on, Page 127, Lines 21 and 22; and it's and you take  
15 notice that even though nobody testified to it, you can  
16 test; and then it goes to 128.

17 THE COURT: But aren't they the fact finders? They are  
18 supposed to do that. That's not -- you are talking about  
19 more of a -- and I've -- because I've read the transcript,  
20 and I'm just trying to be clear as to what it being  
21 testified to.

22 Because when you say put your shoes -- put yourself in  
23 the shoes of the victim, normally what you are saying is to  
24 the juror put yourself in his shoes. And I wanted to make  
25 sure. Because I was knew I hadn't read that any place in

1 this transcript. When you say, however, to a jury, you as  
2 the fact finders it is your responsibility to interpret the  
3 evidence.

4 MR. SMILEY: Right.

5 THE COURT: There's nothing. And I just wanted to make  
6 sure that I had not ---

7 MR. SMILEY: But if I ---

8 THE COURT: --- missed something in the transcript.

9 MR. SMILEY: --- could go a little bit further, Your  
10 Honor. On Page 128, Lines 8 through 10: S when you go to  
11 Club Fantasy and you park your car --- and that - let me  
12 make sure I get the exact.

13 THE COURT: When you get to look at it, you get ---

14 MR. SMILEY: Yes, ma'am.

15 THE COURT: --- to determine if this matches.

16 MR. SMILEY: One ---

17 THE COURT: The top at Line 5?

18 MR. SMILEY: On Line 8, 128: So when you go to Club  
19 Fantasy and you park your car in the back lot and you don't  
20 feel comfortable that your car is safe from all the burglars  
21 that would be later identified based on the quality of this  
22 because this isn't going to be good enough I'm going to  
23 speculate now that being a human being ---

24 THE COURT: It says I'm willing to speculate now that  
25 that's a human being, all right.

1 MR. SMILEY: Yes, ma'am. I put in ---

2 THE COURT: That that ---

3 MR. SMILEY: -- the wrong emphasis.

4 THE COURT: That that human being is most likely  
5 Nathaniel McGee but that's just me speculating.

6 MR. SMILEY: One thirty-one, line five. Right up here,  
7 you -- you have people, I believe they're people.

8 THE COURT: Well, he's talking about the video. And he  
9 is referring to the poor quality of the video. And he is  
10 saying -- I would have to assume he is gesturing toward the  
11 vehicle saying right up here you have people, I believe  
12 they're people.

13 MR. SMILEY: Yes, ma'am. And he follows on again 138,  
14 Lines 14 -- 136, excuse me. Lines 14 and 15. He doesn't -  
15 and it's starting on Line 12. He doesn't think that  
16 Nathaniel would be his killer. I should be afraid of you  
17 because you have got a gun, you better use it. That's what  
18 he said. That's what Jamie said.

19 THE COURT: That's about him speculating - I mean him,  
20 his position on what the facts were as they developed at  
21 this incident; isn't it?

22 MR. SMILEY: Yes, ma'am ---

23 THE COURT: He's not asking the jury to put themselves  
24 in ---

25 MR. SMILEY: And my whole -- when asked the question,

1 Your Honor, my point is this: At the time that it was  
2 happening, I did not believe that he was placing himself in  
3 the shoes of asking the jurors to place themselves in the  
4 shoes of the victim.

5 However, in retrospect in reading everything and you  
6 take the cumulative effect, if I should have objected, I did  
7 not.

8 I look at it and understand the position of Mr. McGee.  
9 And because it was such a close case, I'm saying if I should  
10 have objected and didn't, then I made a mistake. That's all  
11 I'm saying.

12 I did not object. At the time that it was being  
13 argued, I thought it to be argument. I would have objected,  
14 of course, if I thought it was inadmissible as it was going.

15 This was Monday morning quarterbacking. And I -- I'm  
16 just telling you, if I should have, it was such a close case  
17 all of these things could have tilted it one way or another,  
18 Your Honor. That's all I'm saying.

19 THE COURT: You may continue.

20 MS. MEANS: Thank you, Your Honor. I believe that's  
21 all the questions I have for this witness, Your Honor.

22 THE COURT: Any questions from the State?

23 MS. WILSON: Briefly, Your Honor.

24 **CROSS-EXAMINATION BY MS. WILSON OF MR. SMILEY:**

25 Q. Mr. Smiley, about how long have you been practicing

- 1 law?
- 2 A. Twenty years.
- 3 Q. And has a big chunk of that been in criminal law?
- 4 A. About ninety-nine percent of it.
- 5 Q. And you said you were retained to represent Mr. McGee?
- 6 A. Yes, ma'am, I was.
- 7 Q. And about how many times do you recall meeting with him
- 8 before y'all went to trial?
- 9 A. He was in jail for a good while. About a dozen times.
- 10 Q. And did you file the Brady Rule 5 motion for his
- 11 behalf ---
- 12 A. Certainly. Yes. He was initially appointed a public
- 13 defender, Ms. Jennifer Shealy, who actually did the
- 14 preliminary hearing in this case. And I picked it up right
- 15 after that.
- 16 Q. And you said -- you testified today that you reviewed
- 17 all the discovery to your -- Mr. McGee?
- 18 A. Yeah. I thought we tried a really good case.
- 19 Q. Okay. And prior to trial did you discuss the elements
- 20 of the charges -- the charge he was facing and what the
- 21 State had to prove?
- 22 A. We talked mostly about what we had to raise and what
- 23 they had to disprove in self defense; but, yes.
- 24 Q. And did you discuss with him his version of the facts?
- 25 A. Oh, from day one, yeah. His version of the facts on

1 the night of aren't a whole lot in dispute. The only thing  
2 Nathaniel did not know is if he actually shot him. He talks  
3 about reaching in his back pocket and pulling out the gun,  
4 of Jamie getting out, the fellow he had had the prior  
5 difficulties with, getting out and reaching under his  
6 pulled-out tee shirt. That really wasn't disputed. And it  
7 wasn't even really disputed by the State.

8 Nathaniel just can't say I shot him, per se. He knew  
9 he fired a weapon. But there were lots of shots that went  
10 off. And it was a pretty chaotic scene.

11 And it didn't help matters that Mr. McCoy and the  
12 fellows in the car cleaned the scene and left or at least  
13 left before the police arrived. And as I argued they  
14 cleaned the scene. But it's not in dispute what Nathaniel's  
15 position was from day one.

16 Q. Okay. Well, did you discuss any other defenses with  
17 Mr. McGee other than self defense?

18 A. No, because I didn't see that we really had any other  
19 defenses in the case. I thought we had a good one though.

20 Q. Can you briefly characterize the evidence that the  
21 State presented against him at trial?

22 A. Well, the State presented at trial that on the night of  
23 the incident at Club Fantasy that a car pulled up --- well,  
24 let me back up a little bit. That they were at the drag  
25 strip, they being Nathaniel and Terrell Wright. And the

1 decedent and some other people were there. Tensions were  
2 high.

3           They went --- Nathaniel and Terrell got in separate  
4 cars and went to Club Fantasy. Nathaniel parked in the back  
5 of the lot. Terrell parked in another part of the lot.  
6 Nathaniel told me from the beginning that he had pretty  
7 much -- that he was going to the door and as he was walking  
8 in the door -- and his purpose for walking in the door was  
9 to check on what the cover was going to be that night.

10           As he was pulled to the door, a sedan, tinted windows,  
11 pulled up to the front. The fellow in the backseat said  
12 something to the effect, hey, come here, kind of thing.  
13 Nathaniel at the time did not realize it was Jamie Reed. As  
14 he approached, the back door opens. As Jamie gets out --  
15 and this is the fellow that we had -- we were able to get  
16 the testimony about the prior difficulties.

17           And the prior difficulties, Judge, that we were able to  
18 get out, and actually had been documented by the police, is  
19 that Nathaniel had been kidnapped, dragged in the woods by  
20 Jamie Reed, Jamie Reed's brother and two to three Jamaicans  
21 and held at gunpoint and threatened over an alleged break-in  
22 at Jamie Reed's house that Nathaniel says he didn't have any  
23 part of.

24           As a result of those prior difficulties, Nathaniel got  
25 a gun. He didn't feel safe. Nobody was arrested as a

1 result of that incident. But he reported it. And so there  
2 were some prior difficulties heightened by the drag strip  
3 earlier that night.

4       When Jamie got out and reached, he believed him -- and  
5 Nathaniel and I had spoken about this in detail, that he was  
6 reaching for a gun. And Nathaniel pulled out his weapon and  
7 pointed it at Jamie.

8       His weapon certainly fired, but all kinds of weapons  
9 start -- then start going off or simultaneously start going  
10 off.

11       The witness, Terrell Wright, that I did not call to the  
12 stand -- one of the reasons I didn't call him to the stand  
13 is because Terrell fired a weapon in the parking lot that  
14 night, which means he had had that weapon before he arrived.  
15 And since he had been with Nathaniel at the drag strip, I  
16 certainly didn't think it helped our self defense case to  
17 say that Terrell and Nathaniel were walking around as a  
18 posse armed beforehand. And so tactically -- and because  
19 Nathaniel did an extraordinary job testifying in his own  
20 defense, I believed, I decided I would not give the State an  
21 opportunity to impugn Mr. Reed's testimony by calling  
22 Terrell.

23       As other evidence they had, they had video which was  
24 really terrible. They had Ms. Jenkins who was not a very  
25 good witness. As Ms. Smith did not appear. There are a lot

1 of witnesses they didn't call.

2 And I pointed that out in closing argument that we  
3 didn't have the burden of course to call those witnesses and  
4 if they were going to help the State's case they would have  
5 there. So it came down to -- they did not find the gun on  
6 Mr. Reed, but that was because the gentleman in the car and  
7 the other people, they took off before the police arrived.  
8 Mr. McCoy didn't talk -- and Mr. McCoy is the decedent's  
9 cousin I believe is the relationship, didn't talk to the  
10 police until the next day at the earliest.

11 Jamie --- I mean, excuse me. See, I just did it again.  
12 Jamie. Nathaniel. It wasn't intentional. But you know who  
13 I'm talking about. Nathaniel turned himself in. He  
14 explained to the police the problems of what went on.

15 Fred disappeared, and so I had argued -- they didn't  
16 find a gun at the scene. They didn't find a lot of things  
17 at the scene. It was -- it appeared that the decedent had  
18 been cleaned up, it what I argued at least, before they left  
19 the scene. Everybody scattered.

20 I think they found that at least three different guns  
21 were fired in that parking lot that night from the shell  
22 casings they recovered. So they did not have a  
23 particular -- I didn't believe a particularly strong case  
24 for murder.

25 I believed that we had a good case with the fact that

1 Ms. -- Judge Harrington allowed the prior difficulties in  
2 for self defense. And I think Mr. McGee was consistent from  
3 the time before this incident to the time he testified and  
4 presented himself well.

5 Q. Did Mr. McGee give you anybody specifically to talk to?

6 A. Terrell Wright. He wanted --- Terrell Wright and I  
7 explained to him that -- first, Terrell while he was not  
8 charged with murder was charged with firing the pistol in  
9 the lot that night. And so he was a represented individual  
10 at some point in time.

11 But I was -- I was not - I did not see that calling  
12 Terrell Wright was going to be advantageous to our case.  
13 Because if he is -- the girls I thought that they helped us  
14 and wanted to leave them alone. I didn't want to go help  
15 them, for a lack of a better word, help them with their  
16 memories at the time, sort of like where they were to begin  
17 with. So, no. That's what we talked about.

18 Q. Did you think you had ample time to prepare for  
19 trial?

20 A. I was prepared for trial. Absolutely.

21 Q. Did ---

22 A. Would I have liked to have had a week off between  
23 trials, certainly. But I had tried cases back to back  
24 before. I knew Nathaniel's case. Still know Nathaniel's  
25 case. I was ready to go. I was certainly as far as

1 preparation wouldn't say I was unprepared.

2 Q. Thank you. And you also testified that it was a  
3 strategic reason not to call Mr. Wright and that's because  
4 you didn't think it would be advantageous to your case?

5 A. Well, like I said, Monday -- Monday morning  
6 quarterbacking. And I didn't want to give -- I thought  
7 after Nathaniel testified, okay Nathaniel I thought did as  
8 well as any of my clients could have possibly have ever done  
9 on the stand. I thought he did well.

10 I -- by calling Mr. Wright to the stand it was a  
11 tactical decision. I gave the State the chance to impugn  
12 Mr. McGee through impeachment of Mr. Wright or -- didn't  
13 want to do that. I thought I had --- we had crossed the  
14 goal lines, as I like to say, with Mr. McGee. And I didn't  
15 want to give the State the chance to catch up. Which --  
16 okay, I will stop there.

17 Q. No, you are fine. You testified that you didn't object  
18 to the video admission into evidence. Is that -- that's  
19 correct, you didn't object?

20 A. That's correct. The video itself, I mean, it was  
21 evidence. It wasn't good evidence, but it -- the video was  
22 evidence. It had some relevancy that you could actually see  
23 objects on it. I don't know that it was much more relevant  
24 than that. I did object to Mr. Voight's written  
25 interpretation of the video, what I called the transcript.

1           And again as I had testified earlier, he did pretty  
2 much do it orally in his closing argument. And as I said,  
3 Judge, I kept out the transcript that he wanted to  
4 distribute of his interpretation.

5           Actually I think he wanted to put it up on the overhead  
6 for his closing at what he described. And I kept that part  
7 out. But all he did was say it orally. And I probably --  
8 not probably, I should have objected to it. Because there  
9 wasn't a lot that -- a lot of basis for what his arguments  
10 were about it. It was I felt, and one of the reasons I  
11 objected to, written this is what happened on the video as  
12 if it was --- it wasn't written. It was typed up. As if it  
13 was evidence rather than argument. So ---

14           THE COURT: What would have been the basis of your  
15 objection?

16           MR. SMILEY: To his oral arguments?

17           THE COURT: Uh-huh.

18           MR. SMILEY: That he argued facts not in evidence.

19           THE COURT: Didn't he argue his interpretation of the  
20 video?

21           MR. SMILEY: He did argue that. Yes.

22           THE COURT: And how would that not --- how would him  
23 not --- what basis successfully would you have been able to  
24 argue to keep that out? Because after all, argument is what  
25 you want to persuade the jury of.

1 MR. SMILEY: Yes, ma'am.

2 THE COURT: So I'm trying from reading the transcript  
3 I'm trying to figure out how you were --- you know, it's one  
4 thing in hindsight to say I would have objected. It's  
5 another thing for it to have been successful and to have  
6 changed or undermined ---

7 MR. SMILEY: Well ---

8 THE COURT: --- the confidence and the outcome of the  
9 trial.

10 MR. SMILEY: Yes, ma'am, I understand what you're  
11 saying. If I could take you back to that setting, all  
12 right. I didn't know what he was going to do with the  
13 quote, unquote, transcript ahead of time of course because I  
14 didn't have it; right.

15 So I saw it just as --- it might have been  
16 contemporaneously with the closing argument as he was trying  
17 to present it to the jury. All right.

18 I'm like, whoa, whoa, whoa, I object to that. We  
19 approached the bench. It is --- my -- was sustained in  
20 that -- and I don't know if it's on the record or off the  
21 record. I just remember exactly -- he was trying to put up  
22 a typed up, this is what it is kind of thing. He made it  
23 look like evidence. And I'm like huh-uh, can't do that.

24 But the jury at this point has a pretty good clue that  
25 he's got something. And so he doesn't take it back to his

1 table and leave it there and just argue off the top of his  
2 head, Your Honor.

3 THE COURT: Why does he have to? That's my question.  
4 And how would your objection have been successful? That's  
5 no different than you making notes about a closing argument  
6 or someone wanting to use something demonstratively as a  
7 timeline and to argue that. It's not evidence. It's your  
8 interpretation of what you believe the evidence shows, and  
9 it's certainly appropriate in argument.

10 I'm just trying to figure out, it's not that you would  
11 have made an objection. We always would do things better.

12 MR. SMILEY: Yes, ma'am.

13 THE COURT: But it's whether that objection would have  
14 been successful ---

15 MR. SMILEY: --- and whether he would have been limited  
16 in his argument and whether in the grand scheme of the  
17 entirety of this record it's sufficient to undermine the  
18 outcome of the trial.

19 And as I read it, he argued what he believed his  
20 interpretation of --- what he believed the facts and the  
21 evidence showed. And so what I'm trying to get you to  
22 articulate for me is what would have been the basis of the  
23 objection and really in the totality of the record what it  
24 would have kept out his argument?

25 MR. SMILEY: Of course I don't know that it would.

1 It's -- and my only point that I should have objected is  
2 because I just kept --- I'm not disagreeing with you.

3 THE COURT: Well, I think you were successful in  
4 keeping that out, and that was appropriate. But I don't  
5 know that it precludes him from arguing what he believes  
6 that tape showed. Just like you arguing what you believe it  
7 didn't show.

8 MR. SMILEY: Yes, ma'am, don't disagree.

9 THE COURT: That would be almost like the same -- the  
10 same side of the coin him saying well, Mr. Smiley doesn't  
11 get to argue that because that's not how we interpret this  
12 video.

13 MR. SMILEY: Yes, ma'am.

14 THE COURT: And the court certainly would have not  
15 limited you in arguing what you contend the video didn't  
16 show, in other words that it was grainy, didn't really show  
17 anything.

18 MR. SMILEY: And it certainly didn't show what he said  
19 it showed.

20 THE COURT: Exactly.

21 MR. SMILEY: Yes, ma'am.

22 THE COURT: Well, that a factual dispute, isn't it, as  
23 to what you all circumstantially infer the video showed?

24 MR. SMILEY: Yes, ma'am, don't disagree.

25 THE COURT: You may continue, Ms. Wilson.

1 MS. WILSON: Thank you, Your Honor.

2 THE COURT: You're welcome.

3 BY MS. WILSON:

4 Q. Mr. Smiley, you also testified that a couple of times  
5 you kind of interchanged the victim's and the defendant's  
6 names; that's correct?

7 A. (Witness nods.)

8 Q. But the jury was aware who you were referring to?

9 A. Right, I did it by mistake. It was the same kind of  
10 thing. It was no doubt who I was talking about.

11 Q. And was it a strategic decision for you to decide at  
12 the end of trial not to request a voluntary or involuntary  
13 manslaughter charge?

14 A. Yes, and in retrospect it wasn't that good of a  
15 strategy -- yeah, it -- we were -- I was trying to get  
16 Nathaniel to go home because I thought we had presented a  
17 strong case. I didn't want to give the jury a middle  
18 ground.

19 Having said that, I think if I had requested a  
20 voluntary, I believe there was evidence to show some heat of  
21 passion for that. Voluntary could have -- the jury  
22 certainly could have found voluntary. And again, it was  
23 strategically not asking.

24 Q. But at the time you thought it was best not to request  
25 it?

1 A. Yeah, I wanted Nathaniel to go home. I didn't want him  
2 to get convicted of a voluntary, and I thought we were  
3 there.

4 Q. You reference in the transcript I think -- you  
5 reference -- referenced it as Page 160. But it's in the big  
6 numbers its Page 446 where you talk about -- about and if it  
7 is established you must find the defendant not guilty. That  
8 was on Page 160, Volume 3.

9 A. Yeah.

10 Q. Lines four and six. But the court did tell the jury  
11 the State has the burden of disproving self defense?

12 A. Yeah, it follows it through six, six and seven. State  
13 has the burden of disproving self defense by proof beyond a  
14 reasonable doubt.

15 Q. Okay. You had some testimony about, you know, Mr.  
16 Wright's statement. You reviewed that -- you reviewed all  
17 the testimony you had with defendant and he was aware of  
18 what was going to be presented at trial?

19 A. Yeah, and what wasn't going to be presented.

20 Q. Okay.

21 A. Because we were trying to keep it -- I -- well, let me  
22 change that. I was trying to keep it concise and keep it as  
23 closed from attack as possible.

24 Q. Thank you, Mr. Smiley.

25 A. Thank you.

1 THE COURT: Any redirect for the witness?

2 MS. MEANS: Just briefly, Your Honor. Thank you.

3 THE COURT: You're welcome.

4 REDIRECT EXAMINATION BY MS. MEANS OF MR. SMILEY:

5 Q. You testified about Terrell Wright and not having him  
6 as a witness and identifying that there were bullets  
7 recovered at the scene from three different guns?

8 A. Uh-huh.

9 Q. And we obviously knew who -- or you obviously knew at  
10 the time who two of the individuals were who had the  
11 guns, ---

12 A. Right.

13 Q. --- correct?

14 A. Uh-huh.

15 Q. Wouldn't having Mr. Wright testify about there being  
16 somebody else there with a gun, don't you think that that  
17 would have helped Mr. McGee?

18 A. Oh, putting the gun in Terrell's hand you're talking  
19 about? Yeah, but I think it was overridden by the fact that  
20 two of them were together. They were both carrying firearms  
21 and they were both going to the club afterwards.

22 I mean, it's a strategic decision not to call Mr.  
23 Wright. If Mr. McGee in his testimony had fumbled and not  
24 done well, then I may have chosen to call Mr. Wright and try  
25 to end on a different note. But I thought we were ending on

1 a pretty high note so.

2 Q. The video that was admitted into evidence and that was  
3 discussed by the solicitor, his factual interpretation  
4 during his closing, the jury had asked to review that again  
5 during deliberation; didn't they?

6 A. Yeah.

7 Q. So that was certainly something that the jury thought  
8 was ---

9 A. Absolutely.

10 Q. --- important?

11 A. The video was very poor quality. But yes, they I  
12 believe did want to re-look at it.

13 Q. And you testified that the State didn't call Sierra  
14 Smith but she was available to testify?

15 A. No. Sierra Smith was not available to testify. It was  
16 Tiffany Jenkins was available is if I remember correctly.  
17 And I'm pretty sure I did ---

18 Q. And she did testify, correct?

19 MS. WILSON: Objection, Your Honor. Can she let  
20 the ---

21 MS. MEANS: I'm sorry, I thought he was done.

22 A. Tiffany Jenkins testified and did what I thought was an  
23 extremely poor job for the State and a pretty good job for  
24 us. Sierra Smith, she did not testify. The State I think  
25 would have liked her to testify, but she wasn't -- she

1 wasn't present.

2 Q. Thank you, Mr. Smiley.

3 MS. MEANS: I have no further questions, Your Honor.

4 THE COURT: Mr. Smiley, you may step down.

5 MR. SMILEY: May I be excused, Your Honor?

6 THE COURT: Do we need Mr. Smiley for anything else

7 or ---

8 MS. WILSON: Your Honor, I would like for Mr. Smiley to

9 stay just in case ---

10 MR. SMILEY: Sure.

11 THE COURT: We appreciate your indulgence.

12 MR. SMILEY: Sure.

13 MS. WILSON: Thank you.

14 (Break 11:02 a.m. for other matters before the Court.)

15 (Resume proceedings 11:05 a.m.)

16 (Whereupon, witness was duly sworn.)

17 THE CLERK: Please be seated. Please state your full  
18 name, spelling your last name for the record.

19 MS. HENSLEY: Laree Hensley, H-E-N-S-L-E-Y.

20 THE COURT: You may proceed.

21 MS. MEANS: Thank you, Your Honor.

22 THE COURT: You are welcome.

23 LAREE HENSLEY, having first  
24 been duly sworn, testified as follows:

25 DIRECT EXAMINATION BY MS. MEANS OF MS. LAREE HENSLEY:

1 Q. Good morning, Ms. Hensley.

2 A. Good morning.

3 Q. You assisted Mr. Smiley in the case with Nathaniel --  
4 Nathaniel McGee?

5 A. I sit second chair with Jim on a lot of cases, yes.  
6 And I did on Nathaniel McGee's case.

7 Q. And what is your role as second chair?

8 A. I mostly take notes, do legal research, try to keep  
9 track of Jim's motions. Just help Jim.

10 Q. Okay. It sound like you had a limited role in ---

11 A. I don't question any witnesses. I don't review the  
12 discovery. I don't do any trial prep. I am not involved in  
13 any strategic decisions. My role is simply to assist Mr.  
14 Smiley in trying the case. I think two heads are usually  
15 better than one.

16 Q. So you didn't review any of this discovery before  
17 trial?

18 A. No, and I never do on any of Mr. Smiley's cases. We  
19 are not in practice together. We've been friends for 25  
20 years. He sits second chair for me when I try cases, and I  
21 do the same for him.

22 Q. Okay. You were essentially just a backup for him?

23 A. Exactly.

24 Q. Okay. Did you speak to Mr. McGee at all?

25 A. I'm sure I did in the course of the trial. The way we

1 sit as a general rule Mr. Smiley sits in the first chair, I  
2 sit in the second chair, and the client sits in the third  
3 chair just to kind of pass information back and forth. And  
4 so I'm sure I spoke to him during the course of the trial.  
5 I sat next to him.

6 Q. But you were there during the entire time of trial?

7 A. I was. I wasn't there the day of jury selection, but I  
8 must have been in another court somewhere else. But I was  
9 there for the entire trial, yes. I mean as a general rule  
10 when I do this I start the trial with Jim and end the trial  
11 with Jim. I stay until the verdict.

12 Q. But you heard all the testimony at trial?

13 A. Oh, sure.

14 Q. And you performed research for Mr. Smiley for the  
15 motions that he presented ---

16 A. Sure ---

17 Q. --- to the court, correct?

18 A. Well, just like Mr. Smiley said with regard to the  
19 issues about the prior difficulties. I think the State had  
20 made a motion in limine to eliminate those issues. They had  
21 referenced the case. I did a whole bunch of research really  
22 fast while we were arguing that motion getting ready for  
23 that motion. And we won that motion.

24 Q. And did you also observe and hear how Mr. Smiley had  
25 mixed up Mr. McGee's name ---

1 A. You know, I did not notice that at all. I didn't  
2 notice it then, and I only noticed it when I read the  
3 transcript. And I was taking notes. So I didn't see it in  
4 my notes. So I don't think it was important at all.

5 Q. If --

6 A. I think that is was very obvious from Mr. Smiley's  
7 opening who he was referring to.

8 Q. Thank you. Did Mr. McGee ever lean over to you during  
9 the trial and tell you that hey, he's mixed up the name?

10 A. I don't have any recollection of that.

11 Q. And you have no choice in the jury instructions,  
12 correct, the jury charges?

13 A. I don't make any trial decisions for Mr. Smiley.

14 Q. Thank you. I have no further questions.

15 THE COURT: Any questions for the witness?

16 MS. WILSON: Nothing from the State, Your Honor.

17 THE COURT: Any objection to the witness being excused,  
18 from the State?

19 MS. WILSON: I would like for her to stay in case Mr.  
20 McGee takes the stand.

21 THE COURT: If you would remain with us.

22 MS. HENSLEY: Thank you, Your Honor.

23 THE COURT: You are welcome.

24 You may call your next witness.

25 MS. MEANS: Thank you, Your Honor. I call Terrell

1 O'Neil Wright.

2 THE COURT: What testimony is it that you're going to  
3 be eliciting from Mr. Wright?

4 MS. MEANS: He had ---

5 THE COURT: Sir, you can stand right there for me for a  
6 moment.

7 MS. MEANS: He wrote a statement -- actually a  
8 detective wrote a statement to the North Charleston Police  
9 Department. And in that statement he speaks of another  
10 individual that was at the scene shooting at him.

11 THE COURT: Is there any contention as to factually  
12 that's what would have been presented? This isn't a trial.  
13 I'm not going to retry this case. I'm trying to figure out  
14 whether there was an effective assistance of counsel.

15 So him saying what he would have said at trial -- I  
16 don't know that that -- I mean if it's not in contest I'm  
17 trying to figure out how to I then sit in that and making a  
18 decision about ineffective assistance.

19 MS. MEANS: I think the witness was necessary. His --  
20 and ---

21 THE COURT: Isn't that a legal argument; do I really  
22 have to -- I mean there is no contest about what his  
23 testimony would have been, is there?

24 MS. MEANS: No, Your Honor, there -- I assume there is  
25 not.

1 MS. WILSON: Your Honor ---

2 THE COURT: I don't -- I don't think there is any -- I  
3 mean based on ---

4 MS. WILSON: I may -- I can help with this. It's my  
5 understanding that under the case to present -- present  
6 evidence about counsel's failure to call the witness a  
7 witness has to be present. So we can stipulate for the  
8 record that Mr. Wright is here and present.

9 THE COURT: That's normally what -- and I was getting  
10 to that, yeah, to that place. Yeah.

11 MS. MEANS: Thank you.

12 THE COURT: I was just trying to save time.

13 MS. MEANS: I appreciate it.

14 THE COURT: Yeah, we just -- we just have to stipulate  
15 that he was here. Yeah, ---

16 MS. MEANS: He is here.

17 THE COURT: --- that will save us some time.

18 MS. MEANS: Right.

19 THE COURT: I don't think -- I don't think as a  
20 practical matter the substance of what he do -- I don't  
21 think there is any contention as to what the substance of  
22 what his statement was. Mr. Smiley has testified as to what  
23 that was.

24 MS. MEANS: Thank you, Your Honor.

25 THE COURT: And we can stipulate for the record that he

1 is present and available to testify.

2 MS. MEANS: Thank you, Your Honor.

3 THE COURT: Sir, you can take your seat. But remain  
4 with us, please.

5 You may proceed.

6 MS. MEANS: Thank you, Your Honor. Then I would call  
7 Nathaniel McGee to the stand.

8 THE COURT: Sir, if you would come to the stand to be  
9 sworn.

10 (Pause for discussion on scheduling of unrelated case.)

11 (WHEREUPON, witness was duly sworn.)

12 THE CLERK: Can you state your full name, spelling your  
13 last name for the record.

14 MR. MCGEE: Nathaniel McGee, M-C-G-E-E.

15 THE COURT: You may proceed.

16 MS. MEANS: Thank you, Your Honor.

17 THE COURT: You're welcome.

18 **DIRECT EXAMINATION BY MS. MEANS OF NATHANIEL MCGEE:**

19 Q. Good morning, Mr. McGee.

20 A. Good morning.

21 Q. Can you tell us a little bit about yourself and your  
22 family?

23 A. I mean I'm a goodhearted person. I'm very easy going.  
24 I have three kids, two boys and a girl. You know, my family  
25 are very good individuals. I'm a hard worker. That's about

1 it.

2 Q. What type of work did you do?

3 A. I was painting houses.

4 Q. And how far did you go in school?

5 A. To the 11th.

6 Q. Did you get your GED?

7 A. No, ma'am, not yet.

8 Q. Did you speak to your trial counsel about was there  
9 ever any discussion of plea negotiations?

10 A. He came -- he came and saw me one time. And I asked  
11 him could he talk to the solicitor and get it down a little  
12 lower. He said that he will come back to see me, but he  
13 never got back. He never came back.

14 Q. So you had that one discussion?

15 A. Yes, that's -- yes, ma'am.

16 Q. Did you ever raise the issue to him again about a plea?

17 A. I mean, well, when I saw him he was -- I asked him if  
18 he was coming to trial.

19 MS. WILSON: Your Honor, the State is going to object  
20 to this line of questioning. I don't recollect anything in  
21 his application about any allegations about a desire to plea  
22 or any type of plea negotiation allegations.

23 MS. MEANS: I will withdraw that, Your Honor.

24 THE COURT: Okay. You may proceed.

25 BY MS. MEANS:

1 Q. Did you meet with Mr. Smiley before you saw him at  
2 trial?

3 A. I seen him at least three or four times since I was  
4 detained in Charleston County.

5 Q. When were you first detained?

6 A. It was April.

7 Q. Of what year?

8 A. '06.

9 Q. And when was your trial?

10 A. March '09.

11 Q. And you saw him how many times in between that?

12 A. Three to four.

13 Q. Three?

14 A. Three to four within those three years.

15 Q. About how long did you meet with Mr. Smiley each time  
16 he visited with you?

17 A. It was at least ten minutes each time.

18 Q. And what did you do when you met with him?

19 A. We would talk -- I would ask him questions and we would  
20 talk. I was asking him -- I asked him about the statements  
21 of Frederick McCoy, Tiffany Jenkins, Sierra Smith. Those  
22 statements were never in my motions. And I asked him about  
23 the video if I was going to see it. But he told me about  
24 the statements that I -- he was going to get them to me.  
25 But I never got them. He didn't even -- he didn't even have

1 them at the trial. He had to get them from the prosecutor.

2 Q. The witnesses you just mentioned, who provided those to  
3 your attorney?

4 A. I guess it would be the solicitor.

5 Q. Did you provide your trial counsel with any  
6 individual's names to investigate before you went to trial?

7 A. Yes, ma'am. I gave him the names of the individuals  
8 who had me in the woods. It was Arico Reid, Quinton Reid,  
9 Joseph Reid. I told him about the two Jamaicans. And there  
10 was another dude. I don't know his full name, but I think  
11 he goes by the name of Slice.

12 But I gave him those individuals and told him where  
13 that -- where they live. But I mean I guess he didn't  
14 follow up on it.

15 Q. And what are you referencing when you said the  
16 individuals that had you in the woods?

17 A. That I wanted him to at least ask them did that happen.  
18 But he never went.

19 Q. When was that incident that you are referring to?

20 A. Probably like a couple of nights before the incident  
21 that happened at Club Fantasy.

22 Q. And was the decedent present in the woods?

23 A. Yes, ma'am.

24 Q. Do you know if he investigated any of those witnesses  
25 that you gave him?

1 A. He never told me anything that he went out there or  
2 anything like that.

3 Q. When Mr. Smiley came to visit you did he have any  
4 discovery materials or any documents to review with you?

5 A. No, ma'am.

6 Q. Did you discuss any discovery with Mr. Smiley?

7 A. I mean he would -- he would tell me about -- you know,  
8 I asked him, you know, what was going on with the case and  
9 everything. Like he would tell me what's going on. But as  
10 far as reviewing my motion he never reviewed it.

11 Q. Did you view any photographs prior to your trial?

12 A. Phot- -- no, no, ma'am.

13 Q. Did you view any videos or CD's prior to your trial?

14 A. No, ma'am.

15 Q. Did you see any photographs or videos or CD's during  
16 the course of your trial?

17 A. I seen the videos. And he put a picture of me up on  
18 the overhead during the trial.

19 Q. And was that the first time you saw the video?

20 A. Yes, ma'am.

21 Q. Did you have an opportunity to examine all the  
22 evidence?

23 A. I mean not the statements. Because I believe the  
24 statements would have allowed me to know what the State --  
25 what the witnesses were going to say. And I believe that if

1 I knew what they were going to say I could have taken the  
2 plea that he -- when he came and saw me. But I didn't know  
3 what they were going to say.

4 Q. And which witness statements are you referring to?

5 A. Frederick McCoy. Which he testified at trial. Tiffany  
6 Jenkins what she testified at trial. And they said that  
7 they had a statement from Sierra Smith.

8 Q. Did she testify at trial?

9 A. No, ma'am.

10 Q. Did trial counsel hire an investigator at all before  
11 you went to trial?

12 A. Like I said, he never -- I gave him those names. He  
13 never said anything about an investigator -- an investigator  
14 going out. He never said anything about it.

15 Q. Did Mr. Smiley make proper objection during the course  
16 of your trial?

17 A. No, I don't think so.

18 Q. Do you know what evidence was admitted into the record  
19 at the trial?

20 A. Yes, ma'am.

21 Q. Did you discuss the jury charges with your attorney?

22 A. He told me about the self-defense and the murder that I  
23 was facing. But other than that he didn't explain anything  
24 else. Which I told them at the end of the trial that I  
25 wanted to -- I told him to ask for a lesser included

1 offense. But he told me no, that I was going home. And  
2 since he was my representation I took his word for it.

3 Q. Did you have an opportunity to prepare with Mr. Smiley  
4 in your defense?

5 A. I mean he came to see me like two or three times at the  
6 County for ten minutes. So no, I would say no.

7 Q. Do you know if Mr. Smiley subpoenaed any witnesses to  
8 be present for your jury trial?

9 A. I know -- I know he told me that Terrell Wright was  
10 there. But he never called him to the stand.

11 Q. Who did Mr. Smiley call to testify in presentation of  
12 your case?

13 A. Just me.

14 Q. After the evidence was presented to the court did the  
15 jury ask to view any of the evidence?

16 A. They requested to look at the video, a video.

17 Q. Did they ask for anything else?

18 A. I think they came back like two times. They had a  
19 note. They had a note. But I can't recall what it said.

20 MS. MEANS: I have no further questions, Your Honor.

21 THE COURT: Any questions for the witness?

22 MS. WILSON: Briefly, Your Honor.

23 THE COURT: You may proceed.

24 **CROSS-EXAMINATION BY MS. WILSON OF MR. MCGEE:**

25 Q. Good morning, Mr. McGee.

1 A. Good morning.

2 Q. Could you recall again about how many times you met  
3 with Mr. Smiley from the time he started representing you  
4 until the time you went to trial?

5 A. Until the time -- he came to -- he came to see me at  
6 least three or four times prior to my trial. But when -- on  
7 the trial, you know, he came -- he came and saw me prior to.  
8 You know, he saw me at least three times.

9 Q. So you only met with him three times total since he  
10 started representing you?

11 A. Prior to my trial. Prior to the trial. When the  
12 trial -- when he told me that we were going to trial that's  
13 when he was coming to see me. I think like at least one day  
14 after -- the trial he came and saw me.

15 Q. Okay. I'm just trying to be clear because I think I'm  
16 misunderstanding you. From the time you hired him until the  
17 time you went to trial you only met with him three or four  
18 times; is that correct?

19 A. Prior to trial three or four -- three times.

20 Q. Okay. And then one time after trial; is that what ---

21 A. Each day at trial for the days that I went to trial.

22 Q. Okay, so the day of trial he would come and you would  
23 talk to him after?

24 A. Uh-huh.

25 Q. Okay. Thank you. And do you recall -- you said you

1 didn't recall viewing any of the witness's statements with  
2 Mr. Smiley?

3 A. The only -- the only statement that I see that was in  
4 my file was Terrell Wright's.

5 Q. So you reviewed Mr. Wright's statement?

6 A. Yes, ma'am.

7 Q. Did he discuss with you what evidence the State was  
8 going to present against you?

9 A. He told me -- he told me that they was going to present  
10 the video and that Frederick McCoy was there to testify.

11 Q. So he told you -- he told you the State was going to  
12 present a video and Frederick McCoy's testimony?

13 A. During like -- during the trial he told me about the  
14 video that they were going to present it and that Frederick  
15 McCoy was there.

16 Q. And did he tell you about these two females who gave a  
17 statement against you?

18 A. Uh-huh.

19 Q. And did you talk to him about what you -- what you felt  
20 happened that night?

21 A. I told him what happened that night.

22 Q. And what -- what kind of defense did he say he was  
23 going to present at trial when y'all were discussing it?

24 A. I pretty much told him that -- you know, what happened  
25 and I feel like I was going to be killed that night. And we

1 went for self-defense.

2 Q. Okay. So y'all did discuss presenting self-defense?

3 A. Right.

4 Q. And did y'all discuss what type of evidence he would  
5 put forth to support that claim?

6 A. I mean, like I say, I told him what happened. And I  
7 guess he was pretty much going off of that.

8 Q. And so it is your testimony that he gave -- I believe  
9 this was your testimony. If not, tell me. But you gave him  
10 Terrell Wright's -- did you give him Terrell Wright's name  
11 to look into?

12 A. That was already in the motion.

13 Q. Okay. So you didn't request -- specifically request  
14 that he go look into anybody?

15 A. Rico Reid, Joseph Reid, Quinton Reid. And I told him  
16 about the two Jamaicans and a male named -- by the name of  
17 Slice.

18 Q. So you gave him the information of the gentlemen from  
19 the prior incident?

20 A. Right.

21 Q. Okay. And had Mr. Smiley looked into those people what  
22 do you think he would have found?

23 A. I mean they could have told that what the incident that  
24 occurred inside the woods where they had me tied up in the  
25 woods I believe that they would have at least said that that

1 incident took place.

2 Q. Okay.

3 A. I mean something to that extent.

4 Q. But even though they weren't present at your trial Mr.  
5 Smiley was able to argue to the jury that -- about this  
6 incident; you told -- you told the jury about this incident  
7 during your testimony; is that correct?

8 A. Correct.

9 Q. And you don't have any legal background or anything, do  
10 you?

11 A. What do you mean by ---

12 Q. You didn't go law school; you don't have any legal  
13 background?

14 A. No, ma'am.

15 Q. Okay. So a good bit of the decisions about what  
16 happens at trial you left to Mr. Smiley?

17 A. Uh-huh.

18 Q. Thank you.

19 THE COURT: Any redirect?

20 MS. MEANS: No, Your Honor.

21 THE COURT: Sir, you may step down.

22 I assume Mr. Wright's testimony would have been  
23 consistent with the written statement he gave to the police?

24 MS. MEANS: Yes, Your Honor.

25 THE COURT: Mr. Smiley, is that correct? Can we just

1 mark that -- do y'all have a copy of that statement?

2 MS. MEANS: I do, Your Honor.

3 THE COURT: And we will mark that statement as a  
4 court's exhibit.

5 MS. MEANS: May I approach, Your Honor.

6 THE COURT: Yes, ma'am. If you would -- is that your  
7 only copy?

8 MS. MEANS: No, I think ---

9 THE COURT: Okay.

10 MS. MEANS: --- I made additional copies.

11 THE COURT: You can just give one copy to the court  
12 reporter and have her mark it as a court's exhibit.

13 MS. MEANS: Thank you.

14 THE COURT: You're welcome. Thank you.

15 (WHEREUPON, Court's Exhibit 1, statement, was marked for  
16 identification.)

17 THE COURT: Anything further from the applicant?

18 MS. MEANS: Nothing further, Your Honor.

19 THE COURT: Anything from the State?

20 MS. WILSON: Yes, Your Honor. Briefly I would like to  
21 call -- recall Mr. James Smiley.

22 THE COURT: Mr. Smiley, if you would come forward. I  
23 will remind you, sir, you are still under oath.

24 MR. SMILEY: Yes, ma'am.

25 **RECALL EXAMINATION BY MS. WILSON OF MR. SMILEY:**

1 Q. Thank you again, Mr. Smiley. Mr. McGee testified that  
2 he gave you the information of several gentlemen with whom  
3 he said this prior incident took place. Did you look into  
4 those, the identity or try to get in touch with any of those  
5 people?

6 A. We talked about it. Even if I had found them and they  
7 agreed that the incident took place there was no way I was  
8 going to be able to get the extrinsic evidence admitted.

9 The fact that I got the officer to testify about the  
10 prior incident and the fact that Mr. McGee did, the fact  
11 that I got Lile evidence in in this case at all I was  
12 surprised by and quite pleased by it.

13 But the talking to the Reid family I did not think  
14 would be productive. And I couldn't have introduced it  
15 anyway.

16 We got -- we were able to get it before the jury, which  
17 I thought was a big plus in this case. But no, he certainly  
18 told me about it. We talked about the kidnapping in detail  
19 because that was really what we had to establish the prior  
20 difficulties and why he armed himself that night and was one  
21 of the mainstays of getting our self defense to the jury.  
22 So we had talked about it.

23 But no, going to see the Reid's -- first of all, I  
24 don't know that they would have admitted they were in the  
25 woods. And second of all, it would not have been admissible

1 in the case.

2 Q. Okay. Did you simply need to hire an investigator in  
3 this case?

4 A. No, I did not hire an investigator in this case. I did  
5 not find the need to hire one. And I did not approach Mr.  
6 McGee to talk to him about the additional costs of hiring an  
7 investigator. While I was retained in this case I certainly  
8 didn't get a surplus. But that wasn't why we didn't. We  
9 didn't because I thought we had everything we needed to go  
10 forward on our case.

11 Like I said, I felt pretty confident. The biggest --  
12 the hardest part of this case, whole case, was getting the  
13 Lile evidence in to the jury. I mean we got a big feather  
14 in our cap when we were allowed to go into that. And the  
15 reason we were able to go into that was because the officer  
16 had already testified at a prior hearing and at trial about  
17 the prior incident. So then that opened the door to let us  
18 do all of that.

19 I will say that one of the things that I didn't have  
20 that I thought I had that Mr. McGee provided me at trial was  
21 the preliminary hearing. I went looking for it when we were  
22 trying -- getting ready to try the case and I couldn't find  
23 my copy of it. But luckily Mr. Reid handed it to me. And I  
24 was able to use that. And as you can see, it as part of the  
25 record.

1 THE COURT: Anything further from the State?

2 MS. WILSON: Nothing further from the State, Your  
3 Honor.

4 THE COURT: Anything further in rebuttal from the  
5 applicant?

6 MS. MEANS: No, Your Honor.

7 THE COURT: The court will take the matter under  
8 advisement. However, I would request that the attorney  
9 general submit a proposed order within 15 days of today. If  
10 you would like, the order would also be sent to opposing  
11 counsel at which time she can make any suggestions to  
12 changes in the order if she would like. However, the court  
13 will issue its written order within 20 days of today.

14 MS. WILSON: Thank you, Your Honor.

15 THE COURT: Thank you very much.

16 MS. MEANS: Thank you, Your Honor.

17 THE COURT: You're welcome. Thank you.


18 (Whereupon the hearing concluded 11:30 a.m.)

(NOTE: A transcript which has been certified by the court reporter will bear an original signature on the below certification sheet. Please contact the court reporter for additional certified transcripts.)

CERTIFICATE

I, the undersigned Phyllis Norton, Official Court Reporter for the Ninth 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 captioned case, relative to appeal, in the Family Court for Charleston County, South Carolina, on July 23, 2013.

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

  
\_\_\_\_\_  
PHYLLIS NORTON, CVR  
(Signature in blue ink.)

Date: January 24, 2013

Certified Transcript Provided For: SCC 1D  
Certification Reference # 012413 ORIGINAL

HLW  
9

STATE OF SOUTH CAROLINA )  
COUNTY OF CHARLESTON )

IN THE COURT OF COMMON PLEAS )  
2012-CP-10-3986 )

Nathaniel McGee, #333534,  
Applicant,

v.

State of South Carolina,  
Respondent.

2013 OCT 24 11:11:02  
JAMES J. APOSTOLIS  
CLERK OF COURT  
FILED

**ORDER OF DISMISSAL**

Presiding Judge:	The Honorable Deadra L. Jefferson
Applicant's Attorney:	Jessica L. Means, Esquire
Respondent's Attorney:	Ashleigh R. Wilson, Esquire
Trial Counsel:	James W. Smiley, Esquire
	Laree A. Hensley, Esquire
Date of Hearing:	July 23, 2013
Court Reporter:	Phyllis Norton

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed June 19, 2012. The Respondent made its return on December 14, 2012. An evidentiary hearing on the matter was convened on July 23, 2013 at the Charleston County Courthouse. The Applicant was present at the hearing and represented by Jessica L. Means, Esquire. Ashleigh R. Wilson, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

Also present and testifying at the hearing was James W. Smiley and Laree A. Hensley, Esquires. The Court had before it the trial transcript, the Charleston County Clerk of Court records, the Applicant's records from the South Carolina Department of Corrections, the

1/22/18  
[Signature]

Applicant's application, the Respondent's return, the Applicant's appellate records, and one court exhibit.<sup>1</sup>

### PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Charleston County Clerk of Court. The Applicant was indicted at the August 2006 term of the Charleston County Grand Jury for Murder (2006-GS-10-7192). He was represented by James W. Smiley and Laree A. Hensley, Esquires. The Applicant proceeded to trial and was found guilty. On March 5, 2009, the Applicant was sentenced by the Honorable Kristi L. Harrington to confinement for thirty (30) years.

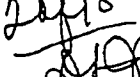
A timely Notice of Appeal was filed on the Applicant's behalf at the South Carolina Court of Appeals. Robert M. Dudek, Esquire of the South Carolina Office of Appellate Defense, Commission on Indigent Defense, perfected the appeal. The South Carolina Court of Appeals dismissed the Applicant's appeal. State v. McGee, No. 12-UP-047 (S.C. Ct. App. Jan. 25, 2012). The Applicant's Petition for Rehearing was denied by Order dated March 27, 2012. The Remittitur was issued on January 29, 2013.

### ALLEGATIONS

In his application, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
  - a. Counsel conceded the Applicant's guilt during his opening statement.
  - b. Counsel misspoke and called the Applicant the victim's name during his opening statement.
  - c. Counsel failed to perform any pretrial investigation.
  - d. Counsel failed to object during the solicitor's closing argument.
  - e. Counsel failed to request a voluntary or involuntary manslaughter charge.
  - f. Counsel failed to object to the self-defense instruction that impermissibly shifted the burden of proof.

<sup>1</sup> Court's Exhibit #1 is Terrell Wright's statement, dated April 18, 2006.

<sup>2</sup> 2/18  


- g. Counsel failed to object to the malice charge that impermissibly commented on matters of fact versus declaring the law.

At the hearing, the Applicant proceeded solely on the allegations he raised in his application. At the conclusion of the evidentiary hearing, the Court took the matter under advisement and directed counsel for the State to provide the Court with a proposed Order within fifteen (15) days of the hearing.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing and to closely pass upon their credibility. This Court has weighed the testimony accordingly.

Set forth below are the relevant findings of fact and conclusions of law as required by S.C. CODE ANN. § 17-27-80 (2003).

### Summary of the Testimony

The Applicant testified he met with counsel three (3) or four (4) times prior to trial. He testified he reviewed witness statements and discussed with counsel the State's evidence against him. He testified they also discussed the self-defense claim that they would present at trial. The Applicant testified he never viewed the video from the scene prior to trial and did not receive a copy of the witness' statements after asking counsel about them. However, he does acknowledge that counsel told him about the witnesses prior to trial. He testified the first time he saw the video was during the trial.

The Applicant testified he gave counsel the names of the men who were involved in the prior incident with the victim to investigate. He testified that he gave counsel the following names: Rico, Joseph, Quentin Reid, the Jamaicans and "Slice" to look up and investigate. He

3  
2/18  
[Signature]

further testified that this incident involved him being held in the woods by several individuals. He testified counsel did not follow up with the names of the men who could verify the incident and did not look into the incident. He testified that he gave counsel the names but counsel never said anything to him further about an investigator going out to talk to them. The Applicant testified had he known what the witness' statements were going to be at trial, he would have pled guilty. The Applicant testified further that had counsel investigated his case, he would have found that the prior incident took place.

The Applicant testified counsel did not make proper objections at trial. He testified he asked counsel to ask for the lesser included offense at trial. He testified he did not have time to prepare with counsel before trial. He further testified that he and counsel discussed self-defense. He also testified that he left decisions at trial to Mr. Smiley. He testified that counsel did give him updates during his pretrial detention. Lastly, the Applicant testified counsel subpoenaed Terrell Wright to testify at trial, but did not call him as a witness.

Also present and testifying was James W. Smiley, Esquire. Counsel testified he has been practicing law for about twenty (20) years and has spent ninety-nine (99) percent of his career practicing criminal law. Counsel testified he was retained by the Applicant and he met with the Applicant about twelve (12) times prior to trial. He testified the Applicant was detained for a "good while" pretrial. He testified he filed Brady and Rule 5 motions for discovery. Counsel testified he reviewed the discovery material he received with the Applicant. Counsel testified it is not his practice to provide clients with discovery material in jail. Counsel testified he spoke with the Applicant in detail about the evidence. He testified he went over the witness statements with the Applicant. He further testified that the witness statements were not exculpatory and did not exonerate the Applicant. He testified he discussed with him the elements of the charge he was

4  
Holt  
Wright

facing, range of penalty, his constitutional rights and what the State was required to prove. He testified he discussed with the Applicant his version of the facts, which were not disputed. He further testified that at the point he was aware the Applicant had fired a weapon, the scene was chaotic with a lot of weapons being fired and it would be difficult to say who killed the victim. He testified that a lot was missing from the scene; he didn't believe the State's case was particularly strong on Murder and that he felt the better case for the Applicant was self-defense. Counsel also testified he discussed possible defenses with the Applicant and that the Applicant's only available defense was self-defense. Counsel testified that he was prepared for trial and ready to try the case.

Counsel testified the Applicant gave him several witnesses to investigate. Counsel testified he did not need to hire an investigator because he thought he had all the information that was needed in the case. Counsel testified that among the names he was given to investigate by the Applicant was Terrell Wright. Counsel testified Wright fired a weapon at the scene of the murder and was seen holding a weapon before the shooting while with the Applicant. Counsel testified Wright was represented by counsel and had pending charges related to the shooting. He also testified that he discussed Wright's statement with the Applicant prior to trial and made a tactical decision not to call Wright as a witness at trial. Counsel testified he did not call Wright as a witness because he did not think the testimony would be advantageous to the Applicant's case. Counsel testified it would not have helped the Applicant at trial for the jury to know that the Applicant was walking around with Wright who was armed prior to the shooting. Counsel also testified he did not want the State to be able through cross examination and impeachment to impugn the Applicant's great trial testimony with Wright's behavior.

5/18  
5  
AA

Counsel testified he also looked into finding the other men involved in the prior incident with the victim. He testified even if he found the men, he would not have been able to enter their testimony as evidence at trial because it would have been extrinsic evidence. He also testified he did not think that talking to the Reed family would have been very helpful and it would have been unlikely that the Reeds would have admitted the prior incident took place. Counsel testified he was still able to present testimony about the prior incident through one of the officers who testified at trial.

Counsel also testified he reviewed the statements of two other witnesses, Sierra Smith and Tiffany Jenkins. He testified Smith, who did not show up for trial, gave a statement identifying the Applicant. Counsel testified Jenkins' statement identified the Applicant and said the person standing in the Applicant's position shot the gun. Counsel testified Jenkins testified poorly at trial for the State which ultimately benefitted the Applicant. Counsel testified he discussed both witnesses' statements with the Applicant in preparation for trial.

Counsel testified he reviewed the video from the scene the night of the incident. He testified the first time the Applicant saw the video was at trial. He testified the video was indecipherable, very grainy, very hazy, in black and white, that the parking lot and video lighting was poor, the general quality of the video was very poor, and the contents were left to interpretation. He further testified that while a viewer could make out some vehicles in the video, the Applicant's vehicle was not visible in the back of the parking lot. Counsel testified he objected to the admissibility of the State's written interpretation (transcript) of the video and was successful, as it was excluded at trial. He testified he did not object to the video, as it did have some relevance and was not prejudicial to the Applicant's case. Counsel testified in retrospect, he should have objected to the Solicitor's interpretation of the video during his closing argument.

6 leaf 18  
[Signature]

He testified he did not know if an objection during the Solicitor's closing would have been successful.

Counsel testified he did not realize he called the Applicant by the victim's name during his opening statement. He testified it was unintentional and he is certain the jury knew who he was speaking about when he made the references during his opening statement. Counsel testified the jury was aware of who the victim was and who the Applicant was.

Counsel testified he discussed requesting a Voluntary Manslaughter charge with the Applicant during trial. He testified that they did not request a Manslaughter charge and the jury could have found evidence to support a Manslaughter charge. However, counsel also testified at trial he thought the Applicant's case was strong and did not want to give the jury a middle ground to consider during their deliberations. He testified it was a strategic decision and he thought it was best at the time not to request a Voluntary Manslaughter charge. He testified their trial strategy was to seek an acquittal, that a request for a lesser included offense conflicted with that strategy, and he felt they had been successful in their strategy until the jury returned with a guilty verdict.

Counsel testified further that he should have objected to the self-defense jury instruction because it shifted the burden of proof to the Applicant. Counsel testified the Applicant's case was a self-defense case and the language charged by the judge was improper. Lastly, counsel testified he did not object to references by the Solicitor to "you" and "your" during his closing. He testified at the time, he did not think the State was asking the jurors to place themselves in the victim's shoes, but in retrospect an objection was warranted.

Also present and testifying was Laree A. Hensley, Esquire. Counsel testified her limited role was to assist Smiley at trial. She testified that she and Smiley have been friends for twenty-

7  
7/18  
[Signature]

five (25) years and that they reciprocate backing one another up during the trial of cases. She testified she was not present for jury selection but was present at the start of the case. She testified that when assisting Smiley, she takes notes, keeps track of motions and conducts legal research. She testified she does not question any witnesses, does not participate in trial preparation, makes no strategic decisions, and does not review discovery. She testified she heard all the testimony. Lastly, she testified she did not notice Smiley's mix-up in the victim's and defendant's names. She testified the mix-up was not important and it was obvious from the opening that the jury was aware of the identity of the parties.

The Applicant also called Terrell Wright to testify at trial. However, after Wright was called to testify, the parties stipulated that Wright was present and willing to testify consistent with his statement given to the police which was labeled Court's Exhibit #1.

#### INEFFECTIVE ASSISTANCE OF COUNSEL

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegation by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRPC).

For the Applicant to be granted post-conviction relief as a result of ineffective assistance of counsel, he must show both: (1) that his "counsel failed to render reasonably effective assistance under prevailing professional norms," and (2) that he was prejudiced by his counsel's ineffective performance. See Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006) (citing Strickland v. Washington, 466 U.S. 668, 687-88, 144 S. Ct. 2052, 2064-65 (1984)). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry

SM 18  
[Handwritten signature]

v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989) (quoting Strickland, 466 U.S. at 694, 104 S. Ct. at 2068). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 694, 104 S. Ct. at 2068).

This Court finds the Applicant's testimony is not credible and finds trial counsel's testimony is credible. This Court further finds trial counsel adequately conferred with the Applicant, conducted a proper investigation, and was thoroughly competent in his representation. This Court finds that counsel has extensive experience in the practice of criminal law and has been practicing criminal law for the past twenty (20) years. This Court finds that counsel met with the Applicant numerous times prior to trial and fully investigated the Applicant's case. This Court finds that counsel reviewed all received discovery with the Applicant. This Court finds that counsel discussed with the Applicant the elements of the charges against him and what the State was required to prove. This Court finds that counsel discussed the Applicant's version of the facts, range of penalty, constitutional rights and possible defenses with the Applicant.

**Conceding guilt during his opening statement.**

This Court finds the Applicant has failed to carry his burden of proving counsel was ineffective for conceding the Applicant's guilt during his opening statements. This Court finds counsel's concession that the Applicant shot the victim was not improper since the Applicant's defense at trial was self-defense. The record also reflects that during his testimony at trial, the Applicant conceded that he pulled out his gun and shot the victim. (Tr. Vol. III, 29:19-30:3). This Court finds this allegation is without merit and no prejudice resulted from counsel's performance.

9 9/21/18  
[Signature]

Misspeaking and calling the Applicant by the victim's name

This Court finds the Applicant has failed to carry his burden of proving counsel was ineffective for inadvertently calling the Applicant by the victim's name during his opening statement. This Court finds counsel's misspeaking had no effect on the jury and the record was sufficient to make the jury aware of the identity of both the victim and the defendant at trial. This Court finds this allegation is without merit and no prejudice resulted from counsel's performance.

Failure to investigate

This Court finds the Applicant has failed to carry his burden of proving counsel was ineffective for failing to investigate the Applicant's case prior to trial. "[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Walker v. State, 397 S.C. 221, 235, 723 S.E.2d 610, 615 (Ct. App. 2012) (quoting Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011)). "Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result." Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)). "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Wiggins v. Smith, 539 U.S. 510, 521-22, 123 S. Ct. 2527, 2535 (2003) (citing Strickland, 466 U.S. at 691, 104 S. Ct. at 2066).

This Court finds that counsel fully investigated the Applicant's case and potential witnesses prior to trial. The Applicant alleges that counsel did not investigate several potential

witnesses including Terrell Wright and the men involved in the Applicant's alleged prior incident with the victim. This Court finds counsel provided credible testimony that he investigated both Wright and the other men identified by counsel as the Reeds. This Court finds counsel provided credible testimony that he obtained Wright's statement, spoke with Wright prior to trial, and decided not to call Wright as a witness at trial because he thought it would impugn the Applicant's beneficial trial testimony. This Court finds counsel articulated a valid strategic reason for failing to call Wright at trial as a defense witness. This Court also finds counsel fully investigated Wright and discussed the substance of Wright's testimony with the Applicant prior to trial.

This Court also finds counsel fully investigated the alleged prior incident with the victim. This Court finds counsel provided credible testimony that he thought investigating the other men involved in the incident would have likely been futile and it is unlikely their testimony about the prior incident would have been admissible at trial. This Court finds counsel was able to fully present to the jury testimony about the prior incident without tracking down the other men involved through the Applicant's own testimony at trial. (Tr. Vol. III, 8:24-16:16). This Court further finds that counsel was also able to fully present to the jury the testimony about the prior incident through one of the officers who testified at trial. This Court finds this allegation is without merit and no prejudice resulted from counsel's performance.

**Failure to object during the solicitor's closing argument**

This Court finds the Applicant has failed to carry his burden of proving counsel should have objected during the solicitor's closing argument.<sup>2</sup> The Applicant alleges counsel should have objected to "Golden Rule" violations made by the solicitor during his closing. South

<sup>2</sup> This Court notes the record reflects that counsel objected several times throughout the State's closing argument. (Tr. Vol. III, 126:8-15, 129:12-20, 139:7-12).

Carolina prohibits Golden Rule arguments that ask the jurors to place themselves in the victim's shoes in both criminal and civil cases. See State v. Reese, 370 S.C. 31, 38, 633 S.E.2d 898, 901 (2006) (citing Von Dohlen v. State, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004) ("A solicitor's closing argument must be carefully tailored not to appeal to the personal biases of the jury" and "must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences that may be drawn therefrom."); State v. McDaniel, 320 S.C. 33, 37-38, 462 S.E.2d 882, 884 (Ct. App. 1995) (citing State v. White, 246 S.C. 502, 505-06, 144 S.E.2d 481, 482 (1965)).

This Court finds the Solicitor's closing argument did not include any violations of the "Golden Rule." This Court finds that in the State's closing argument, the Solicitor did not ask the jury to place themselves in the victim's shoes. Although the Solicitor's argument placed himself at the scene and attempted to place the jury at the scene this argument was merely his rendition, explanation or dramatization of the crime scene as depicted in the video.

This Court also finds that the Solicitor's use of the words "you" and "your" during his closing argument alone does not indicate a violation of the "Golden Rule." This Court finds the Solicitor's closing argument was proper in this regard.

The Applicant also alleges counsel should have objected to the solicitor's interpretation of the video recording of the scene the night of the shooting.

[C]losing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions.

State v. Mouzon, 321 S.C. 27, 31-32, 467 S.E.2d 122, 125 (Ct. App. 1995), aff'd, 326 S.C. 199, 485 S.E.2d 918 (1997) (citing Herring v. New York, 422 U.S. 853, 862, 95 S. Ct. 2550, 2555 (1975)).

12 12/18  
RJR

“A solicitor’s closing argument must be carefully tailored so as not to appeal to the personal biases of the jury.” Von Dohlen, 360 S.C. at 609, 602 S.E.2d at 744 (citing State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996); State v. Linder, 276 S.C. 304, 311, 278 S.E.2d 335, 339 (1981)). “The argument must not be calculated to arouse the jurors’ passions or prejudices, and its content should stay within the record and reasonable inferences that may be drawn therefrom.” Id. at 609–10, 602 S.E.2d at 744 (citing Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998); Copeland, 321 S.C. at 324, 468 S.E.2d at 624). “Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument.” Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002) (citing Simons, 331 S.C. at 338, 503 S.E.2d at 166). “The relevant question is whether the solicitor’s comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.” Id.

This Court finds the Solicitor’s interpretation of the video recording was not objectionable and counsel was not ineffective for failing to object to the argument. This Court finds the Solicitor’s interpretation of the video was proper and reflected the inferences the State wanted the jury to take from the video. This Court finds the Solicitor’s argument in no way affected the Applicant’s ability to receive a fair trial. This Court also finds that any alleged improper statements made by the Solicitor during his closing argument were cured by the trial court’s instructions to the jury that opening and closing arguments were arguments and not evidence. The Court gave curative instructions emphasizing this in response to objections made by Mr. Smiley regarding the Solicitor’s closing argument. (Tr. Vol. II, 33:22–34:11; 43:8–14; 109:18–25; 126:17–22). However, the Court notes that Mr. Smiley objected several times to the

1301/18  
 [Signature]

Solicitor's interpretation of the evidence during closing argument, which objections were sustained, and curative instructions subsequently were given by the Court. This Court finds these allegations are without merit and no prejudice resulted from counsel's performance.

**Failure to request voluntary or involuntary manslaughter charge**

This Court finds the Applicant has failed to carry his burden of proving counsel was ineffective for failing to request a Manslaughter charge at trial. This Court finds and the record reflects counsel considered requesting a jury instruction on Voluntary Manslaughter at trial and made a valid strategic decision not to request the charge at the end of trial. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Strickland, 466 U.S. at 693, 104 S. Ct. at 2067. Therefore, "[j]udicial scrutiny of counsel's performance must be highly deferential." Id. at 689, 104 S. Ct. at 2065. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1996); Underwood v. State, 309 S.C. 560, 562, 425 S.E.2d 20, 22 (1992); Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992). "Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct will not be deemed ineffective assistance of counsel." Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992). Furthermore, "[t]here is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (citing Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007)). "[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel." Lounds v. State, 380 S.C. 454, 462, 670 S.E.2d 646,

1 April 18  
 [Signature]

650 (2008) (citing Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 403 (2002); Stokes, 308 S.C. at 548, 419 S.E.2d at 779).

This Court finds counsel provided credible testimony that he considered requesting a Voluntary Manslaughter charge, but after the Applicant's beneficial and compelling testimony at trial, he felt he had a strong case for acquittal based on self-defense and did not want to give the jury middle ground to consider. This Court finds this strategic decision was valid. This Court finds counsel's testimony that in retrospect he should have requested a Voluntary Manslaughter charge is not dispositive, as this Court must evaluate counsel's performance based on counsel's view at the time of the proceeding. See Strickland, 466 U.S. at 688, 144 S. Ct. at 2065.

**Failure to object to self-defense instruction**

This Court finds the Applicant has failed to carry his burden of proving counsel was ineffective for failing to object to the self-defense instruction given to the jury. The Applicant alleges counsel should have objected to the self-defense jury instruction given at trial because it shifted the burden of proof from the State to the Applicant. The Applicant argues the court's instruction to the jury that "[s]elf-defense is a complete defense. And if it is established, you must find the defendant not guilty" was improper and objectionable. (Tr. Vol. III, 160:3-5). The Court also instructed, "The State has the burden of disproving self-defense by proof beyond a reasonable doubt." (Tr. Vol. III, 160:6-8). This Court finds and the record reflects the jury instruction given by the court was proper. The Court can discern no language in the charge shifting the burden of proof from the State of establishing guilt beyond a reasonable doubt and disproving self-defense beyond a reasonable doubt. In fact, the Court very clearly charges on the presumption of innocence, more specifically, that, "A person charged with committing a criminal offense in South Carolina is never required to prove himself innocent." (Tr. Vol. III, 151:17-19).

15 150218  
JAF

This Court finds the instruction given to the jury was the standard self-defense jury instruction given in South Carolina until State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009) and substantially similar to the instruction approved by the Supreme Court in State v. Davis, 282 S.C. 45, 317 S.E.2d 452 (1984).<sup>3</sup> This Court finds this allegation is without merit and no prejudice resulted from counsel's performance.

**Failure to object to the malice charge**

This Court finds the Applicant failed to present any argument or testimony in support of this allegation; therefore, this Court considers this allegation abandoned by the Applicant.

Accordingly, this Court finds the Applicant failed to prove the first prong of the Strickland test: that trial counsel failed to render reasonably effective assistance under prevailing professional norms. See Strickland, 466 U.S. at 688, 104 S. Ct. at 2065. The Applicant failed to present specific and compelling evidence that trial counsel committed either errors or omissions in his representation of the Applicant. This Court also finds the Applicant has failed to prove the

---

<sup>3</sup> The self-defense jury instruction approved by the South Carolina Supreme Court in State v. Davis read as follows:

Self-defense is a complete defense. If established, you must find the defendant not guilty. There are four elements required by law to establish self-defense in this case: First, the defendant must be without fault in bringing on the difficulty. Second, the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger. Third, if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. If the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life. Fourth, the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance. If, however, the defendant was on his own premises he had no duty to retreat before acting in self-defense. These are the elements of self-defense.

If you have a reasonable doubt of the defendant's guilt after considering all the evidence including the evidence of self-defense, then you must find him not guilty. On the other hand, if you have no reasonable doubt of the defendant's guilt after considering all the evidence including the evidence of self-defense then you must find him guilty.

282 S.C. at 46, 317 S.E.2d at 453.

10/21/18  
JAG

second prong of Strickland: that he was prejudiced by trial counsel's performance. See id. at 694, 104 S. Ct. at 2065. In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 694, 104 S. Ct. at 2068). This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

#### All Other Allegations

As to any and all allegations that were raised in the application at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant has failed to present any evidence regarding such allegations. Accordingly, this Court finds the Applicant abandoned such allegations. Therefore, they are hereby denied and dismissed.

#### CONCLUSION

Based on the forgoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient and the Applicant was not prejudiced by counsel's representation. Therefore, this application must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

17 17 Feb 18  
[Signature]

**IT IS THEREFORE ORDERED:**

1. That the application for post-conviction relief be denied and dismissed with prejudice;  
and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 23<sup>rd</sup> day of October, 2013

*DL Jefferson*

\_\_\_\_\_  
The Honorable Deadra L. Jefferson  
Presiding Judge, Ninth Judicial Circuit

Charleston, South Carolina.  
at chambers

18-18  
*[Handwritten signature]*

COUNTY OF Charleston  
STATE \_\_\_\_\_

VS.  
NATHANIEL MCGEE.

INDICTMENT/CASE#: 2006GS107192

A/W#: K121596

Date of Offense: 4/17/2006

S.C. Code § : 16-03-0010, 0020

CDR Code #: 0116

AKA: \_\_\_\_\_

Race: B Sex: M Age: 25

DOB: [ ] SS#: \_\_\_\_\_

Address: \_\_\_\_\_

GOOSE CREEK, SC 29445

DL#: \_\_\_\_\_ SID#: \_\_\_\_\_

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was  CONVICTED OF or  PLEADS TO: Murder

in violation of § 16-03-0010, 0020 of the S.C. Code of Laws, bearing CDR Code # 0116

NON-VIOLENT  VIOLENT  SERIOUS  MOST SERIOUS  Mandatory GPS(CSC §17-25-45 w/minor 1st or Lewd Act)

The charge is:  As Indicted,  Lesser Included Offense,  Defendant Waives Presentment to Grand Jury. \_\_\_\_\_ (Defendant initial)

The plea is:  Without Negotiations or Recommendation,  Negotiated Sentence,  Recommendation by the State.

ATTEST:

Voigt, Gregory

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the  State Department of Corrections,  County Detention Center, for a determinate term of 30 days/months/years or  under the Youthful Offender Act not to exceed \_\_\_\_\_ years and/or to pay a fine of \$ \_\_\_\_\_; provided that upon the service of \_\_\_\_\_ days/months/years and/or payment of \$ \_\_\_\_\_; plus costs and assessments as applicable\*; the balance is suspended with probation for \_\_\_\_\_ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

CONCURRENT or  CONSECUTIVE to sentence on: \_\_\_\_\_

The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.

The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

SPECIAL CONDITIONS:

RESTITUTION:  Deferred  Def. Waives Hearing  Ordered PTUP \_\_\_\_\_

Total: \$ \_\_\_\_\_ plus 20% fee: \$ \_\_\_\_\_ days/hours Public Service Employment

Payment Terms: \_\_\_\_\_ Obtain GED \_\_\_\_\_

set by SCDPPPS \_\_\_\_\_ Attend Voc. Rehab. or Job Corp. \_\_\_\_\_

Recipient: \_\_\_\_\_ May serve W/E beginning \_\_\_\_\_

\*Fine: \$ \_\_\_\_\_ Substance Abuse Counseling \_\_\_\_\_

§ 14-1-206 (Assessments 107.5 %) \$ \_\_\_\_\_ Random Drug/Alcohol testing \_\_\_\_\_

§ 14-1-211(A)(1) (Conv. Surcharge) \$100 \$ 100.00 Fine may be pd. in equal, consecutive weekly/monthly

§ 14-1-211(A)(2) (DUI Surcharge) \$100 \$ \_\_\_\_\_ prmts. of \$ \_\_\_\_\_ beginning \_\_\_\_\_

§ 56-5-2995 (DUI Assessment) \$12 \$ \_\_\_\_\_ \$ \_\_\_\_\_ paid to Public Defender Fund

§ 35.13 (Public Def/Prob) \$500 \$ \_\_\_\_\_ Other: \_\_\_\_\_

§ 73.3, 1B TP (Law Enforce. Funding) \$25 \$ 25.00

§ 33.7, 1B TP (Drug Court Surcharge) \$100 \$ \_\_\_\_\_

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

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

3% to County (if paid in installments) \$ 3.75

§ 90.11 TP (SCCJA Surcharge) \$5 \$ 5.00

TOTAL \$ 133.75

PRESIDING JUDGE

Callahan  
Clerk of Court/ Deputy Clerk

ATTEST: A TRUE COPY

JULIE J. ARMSTRONG (SEAL)

CLERK, C.P./G.S. & T.C.

By [Signature]  
DEPUTY CLERK

Court Reporter: Mia Ferron

[Signature]  
3/15/09

SCCA/217 (07/2008)



Carolina Department of Corrections. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

## II.

In his Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel.
  - a. "Counsel constitutionally ineffective for conceding Petitioner's guilty during opening argument at trial."
  - b. "Failing to perform any pre-trial investigation"
  - c. "Mistating the facts"
  - d. "Failing to object when the prosecution repeatedly stated his personal opinions regarding the credibility of the Petitioner"
  - e. "Failing to object...golden rule violation"
  - f. "Failing to request a jury instruction on lesser included offense of voluntary manslaughter"
  - g. "Failed to object to the malice charge where the judge should have made it clear to the jury that they were free to accept or reject the permissive inferences depending on its view of the evidence"
  - h. "Failing to object to the self-defense instruction that impermissibly shifted the burden of proof:
  - i. "Failed to object to the malice charge that is a unconstitutional impermissible comment on the matters of fact versus declaring the law"
  - j. "Failed to object to the malice charge that is a unconstitutional impermissible comment on the facts since Petitioner was charged with the lesser included offense/self-defense in Murder prosecution and the judge charged the jury that they could infer malice from the use of a deadly weapon"

## III.

The Applicant alleges ineffective assistance of counsel. 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 assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, the Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

#### IV.

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

V.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held.

Respectfully submitted,

ALAN WILSON  
Attorney General

JOHN W. McINTOSH  
Chief Deputy Attorney General

SALLEY W. ELLIOTT  
Senior Assistant Deputy Attorney General

ASHLEIGH R. WILSON  
Assistant Attorney General

By:   
\_\_\_\_\_  
ATTORNEYS FOR RESPONDENT

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

Dec. 14, 2012:

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF CHARLESTON )  
 )  
 )  
 )  
 )  
 NATHANIEL MCGEE, #333534 )  
 )  
 )  
 )  
 )  
 )  
 Applicant, )  
 )  
 )  
 vs )  
 )  
 )  
 STATE OF SOUTH CAROLINA, )  
 )  
 )  
 )  
 )  
 )  
 Respondent. )

---

IN THE COURT OF COMMON PLEAS

2012-CP-10-3986

AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Linda Carol Garrett, Esquire  
 Laddaga & Garrett, PA  
 PO Box 62498  
 N. Charleston, SC 29419

DATED this 14th day of December, 2012

*Anne R. Henley*  
 Anne R. Henley, Legal Assistant  
 For Respondent

FILED  
 2012 DEC 17 PM 1:32  
 JULIE J. ARMSTRONG  
 CLERK OF COURT  
 BY \_\_\_\_\_

610

GKV 20060402168

WITNESSES

KEITH HAIR AND/OR

MATT CASEY

ELMORE, NCPD

2006013629

ARREST WARRANT NUMBER

K121596

APRIL 17, 2006

ACTION OF GRAND JURY

**TRUE BILL**

Foreperson of Grand Jury

VERDICT

guilty *[Signature]* 9/5/2009

Foreperson of Petit Jury

Date:

DOCKET NO. 2006-GS-10-1172

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

AUGUST TERM 2006

THE STATE

vs.

NATHANIEL MCGEE

06-2190 (1)

Indictment for  
MURDER

JULIE J. ARMSTRONG  
CLERK, C.P., G.S. & F.C.  
BY *[Signature]*

2006 SEP -7 AM 9:36

FILED

ATTEST: A TRUE COPY  
JULIE J. ARMSTRONG (SEAL)  
CLERK, C.P., G.S. & F.C.  
By *[Signature]*  
DEPUTY CLERK



PAGE 1 of 3

COMPLAINT # 2006013629

NORTH CHARLESTON POLICE DEPARTMENT

DEFENDANT STATEMENT



STATEMENT OF TERRELL O'NEIL WRIGHT

HOME ADDRESS \_\_\_\_\_ R. D. N. CHAS HOME PHONE \_\_\_\_\_

EMPLOYER PALMER'S PAINTING BUSINESS ADDRESS \_\_\_\_\_

BUS. PHONE \_\_\_\_\_ OCCUPATION \_\_\_\_\_

THIS STATEMENT IS GIVEN April 18, 2006 (DATE) AT 4:10 pm (TIME)

N. C. P. D (LOCATION)

THIS STATEMENT IS BEING WRITTEN BY DET. ELMORE WITH MY PERMISSION.

April 17, 2006 @ around 1am me, AND NATE MET UP AT CLUB FAATACY NATE WAS DRIVING MY FORD L-T-D AND HE HAD SOME OTHER GUY WITH HIM. I WAS DRIVING MY LINCOLN SILVER IN COLOR. WE PARKED IN THE BACK PARKING LOT OF THE CLUB. I WAS TALKING TO A SCRIPER AT MY CAR. NATE WALKED UP TOWARDS THE FRONT OF THE CLUB AND WAS TALKING TO SOME SCRIPER WITH SOME OTHER GUY. I SAW GRAY / SILVER CHRYSLER PULL UP. NATE NOTICED THAT THE CHRYSLER HAD PULLED UP TOO. WE ALL KNOW THAT IT WAS SAMIE'S CAR. THE NEXT THING I KNOW IS THAT SAMIE JUMPED OUT OF THE BACK BACK SEAT OF HIS CAR AND HIM AND NATE STARTED ARGUING FACE TO FACE. ANTONIO WAS DRIVING <sup>KPE/TW</sup> SAMIE'S CAR. I HEARD A GUN SHOT. I SAW NATE RUNNING BACK TO MY L-T-D FEEL THE ONE HE DROVE THERE IN. HE WAS STUMBLING LIKE HE WAS SHOT. I DIDN'T KNOW IF HE WAS HIT OR NOT. THAT'S WHEN SHOT STARTED COMING MY WAY. I GOT MY GUN

I HAVE READ THE FOREGOING STATEMENT OR HAVE HAD IT READ TO ME AND IT IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE. I HAVE GIVEN THIS STATEMENT FREELY AND VOLUNTARILY AND HAVE BEEN PROVIDED A COPY OF MY STATEMENT.

WITNESS: DET. KIM P. [Signature]

SIGNATURE: Terrell Wright

WITNESS: \_\_\_\_\_

AND STARTED SHOOTING UP INTO THE AIR. I WAS BACKING UP WHILE I WAS SHOOTING AND FEEL DOWN. I GOT UP AND DROVE OFF. I GOT HOME AND TOLD MY GIRLFRIEND (STEPHANIE MOORE) WHAT JUST HAPPENED, BUT I DIDN'T KNOW JAMIE WAS SHOT OR DEAD UNTIL THE NEWS CAME ON. <sup>KPE/TW</sup> LATER THAT DAY I WENT TO SEE MY PROBATION OFFICER AND I GOT A CALL FROM MY MOTHER TELLING I WAS ON THE NEWS. SHE TOLD ME THAT THE NEWS WAS SAYING THAT I SHOT INTO A CROWD OF PEOPLE. LATER THAT NIGHT I THREW THE GUN THAT I HAD SHOT INTO THE AIR WITH INTO THE SIDE OF THE BRIDGE OFF OF N. RHETT. ON THE HANAHAN SIDE. REFER I DID ALL THAT I DID GO BY MY LAWYER'S OFFICE AND SPOKE WITH HIM. I TOLD HIM ABOUT THE INCIDENT AND HE TOLD ME NOT TO WORRY RIGHT NOW IF <sup>KPE/TW</sup> ~~IT~~ IT IS NOT A ARREST WARRANT FOR ME. LATER THAT NIGHT I SAW THE NEWS AND THEY SAID THAT IT WAS AN ARREST WARRANT FOR ME. <sup>KPE/TW</sup> ~~IT~~ I CALLED MY LAWYER BACK AND HE TOLD ME THAT HE SAW IT ON THE NEWS AND FOR ME TO TURN MYSELF IN TO THE POLICE. AT 2pm TODAY MY MOTHER DROPE ME OFF AT THE POLICE DEPARTMENT.

Q: WHAT KIND OF GUN DID YOU HAVE?

A: I DON'T REMEMBER, IT WAS AN AUTOMATIC.

I HAVE READ THE FOREGOING STATEMENT OR HAVE HAD IT READ TO ME AND IT IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE. I HAVE GIVEN THIS STATEMENT FREELY AND VOLUNTARILY AND HAVE BEEN PROVIDED A COPY OF MY STATEMENT.

WITNESS: DET. KIMB P. [Signature]

WITNESS: \_\_\_\_\_ SIGNATURE: [Signature]

I HAVE BEEN PROVIDED A COPY OF MY STATEMENT. SIGNATURE: \_\_\_\_\_

② Q: Did you speak with NATE AFTER THE SHOOTING?

A: YES, AFTER HE SAID HE WAS GOING TO TURN HIMSELF IN.

③ Q: Why do you think this shooting happened?

A: I DON'T KNOW, MAYBE BECAUSE NATE WAS SCARED <sup>HE/TO</sup> OF WHAT HAD HAPPENED TO HIM BEFORE, AND THE WAY JANIE TUMBLED OUT OF HIS CAR. <sup>SCARED/TH</sup> <sup>KPE</sup>

END.

OR

STATEMENT

I HAVE READ THE FOREGOING STATEMENT OR HAVE HAD IT READ TO ME AND IT IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE. I HAVE GIVEN THIS STATEMENT FREELY AND VOLUNTARILY AND HAVE BEEN PROVIDED A COPY OF MY STATEMENT.

WITNESS: Det. Keith P.R.

SIGNATURE: Terrell Wright

WITNESS: