

VOLUME THREE OF THREE

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Dorchester County

Edgar W. Dickson, Circuit Court Judge

RECEIVED

NOV 24 2014

S.C. Supreme Court

STEVEN C. BRISCOE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001910

A P P E N D I X

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Appellate Defender

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ATTORNEY FOR PETITIONER

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1 ILLNESS, AND FOR ALL INTENTS AND PURPOSES, BECAUSE OF
2 THAT ILLNESS, WAS IN THE WRONG PLACE AT THE WRONG
3 TIME, UNDER THE VERY WRONGEST OF CIRCUMSTANCES --
4 ALTHOUGH WRONGEST IS NOT A WORD, I'M GOING TO USE IT
5 TODAY. AND FOR ALL INTENTS AND PURPOSES, HE SEEMED TO
6 ME TO BE, BASED ON THE LIMITED AMOUNT OF INFORMATION
7 THAT I'VE HEARD TODAY, PROBABLY GENEROUS IN SPIRIT,
8 BASED ON WHAT HIS WIFE HAS INDICATED TO ME, BECAUSE A
9 CHILD WOULD NOT BE ABLE TO SLEEP ALL NIGHT UNLESS THEY
10 HAD VERY FOND MEMORIES OF THEIR FATHER, AND HE WAS A
11 LOVING AND CARING MAN, BUT NOT AGGRESSIVE NECESSARILY
12 IN ANY WAY, HE WAS PROBABLY AGGRESSIVE THAT NIGHT
13 BECAUSE OF HIS ADDICTION, BUT PROBABLY UNDER NORMAL
14 CIRCUMSTANCES, WAS KIND AND GENTLE AND GIVING. AND
15 SO, I'M FORCED TO DEAL WITH THAT LAW, WHICH IS
16 TREMENDOUS. AND UNFORTUNATELY, I HEARD MR. BELL --
17 NOT UNFORTUNATE WHAT HE SAID, BUT I HEARD HIM SAY THAT
18 THEY NOW HAVE CLOSURE, WHICH IS TO A GREAT EXTENT
19 CORRECT. UNFORTUNATELY, THE CLOSURE OF THESE
20 PROCEEDINGS CAN'T BRING THEM WHAT THEY WANT MOST,
21 WHICH IS THEIR LOVED ONE. AND THEY STILL WILL HAVE TO
22 LIVE WITH THE REMNANTS OF ALL OF THIS, AND TRY TO HAVE
23 SOME PEACE ABOUT IT. AND I HOPE, I HOPE YOU KNOW --
24 AND IT REALLY MOVED ME WHEN I HEARD FROM HIS WIFE,
25 BECAUSE IT JUST TOLD ME OF THE GENEROSITY OF SPIRIT OF

1 THE PERSON THAT SHE IS, BECAUSE SHE SAID, I FORGIVE
2 HIM. AND I'VE LISTENED TO FOLKS SAY THAT A LOT, AND
3 BELIEVE ME, I HAVE A -- FOLK OFTEN LOOK AT ME BECAUSE
4 I LOOK YOUNG, AT LEAST I THINK I STILL LOOK YOUNG, AND
5 THEY THINK BECAUSE I LOOK SO YOUNG THAT I DON'T HAVE
6 ANY DISCERNMENT. BUT I CAN TELL WHEN SOMEBODY IS
7 GENUINE, AND WHEN THEY'RE JUST SAYING THINGS. AND
8 WHEN YOU SAID YOU FORGAVE HIM, THAT CAME FROM THE PIT
9 OF WHO YOU ARE. AND I BELIEVE YOU, AND I BELIEVE YOU
10 FORGIVING HIM IS GOING TO FREE YOU TO BE ABLE TO LIVE
11 YOUR LIFE, AND TO BE ABLE TO RAISE YOUR CHILDREN. AND
12 I HOPE THAT THE DEFENDANT REALLY GRASPS THE DEPTH OF
13 WHAT YOU DID FOR HIM TODAY. AND SO, I THANK YOU FOR
14 YOUR CANDOR. AND I, IN NO WAY, HOPE THAT ANYTHING
15 I'VE SAID TODAY DIMINISHES HIS IMPORTANCE TO YOU OR TO
16 YOUR FAMILY. I HOPE IN SOME WAY IT HAS GIVEN YOU SOME
17 COMFORT.

18 NOW, I'M ALSO FACED WITH A GREAT
19 LOSS OF THE DEFENDANT'S MOTHER. SHE PROBABLY AT THIS
20 POINT IS HAVING TO WRESTLE WITH HER OWN DEMONS ABOUT
21 THIS SITUATION. AND EVERY PARENT WHO RAISES A CHILD
22 WHERE SOMETHING HAPPENS ALWAYS STRUGGLES WITH, HOW
23 COULD I HAVE PREVENTED THIS? HOW COULD I HAVE SOME
24 WAY INTERVENED AND MADE SURE THIS DID NOT HAPPEN? BUT
25 YOU KNOW, ONCE CHILDREN REACH A CERTAIN AGE THEY MAKE

1 THEIR OWN DECISIONS, AND YOU CAN'T HOLD YOURSELF
2 ACCOUNTABLE FOR THOSE THINGS.

3 I THINK THAT THE TRUTH OF WHAT
4 HAPPENED ON THIS EVENING, BECAUSE NONE OF US WAS
5 THERE, LIES SOMEWHERE IN THE MIDDLE OF ALL OF THESE
6 STORIES. AND THAT'S THE WONDERFUL THING ABOUT BEING A
7 JUDGE, I GET TO BE MUTUAL AND DETACHED. I GET TO
8 REALLY HEAR, WITHOUT HAVING TO ADVOCATE. SO, I DON'T
9 HAVE ANYBODY -- WHEN I WAS A LAWYER, NOW, I WAS AN
10 ADVOCATE, I WAS AN ADVOCATE'S ADVOCATE, AND I BELIEVED
11 IN MY CLIENTS, OR THEIR POSITIONS, AND ADVOCATED, I
12 HAD TUNNEL VISION, I COULDN'T SEE ANYTHING ELSE, WHICH
13 IS WHAT BOTH MR. BELL AND MR. KEARSE HAVE DONE IN THIS
14 CASE, AND THEY'VE DONE A VERY GOOD JOB ADVOCATING FOR
15 THEIR RESPECTIVE INTERESTS. BUT AS A JUDGE I HAVE THE
16 LUXURY OF BEING COMPLETELY NEUTRAL AND LISTENING FOR
17 WHAT I PERCEIVE TO BE THE TRUTH OF A SITUATION. AND I
18 HAVE LEARNED THAT IN MOST OF THESE SITUATIONS YOU
19 NEVER HEAR THE COMPLETE TRUTH, BUT YOU HEAR THREADS OF
20 TRUTH THROUGH WHAT PEOPLE SAY AND HOW THEY REPRESENT
21 WHAT HAPPENED, AND I THINK WE HAVE HEARD SOME THREAD
22 OF WHAT HAPPENED THAT EVENING. AND I THINK THAT WE
23 HAVE HEARD SOME PART OF THE TRUTH. I'M NOT CERTAIN WE
24 HEARD IT ALL, BECAUSE AGAIN, AS I'VE INDICATED, NONE
25 OF US WERE THERE.

1 I THINK WHAT IS COMPLETELY
2 UNFORTUNATE ABOUT THIS ENTIRE CASE IS THAT WE'LL NEVER
3 KNOW THE LEVEL OF CULPABILITY OF THE OTHER FOLK WHO
4 WERE THERE. I DON'T THINK WE'LL EVER KNOW EXACTLY WHO
5 DID WHAT, WHEN, BECAUSE I THINK IT HAPPENED VERY
6 QUICKLY. AND I THINK, IN HAND SIGHT, THEY ALL WISH
7 THEY HAD NOT BEEN THERE. AND I THINK THAT THEIR
8 CULPABILITY IS A LOT GREATER THAN HAS BEEN REFLECTED
9 BY THEIR TESTIMONY, BECAUSE I'M CERTAIN THAT THE
10 DEFENDANT WAS NOT THE ONLY ONE WHO HAD A GUN AT THE
11 PARTY. AND I AM ALSO CERTAIN THAT -- IT IS REALLY
12 UNFORTUNATE, THE PLACE THE DEFENDANT FINDS HIMSELF IN,
13 BECAUSE QUITE FRANKLY, I THINK IF HE HAD SIMPLY COME
14 TO TERMS WITH THE TRUTH AND TOLD IT HE WOULD BE IN
15 MUCH -- I DON'T KNOW WHETHER HIS POSITION WOULD BE
16 DIFFERENT BUT I THINK AT LEAST HE'S HAVE SOME PEACE
17 WITH HIMSELF. BUT I THINK HE HAS CONVINCED HIMSELF OF
18 HIS OWN REALITY OF WHAT TOOK PLACE ON THAT EVENING.
19 AND I THINK HE IS GRAPPLING WITH THE FACT THAT IN A
20 SPLIT SECOND -- AND I SAY, SPLIT SECOND RELATIVE,
21 BECAUSE I MEAN, PROBABLY IN THE SPAN OF A WEEK OR TWO
22 HE MADE A DECISION THAT HAS INEXTRICABLY ALTERED HIS
23 LIFE AND HIS VICTIM'S LIFE, BECAUSE NOW A MAN IS DEAD.
24 AND I THINK THAT IS PROBABLY THE MOST UNFORTUNATE
25 THING IN THIS PARTICULAR SITUATION.

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1 I THINK WHAT IS ALSO UNFORTUNATE
2 ABOUT THIS SITUATION IS THAT THEY WERE ALL, TO SOME
3 EXTENT, NOVICES IN THE DRUG TRADE, BECAUSE A REAL
4 EXPERT IN DRUG TRANSACTIONS WOULD NEVER HAVE SHOT THE
5 VICTIM, THEY WOULD HAVE JUST SAID, CATCH HIM, AND THAT
6 WOULD HAVE BEEN THE END OF IT, AND HE PROBABLY WOULD
7 HAVE ENDURED A SEVERE BEATING, BUT THAT PROBABLY WOULD
8 HAVE BEEN THE EXTENT OF WHAT HE EXPERIENCED, AND THAT
9 WOULD HAVE BEEN THE END OF IT, BECAUSE A REAL DRUG
10 DEALER DOES NOT WANT TO BRING THE ATTENTION OF THE
11 POLICE UNDER ANY CIRCUMSTANCES TO A TRANSACTION.

12 NOW, I'M NOT CERTAIN WHETHER
13 SOMEBODY PLANNED TO RIP SOMEBODY OFF THAT NIGHT, AND
14 THE VICTIM GOT CAUGHT IN THE CROSS HAIRS, OR WHETHER
15 HE SAW AN OPPORTUNITY DURING THAT MALAY TO MAYBE GET
16 HIM SOME DRUGS, I DON'T KNOW EXACTLY WHAT HAPPENED,
17 BECAUSE AGAIN, I WAS NOT THERE, I CAN ONLY EXTRAPOLATE
18 FROM WHAT WAS SAID AND WHAT WAS NOT SAID AS TO WHAT
19 HAPPENED ON THAT EVENING.

20 SO, UNFORTUNATELY, THE COURT IS
21 FACED WITH AN UNTENABLE SITUATION BECAUSE OF WHAT HAS
22 HAPPENED. AND MR. BELL WAS VERY POIGNANT, HE SAYS,
23 IT'S SENSELESS, JUST A SENSELESS ACT THAT TOOK THE
24 LIFE OF THIS VICTIM IN THIS CASE, UNNECESSARY, BECAUSE
25 NOW TWO LIVES ARE LOST, AND TWO FAMILIES ARE LEFT TO

1 DEAL WITH THAT, WITH THE REMNANTS OF THAT.

2 THE COURT, IN CONSIDERING AN
3 APPROPRIATE SENTENCE IN THIS MATTER, HAS CONSIDERED
4 THE AGE OF THE VICTIM AND THE EFFECTS THAT THIS WHOLE
5 EVENT HAS HAD ON HIS FAMILY, THE AGE OF THE DEFENDANT,
6 AND THE FACT THAT HE HAS MINOR CHILDREN, AS WELL AS
7 THE EFFECT THAT IT HAS HAD ON HIS FAMILY, TO SOME
8 EXTENT. THE SENSELESSNESS OF THIS ACT, AS WELL AS WHAT
9 JUDGE FIELDS SO APPROPRIATELY OBSERVED AS TO WHETHER
10 THIS PERSON IS TRULY WICKED OR TRULY MISGUIDED, AND IT
11 IS MY ASSESSMENT THAT HE IS TRULY MISGUIDED. AND IF
12 I'M WRONG, MY RADAR MAY BE OFF, I'M NOT INFALLIBLE,
13 AND I'M NOT PERFECT, AND I DON'T REPRESENT TO ANYONE
14 THAT I AM. BUT I THINK UNDER THE CIRCUMSTANCES,
15 REALLY, WHETHER I GAVE MR. BRISCOE LIFE OR THIRTY
16 YEARS, AT THIRTY-THREE IT'S A LIFE SENTENCE, BECAUSE
17 HE HAS TO -- IT IS CLASSIFIED AS MOST VIOLENT, IT IS
18 ALSO CLASSIFIED AS SERIOUS, WHICH MEANS THERE IS NO
19 PAROLE TO BE GRANTED FROM IT, HE WILL HAVE TO MAX OUT
20 HIS SENTENCE, AND HE WILL HAVE TO SERVE AT THE RATE,
21 DEPENDING ON WHAT HAPPENS AT THE DEPARTMENT OF
22 CORRECTIONS, SOMEWHERE BETWEEN TWENTY-FIVE AND TWENTY-
23 EIGHT YEARS, IF I WERE TO GIVE HIM THE MINIMUM, IN
24 WHICH CASE HE WOULD BE ALMOST SIXTY YEARS OLD WHEN HE
25 GOT OUT OF PRISON. SO, CERTAINLY, FOR ALL INTENTS AND

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1 PURPOSES, THAT'S A LIFETIME. HIS CHILDREN WILL BE
2 GROWN, AND TO THE EXTENT THAT YOU CAN START OVER AT
3 THAT AGE, IT'S NOT INSURMOUNTABLE, BUT CERTAINLY IT'S
4 A LIFETIME.

5 SENTENCE OF THE COURT

6 BASED ON WHAT HAS BEEN PRESENTED
7 TO THE COURT I FIND IT APPROPRIATE -- SIR, IF YOU
8 WOULD STAND FOR SENTENCING -- AND THIS RECORD, THE
9 COURT WOULD FIND IT APPROPRIATE, SIR, THAT YOU BE
10 SENTENCED TO THE STATE DEPARTMENT OF CORRECTIONS FOR A
11 PERIOD OF THIRTY YEARS.

12 YOU WILL RECEIVE CREDIT, PURSUANT
13 TO TWENTY-FOUR, THIRTEEN, FORTY, TO BE CALCULATED AND
14 APPLIED BY THE DEPARTMENT OF CORRECTIONS.

15 THANK YOU VERY MUCH.

16 MR. KEARSE: THANK YOU, YOUR
17 HONOR.

18 SOLICITOR BELL: THANK YOU, YOUR
19 HONOR.

20 THE COURT: THANK YOU.

STATE OF SOUTH CAROLINA)

County of DORCHESTER)

IN THE COURT OF COMMON PLEAS

2009-CP-18-

305

STEVEN BRISCOE #312254)

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

v.)

State of South Carolina)

APPLICATION FOR

POST-CONVICTION RELIEF

FILED-RECORDED
2009 FEB 18 AM 10:46
JEREMY L. GRAHAM
CLERK OF COURT
DORCHESTER COUNTY

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention LIEBER CORRECTIONAL INSTITUTION, P.O. BOX 205
RIDGEVILLE, SOUTH CAROLINA, 29472
2. Name and location of Court which imposed sentence DORCHESTER COUNTY
GENERAL SESSIONS
3. Name(s) of co-defendant(s) (if any) NONE
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
(a) 04-GS-18-1100 (murder)

- (b) _____
- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) NOVEMBER 4, 2005 (thirty years)
- (b) _____
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty JURY TRIAL
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
YES
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. SOUTH CAROLINA COURT OF APPEALS
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. CONVICTION AND SENTENCE AFFIRMED
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. SUBMITTED April 1, 08, filed May 14, 08
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. UNPUBLISHED Op.No. 2008-UP-259
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) N/A

- (b) _____
 (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) INEFFECTIVE ASSISTANCE OF COUNSEL
 (b) DENIAL OF SIXTH AND FOURTEENTH AMENDMENT(S)
 (c) TRIAL COUNSEL(S) INACTIONS TO PROTECT MY RIGHTS
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) SEE ATTACHED ISSUES AND MEMORANDUM OF LAW IN SUPPORT
 (b) SEE ATTACHED
 (c) SEE ATTACHED
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? No
 (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No
 (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No
 (d) any other petitions, motions or applications in this or any other Court? No
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. N/A
 ii. _____
 iii. _____
 iv. _____
- (b) the name and location of the Court in which each was filed:
- i. N/A
 ii. _____
 iii. _____

iv. _____
 (c) the disposition thereof:

i. N/A _____

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. N/A _____

ii. _____

iii. _____

iv. _____

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

i. N/A _____

ii. _____

iii. _____

iv. _____

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

No

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

(a) which grounds have been presented:

i. N/A _____

ii. _____

iii. _____

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

i. N/A _____

ii. _____

iii. _____

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

(a) this is first collateral filing PCR
 (b) _____
 (c) _____

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

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

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

(a) the name and address of each attorney who represented you:
 i. KEVIN KEARSE, ESQUIRE
DORCHETSER COUNTY BAR
 ii. SAME AS ABOVE
 iii. JOSEPH SAVITZ III, ESQUIRE
SOUTH CAROLINA APPELLATE DEFENSE
 (b) the proceedings at which each such attorney represented you:
 i. TRIAL
 ii. SENTENCING
 iii. DIRECT APPEAL

19. State clearly the relief you seek in filing this application:
 FOR THIS COURT ,VACATE SENTENCE AND REMAND FOR NEW TRIAL OR IN
 THE ALTERNATIVE WHATEVER RELIEF THIS COURT DEEMS APPROPRIATE.

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

NO

Revised 3/2003

STATE OF SOUTH CAROLINA)

VERIFICATION

County of DORCHESTER)

I, STEVEN BRISCOE #312254, being duly sworn
 upon my oath, depose and say that I have subscribed to the foregoing application; that I know the
 contents thereof; that it includes every ground known to me for vacating, setting aside or
 correcting the conviction and sentence attacked in this application; and that the matters and
 allegations therein set forth are true.

Steven Briscoe

SWORN to and subscribed before me this 5
 day of Feb, 09.

Yvette Bl (L.S.)
 Notary Public

My Commission Expires: 8/2/2016

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

I, STEVEN BRISCOE #312254, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

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

Steven Briscoe

Applicant

SWORN or affirmed to and subscribed before me this
5 day of Feb., 09.

Yvette Bl
Notary Public

My Commission Expires: 8/20/2016

IN THE STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF DORCHESTER

2009-CP-18-1305

STEVEN BRISCOE #312254) INDICT.No. 04-GS-18-1100

PETITIONER,)

-V-)

CERTIFICATE OF SERVICE

STATE OF SOUTH CAROLINA; and)

ATTORNEY GENERAL, HENRY McMASTER)

RESPONDENT,)

FILED-RECORDED
2009 FEB 18 AM 10:47
CLERK OF COURT
DORCHESTER COUNTY

I, Steven Briscoe, do hereby swear under the penalty of perjury that I have mailed the Original and (1) one copy of the enclosed Application for Post Conviction Relief and Memorandum of Law in Support to the Clerk of Court for Dorchester County, SC. This was done by placing the aforesaid documents in a properly addressed, sufficient postage affixed envelope and placed in the U.S. Mailroom here at Lieber Corr. Inst. P.O. Box 205, Ridgeville, SC. 29472.

SWORN TO AND SUBSCRIBED BEFORE ME

THIS 5 DAY OF Feb., 2008

Yvette Ben

NOTARY PUBLIC

MY COMM. EXPIRES

8/20/2016

Respectfully Submitted,

/s/ Steven Briscoe
Steven Briscoe #312254

Steven Briscoe #312254
Lieber Corr. Inst.
P.O. Box 205
Ridgeville, SC. 29472

FILED-RECORDED

2009 FEB 18 AM 10:49

CHERYL GRAHAM
CLERK OF COURT
DORCHESTER COUNTY

RE: Post Conviction Relief Application and Attached Issues &
Memorandum of Law in Support

Dear Clerk,

Enclosed for filing please find the Original and (1) copy of my Post Conviction Relief Application, Issues presented and attached Memorandum of Law In Support.

Could you please clock stamp the copy and return it to me for my files? For your convenience I have enclosed a self addressed, sufficient postage affixed envelope to return the copy to me.

I truly thank you very much for your time and convenience in this matter.

Kindest Regards,

/s/ Steve Briscoe
Steven Briscoe #312254

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF DORCHESTER	)	
	)	
	)	2009-CP-18-0305
	)	
Steven Briscoe, #312254,	)	
	)	
Applicant,	)	
	)	
v.	)	RETURN
	)	(Appointment of Counsel Requested)
State of South Carolina,	)	
	)	
Respondent.	)	

The Respondent, making its Return to the application for post conviction relief (PCR) filed February 18, 2009,¹ would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Dorchester County Clerk of Court. The Applicant was indicted at the October 2005 term of the Dorchester County Grand Jury for Murder (2004-GS-18-1100). Kevin Kearse, Esquire, represented him. On October 31, 2005, Applicant proceeded to a jury trial before the Honorable Deadra L. Jefferson. Applicant was found guilty, and on November 4, 2005, Applicant was sentenced to thirty (30) years imprisonment.

A notice of appeal was filed and an appeal perfected. The conviction and sentence were affirmed. State v. Briscoe, 2008-UP-259 (S.C. Ct. App. filed May 14, 2008). The remittitur was sent on May 30, 2008.

¹ Received by Respondent January 21, 2010.

Attached herewith and incorporated herein are the records of the Dorchester County Clerk of Court regarding the subject conviction, the Applicant's records from the South Carolina Department of Corrections, the appellate records, and the trial transcript. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

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

1. Ineffective assistance of counsel.
 - a. "...failing to object to the highly prejudicial opinion testimony of a State's witness who had not been qualified as an expert by the trial court[.]"
 - b. "...failing to object to the prosecution's prejudicial closing argument that unduly prejudiced petitioner and denied him a fair trial[.]"
 - c. "...failing to object to the prosecution's closing argument that violated the golden rule[.]"
 - d. "...failing to object to the highly prejudicial closing argument by the state that impermissibly vouched for the State's witnesses and bolstered the credibility of the State's case[.]"
 - e. "...failing to object to the trial court's jury instructions that shifted the burden of proof[.]"
 - f. "...failed to object to the erroneous jury instructions on malice[.]"

Any claims not specifically enumerated in the PCR application or amendments will be opposed by the State at an evidentiary hearing, and the State will seek summary dismissal of vague or general claims at an evidentiary hearing. S.C. Code §17-27-50. All amendments should be made well in advance of an evidentiary hearing by counsel of record. Rule 11, SCRPC.

III.

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 hereinbefore either expressly admitted, qualified or explained is hereby denied.

V.

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

Respectfully submitted,

HENRY D. McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

MARY S. WILLIAMS
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

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

Feb 4, 2010.

STATE OF SOUTH CAROLINA)

COUNTY OF DORCHESTER)

IN THE COURT OF COMMON PLEAS

2009-CP-18-0305

STEVEN BRISCOE, 312254)

Applicant,)

vs)

AFFIDAVIT OF SERVICE BY MAIL

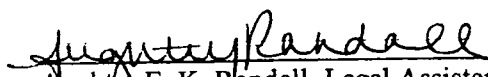
STATE OF SOUTH CAROLINA,)

Respondent.)

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

**Jennifer Queen, Esquire
Gyro Trac (USA), Inc.
10 Flying Cloud Drive
Summerville SC 29483**

DATED this 5th day of February, 2010.


Aughtry E. K. Randall, Legal Assistant
For Respondent

1 STATE OF SOUTH CAROLINA

2 COUNTY OF DORCHESTER

CIRCUIT COURT

2009-CP-18-00305

3
4 STEVEN BRISCOE,
5 Applicant,

6 -vs-

TRANSCRIPT OF RECORD

7 STATE OF SOUTH CAROLINA,
8 Respondent.

9
10 Post Conviction Relief Hearing
11 Heard on Wednesday, May 22, 2013
12 Orangeburg, South Carolina
13

14
15 BEFORE:

THE HONORABLE EDGAR W. DICKSON

16
17
18 APPEARANCES:

19 Counsel on Behalf of the Applicant:
Charles T. Brooks, III, Esq.

20
21 Counsel on Behalf of the Respondent, State of SC:
Walt Whitmire, Esq.
22

23 Cheri L. Young, RPR
24 Circuit Court Reporter
P O Box 5232
25 Aiken, SC 29803-5232

EXAMINATION INDEX

STEVEN BRISCOE

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CROSS BY MR. BROOKS

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1 ON WEDNESDAY MAY 22, 2013 AT 4:22 P.M.:

2 THE COURT: Mr. Whitmire?

3 MR. WHITMIRE: May it please the Court, Your Honor.

4 THE COURT: Yes, sir.

5 MR. WHITMIRE: The State calls Steven Briscoe V State
6 of South Carolina, 2009-CP-18-0305. Mr. Briscoe is
7 presently confined to the Department of Corrections
8 pursuant to orders of commitment from the Dorchester
9 County Clerk. Mr. Briscoe was indicted the October 2005
10 term of the Dorchester Grand Jury for murder.

11 Kevin Kearse represented him on October 1st -- 31st,
12 2005. Mr. Briscoe proceeded to trial before the Honorable
13 Judge Jefferson. Judge Jefferson -- Applicant was found
14 guilty and Judge Jefferson sentenced him to 30 years
15 imprisonment.

16 A notice of appeal was filed and perfected on his
17 behalf. The conviction and sentence were affirmed, State
18 V Briscoe 2008-UP-259. The remittitur was sent May 30th,
19 2008.

20 Mr. Briscoe filed his application for post-conviction
21 relief April 18th, 2009. The State filed its return.
22 Mr. Briscoe is present and represented by Mr. Brooks.

23 At this time the State turns matters over to
24 Mr. Brooks noting that there was a pending pro se motion
25 for Mr. Brooks to be relieved.

1 THE COURT: Okay. All right. Mr. Brooks?

2 MR. BROOKS: Do you still want me on the case or do
3 you want that motion to --

4 THE APPLICANT: Motion to be relieved.

5 MR. BROOKS: Judge, he wants to address the Court on
6 that motion to be relieved.

7 THE COURT: Okay. Mr. Briscoe, let me hear from you,
8 please, sir.

9 THE APPLICANT: There was an issue, sir, pertaining to
10 my grand jury impanelment documents. I was trying to make
11 sure that my rights have been protected by obtaining these
12 documents. And when I brought it up to my attorney, he
13 said to me that, that grand jury impanelment documents
14 didn't apply to county juries. He said that it was only
15 for state juries.

16 But I read a case of Evans versus State saying that
17 grand jury impanelment documents covered county juries as
18 well also. I have that here with me also, sir.

19 THE COURT: Okay. Well, I mean, that's an argument
20 you can certainly go forward, and we can discuss today.
21 Okay?

22 THE APPLICANT: Yes, sir.

23 THE COURT: Anything else?

24 THE APPLICANT: I would have liked to be able to -- I
25 feel like, you know, he didn't give me accurate and

1 necessary information at the time.

2 THE COURT: Well, I don't know that he's given you any
3 inaccurate information at this time. The only thing I
4 said was that I'll let you argue that position.

5 THE APPLICANT: Okay, sir. I have the letter with him
6 telling me that it did not apply, that Evans versus State
7 did not apply to grand juries, to county grand juries.
8 But I have Evan versus State with me as well that says it
9 does apply to state grand juries.

10 THE COURT: Okay.

11 THE APPLICANT: I just felt like he wasn't, he wasn't
12 really, you know, trying to supply me with the necessary
13 and accurate information for me to move forward.

14 THE COURT: Okay. Well, but we've got a number of
15 other issues to go forward on; is that correct?

16 THE APPLICANT: Yes, sir.

17 THE COURT: Okay. All right. And I notice that he
18 had filed an amended application for post-conviction
19 relief back in April, part of your request; is that
20 correct?

21 THE APPLICANT: Well, actually, what I was asking was
22 his opinion on the issue. I wasn't, I wasn't asking for
23 him to file the issue. I wanted his opinion on the issue.

24 THE COURT: Okay.

25 THE APPLICANT: And he filed it and never responded,

1 you know --

2 THE COURT: Well --

3 THE APPLICANT: -- my position to it.

4 THE COURT: -- I assume he filed that out of abundance
5 of caution because you get one PCR hearing.

6 THE APPLICANT: Yes, sir.

7 THE COURT: Do you understand?

8 THE APPLICANT: Yes, sir.

9 THE COURT: And so what we want to do is make sure we
10 cover everything that you're concerned about.

11 THE APPLICANT: Okay.

12 THE COURT: Okay? And that's what we're prepared to
13 do today. And I will, if, after I listen to your
14 arguments on Evans versus State, if I believe the record
15 needs to remain open to cover some other issues, I'll be
16 happy to leave the record open to take any more evidence
17 on that. Okay?

18 THE APPLICANT: So we're going to move forward with
19 it?

20 THE COURT: Yes, sir.

21 THE APPLICANT: Okay. Well, you know what, sir, I
22 wish -- we can just omit that and just go ahead and get
23 into the issues because I want to make sure that I have an
24 opportunity to get my issues on the record.

25 THE COURT: Oh, yeah. Well, I want to get everything

1 on the record. That's why we're here. Okay? And you're
2 ready. I know you brought out all your stuff.

3 THE APPLICANT: Yes, sir.

4 THE COURT: Okay. Great. Let's get --

5 MR. BROOKS: Ready, Judge?

6 THE COURT: Yes, sir. I'm ready.

7 MR. WHITMIRE: Your Honor, Mr. Briscoe has filed an
8 extensive PCR application amendment. I'd just ask that
9 Mr. Brooks put it on the record the claims that
10 Mr. Briscoe is proceeding on today.

11 MR. BROOKS: Judge, out of abundance of caution, I
12 think the Court will give Mr. Briscoe a wide amount of
13 latitude to put his issues on the record as he's
14 testifying.

15 THE COURT: Oh yeah. I'm going to.

16 MR. BROOKS: So that will take care of that issue at
17 this time.

18 THE COURT: And, Mr. Whitmire, just to address your
19 concerns. If something comes up, just as I told
20 Mr. Briscoe, if there's an issue that I believe I need to
21 hold the record open for any further information, I'll do
22 that for the State as well as for him.

23 I would note that the only thing I have is the
24 transcript. I don't know if, you know, usually I get
25 returns and all of that other good stuff.

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1 MR. WHITMIRE: Yes, Your Honor.

2 THE COURT: And I've saved y'all as many trees as I
3 could.

4 MR. WHITMIRE: Your Honor.

5 THE COURT: Yes, sir.

6 MR. WHITMIRE: There's extra copies in the file. I
7 didn't prepare these packets.

8 THE COURT: Okay.

9 (Documents handed to the Judge.)

10 MR. WHITMIRE: I do apologize.

11 THE COURT: No problem. Thank you, sir.

12 All right. Mr. Brooks, the ball is now in your court.

13 MR. BROOKS: We would call Mr. Briscoe to the stand.

14 THE COURT: Mr. Briscoe, come on up. Mr. Briscoe, do
15 you mind standing, putting your hand on the Bible so we
16 can swear you in?

17 STEVEN BRISCOE, having been duly sworn, was examined
18 and testified as follows:

19 THE COURT: All right, sir. If you'd get comfortable
20 please, sir. Okay.

21 THE APPLICANT: Okay.

22 THE COURT: Mr. Brooks?

23 MR. BROOKS: All right.

24

25

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DIRECT EXAMINATION

1
2 Q. Mr. Briscoe, you had Mr. Kearse as your attorney; is
3 that correct?

4 A. That's correct.

5 Q. And he was court appointed; is that right?

6 A. That's correct.

7 Q. And you raised certain issues in your PCR that you
8 want this Court to give you a new trial. Isn't that
9 correct?

10 A. That's correct, sir.

11 Q. And one of the things you talked about was you felt
12 that Mr. Kearse failed to properly investigate your case;
13 is that right?

14 A. No. I never spoke to you about him failing to
15 properly investigate my case.

16 Q. Okay.

17 THE COURT: And, I'm sorry, Mr. Brooks. I've got to
18 ask you to speak up a little louder.

19 THE APPLICANT: I don't recall speaking to you about
20 that. I mean, I spoke to you one time. We talked about
21 the first issue.

22 BY MR. BROOKS:

23 Q. Okay. The first issue?

24 A. About issue eight. That's it.

25 Q. Is that all you want to go on?

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1 A. No, that's not all I want to go on. I was just trying
2 to answer the question.

3 Q. What you want me to do is go ahead and let you put
4 your issues on the record?

5 A. If that's --

6 Q. Sure. Sure. I'll help you out. Issue number one,
7 what is that?

8 A. I would like to request that my PCR application,
9 including the citings of law, be made a part of the Court
10 record.

11 Q. Okay.

12 A. I would also like to request that the Court address
13 all issues presented pursuant to the relevant South
14 Carolina codes and statutes.

15 Q. Okay. We filed various amendments that you sent to be
16 filed with the Court. And those are on the record. The
17 Court has those.

18 A. Yes, sir.

19 Q. Now, I do know one thing you had mentioned was
20 Mr. Kearse not objecting to an officer trying to give some
21 expert testimony.

22 Do you remember we talked about that?

23 A. Today we talked about that a little bit. That's the
24 part of the first issue. If you would allow me to speak
25 on it.

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1 Q. Go ahead.

2 A. Thank you, sir.

3 Q. All right.

4 A. Issue A, was counsel ineffective for failing to object
5 to the highly prejudicial opinion testimony of the State's
6 witness who had not been qualified as an expert by the
7 trial court.

8 And issue B is, was counsel ineffective for failing to
9 object to the prosecution's prejudicial closing argument
10 that was unduly prejudicial in the denial of a fair
11 trial.

12 To save the Court's time, I wish to argue these issues
13 together, Your Honor, since the facts of the one
14 accomplish the other.

15 Q. Okay.

16 A. Your Honor, Detective Earl Asbill of the Dorchester
17 Police Department presented blood evidence testimony for
18 the State during the trial without being qualified and
19 admitted by the Court as an expert which rendered his
20 testimony inadmissible due to its unreliability.

21 If you would, please, turn to page 425 of the
22 transcript, line 17.

23 THE COURT: Bear with me one second. 425?

24 THE APPLICANT: Yes, sir.

25 THE COURT: All right. 425.

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1 THE APPLICANT: Line 17 is the State's representative
2 Solicitor Bell. Solicitor Bell saying, Your Honor, we
3 offer Dr. Sexton as an expert in forensic pathology. So
4 Dr. Joel Sexton, the State's representative in forensic
5 pathology was offered by the State and admitted by the
6 Court as an expert in forensic pathology.

7 If I can get you to turn, please, to page 494, line
8 14. You will see that Mr. Vello Parvel, the State's
9 representative in firearms identification, was offered by
10 the State and admitted by the Court as an expert in
11 firearms identification.

12 If I could get you to turn to page 661 of the same
13 book, please. Go to line 12. You'll see that Mr. Mark
14 Kelly, the State's representative in the interstate
15 commerce of firearms was offered by the State and admitted
16 by the Court as an expert in the interstate commerce of
17 firearms.

18 However, Lieutenant Earl Asbill was allowed to elicit
19 highly prejudicial opinion testimony without being
20 qualified and admitted as an expert by the trial court.
21 Lieutenant Asbill was allowed to testify as though he were
22 a blood expert, blood being critical evidence, perhaps the
23 ultimate issue going to the heart of the murder case.

24 THE COURT: Where is that that you're talking about?

25 THE APPLICANT: No, I just wanted to show you in the

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1 transcript where he was admitted.

2 Now I'm just saying -- I'm just speaking on, I
3 can't -- I can't take you to the transcript about Mr.,
4 about Mr. Asbill because it's not in the transcript. He
5 was never offered or admitted. He was never offered by
6 the State or admitted by the Court.

7 I'm just speaking on the issue in general now.

8 BY MR. BROOKS:

9 Q. Let me help you. What you're trying to do is show the
10 other examples where there were witnesses that were used
11 as experts and presented as such, as opposed to
12 Mr. Asbill --

13 A. Yes, sir.

14 Q. -- who was not; is that right?

15 A. Yes, sir. Yes, sir.

16 THE COURT: Okay. So Asbill, was not qualified as an
17 expert?

18 THE APPLICANT: He was not offered or admitted by the
19 Court. He was not offered by the State or admitted by the
20 Court, but he gave forensic testimony. He gave blood
21 testimony.

22 And by doing so he bolstered the State's case and
23 violated the South Carolina Rules of Evidence.

24 THE COURT: All right. And, Mr. Briscoe, I hate to
25 interrupt but it would make it easier for me. What pages

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1 did Mr. Asbill testify at?

2 THE APPLICANT: Okay.

3 THE COURT: Beginning at.

4 THE APPLICANT: Let's see. Well, he has extensive --
5 he testifies at various places in the transcript, within
6 the transcript. If you'd just give me one second.

7 THE COURT: Take your time. Asbill.

8 THE APPLICANT: Page 458 on, he repeatedly refers to
9 blood and blood spatter throughout his testimony.

10 THE COURT: Okay.

11 THE APPLICANT: But I just wanted to speak about that
12 in particular.

13 THE COURT: And let me just look at 458 while I got it
14 in front of me.

15 THE APPLICANT: Okay.

16 THE COURT: And you said at 458 he began talking about
17 blood?

18 THE APPLICANT: Yes, sir. Blood and blood spatter
19 throughout his testimony. That's where he begins his
20 testimony, at page 458 of the transcript. And throughout
21 his testimony he speaks about blood and blood splatter.

22 THE COURT: Okay.

23 THE APPLICANT: Your Honor, but --

24 THE COURT: Right.

25 THE APPLICANT: -- the testimony --

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1 THE COURT: Okay. I'm sorry.

2 THE APPLICANT: Thank you. It was further prejudicial
3 because the alleged blood specimens were never
4 scientifically tested to determine in fact if it was blood
5 at all.

6 If you go to page 470 in the transcript, please, and
7 go to page (verbatim) nine. During his testimony
8 Lieutenant Asbill was asked where the blood was coming
9 from. And he said, I would assume it was coming from the
10 wound of the deceased as he was walking into the bedroom
11 there.

12 If the supposed blood specimens had been properly
13 tested, Lieutenant Asbill would have at least known if it
14 was indeed blood and whether the specimen belonged to the
15 deceased or not.

16 It does not reflect if the substance was ever tested
17 or the results thereof anywhere in the discovery materials
18 or any of the investigator's case notes or anywhere within
19 the trial transcript.

20 THE COURT: Okay.

21 THE APPLICANT: Okay. Now in the transcript at page
22 932 at line 14.

23 THE COURT: Okay. Bear with me one second. 932?

24 THE APPLICANT: Yes, sir.

25 THE COURT: What line?

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1 THE APPLICANT: Line 14.

2 THE COURT: Okay.

3 THE APPLICANT: Solicitor Harrison Bell during his
4 closing argument assured the jury that they did the best
5 police work possible. Surely testing a substance assumed
6 to have been blood which very well could have proven to be
7 the key forensic evidence necessary to provide any type of
8 certainty whatsoever would fall right in line with doing
9 at least good police work, if not the best police work
10 possible.

11 Fourteen-year law enforcement veteran Detective Tom
12 Marshall of the Dorchester County Sheriff's Department
13 during cross-examination was questioned about his
14 different, his knowledge of different calibers of
15 handguns, and that --

16 THE COURT: What page is that?

17 THE APPLICANT: That's page 588. Page 588 at line
18 17. He was asked specifically if a 10 millimeter is
19 different from a .40 to which he replied yes. And after
20 basic, further basic questioning upon the subject,
21 Solicitor Bell chose to object to the line of questioning
22 on the basis that Lieutenant Marshall was not an expert.

23 But at page 589 at lines, beginning at line four, even
24 after Lieutenant Marshall had exhibited that after 14
25 years in law enforcement he was indeed aware of at least

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1 the differences between the different calibers of
2 different handgun which in no way required a necessity of
3 any type of scientific knowledge whatsoever. Solicitor
4 Bell chose to question -- chose to object to the line of
5 questioning on the basis that Lieutenant Marshall was not
6 an expert.

7 However, Solicitor Bell willingly allowed Lieutenant
8 Asbill to give non-expert forensic testimony to bolster
9 the State's case making their perceived version of events
10 seem plausible. The unqualified opinion testimony of
11 Lieutenant Asbill was all the more damaging due to the
12 fact that the crime scene had been tampered with by the --

13 MR. WHITMIRE: Objection, Your Honor. The witness is
14 reading a prepared transcript.

15 THE COURT: He's reading from his -- those are his
16 notes; right?

17 MR. BROOKS: Yeah, he's reading his notes and he's
18 referencing --

19 THE APPLICANT: The transcript.

20 MR. BROOKS: -- the transcripts.

21 THE COURT: Yeah, I'm going to let him do that. Okay.

22 THE APPLICANT: Thank you, Your Honor.

23 THE COURT: I'll note your objection.

24 MR. WHITMIRE: Thank you, Your Honor.

25 THE COURT: All right. Go ahead, Mr. Briscoe.

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1 If you give me a trial reference, give me the page and
2 number so I know what you're talking about.

3 THE APPLICANT: Yes, sir.

4 Solicitor Bell -- or rather, the testimony was all the
5 more damaging due to the fact that the crime scene had
6 already been tampered with by the State's witnesses
7 themselves, admittedly prior to the arrival of the
8 sheriff's department to the crime scene.

9 If you go to page 229, please, of the transcript at
10 line three.

11 THE COURT: Hold on a second.

12 THE APPLICANT: Yes, sir.

13 THE COURT: Page 229?

14 THE APPLICANT: Yes, sir. That would be in book one.

15 THE COURT: Okay. And what line?

16 THE APPLICANT: Line three, page 229.

17 THE COURT: Now, what -- where is this stuff about --
18 is that where they said there was tampering with it?

19 THE APPLICANT: Yes, sir. You see that at page 229
20 starting at line three. It says, I'm reading from the
21 transcript, there were beer bottles and stuff in the
22 kitchen. So I was telling them that there was a big mess
23 so I was, I put some of the stuff that was messed up into
24 a black bag.

25 Okay. And this is the testimony of State witness

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1 Lanesha Green. And they said, okay, what were they
2 doing. She said, they went into the room and to one of
3 the rooms of the house that most of stuff was in, like the
4 books and clothes and there was an air mattress and they
5 were taking stuff out of the house.

6 And they asked her, what were they doing with it. She
7 said, a duffel bag and some shoes and a bottle of liquor
8 and maybe a few other things they put into my car and the
9 rest of the stuff went into the black Honda.

10 Now if you go to page 245 of the transcript. That was
11 State's witness Lanesha Green. At 245 of the transcript
12 line 19 it reads, and this is Lanesha Green again.
13 Already now -- all right. Now admittedly you cleaned up
14 the scene, did you not. And she said, I would not. And
15 then Mr. Kearse says, y'all removed items. You say you
16 removed items. And she says, right.

17 Now if you go to page 303 of the transcript, please
18 sir.

19 THE COURT: Okay. Page 303.

20 THE APPLICANT: I'm sorry, Your Honor. It's a little
21 bit more difficult for me to navigate. 303 and that's
22 line 24, sir.

23 THE COURT: Okay.

24 THE APPLICANT: It reads, and this is Ryan North,
25 State's witness Ryan North's testimony. All right. Now

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1 in addition, do you recall telling law enforcement
2 somebody cleaned up the house. And then if you go over to
3 to the next page. After the incident. He says, that was
4 my interpretation, yes, sir.

5 And they asked him, all right, your interpretation on
6 July 8, 2003, was that two Cusack sisters cleaned up the
7 coke and took it to their uncle, and had the marijuana.
8 And his response was, that's what I got from Jermaine the
9 next day because I knew there were drugs in the house
10 spread all over, and Jermaine got his part of the drugs
11 and his part of the marijuana out of the house so somebody
12 had to come back and get it. And so he says, all right,
13 and it was your understanding it was Jermaine that came
14 back and got all of the drugs out of the house. And he
15 says, yes, sir.

16 Now if you go to page 356 of the same book.

17 THE COURT: 256 or 356?

18 THE APPLICANT: 356, please, sir. Thank you, sir.

19 Line 20, it reads, and this is Jermaine Cusack's
20 testimony, State's witness Jermaine Cusack. Mr. Kearse
21 asked him, okay, and what did you do when you went back to
22 the house. Jermaine Cusack testified, I grabbed up like a
23 duffel bag that I had with some clothes in it.

24 Okay. None of the State's witnesses attempted to
25 contact the authorities of any type to report this man

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1 being shot in their home. They did not even call 9-1-1
2 for an ambulance to help this man after he had been just
3 shot, supposedly right in front of them. Instead the
4 State's witnesses chose to clean the scene before leaving
5 the scene and then leaving town all together.

6 If you would turn to page 241 of the transcript, sir.

7 THE COURT: 241?

8 THE APPLICANT: Yes, sir. 241.

9 THE COURT: I'm there.

10 THE APPLICANT: 249 to line two. It reads, this is
11 Lanesha Green's testimony. Well, whether it was anything
12 or not you guys removed some -- y'all put stuff in the
13 car, isn't that correct. And she says, there was stuff in
14 the car, yes, sir. And he said, and you guys took out of
15 that residence whatever you thought would be incriminating
16 towards you guys -- incriminating something towards you
17 guys, isn't that correct.

18 And she says, no, sir, I wouldn't say that. He said,
19 all right, y'all would not say you cleaned up and put this
20 stuff, you said, back into the black Honda and you put
21 stuff into your Chevy Caprice. And she says, I put stuff
22 in. I put something into my car. He says, right. And
23 once you all did you that you guys took off to
24 Orangeburg. She says, we went back to his mother's
25 house. And he says, all right, and y'all drove to

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1 Orangeburg, did you not. She says, I drove to
2 Orangeburg. All right. And you didn't go down to the
3 sheriff's office, you all didn't call the investigator,
4 y'all didn't dial 9-1-1. Y'all left the scene. She says,
5 we left, we left the scene.

6 THE COURT: Okay.

7 THE APPLICANT: The substance assumed to have been
8 blood could have very easily been left behind by one of
9 these very same mentioned witnesses, whether accidentally
10 or purposefully. The unqualified testimony was compounded
11 by the solicitor's closing arguments to the jury which
12 repeatedly referred to Lieutenant Asbill's testimony about
13 blood or blood splatter.

14 If you turn to page 921 of the transcript, please,
15 sir.

16 THE COURT: And, Mr. Briscoe?

17 THE APPLICANT: Yes, sir.

18 THE COURT: Do you have this all written down for me?

19 THE APPLICANT: No.

20 THE COURT: Everything that you're reading right
21 there, have you got it all written down?

22 THE APPLICANT: No, sir. Not everything.

23 THE COURT: Okay. Well, let me ask you. What you're
24 going through now is what you have written down?

25 THE APPLICANT: Just some notes, sir.

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1 THE COURT: Okay. Well, what I was going to ask is,
2 do you have an extra copy you can just give that to me?

3 THE APPLICANT: No, sir.

4 THE COURT: You don't have an extra copy?

5 THE APPLICANT: No, sir. I don't want to lose your
6 attention, sir, please.

7 THE COURT: You're not. I just want to make sure what
8 we got. Okay. Go ahead.

9 THE APPLICANT: 921. On page 921.

10 THE COURT: Hold on one second. Mr. Kearse might have
11 a copy.

12 MR. KEARSE: If I can approach, Your Honor?

13 THE COURT: Yes, sir. And I can follow. This is what
14 you're talking about?

15 THE APPLICANT: That's not what I have.

16 THE COURT: Is this not what he's --

17 MR. BROOKS: Are you reading from something different
18 than the memorandum you sent me?

19 THE APPLICANT: You don't have this, what I'm saying
20 right now.

21 MR. BROOKS: Okay. He's got something totally
22 different.

23 THE COURT: Okay. I'm sorry.

24 MR. BROOKS: That's a copy of what I had filed and he
25 says he's got something totally different, Judge, so...

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1 THE APPLICANT: Yeah. They don't have this, Your
2 Honor.

3 THE COURT: Okay.

4 THE APPLICANT: So we're at page 921, line eight.

5 THE COURT: Okay.

6 THE APPLICANT: We know that the shooter, we know that
7 he was shot near the door because there was blood splatter
8 near the door right there. Okay.

9 Detective Asbill came up and said, it was blood
10 splatter. High velocity blood splatter. Then on page
11 922, if you turn over, line 13. He says, and we know he
12 was at the door because that's where the blood was hit.
13 If you go down to line 23 and there's blood drops. You
14 remember blood drops that he talked about. State's Four.
15 Blood drops on the floor.

16 And then if you go to page 942, line one, he says --
17 line two. I'm sorry. He says, you know, they found
18 drops. They found blood splatter on the door. The blood
19 drips. Throughout the testimony he talks about blood and
20 blood splatter.

21 The prosecution used Lieutenant Asbill's testimony to
22 deliberately invoke personal prejudice, knowing all the
23 while that the personal opinion of a non-qualified expert
24 jeopardizes the integrity of the entire trial process.

25 Clearly counsel should have objected to such

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1 prejudicial testimony. Further, counsel failed to
2 challenge Lieutenant Asbill's qualifications as well, such
3 unchallenged testimony so effective at trial with
4 unfairness as to make the result a conviction, a denial of
5 due process and due to the testimony's unreliability it
6 surely misled the jury in reaching a verdict.

7 It was prejudicial because the alleged blood specimens
8 were never scientifically tested to determine if they were
9 in fact blood at all, and due to the fact that the crime
10 scene had been tampered with by the State's witness
11 themselves admittedly. And the testimony was inadmissible
12 due to its unreliability.

13 Your Honor, for counsel's error I was prejudiced and
14 denied my right to a fair trial as well as my right to
15 effective assistance of counsel, Your Honor. There's a
16 reasonable probability that if counsel would have
17 objected, if not for the error, the outcome of the trial
18 would have been different, Your Honor.

19 THE COURT: Yes, sir.

20 THE APPLICANT: That's issue A and B. I wish to skip
21 issue C and move on to issue D, Your Honor.

22 THE COURT: No, why are you skipping C?

23 THE APPLICANT: I just wish to omit it. I don't even
24 want to bring it up, Your Honor.

25 THE COURT: So if you are skipping C --

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1 THE APPLICANT: Yes, sir.

2 THE COURT: -- that means it's not an issue to you.

3 THE APPLICANT: I wish not to bring this issue up.

4 THE COURT: So issue C is not at issue?

5 THE APPLICANT: Yes, Your Honor.

6 THE COURT: You're withdrawing that?

7 THE APPLICANT: Yes, sir. I'm withdrawing issue C.

8 Then issue D, sir.

9 THE COURT: Okay.

10 THE APPLICANT: Okay. Issue D is, was counsel
11 ineffective for failing to object to the highly
12 prejudicial closing argument by the State that
13 impermissibly vouched for the State's witnesses and
14 bolstered the credibility of the State's case.

15 Your Honor, the State's case in chief was based solely
16 on self-supportive, biased, alleged eyewitness testimony
17 by witnesses who were directly involved with the incident,
18 two of whom which were even facing prison themselves
19 because of it. They all gave conflicting, contradictory
20 stories.

21 Solicitor Harrison Bell himself would admit that the
22 stories as to how this murder occurred were different,
23 saying it twice. And even going as far as to say that the
24 stories don't match up well.

25 If you would turn to page 938 in the transcript,

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1 please, sir.

2 THE COURT: 938?

3 THE APPLICANT: 938, sir.

4 THE COURT: Okay. I'm there. What line?

5 THE APPLICANT: 938, line 14. Line 14 of 938. The
6 stories are different.

7 Okay. If you go to page 939, line three, next page.
8 Line three. It says, the stories are different again.

9 And if you go down to line 15, he reads, they don't
10 match up well. On the other hand is when they really
11 don't, they don't match up well. All right. However, he
12 would later vouch for the truth and veracity of the
13 State's witnesses in several separate instances. At one
14 point literally guaranteeing the jury, all to bolster the
15 credibility of the State's witnesses in an effort to
16 contain -- obtain a conviction.

17 Now if you turn to 923.

18 THE COURT: 923?

19 THE APPLICANT: Yes, sir. 923, sir.

20 THE COURT: Okay. Where are we?

21 THE APPLICANT: Page 923. He says --

22 THE COURT: Okay. Which line?

23 THE APPLICANT: Line 19.

24 THE COURT: Okay.

25 THE APPLICANT: 923. He says, that's -- there's

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1 nothing wrong. I mean, that's not misconstruing any
2 evidence. That's not lying.

3 Now at page 939, if you could turn, please, Your
4 Honor, to 939 to line 17. He says, at the end of line 17,
5 but they came in, tried to tell the truth as best as they
6 remembered it. Solicitor -- then in between him telling
7 the jury that the State's witnesses were telling the
8 truth, Solicitor Bell says, at line 20, if you go down to
9 line 20, because I guarantee you. And it cannot be said
10 with certainty that this statement considering its precise
11 timing did not lead the jury to think that the State was
12 perhaps in possession of some type of proof of this
13 allegation that the jury was for some unknown reason not
14 privileged to, which in turn obviously weighed heavily on
15 the jury's decision to convict.

16 Solicitor Bell would go on to tell the jury at page
17 940, the next page, if you turn, please, at line three.

18 THE COURT: What page again?

19 THE APPLICANT: The next page. 940, sir.

20 THE COURT: Okay.

21 THE APPLICANT: At line three. He says, after telling
22 the jury, because I guarantee you, don't you think that
23 they would have gotten their stories straight or are they
24 just telling you the truth. And I tell you, ladies and
25 gentlemen, they're just telling the truth as best they

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1 can.

2 Solicitor Bell's comment constitute an error of law --
3 constituting an error of law and were inherently
4 prejudicial as per Matthews versus State as well as
5 Gilchrest versus State. There's a reasonable
6 probability that under the circumstances if Solicitor Bell
7 had not given his personal assurance as to the veracity of
8 the State's witnesses the outcome of the trial may have
9 been different.

10 Trial court would acknowledge the fact that this was a
11 credibility case and that this really came down to who the
12 jury believed, unveiling the true motivation behind
13 Solicitor Bell's decision to vouch.

14 If you turn to page 833, please, Your Honor.

15 THE COURT: Yes, sir. 833.

16 THE APPLICANT: 833. 8-3-3, sir.

17 THE COURT: Yes, sir.

18 THE APPLICANT: Line six. Trial court reads, uh-huh,
19 because this is a credibility case.

20 Now at page 985, if I can get you to turn again --
21 sorry, Your Honor. Trying to get through this as quick as
22 I can.

23 THE COURT: I'm sorry. What page?

24 THE APPLICANT: 985, sir.

25 THE COURT: Okay.

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1 THE APPLICANT: Line 23.

2 THE COURT: Bear with me one second. Okay. 985.

3 What page -- what line?

4 THE APPLICANT: At the end of line 23 at page 985.

5 Trial court would say that this was a credibility case.

6 It really came down to who the jury believed as the
7 finders of the facts.

8 THE COURT: Okay.

9 THE APPLICANT: And at page 986, if you turn to the
10 next page and go down to line 17. She would say again, as
11 I indicated, this was a credibility case. It came down to
12 who the jury believed. Okay.

13 Trial court would further state at page 1004, page
14 1004.

15 THE COURT: Okay.

16 THE APPLICANT: Line seven. She says, I think their
17 culpability is a lot greater than has been reflected by
18 their testimony. Okay.

19 THE COURT: What line is that? Line seven?

20 THE APPLICANT: Line seven, sir. At the end of line
21 seven she says, and I think their culpability is a lot
22 greater than has been reflected by their testimony.

23 THE COURT: Okay.

24 THE APPLICANT: As to Williams versus State, testimony
25 by witnesses which is willfully and knowingly false must

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1 be disregarded in its entirety.

2 Your Honor, at this time I wish to present an
3 exhibit. I have an exhibit for you, Your Honor, Exhibit
4 A, please, sir. I have a copy for you.

5 THE COURT: If you'd show that to Mr. Brooks.

6 THE APPLICANT: No, sir. I didn't show him my
7 exhibit. I didn't --

8 MR. BROOKS: He said, would you go ahead and show it
9 to me.

10 THE APPLICANT: Oh. I have a copy for you too as
11 well, sir. I have a copy as well for the State. This is
12 Exhibit A.

13 THE COURT: Applicant's Exhibit One is Exhibit A.

14 (Exhibit A marked as Applicant's Exhibit No. 1,
15 polygraph report, and received into evidence.)

16 THE COURT: Now it's marked. Now tell me,
17 Mr. Briscoe, what is -- just tell me what this is supposed
18 to be.

19 THE APPLICANT: Okay, sir. State's witness Travis
20 North was given a polygraph test administered by
21 Lieutenant Terry VanDoran on July the 9th, 2003. Travis
22 failed the lie detector examination, specifically on the
23 question, did you shoot Mark.

24 MR. WHITMIRE: I object, Your Honor. This is hearsay.

25 THE APPLICANT: No, this is --

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1 THE COURT: No, what he's saying is -- I understand
2 that you might be claiming this as hearsay, but I guess
3 what you're really saying is polygraph reports can't be
4 introduced into evidence. Is that correct, Mr. Whitmire?

5 MR. WHITMIRE: Yes, Your Honor. There's no foundation
6 to get this report in. And secondly, Your Honor, this was
7 addressed at trial. His counsel brought this to the trial
8 court's attention and that was ruled upon.

9 THE COURT: And what I will do is, I'll note it as a
10 proffer. Okay. You're proffering this into evidence.
11 Okay. You want it to go in. He's objecting to it, but
12 it's -- and I'll note it as a proffer.

13 THE APPLICANT: Sir, I'm not trying to -- I just want
14 you to read it.

15 THE COURT: Oh, no. I understand that.

16 MR. BROOKS: He's saying he's going to do that.

17 THE COURT: Yeah.

18 MR. BROOKS: That's what he's saying. He's talking
19 about from a legal terminology.

20 THE APPLICANT: Okay. I know that it's not admissible
21 at trial, but I was --

22 MR. BROOKS: And it's been --

23 THE APPLICANT: -- PCR hearing. State versus Dorenson
24 it was admissible for --

25 THE COURT: Mr. Briscoe, hold on. I got it.

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1 THE APPLICANT: I'm sorry, sir.

2 THE COURT: I've noted his objection. I'm going to
3 read it.

4 THE WITNESS: Okay. Thank you, sir. I'm sorry.

5 BY MR. BROOKS:

6 Q. Go ahead.

7 A. Well, he failed the lie detector examination
8 specifically on the questions, did you shoot Mark while in
9 the house on the Lucille Road, did you shoot Mark and do
10 you know for sure who shot Mark. Travis North answered --

11 THE COURT: Mr. Briscoe, I don't mean to interrupt
12 you. I've got that. You don't have to read it to me.

13 THE APPLICANT: Okay.

14 THE COURT: Okay. Gotcha. If you move onto your next
15 thing.

16 THE APPLICANT: Okay, sir. But the jury would never
17 know of the exam results, you know. And trial court just
18 prior to sentencing would state that, what is completely
19 unfortunate about this entire case is that we'll never
20 know the level of culpability of the other folk who were
21 there. I don't think we'll ever know exactly who did
22 what.

23 That was at page 104 of the transcript, sir, line five
24 -- or 1,004. I'm sorry.

25 MR. WHITMIRE: Your Honor, just for the record, I

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1 renew my objection.

2 THE COURT: Okay. I'll note it.

3 THE APPLICANT: That's line, line one of page 1,004.

4 Trial court would state, I think what is completely
5 unfortunate about this entire case is that we'll never
6 know the level of culpability of the other folks who were
7 there. I don't think we'll ever know exactly who did
8 what. To compound --

9 THE COURT: Okay.

10 THE APPLICANT: To compound his voucher for the
11 State's witnesses, Solicitor Bell would also disparage
12 defense alibi during his testimony -- during his closing
13 argument by telling the jury at page 947, if you would
14 please turn.

15 THE COURT: 947?

16 THE APPLICANT: 947, line six. A defense witness
17 would say anything to make sure that the defendant does
18 not go to jail. It's as simple as that. She's going to
19 say anything to make sure he doesn't go to jail. It's as
20 simple as that.

21 Okay. And the defense witness testified that I was
22 seen in the State of Virginia within the time frame that
23 made it physically impossible to have been in the State of
24 South Carolina at the time of the incident.

25 If you would turn to page 687 of the transcript. 687.

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1 THE COURT: 687, what line?

2 THE APPLICANT: 687, line eight of the transcript.

3 Reads -- 687, eight. 688-22. Now -- all right. Now, did
4 he ask you specifically as to whether or not Steven and
5 Jason Turner went out of town in August of 2003.

6 No. Did they in fact go out of town together in July
7 of 2003. No, not that I know of. And you say not that
8 you know of, are you certain or are you uncertain. I'm
9 certain. If Steven would have took a long trip I would
10 have known. Okay. Because the two of you were living
11 together. Yes, and I was pregnant with my daughter at the
12 time. All right. And what did you, and what did that do
13 as far as he was concerned. You say you were pregnant.
14 What's the significance of that. He didn't leave my
15 side. All right. Now, do you recall that you guys --
16 what you guys were doing on July the 3rd of 2003. Yes.
17 Well, I remember, I definitely remember the 4th because we
18 always cook out on the grill but I remembered that day and
19 he went out with his friends and then he was back home,
20 I'd say, I know it was before two. So, and then he went
21 on the 4th. Now when you say two, are you talking
22 two p.m. or two a.m. Two a.m. Okay. And that would be
23 two a.m. of what. July, and that would have been a
24 four -- I mean a four, July the 4th. Uh-huh. Okay. All
25 right. And he came home and what happened. He went to

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1 sleep. He had to get up at 6:30 to go pick his aunt up
2 from work because she gets off at seven.

3 Okay. And if you turn to page 913. That was State's
4 witness Ms. Billie Graves. Now if I turn to page 913,
5 Your Honor, please, and I'm almost done with this, Your
6 Honor. 913.

7 THE COURT: Okay.

8 THE APPLICANT: 9-1-3, sir.

9 THE COURT: Yes, sir. What line?

10 THE APPLICANT: 913, line 22.

11 THE COURT: Yes, sir.

12 THE APPLICANT: It says, they tell you Steven couldn't
13 have gone. He took his aunt to work who was living with
14 her at the time. He got home over at Billie's house
15 about, before two. Before two. How is he going to leave
16 and come to Virginia, I mean, South Carolina. He goes and
17 picks her back up at seven in a totally different vehicle.

18 Test this evidence. Okay.

19 Sir, at this time I have another exhibit I wish to
20 present you with for your review. I have copies for my,
21 for my attorney as well as for the State.

22 (Applicant's Exhibit No. 2, coroner's report, was
23 received into evidence.)

24 THE APPLICANT: Sir, and this is the coroner's
25 report. And what I want you to take note to on this is

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1 the time. It says the time of the injury was 11:40 p.m.
2 that night, of the 3rd.

3 So, and so that's why I said that it was physically
4 impossible for me to have been in the state of -- I could
5 not have been in South Carolina at 11:30 to commit this,
6 this atrocity and then been in Virginia, back in Virginia
7 by one o'clock that night or two o'clock that night.

8 THE COURT: Okay.

9 THE APPLICANT: The traveling time, it would have been
10 impossible. It's at least five hours away. At least.

11 THE COURT: Okay.

12 THE APPLICANT: Okay, sir. And so, none of the
13 State's -- Your Honor, none of the State's case or theory
14 would be based on any kind of reliable evidence. The
15 State's entire theory is based on bias, self-supportive,
16 unreliable, alleged eyewitness accounts that are
17 questionable at best. It's mere assertion. Counsel
18 should have objected to the highly prejudicial closing
19 argument by the State to impermissibly vouch for the
20 State's witnesses bolstering their credibility in the
21 State's case. Solicitor Bell's voucher was highly
22 prejudicial because the case was circumstantial and the
23 witnesses at issue were the State's key witnesses and
24 their credibilities were crucial to the State's case.

25 Also because these witnesses were the State's only

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1 direct evidence. And not only were they all directly
2 involved with the incident, they were testifying either to
3 receive reduced sentences themselves or to assist another
4 State's witness in achieving the goal of a reduced
5 sentence. Your Honor, for counsel's error, I was
6 prejudiced and denied my right to a fair trial as well as
7 my right to effective assistance of counsel.

8 Your Honor, there's a reasonable probability that if
9 not for counsel's error the outcome of the trial may have
10 been different as well as the appeal.

11 THE COURT: Okay.

12 THE APPLICANT: Your Honor, at this time I wish to
13 omit issues E and F. Issues E --

14 THE COURT: Okay. E and F are out.

15 THE APPLICANT: Yes, sir. I wish to omit --

16 THE COURT: You're waiving those.

17 THE APPLICANT: -- E and F, and move on to issue G
18 which will be my final issue, Your Honor.

19 THE COURT: And G was?

20 THE APPLICANT: Issue G is --

21 THE COURT: Is that in your new one?

22 THE APPLICANT: No, sir. It's in the -- yes, sir. It
23 was an amendment. It was the first amendment, sir.

24 THE COURT: I've only got one amendment; is that
25 correct?

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1 THE APPLICANT: Yeah. Yes, sir.

2 THE COURT: And that's the one that you sent to
3 Mr. Brooks and he filed?

4 THE APPLICANT: I didn't really want that filed but I
5 was just asking his opinion about that issue. I didn't
6 want it filed, sir. I was just, like, asking him what he
7 thought about it and he filed it.

8 THE COURT: I understand what you're saying. Is
9 there -- is there another -- is there a G, Mr. Brooks, are
10 you aware of a G?

11 MR. BROOKS: I don't know if it's necessarily
12 referenced as a G, but we filed all that, the issues. Now
13 he might have something different and I would ask the
14 Court to go ahead and let him elaborate on it.

15 THE COURT: No, I will. I was just trying to -- if it
16 was written down somewhere I just wanted to see it. What
17 is G?

18 THE APPLICANT: Was counsel ineffective for failing to
19 object when the State impeached the defense witness's
20 testimony with an illegally recorded tape conversation.

21 THE COURT: Okay.

22 THE APPLICANT: Do you have that, sir?

23 THE COURT: I don't have it but you can tell me about
24 it.

25 THE APPLICANT: Okay. Well, Your Honor, prior to

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1 trial, defense (witness Helen Coles was interviewed at her
2 residence in Virginia by Dorchester County Sheriff's
3 Department Detective Lieutenant Terry VanDoran.

4 MR. WHITMIRE: Your Honor --

5 THE APPLICANT: At page 877 of the transcript --

6 MR. WHITMIRE: -- I object. I have an amendment,
7 allegation H for motion for speedy trial. The State
8 didn't have amendment G. That's the first I'm hearing
9 this allegation as well.

10 THE COURT: Do you have a copy of what you got right
11 there?

12 THE APPLICANT: No, sir.

13 THE COURT: Do you have the original that you're
14 looking at? What are you reading from?

15 THE APPLICANT: It's just notes, sir.

16 THE COURT: May I just see them? I'll hand them right
17 back to you.

18 (Document handed to the Judge.)

19 THE COURT: Did you write this?

20 THE APPLICANT: Yes, sir.

21 THE COURT: This is your handwriting?

22 THE APPLICANT: Yes, sir. It is, sir.

23 THE COURT: Okay. That's nice, clear handwriting.
24 Who was your teacher? Who taught you how to write this
25 well?

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1 THE APPLICANT: Just in school, sir.

2 THE COURT: Okay. I mean, it's nice. It's clear.

3 THE APPLICANT: Thank you, sir. Can I please --

4 THE COURT: I'm giving it right back to you. That's
5 it. Relax. You got it. He's going to read what he's
6 going to tell me.

7 MR. WHITMIRE: I'd just like to have an opportunity to
8 brief this issue if necessary since that's the first I'm
9 hearing about it.

10 THE APPLICANT: I have a clerk of court stamped copy
11 of this issue. This issue was filed in 2009, sir, on
12 February of 2009.

13 THE COURT: Hold on a second.

14 THE APPLICANT: I have a clerk of court stamped copy.

15 THE COURT: Go ahead.

16 THE APPLICANT: Thank you, Your Honor.

17 THE COURT: And I will -- if you need to brief
18 something, Mr. Whitmire, I'll be more than happy to give
19 you an opportunity to work late hours at the AG's office
20 and brief those. Okay?

21 MR. WHITMIRE: Thank you, Your Honor.

22 THE COURT: Yes, sir. I wouldn't want you to pass up
23 that opportunity and I won't let you. Okay.

24 THE APPLICANT: Okay, sir. If you turn to page 879.
25 Again, Your Honor, this is the last issue. I'll try to

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1 get through this as quickly as possible.

2 THE COURT: 879. And you don't have to hurry,
3 Mr. Briscoe. We're here at your convenience.

4 THE APPLICANT: Thank you, sir.

5 THE COURT: Page 879. What line?

6 THE APPLICANT: Page 879, line 14, sir.

7 THE COURT: Okay.

8 THE APPLICANT: It reads, now you taped this
9 conversation, correct. He says, yes, sir. And you had a
10 voice-activated tape recorder. It was not my recorder. I
11 borrowed it from the Danville detectives. It was a mini
12 recorder, a digital type. Okay.

13 Now if you go to the next page, page 880, line three.
14 It reads, all right. And you took that tape recorder and
15 you stuck it down in your pocket, did you not. I put it
16 in my front shirt pocket, yes, sir.

17 Okay. And if you go to page -- if you go down to line
18 11 it reads, but you did not inform this woman when you
19 questioned her that you were taping her. He -- no, sir.
20 All right. So when -- and you asked her these questions
21 unbeknownst to her that she was being recorded, correct.
22 That's correct, sir. All right. During the interview
23 Lieutenant VanDoran secretly taped her using a digital
24 voice-activated mini recorder hidden in his front shirt
25 pocket. Hidden in his front shirt pocket.

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1 During trial following the defense witness's testimony
2 the State moved to play the illegal tape that was
3 surreptitiously recorded during the interview for the jury
4 as rebuttal testimony to impeach the defense witness's
5 testimony without objection from defense counsel.

6 If you would turn to page 853 of the transcript.

7 THE COURT: Okay.

8 THE APPLICANT: To line 17.

9 THE COURT: Okay.

10 THE APPLICANT: It reads, surreptitiously taping her
11 but I don't have any objection to that tape.

12 Okay. And if you go down to page, transcript page
13 874.

14 THE COURT: Okay.

15 THE APPLICANT: 874, line one. And then asked her
16 questions and some specifically about a weapon, is that
17 correct. I did, sir. Have you -- was that recorded. It
18 was, sir. And have you reviewed that recording. I have,
19 sir. Does it accurately reflect the conversation that
20 went on between you and Mrs. Coles back in August of 2004.
21 Yes, it does, sir.

22 And at this time Solicitor Bell played parts of the
23 conversation.

24 Okay. And then it goes back to them questioning
25 Lieutenant VanDoran again. That's a part of the

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1 conversation you had. Yes, sir.

2 Your Honor, we offer the tape of those conversations
3 into evidence as a State's Exhibit. Mr. Kearse, no
4 objection, Your Honor.

5 So at this time it was offered into evidence without
6 objection from defense counsel.

7 Okay. The State's representative, Solicitor Harrison
8 Bell, stated during cross-examination, the defense witness
9 was inquired about talking to Lieutenant VanDoran about a
10 gun that he had asked her about and she stated that she
11 was talking about another gun and there were two different
12 guns.

13 If you would turn to page 826 of the transcript,
14 please. 826, line 20.

15 THE COURT: Okay.

16 THE APPLICANT: Okay. During the cross-examination of
17 the defendant's mother yesterday she was inquired about
18 talking to Detective VanDoran about a gun that he had
19 asked her about. And she stated that she was talking
20 about another gun and there were two different guns as I
21 recall.

22 Okay. He went on to say that they had the recording
23 that he sought to put in through Lieutenant VanDoran where
24 she talks about this one gun that she purchased at
25 Carter's Gun Shop. And that's all she talks about.

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1 Solicitor Bell states that he would do that to rebut her
2 statement -- to impeach her statement from what she
3 testified to during cross-examination which he thinks is
4 proper impeachment.

5 If you turn -- if you look at page 827 at line five,
6 that's where he says, we have the recording that I will
7 put in through Detective VanDoran where she talks about
8 this one gun that she purchased at a gun shop, Carter's
9 Gun Shop. And that's all she talks about. And I will do
10 that to rebut her statement, to impeach her statement from
11 what she told during cross-examination which I think is
12 proper impeachment.

13 Defense counsel Kevin Kearse, who had never been made
14 aware of the tape's existence prior to trial, after
15 hearing the illegally-recorded -- after hearing the
16 illegal recording and Solicitor Bell's misleading
17 explanation and misrepresentations of the facts within was
18 led to believe that the defense witness had indeed given
19 inconsistent statements.

20 If you look on page 827 at line 14, it reads, Your
21 Honor, I haven't been made aware of this tape or the
22 recording or the existence of a recording.

23 Okay. And if you turn to page 829 at line 23 it
24 reads, because she says that she gave, she admitted she
25 gave two inconsistent statements. Okay. Defense counsel

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1 stated for the record that the defense witness admitted to
2 giving inconsistent statements. Defense counsel during
3 closing summations to the jury went as far as to tell the
4 jury that the defense witness made a mistake initially
5 saying that she did not realize which gun they were
6 talking about.

7 If you turn to page 912, please, Your Honor, line 21.

8 THE COURT: You said 912; right?

9 THE APPLICANT: Yes, sir; 912. At the end of line 21,
10 it reads, she told you she made a mistake about the gun
11 initially when she told them. She did not realize which
12 gun they were talking about. Okay.

13 This act by defense counsel in itself was highly
14 prejudicial due to the fact that the witness did not give
15 inconsistent statements at all, nor did she ever say that
16 she did which is proven by the mere absence of any such
17 testimony whatsoever reflecting her doing so anywhere
18 within the record of the proceedings. She was talking
19 about two entirely different handguns, just as she had
20 testified to.

21 If you will turn to page 713 of the transcript,
22 please, Your Honor.

23 THE COURT: All right.

24 THE APPLICANT: Okay. I'll go to line 25. Defense
25 witness Helen Coles stated, we're talking about two

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1 different guns here. Okay. After hearing the witness's
2 testimony and then the tape, obviously taken into
3 consideration the manner in which the recording was
4 introduced to the Court by Solicitor Bell, trial court
5 replied, I heard her testimony as being inconsistent
6 referring to the same gun and telling him that it had been
7 stolen and then now telling a story that she gave it to
8 somebody as collateral.

9 That's at page 828. 828, line 23. I heard her
10 testimony as being inconsistent and general and referring
11 to the same gun and telling him it had been stolen and
12 then now telling a story that she gave it to someone as
13 collateral.

14 Okay. Then trial court immediately states, maybe I
15 misunderstood what she was saying, which is at page 829,
16 line four. And maybe I misunderstood what she was saying.

17 The cleverly deceptive way that the illegal tape was
18 introduced with the misleading misrepresentation of the
19 contents within the tape made it seem to trial court and
20 even to defense counsel -- and even defense counsel as
21 well like the defense witness had given inconsistent
22 statements when in fact she had not. This act in itself
23 is clearly prejudicial because if the trial court and
24 defense counsel were both misled by the illegal recording
25 and its improper explanation, surely the jury was as well.

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1 If you would turn, well, actually you are at page
2 829. If you go down to line 23, it says, because she
3 gave, she says she gave -- she admitted that she gave
4 inconsistent statements. 829, 22 through 23. And then on
5 page 831 at page (verbatim) four through five, it reads,
6 about that, because I mean, that already came across in
7 her testimony. She's given inconsistent statements.

8 Okay. Trial court goes on to state, you can't
9 secretly tape somebody without their knowledge. That's a
10 violation of the Federal Wiretap Act. When Solicitor Bell
11 went on to further mislead the trial court by stating, but
12 that's on a phone. This was in person. That's at page
13 837. 837, line 13.

14 I'm sorry. Line one. You can't secretly tape someone
15 without their knowledge. That's a violation of the
16 Federal Wiretap Act. Right, but that's on a phone though,
17 on a telephone. That's on a phone. Yes. This was in
18 person.

19 Okay. It's 837, one through 12. This was in person.
20 Trial court reiterated the fact you can't secretly tape
21 somebody. The police can't secretly tape somebody without
22 letting them know they are being taped. That's just
23 fundamental. That's at line 13 through 20.

24 You can't secretly tape somebody. The police can't
25 secretly tape somebody without letting them know they're

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1 being taped. You can't tape somebody and submit it in
2 court. Yes. That's just fundamental. All right.

3 Solicitor Bell will further respond, that's not
4 wiretapping at page 840, line two. That's not
5 wiretapping. Okay. Trial court then rules that even if
6 it were a telephone conversation and she was not aware
7 that she was being taped, it could still be offered for
8 impeachment. That's at page, if you turn back to 838,
9 line seven. Even if it were a telephone conversation and
10 she was not aware that she was being taped, it could still
11 be offered for impeachment. Okay.

12 At 838. After admitting on the record that the
13 defense witness had been surreptitiously taped, trial
14 court allows the illegal tape to be played for the jury as
15 rebuttal to impeach defense witness Helen Coles'
16 testimony. That's at page 854, line three. 854, line
17 three. I'm a little troubled that surreptitiously she was
18 taped also.

19 Page 874, if you turn to, please, Your Honor -- I'm
20 just about finished, Your Honor -- line one. And then
21 asked her questions and so specifically --

22 THE COURT: You said 874, line one?

23 THE APPLICANT: Yes, sir.

24 THE COURT: We've done that already; right?

25 THE APPLICANT: No, sir.

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1 THE COURT: Okay. Go ahead.

2 THE APPLICANT: Oh, I had done that. I'm sorry, sir.
3 That's when it was admitted. Okay, sir.

4 So immediately following Solicitor Bell had the tape
5 illegally -- had the illegal tape recording admitted into
6 evidence as State's Exhibit 28 without objection from
7 counsel resulting in an unduly prejudice (verbatim) and
8 denial of a fair trial due to the tape being evidence
9 seized in violation of the fourth amendment and the
10 Federal Wiretap Act, making the illegally-recorded tape
11 the fruit of the poisonous tree, sir. All right -- which
12 is impermissible as per Socilly versus Leak, Leaky
13 (phonetically).

14 During closing argument Solicitor Bell used the
15 recording to further mislead the jury by implying that
16 after the tape was revealed the defense witness was,
17 quote, caught, unquote, as if she had given untrue
18 testimony stating, quote, oh, oh, she's caught. She gave
19 two different stories about that. That's not what she
20 told Lieutenant VanDoran what happened to the gun in
21 Virginia, unquote, disparaging her testimony. That's at
22 page 947, Your Honor.

23 THE COURT: Yes, sir.

24 THE APPLICANT: At line 18.

25 Okay. While on cross-examination did you talk to

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1 Detective VanDoran when he was in Virginia. Yeah. Well
2 didn't you tell him that you lost the gun, that it had
3 been stolen out of your car. Oh, that's a different gun.
4 That's a gun I had before I had this one. Oh, oh, she's
5 caught. That's a different gun. I had a different gun
6 and it got stolen and then I bought this 10 millimeter and
7 then I gave it away. Well, it's not what she told
8 Detective VanDoran in Virginia, the gun that he asked her
9 about, the gun you purchased. And she said she agreed
10 Carter's Gun Store -- she agreed Carter's Gun Store that
11 we have the receipt for was lost. Okay.

12 The illegal recording so affected the trial with
13 unfairness as to make the results and conviction a denial
14 of due process which is protected by the 14th amendment
15 and due to the State's misrepresentations of the facts
16 within the tape which surely mislead the jury in reaching
17 their verdict.

18 Okay. It was prejudicial because illegally-seized
19 evidence was introduced to the jury in a manner that led
20 them to believe that a defense witness had given untrue or
21 false testimony in a circumstantial case when in fact they
22 had not.

23 Okay. As per Miller versus State, a conviction cannot
24 be based on misleading evidence presented by the
25 prosecution.

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1 Your Honor, for counsel's error I was prejudiced and
2 denied my right to a fair trial as well as my right to
3 effective assistance of counsel. Your Honor, there's a
4 reasonable probability that if not for counsel's error the
5 outcome of the trial may have been different as well as
6 the appeal.

7 And, Your Honor, in closing, at this time I would also
8 like to request that the record reflect that the tape in
9 actuality clearly shows that during the recording,
10 interview with Lieutenant VanDoran, the defense witness
11 could not have been referring to her 10 millimeter handgun
12 as being the weapon that was stolen from her vehicle due
13 to the fact that at trial during cross-examination
14 Lieutenant VanDoran was asked to confirm that visually
15 there really is not a big difference between a Glock .40
16 which he owned and a 10 millimeter Glock which is the
17 weapon in question. Lieutenant VanDoran replied that
18 unless you knew, you probably would not know, that's
19 correct. That's at page 878, sir.

20 THE COURT: 878?

21 THE APPLICANT: Yes, sir.

22 THE COURT: Okay.

23 THE APPLICANT: 878, line 23.

24 THE COURT: All right, sir.

25 THE APPLICANT: Then really this is the cross-

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1 examination of Mr. VanDoran. There really isn't that big
2 of a difference between a Glock .40 and a 10 millimeter,
3 correct. You wouldn't -- you would -- unless you knew you
4 probably wouldn't know, that's correct.

5 Okay. And then at page -- however, I'm sorry.
6 However, shortly afterwards when Lieutenant VanDoran was
7 asked if it was even conceivable that the defense witness
8 was talking about another handgun and not her 10
9 millimeter Glock handgun as being the gun that was stolen
10 from her car after her accident, he reluctantly replied
11 that was not his understanding. And that's at line three.
12 All right -- of the same page. Line three of page 879.

13 All right. So then she told you about the gun that
14 she lost in her car, is that correct. That's correct,
15 sir. And is it -- and it's conceivable since she said no
16 it doesn't look like the Glock that you showed her, she
17 was talking about another handgun, correct. And he says,
18 that was not my understanding, sir.

19 The record does not reflect that the fact that the
20 actual color of 10 millimeter Glock in question as well as
21 the Glock .40 that Lieutenant VanDoran owned and showed to
22 defense witness during the interview was black.
23 Therefore, the witness could not have been referring to
24 the 10 millimeter Glock handgun as being the gun that she
25 stole out of her wrecked car during the -- the gun that

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1 had been stolen out of her wrecked car during the
2 interview because she clearly says it did not look like
3 that. At page 878, line 20. And she said it did not look
4 like that. It wasn't that large or whatever. Yes, sir.

5 Okay. And 878 -- on page 879, rather, at line six.
6 And it's conceivable she said no, it does not look like
7 that Glock you showed her. She was talking about another
8 handgun. Okay. The gun that she was talking about did
9 not look like Lieutenant VanDoran's Glock .40. Okay. 878
10 line five. I carry a Glock .40, yes, sir. 800 -- page
11 877, line 23. Okay. And in that conversation, during
12 that conversation you showed her your department-issued
13 handgun, correct? I did, sir.

14 Okay. The handgun that the defense witness spoke of
15 during the illegal surreptitiously taped interview as
16 being stolen out of her wrecked Mazda was a chrome or
17 silver in color nine millimeter Jennings handgun that she
18 also purchased at Carter's Gun Store prior to purchasing
19 the black 10 millimeter Glock from Carter's. She
20 purchased both handguns from Carter's Gun Store as the
21 sales receipts that I now wish to submit for the Court's
22 review --

23 MR. WHITMIRE: Objection. Hearsay.

24 THE APPLICANT: -- will confirm. I have receipts from
25 the gun store, sir. There's a number up there where you

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1 can call him. They encourage you -- they tell you to call
2 them. You can confirm Carter's Gun Store is one of the
3 biggest gun stores in that area. The policemen know him.
4 Everybody knows him, Your Honor.

5 THE COURT: Okay. And what do you have?

6 THE APPLICANT: I have copies for everyone.

7 THE COURT: I hate to get you up.

8 MR. BROOKS: No, that's fine, Your Honor.

9 THE APPLICANT: This is the last time.

10 THE COURT: You're objecting to the receipts?

11 MR. WHITMIRE: Chain witness, no foundation, and based
12 on hearsay. I don't think he's referring --

13 THE APPLICANT: Not hearsay. The 10 millimeter
14 receipt is from the trial. Came straight from the case.

15 THE COURT: Just hold on. You're going to get a
16 chance to respond. Right now Mr. Whitmire's telling me
17 why he's objecting to -- have you even seen this? First
18 of all, I'm going to let you look at.

19 THE APPLICANT: This is from the State -- I got this
20 from the State.

21 THE COURT: Okay. Let him look at it. We're not
22 going anywhere. We're not doing anything.

23 (Pause.)

24 MR. WHITMIRE: Your Honor, those are my objections.
25 it's not self-authenticating. There's a complete lack of

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1 foundation, but if he wants to proffer it in.

2 THE COURT: I'm going to accept it as a proffer.

3 Okay? This will be Applicant's Three.

4 (Applicant's Exhibit No. 3, receipts for handguns, was
5 received into evidence.)

6 THE COURT: And this is a receipt for one of the
7 guns?

8 THE APPLICANT: No, this is a receipt for both guns.

9 THE COURT: For both guns?

10 THE APPLICANT: Yes, sir. And I tell you why I
11 brought them both.

12 THE COURT: Okay. You bought these?

13 THE APPLICANT: I brought both of these to my hearing
14 with me today.

15 THE COURT: No, no, no. Did you buy both of these
16 guns?

17 THE APPLICANT: No, no, sir. No, sir.

18 THE COURT: All right. Well, then Mr. Brooks is going
19 to go into how he got these receipts and stuff like that.

20 MR. BROOKS: You want to?

21 THE COURT: Yeah, I want to find out how he got the
22 receipts.

23 MR. BROOKS: I believe he's getting ready to explain
24 it, Judge.

25 THE COURT: And I'm going to note your objection is

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1 preserved. This is just a proffer.

2 MR. WHITMIRE: Thank you, Your Honor.

3 BY MR. BROOKS:

4 Q. Mr. Briscoe, please explain how you obtained these.

5 A. Okay. I obtained them because the gun in question
6 during the trial was purchased by my mother. That's what
7 this issue is surrounding. The issue is surrounding he
8 used this illegally taped, illegally recorded taped
9 conversation to impeach her testimony as to this gun in
10 particular. Right. But the thing about it, my mother is
11 the one that purchased these, these guns. These were her
12 guns. These were my mother's guns. Do you understand
13 what I'm saying?

14 Q. I got you.

15 A. So she went back to the gun store after we found out
16 about this tape and found out what they did and how they
17 misrepresented the facts within the tapes, she went back
18 to the gun store and got the copy of the gun that she was
19 talking about. If we had known that they were going to
20 use that tape for what they did or even of the tape's
21 existence at all, we could have used the tape to prove
22 that we were telling the truth, or that she was telling
23 the truth about what she testified to, you know. During
24 the taped -- during the interview in Virginia the
25 detective questioned the witness only about the handgun

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1 purchase from Carter's. Lieutenant --

2 THE COURT: Mr. Briscoe, can I interrupt you for a
3 question? Okay. I understand you did not know about the
4 tape. Okay. So you did not have this receipt at trial.

5 THE APPLICANT: The 10 millimeter receipt was at
6 trial; yes, sir.

7 THE COURT: Okay. You had the 10 millimeter receipt
8 at trial?

9 THE APPLICANT: That's straight from the State, from
10 the motion of discovery.

11 THE COURT: But you did not have the receipt for the
12 other gun?

13 THE APPLICANT: Exactly.

14 THE COURT: And so your mother went back and got the
15 receipt for the other gun?

16 THE APPLICANT: For the nine millimeter, the gun when
17 she says I was talking about two different guns.

18 THE COURT: Okay.

19 THE APPLICANT: The --

20 THE COURT: Just let me ask you questions. Then I'll
21 let you explain it. Okay?

22 So the receipt for the nine millimeter gun, the other
23 gun, you did not have -- your mother did not have it?

24 THE APPLICANT: No, ma'am -- no, sir.

25 THE COURT: Is that correct?

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1 THE APPLICANT: No, sir, Your Honor.

2 THE COURT: So Mr. Kearse did not have that?

3 THE APPLICANT: No, sir.

4 THE COURT: And were you aware prior to the trial that
5 that was going to be an issue?

6 THE APPLICANT: No, sir.

7 THE COURT: Okay.

8 THE APPLICANT: Not at all. We didn't even know the
9 tape existed.

10 THE COURT: No, I understand that. Did Mr. Kearse ask
11 you to get the receipts for the 10 millimeter or the nine
12 millimeter before trial?

13 THE APPLICANT: The State already had the receipt for
14 the 10 millimeter. But we had no reason, we didn't know
15 the issue would come up at all. We didn't know anything
16 about it. We were blind sided by it.

17 THE COURT: Okay.

18 THE APPLICANT: You know, it was just out of the
19 blue. And the way it was represented, it made it look to
20 the jury like she was lying. Even Kearse was like, hey,
21 man, she gave two different --

22 MR. WHITMIRE: Objection. Asked and answered.

23 THE APPLICANT: He's right there. He can -- I mean, I
24 can find it in the transcript where he said it.

25 THE COURT: No, no, no. That's okay. I know you can

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1 find it in the transcript. Okay. I'm just trying to find
2 out.

3 Okay. Now what else do you need to tell me about
4 this?

5 THE APPLICANT: Okay. Well, during the interview in
6 Virginia, the detective questioned the witness only about
7 a handgun purchased from Carter's. He never made mention
8 of any specific make, model or caliber.

9 If you turn to page 877 of the transcript, if you turn
10 to 877 of the transcript.

11 THE COURT: Okay. Line 19.

12 THE APPLICANT: Line 14.

13 THE COURT: Line 14. Okay.

14 THE APPLICANT: Now when you asked her as the tape
15 shows you asked her handgun. You said handgun. Can I ask
16 you about your handgun. Did you not -- a handgun, yes,
17 sir. Right. A handgun. You didn't say anything specific
18 about caliber or nothing like that. Is that correct.
19 That is correct, sir.

20 THE COURT: Okay.

21 THE APPLICANT: He just said a handgun. So, when
22 questioned -- I'm sorry. And then page 881.

23 THE COURT: Okay.

24 THE APPLICANT: All right. At line four at page 881,
25 all right. And it was one of you guys who mentioned

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1 Carter's, was it not. It was it one of the Danville
2 detectives. Yes, sir. Right. Because she could not
3 remember where she had purchased that particular handgun,
4 is that right. She made a reference to a street during
5 the conversation which basically keyed one of the Danville
6 detectives to think he knew which gun shop she was
7 referring to. Okay.

8 When questioned about a missing handgun purchased at
9 Carter's, the detective -- the defense witness referred to
10 the handgun that she could not account for because that
11 had been stolen from her wrecked car. The witness was
12 speaking of two entirely different handguns at two
13 different times, both of which were purchased at Carter's
14 Gun Store just as she had testified to.

15 If you turn to 713, please. 713, sir, line 25. We're
16 talking about two different guns here. And that page --
17 she didn't know anything about the tape, Your Honor. She
18 didn't know anything about the tape. All right.

19 And page 826, please, sir. 826 at line 20. During
20 the cross-examination of the defendant's mother
21 yesterday --

22 THE COURT: Now we've already gone over that as well.

23 THE APPLICANT: 826, line 20?

24 THE COURT: Yeah. We've already gone over that.

25 THE APPLICANT: Okay. Yes, sir. Well, I wanted to

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1 reiterate the fact that --

2 THE COURT: No, I --

3 THE APPLICANT: -- he was asking her about --

4 THE COURT: No, I'm cool.

5 THE APPLICANT: I was trying to explain myself, Your
6 Honor, the best I could, Your Honor.

7 THE COURT: You did good. You referred to chapter and
8 verse.

9 THE APPLICANT: Your Honor, I pray that I've met the
10 burden of proof by a preponderance of the evidence and
11 deserve to have my conviction overturned and my sentence
12 vacated, Your Honor.

13 Thank you for your time and attention and your
14 patience and your grace and your kindness. Thank you,
15 sir, for just giving me the opportunity to get my bite at
16 the apple, sir. Thank you.

17 THE COURT: Thank you, Mr. Briscoe.

18 One second.

19 Mr. Brooks, your direct examination has been stirring,
20 but is there anything else you need to address?

21 MR. BROOKS: No, sir. I'll turn it over to
22 Mr. Whitmire.

23 THE COURT: Okay. Mr. Whitmire, anything on cross-
24 examination?

25 MR. WHITMIRE: Just a few things, Your Honor.

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1 MR. BROOKS: You actually have a question?

2 MR. WHITMIRE: Yes.

3 MR. BROOKS: All right.

4 THE COURT: All right.

5 CROSS-EXAMINATION

6 BY MR. WHITMIRE:

7 Q. Specifically, Mr. Briscoe --

8 A. Yes, sir.

9 Q. -- you alleged that trial counsel should have objected
10 to the testimony regarding the blood splatter?

11 A. Yes, sir.

12 Q. And didn't Lieutenant Asbill testify to patterns of
13 blood he witnessed, that he personally observed?

14 A. I mean, he said it was blood but he doesn't know it
15 was blood because it was never tested. That's my issue.

16 Q. You're very, very familiar with the transcript, I
17 see. Do you recall your trial counsel's examination of
18 Lieutenant Asbill?

19 A. To some extent, I do.

20 Q. Do you recall trial counsel eliciting from Lieutenant
21 Asbill that there was no DNA to connect you to that blood?

22 A. Yes, he did say that. I think -- I know that there
23 was no DNA. I don't know exactly who said it. I know
24 they was talking about -- they was talking about all
25 different kind of shoe prints and DNAs and all kinds of

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1 stuff. There was nothing connecting me to this.

2 Q. And didn't your trial counsel on cross-examination
3 vigorously bring these facts out when the State presented
4 their necessary witnesses to show that someone had been
5 shot?

6 A. I'm not really understanding what --

7 Q. Didn't your trial counsel on cross-examination bring
8 these facts out?

9 A. Bring what facts out?

10 Q. That there was no DNA, there was no smoking gun in
11 forensics to connect you.

12 A. Well, that has nothing to do with the issue; does it?

13 Q. Well, wasn't your defense --

14 A. He did say that, yes, sir. He did say that..

15 Q. Wasn't your defense alibi, strict alibi?

16 A. Yes, sir. As far as I know.

17 Q. You were in Virginia at the time of this offense;
18 correct?

19 A. That's correct.

20 Q. And if that's the case, the blood from the victim
21 shouldn't matter; should it?

22 A. Yes.

23 Q. If you're claiming you weren't even there.

24 A. But my issue is, according to the South Carolina Rules
25 of Evidence, it was a violation because he gave forensic

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1 expert witness testimony. That was my issue. That -- I
2 mean, as far as I was understanding, this was a fact of
3 law, a issue of law here from what I was told, from what
4 I -- what I'm understanding. So that's what I argued. I
5 wasn't trying to --

6 Q. But --

7 A. -- argue anything outside of the fact that they
8 didn't -- the blood didn't -- he's given blood testimony.
9 He's saying it was blood but he doesn't know it was
10 blood. It could have been anything. It could've been
11 ketchup. It could've been anything.

12 Q. There's no dispute the victim had been shot five times
13 and killed; is that correct?

14 A. That's what the autopsy reports says that I got.
15 That's what it says.

16 Q. I think you did allege in your legal conclusion that
17 this testimony was very prejudicial to you. Do you recall
18 your trial counsel making objections throughout the trial
19 on that ground?

20 A. No, he did not object. That's the whole issue about
21 it. He didn't object to his, this guy testifying as
22 though he were a blood expert.

23 Q. Didn't your trial counsel file a motion or make a
24 motion at the beginning of trial to keep pictures of the
25 victim out?

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1 A. He could have. I think he did.

2 Q. And didn't your trial counsel make about seven or
3 eight motions? I think it was six actually. I stand
4 corrected. Six motions?

5 A. He made several motions but that had nothing to do
6 with this issue, sir.

7 Q. One of the motions was a Biggers motion to exclude
8 identification testimony. Do you recall that?

9 A. I do. I do. That was my direct appeal, issue on my
10 direct appeal.

11 Q. And do you remember how many witnesses identified you
12 as the shooter?

13 A. One witness identified me as the shooter initially.
14 And that was my co-defendant. Now, then he got some other
15 people to come along after that and say, yeah, that was
16 the guy. They gave different heights, different sizes,
17 different shapes, different complexions. They gave all of
18 these different -- there were all these discrepancies in
19 what this guy looked like. And there was also a situation
20 whereas my co-defendant, they were saying that --

21 Q. Thank you. Thank you, Mr. Briscoe. Now, didn't three
22 witnesses ID you in a photo lineup?

23 A. My co-defendant ID'd me in a photo lineup. The person
24 that I knew, the person that I feel like was protecting
25 someone in this case, he identified me and days later when

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1 the people that he knew in South Carolina who were
2 directly involved with this case came in and identified
3 me. They were saying that it was an issue surrounding
4 Biggers --

5 Q. Your --

6 A. Can I answer?

7 THE COURT: I'm going to let him answer.

8 MR. WHITMIRE: Sorry, Your Honor.

9 THE COURT: That's okay, Mr. Whitmire.

10 THE APPLICANT: They were saying that these people had
11 no prior, had no contact before these IDs were made, but
12 it was proven within the transcript during examination and
13 cross-examination that these people did have contact. And
14 I have that information right here, sir, if you need me to
15 bring it to your attention. I have it right here.

16 BY MR. WHITMIRE:

17 Q. That's okay. That's quite okay.

18 A. These people did have -- they said -- they testified,
19 some of them testified they didn't have contact.

20 Q. And that's correct.

21 A. Didn't have contact. And later on they testified
22 where they did have contact. So there was contact, within
23 the record of the transcript that these people did have
24 contact.

25 And what our argument was, we were saying that this

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1 guy told them, there was an issue that they took a picture
2 of me from the county jail in the transcript, they took
3 everybody else, rather, all -- there was six pictures.
4 The five people in the pictures from the county jail had
5 county jail uniforms with no shirt collars. But my
6 picture was my driver's license picture and it had
7 distinctly showed my --

8 Q. Mr. Briscoe --

9 A. Can I -- showed my --

10 THE COURT: Mr. Briscoe.

11 THE APPLICANT: -- my collar, my shirt.

12 THE COURT: Mr. Briscoe.

13 THE APPLICANT: -- so all he had to do --

14 THE COURT: Mr. Briscoe! Stop. Okay? And let me
15 just explain why. Okay. You got an opportunity to say
16 whatever you wanted to. Remember that? And we went
17 through patiently and let you do that. Do you remember
18 that?

19 THE APPLICANT: Yes.

20 THE COURT: Okay. Now it's Mr. Whitmire's turn to ask
21 you questions.

22 THE APPLICANT: I just want to answer them.

23 THE COURT: I understand that. But you need to just
24 answer the question. Okay?

25 THE APPLICANT: Okay.

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1 THE COURT: On redirect you can get back and address
2 anything that you think he misrepresented or something
3 like that.

4 THE APPLICANT: Okay.

5 THE COURT: Mr. Brooks I'm sure on redirect will help
6 you clarify that.

7 MR. BROOKS: Yes, sir.

8 THE COURT: Okay. All right, Mr. Whitmire.

9 THE APPLICANT: Sorry, sorry.

10 BY MR. WHITMIRE:

11 Q. Yes or no, Mr. Briscoe. Didn't Ryan North, his
12 brother, and Mr. Turner all pick you out of a photo
13 lineup? Yes or no.

14 A. Yes.

15 Q. And do you recall, weren't you arrested about a year
16 or so after the offense?

17 A. Yes.

18 Q. They couldn't identify who you were. You were unknown
19 at first; is that correct?

20 A. Yes.

21 Q. Because the only person that you knew you could
22 allegedly, State's version of the offense, that you had
23 came down from Virginia with Mr. Turner as the muscle on a
24 drug deal. That was the State's version of events; right?

25 A. I've never heard that before. That's not in, anywhere

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1 in the transcript, not the way you word it.

2 Q. Now regarding your co-defendant, Jason Turner. Didn't
3 he finally identify you on the eve of his trial; is that
4 correct?

5 A. Not exactly sure when. But I know it was, like, a
6 year later.

7 Q. And regarding all these issues with impeachment and
8 prior records and drug dealing, didn't your trial attorney
9 vigorously cross-examine every one of the State's
10 witnesses?

11 A. I mean, he did a little bit. He did a little bit.
12 You know, and he would get them, he would get them right
13 where he had them and then he would just let them go. He
14 would just let them go. Where he had them where he could
15 prove they was lying and he would just fall off of that
16 subject and go onto something else. And I would write him
17 notes and he told me they even had ... I'm sorry.

18 Q. And, Mr. Briscoe, concerning Jason Turner, it was your
19 testimony that you had not seen Mr. Turner since, I
20 believe it was, what, May of 2007?

21 A. I hadn't seen him for a long time.

22 Q. And the offense occurred in July and this is what you
23 testified to. Now, Mr. Turner admits up and pleads guilty
24 to his role in this overall offense; is that correct?

25 A. That's what he said. Yeah. That's what he -- to my

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1 understanding.

2 Q. And weren't Mr. Turner's phone records traced back to
3 Danville, Virginia the day prior?

4 A. That's incorrect. His phone records was traced back
5 to Gretna, Virginia.

6 Q. And isn't Gretna within 15 miles of Danville?

7 A. No. It's actually 50 miles away from Danville. I
8 have all of that information here as well.

9 Q. Mr. Turner, thank you -- not Mr. Turner, but
10 Mr. Briscoe, the record will reflect what it reflects.

11 Now, specifically --

12 A. It was in the record.

13 Q. -- regarding --

14 A. It was in the record.

15 Q. -- untruthful testimony, weren't you impeached? Do
16 you remember testifying and didn't the State use some
17 tapes to impeach you?

18 A. To impeach me?

19 Q. Well, that you claim not to have a girlfriend on the
20 side?

21 A. Yeah.

22 Q. And not to call her regarding certain aspects of
23 things you wanted done. Those tapes were introduced to
24 impeach you; right?

25 A. Listen, the whole thing about those tapes --

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1 Q. Uh-huh.

2 A. -- were, we had physical relations and he brought it
3 out to unnerve me during the trial.

4 Q. But didn't you -- when you were asked about it, didn't
5 you say, no, I've never once been with that woman? I
6 don't know her. And that's why the State was able to do
7 that; right?

8 A. I did say that I had not been with her. Yes, I did
9 say that. He said that in front of my fiancée and I just
10 lost, I just lost sight of the fact that I was on trial
11 for my life. I became protective over my family, man.
12 And I said, I ain't been with that woman. Just, I was
13 embarrassed and it was just emotion that overcame me and I
14 wasn't thinking rationally and I did say it. I did say
15 that I had not been with the woman.

16 Q. And just to distinguish, just to make clear some of
17 your prior allegations. When you're referring to the
18 wiretap issue, you're talking about phone calls that you
19 made to this woman; is that correct?

20 A. No, I'm not.

21 Q. You --

22 A. No, I'm talking about the State Detective VanDoran
23 secretly recording a defense witness without telling her
24 that she was being recorded and then, and then admitted it
25 into evidence during the trial.

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1 Q. But you understand Judge Jefferson took these issues
2 up at the same time, they're separate issues; correct?

3 A. She said that they were -- she said that the tape was
4 admissible for impeachment purposes.

5 Q. And your attorney vigorously -- I mean, it's 30-plus
6 pages on the record -- argued on your behalf on this; is
7 that correct?

8 A. I mean, he argued that he had never heard the tape
9 which is the truth. None of us knew about the tape. But
10 the thing about it was that, you know, it was an illegally
11 recorded tape. It was surreptitiously recorded.

12 Q. Regarding the tape of you and your mistress, do you
13 recall that when you would make phone calls from the jail
14 there was a recording stating this call may be recorded?

15 A. Yeah, I think.

16 Q. So you're on notice?

17 A. I did, I did --

18 Q. And this was brought in for impeachment purposes, not
19 in the State's case in chief?

20 A. Yeah, it was brought in -- it was a credibility case.
21 It was brought in to destroy my credibility but it had
22 nothing to do with the case.

23 Q. Now, do you have those tapes? There are six tapes
24 that were introduced. Do you have them today?

25 A. You're kidding; right?

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1 Q. In the record, it doesn't reflect what was said on the
2 tapes just besides one or two things. Do you have them
3 today?

4 A. No, but they were made a part of the Court's -- the
5 court record. I'm sure you have them, if I'm not
6 mistaken. Doesn't the DA's (verbatim) office have them?

7 Q. We don't have anything, Mr. Briscoe.

8 A. Attorney general?

9 Q. We're separate --

10 A. Don't you get all of this stuff from the trial? I
11 thought so. Sorry.

12 Q. Then that's one issue. The other issue is with what
13 you really are alleging here today. We want to
14 distinguish that. What you're alleging is that it was
15 illegal for the State to tape your mother when they were
16 interviewing her; is that correct?

17 A. For the detective to.

18 Q. Just the tape in his pocket?

19 A. It was hidden.

20 Q. Hidden?

21 A. He didn't tell her she was being taped. It's in the
22 transcript.

23 Q. Did she know she was making a statement?

24 A. I mean, she was talking to him. They just told her
25 that she had been -- that I was arrested for a murder.

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1 She wasn't even thinking about anything.

2 Q. I'm only going to ask you one or two more questions
3 about this. Do you recall why the State -- strike that,
4 Your Honor.

5 Do you recall your mother saying that she did not give
6 an inconsistent statement, that the detectives just didn't
7 ask her about that second gun?

8 A. I'm not exactly sure but that's what she was replying
9 to. And he didn't -- he asked her about a handgun
10 purchased from Carter's Gun Store. He didn't make any
11 specific -- he didn't mention any specific make or model.
12 He asked about a missing handgun.

13 Q. So when the State introduced its rebuttal case, it put
14 those tapes in to clarify the inconsistent statement; is
15 that correct?

16 A. No.

17 Q. There's ambiguity there?

18 A. There was no -- the tapes actually proved that we were
19 telling the truth. So there was no clarification of any
20 inconsistencies. She was telling the truth, just like the
21 tape proves that she was. She was talking about two
22 different guns. That's the whole purpose of us going to
23 get these gun receipts.

24 Q. Now also regarding the identification testimony, don't
25 numerous State witnesses put your mother's vehicle or a

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1 vehicle very similar to your mother's at the murder scene?

2 A. They said about three or four different, maybe more
3 than that, vehicles, man. They said a bunch of different
4 vehicles, but nobody ever said anything about Virginia
5 tags until the trial. Nobody ever said -- Mr. Kearse can
6 testify to that. Nobody ever said anything about Virginia
7 tags until the day of the trial. Everybody started
8 talking about Virginia tags all of sudden.

9 Then they said it was a four-door car. My mother's is
10 only two door. They were talking about a gray four-door
11 Pontiac Grand Prix, not a two-door gold Pontiac Grand Am
12 but at the trial all of a sudden -- prior to trial that's
13 what they was talking about. And then at trial all of a
14 sudden it was a two-door Pontiac Grand Am with Virginia
15 plates. It's sitting outside right now.

16 Q. Without referencing the page number, Mr. Briscoe, when
17 there was a little bit of inconsistent testimony, whether
18 it be a Grand Am or Grand Prix, it was definitely a
19 Pontiac?

20 A. Four doors and two doors.

21 Q. Didn't your trial counsel hammer this home and really
22 cross-examine these witnesses?

23 A. I don't feel like he hammered anything. I don't feel
24 like he hammered anything. As a matter of fact, at one
25 point he threw his hands up in front of the jury, rolled

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1 his chair in front of the jury, threw his hands up on his
2 head and just looked at me with the jury, after they
3 played the tape about the recording with, you know, that I
4 had, you know, what I was telling her, you know, what she
5 was telling me that she was pregnant.

6 But the fact of the matter was, you know, it turned
7 out not to even be my baby but I had been with her. So I
8 didn't know. So, and then I was going through so much. I
9 was in the county jail looking at a murder, something I
10 knew nothing about, you know.

11 And then -- it was just a crazy situation. It was
12 crazy, man. It was just crazy.

13 MR. WHITMIRE: Beg the Court's indulgence. I just want
14 to make sure I covered everything. (Pause.)

15 No further questions, Your Honor. Thank you,
16 Mr. Briscoe.

17 THE COURT: Mr. Brooks?

18 MR. BROOKS: No questions, Judge.

19 THE COURT: Thank you, sir.

20 MR. BROOKS: He's explained everything.

21 THE COURT: You may step down. Thank you, sir. Thank
22 you, sir. All right. Who's next?

23 MR. BROOKS: I'll let the attorney general's office
24 call Mr. Kearse to the stand.

25 THE APPLICANT: Thank you, Your Honor.

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1 THE COURT: Yes, thank you, Mr. Briscoe.

2 MR. WHITMIRE: May it please the Court. State calls
3 Mr. Kearse.

4 KEVIN KEARSE, having been duly sworn, was examined and
5 testified as follows:

6 THE COURT: Thank you, sir. As soon as you get
7 comfortable, Mr. Whitmire can begin examining you. Okay?

8 DIRECT EXAMINATION

9 BY MR. WHITMIRE:

10 Q. Mr. Kearse, I'll try to keep these questions confined
11 to the allegations. I'm just going to ask a few basic
12 background questions for the record first.

13 How did you become involved in Mr. Briscoe's case?

14 A. I was court appointed.

15 Q. And when were you appointed?

16 A. I don't remember, to be honest. This case is 2003,
17 2004. Probably sometime in 2002.

18 Q. Do you roughly recall how many times you met with
19 Mr. Briscoe in preparation for trial?

20 A. He was confined in the Dorchester County Jail. So it
21 would have been more than six. Not personally.

22 Q. And did you file for Rule Five and Brady?

23 A. Yeah, I did.

24 Q. You do you recall reviewing this material with
25 Mr. Briscoe?

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1 A. Yes.

2 Q. Can you characterize the State's evidence in this
3 case, what their theory of the case was?

4 A. Basically the case was that Steven, and I think it was
5 Jason, I think that's who was a prior friend of Steven's.
6 Their version was that they came down from Virginia
7 pursuant to a drug deal, and that they did it in was
8 Graves or something like that in Dorchester County, some
9 small town outside of Saint George.

10 That the drug deal went bad, that the decedent
11 snatched the drugs, ran towards the door and a house full
12 of people, and that their version was Steve shot him as he
13 ran towards the door, cleaned up, and then got in a car
14 and drove back to Virginia with or without Jason. I can't
15 remember that part.

16 Q. And --

17 A. That's the State's case now, the State's version.

18 Q. Did Mr. Briscoe consistently maintain an alibi defense
19 in this case?

20 A. Oh, yeah. Clearly. Yeah. He said he was not guilty.
21 Constantly professed his innocence and put forth the alibi
22 defense.

23 Q. Now I believe at one point in the trial Judge
24 Jefferson said, this is a credibility case. What pretrial
25 preparations can you recall -- do you recall making in

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1 anticipation of impeaching the State's witnesses?

2 A. Well, I had the discovery. Went over discovery. I
3 investigated the case vigorously, investigated the case
4 with the officers and the witnesses. I don't think I went
5 out to the house where it happened. I think they sent me
6 pictures so I didn't have to go out to the house. I'm
7 pretty certain I have the photographs of the house.

8 And his mom supplied pictures of her car, and talked
9 to his mother and the girlfriend. I don't think I talked
10 to the girlfriend much. Mostly his mother who was one of
11 his alibi witnesses because I think she testified. Like I
12 said, this was so long ago, but I think she testified she
13 had the car that night or something like that and went to
14 a fair or something.

15 Q. I believe she testified she went to a fair in Roanoke?

16 A. Right. Right. Exactly.

17 Q. Did Mr. Briscoe give you any evidence that clearly put
18 the car in Virginia at the time of the offense besides
19 just her testimony?

20 A. Well, I mean, her testimony. They didn't have a
21 picture with a date stamped on it saying in anticipation
22 of the trial, here's the car. But, I mean, like he
23 testified to, the car that was described by the witnesses
24 was, I think they said it was a four door and his mom's
25 car was a two door. And then there was some discrepancy

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1 about the color and the make. And I think they had a car
2 or we supplied a picture or something that somebody had.
3 I don't know if his mom's car was a Grand Am and there was
4 another type of car very similar to it.

5 Q. Grand Prix?

6 A. Right. A Grand Prix. And put that into evidence
7 also.

8 Q. But do you recall having any smoking gun alibi
9 evidence?

10 A. I don't know if you can have a smoking gun alibi.

11 Q. Well, compelling evidence.

12 A. I didn't have, like, a videotape of him at work, you
13 know, with a timecard. Nothing like that. I mean, he had
14 about as good as you can get when you, you know, you're
15 somewhere trying to match where you are to a specific
16 date. And his girlfriend said they were together, I
17 think, and the mom said she had the car at the fair.

18 Q. And regarding Mr. Briscoe's first allegation that you
19 should've objected inadmissible testimony from Lieutenant
20 Asbill, blood splatter. Do you recall that being
21 significantly important testimony in this trial?

22 A. I think it's all important. That's why they put it
23 in. And he's -- I mean, quite possibly I should have
24 objected. But I think his testimony, I kind of went
25 through the transcript a little bit and I remember, I

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1 think he said he had gone to Criminal Justice Academy. He
2 had taken both the basic and the advanced class. So he
3 might have been found to be an expert anyway.

4 But, again, I don't necessarily think it was an
5 outcome determinative because he said we were arguing that
6 it was an alibi. I mean, but it did kind of bolster the
7 State's version of how the crime took place. It was clear
8 somebody shot the decedent.

9 Q. Do you recall using some of the State's forensic
10 evidence that was presented to show maybe additional, show
11 additional culpability from other people that were at the
12 scene that night?

13 A. Right. Yeah, I mean, you know, other people had
14 guns. Other people were in the house. You know, there
15 was no DNA from the door to the car to the clothes or
16 anything like that. There was nothing in there to show
17 that Steven Briscoe was in that house or shot that young
18 man.

19 Q. So this was a case about identification essentially?

20 A. Well, once again, just like any criminal case, that
21 becomes a case of believability, who you believe, because
22 he was arguing alibi.

23 Q. And you had made, I think, a Biggers objection at
24 every possible juncture of this trial; is that correct?
25 Just to preserve it?

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1 A. Pretty much. I think there are a couple things
2 that -- I mean, Asbill, I think his would have gotten in
3 anyway because, like I said, all they had to do was offer
4 him at that point. But that should have been objected to.

5 In his brief Steven refers to solicitor, Assistant
6 Solicitor Bell, Harrison, I'll just call him Harrison,
7 Harrison Bell arguing that in his closing argument when he
8 said, I can guarantee. He's absolutely right. I should
9 have objected to that.

10 Q. And I had a chance to read that too. Do you recall
11 solicitor saying I can guarantee you stopping and no
12 thought --

13 A. No, what he said in his closing, he said something
14 about, I don't know if he said, I guarantee they're
15 telling the truth or, but he did vouch. He started
16 vouching for their credibility. I mean, to be quite
17 honest, you know, I should have objected but at trial it
18 came across as begging, to be honest, because their
19 witnesses were, lacked so much credibility. It just
20 was -- it almost came across as a plea of desperation, if
21 you ask me, you know.

22 Q. And regarding the witnesses, do you recall how you
23 portrayed the State's witnesses that were at the scene
24 that night that all testified to their involvement?

25 A. They were all friends. They all knew each other.

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1 They were all involved in either doing drugs, including
2 the decedent, or selling them. Everybody knew everybody
3 including Jason Turner. And nobody knew Steven Briscoe
4 except Jason Turner.

5 So, they admitted, begrudgingly, you know, they
6 wouldn't say, yeah, we cleaned up the scene. But they
7 admitted they cleaned up the scene after the crime and
8 nobody called 9-1-1 about their friend who was either dead
9 or dying on the floor.

10 Not even when they got to Orangeburg, I think. I
11 don't even think when they got up here, when they got away
12 called back and said, I heard there was a shooting. I
13 don't think so.

14 Q. And didn't you use a statement from every single
15 witness to impeach him?

16 A. Yes, I did.

17 Q. And I believe Mr. Briscoe had referenced a polygraph.
18 Didn't you bring this to the Judge's attention as a
19 possible tool of impeachment?

20 A. I remember I did. I think she ruled. I didn't see it
21 in the record. I mean, you have three books of
22 transcript. But, yeah, I'm pretty certain we addressed
23 it. I don't know if she ruled on the record or not. If
24 she didn't, I should have had it placed on the record, but
25 she wasn't going to allow that in, unfortunately.

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1 Q. And would you characterize this as possibly one of the
2 longer trials that you've done in your career?

3 A. I wouldn't characterize it as that. I mean, it was a
4 week long but, I mean, trials can go on a lot longer than
5 that.

6 Q. Did you investigate every possible witness that
7 Mr. Briscoe asked you to do?

8 A. Yes.

9 MR. WHITMIRE: Beg the Court's indulgence.

10 THE COURT: Okay.

11 (Pause.)

12 MR. WHITMIRE: No further questions, Your Honor.

13 THE COURT: Thank you, sir. Mr. Brooks, anything on
14 cross?

15 MR. BROOKS: Yes, sir.

16 CROSS-EXAMINATION

17 BY MR. BROOKS:

18 Q. Mr. Kearsse?

19 A. Yes, sir.

20 Q. This trial was back in '05; isn't that correct?

21 A. Yeah. That's what it says on the transcript. Yeah,
22 so.

23 Q. That's about eight years ago?

24 A. Yeah, I guess. I mean ...

25 Q. And I'm sure you have dealt with and tried numerous

KEVIN KEARSE -- CROSS

1 criminal matters in that span of time?

2 A. Probably be a (verbatim) under statement, Mr. Brooks,
3 yeah. I mean, I've had a lot of cases.

4 Q. So it's fair to say that your memory is probably a
5 little hazy?

6 A. Well, I remember some of it. I mean, you know, it was
7 a murder trial. It did last for a week long. Steven is
8 from Virginia. I mean, you don't get a whole lot of those
9 in Dorchester County.

10 Q. Some of the most critical points like that you would
11 remember, but a lot of the specifics as far as how much
12 investigation you may have done, you might not be as
13 accurate on that; is that fair to say?

14 A. Yes, I think that's fair to say.

15 Q. Okay. And it's probably fair to say that, you know,
16 his recollection of how much interaction he had with you
17 is probably a little more accurate than your recollection
18 that he's testifying to?

19 A. It could be. I don't know.

20 Q. And some of things that you may or may not be accurate
21 about, you would obviously defer to whatever is in the
22 transcript; right?

23 A. If it's in the transcript, yeah.

24 Q. Okay. I mean, you wouldn't argue, you know, if the
25 transcript said one thing, you wouldn't say your

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1 recollection is something totally different?

2 A. No. Like I said, I don't know. Just to address what
3 he said and try to do it as expeditiously as possible.

4 THE COURT: And the Court appreciates that.

5 THE WITNESS: Thank you, Your Honor. To go down his
6 points, we addressed the polygraph. But I don't know if
7 that's in the transcript or it was on the record. I don't
8 remember.

9 BY MR. BROOKS:

10 Q. Right.

11 A. I filed a motion for identification to suppress and I
12 think it was Travis North or Ryan North or somebody, and
13 maybe all of the out-of-court identification. That I
14 believe is in the record and of course that motion was
15 denied and they were allowed. Well, we used that to
16 attack credibility.

17 The issue of, that he brought up about the tape. I
18 objected to the tape prior to the tape being played. And
19 he's right, I haven't even heard the tape. It hadn't been
20 turned over pursuant to discovery. I objected on that
21 grounds. I also objected on the fact that he was
22 surreptitiously tape recording in terms of the mother.
23 Judge Jefferson chose to allow it and said that they did
24 not have to turn it over or supply it to us because they
25 were using it in rebuttal for impeachment purposes.

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1 The same thing with the jail tape. And, again, we all
2 know when you call from the jail that you're being tape-
3 recorded.

4 I know he didn't address this, but I would relate the
5 blood splatter evidence that Detective Asbill testified to
6 to the element of malice. And I thought that was
7 interesting and I don't know if he -- I don't know his
8 ABCDEFG chronology on his memorandum, but I thought that
9 in the memorandum I got he makes a good point and that the
10 element of malice and the charge of malice did
11 impermissibly shift some of the burden to him. And I
12 should have, if nothing else, objected to the charge and
13 preserved that for his appeal on that charge of malice.
14 So, in that regard I agree with him.

15 I also agree with him about, you know, Harrison Bell
16 vouching for the witnesses. I think that would have just,
17 they would have just been told to disregard that and
18 strike it.

19 And there's one thing in the -- and it happened during
20 closing that I should have objected to and maybe
21 cumulative. He should be allowed a new trial and that is
22 because Mr. Bell mentioned that on the drive back from
23 Orangeburg, and I don't have a specific page. If you give
24 me a ... it's in the record that the cell phone towers
25 would show that as he was making calls he was going back

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1 to Orangeburg or something like that. That wasn't in the
2 case in chief at all. And that shouldn't -- he shouldn't
3 have been allowed to even --

4 Q. He shouldn't have been allowed to raise that on
5 closing?

6 A. On closing, right, because it wasn't part of the
7 evidence. And certainly I think that was deficient that I
8 did not catch that. In fact, I thought about that right
9 after the trial. And I was like, wait a minute, that
10 wasn't part of the evidence.

11 So those things really stand out to me in terms of how
12 the trial went.

13 MR. BROOKS: Beg the Court's indulgence.

14 THE COURT: Okay. (Pause.)

15 BY MR. BROOKS:

16 Q. Mr. Kearse, do you recall the identification of
17 Mr. Briscoe and the difference between his picture with
18 the shirt collar? Do you recall that?

19 A. Yes. I mean, that's what I made the argument on was
20 that there were six photographs. I believe it was only
21 six not eight. And I think that his picture was the only
22 picture that, or the only individual that had a collar on
23 in the photographs. And I think they pulled his picture
24 from his driver's license or something like that.

25 Q. Basically going along with what he had testified to

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1 here earlier today; is that right?

2 A. Right. I mean, yeah, if you were a cunning person you
3 could about -- because I think the two brothers are
4 primarily the persons other than Jason Turner. Jason
5 Turner was an easy ID. They knew each other. They took
6 one photograph to the jail and said, is this Steven
7 Briscoe. Jason Turner said, yeah, that's him.

8 The two brothers, I think it's Travis and Ryan North,
9 something like that. They are the ones who did a
10 subsequent photograph lineup, like a year later, like a
11 year and a half later after the thing allegedly happened.

12 And, you know, one shirt -- one picture had a collar
13 on it and everybody else had no collar. And one guy
14 picked him out, went out in the hallway. They talked.
15 They didn't even segregate them. They brought the other
16 brother in. And after they switched two to one or one to
17 two or something like that, then he picked out Steven also
18 as the person, but this was after a year and a half that
19 they had been in jail with Jason Turner.

20 Q. The North boys?

21 A. Right.

22 Q. They were in jail for something else?

23 A. No, they were all in jail for, I believe, this crime
24 here.

25 Q. Okay. And of course they all got deals; right?

1 A. Of course. They either got, I think Jason Turner got
2 his deal before the trial which I found, you know, that
3 was abnormal. But -- and we argued that, and I think the
4 Norths got the old, they hadn't been sentenced yet so I
5 couldn't get -- whatever. I don't know. I'm just
6 testifying to the truth that I don't know. If I'm going
7 to go to jail for the rest of my life or not, you know,
8 that kind of thing.

9 Q. Didn't they give some -- didn't those North boys give
10 some inconsistent statements?

11 A. Yeah. Yes, they did. Right. I mean, there was
12 the -- I think it was one of them, Ryan maybe, the bigger
13 one. I think it was bigger one, physically bigger one, an
14 older one, I think, actually admitted he had a gun. And I
15 think it was a .40. I think he had a Smith and Wesson .40
16 caliber. And I think Jason Turner admitted he had a 10
17 millimeter or something like that.

18 Q. There was no murder weapon ever presented at this
19 trial; right?

20 A. No, no gun was found.

21 Q. No gun?

22 A. Right. There was no gun, no.

23 MR. BROOKS: Beg the Court's indulgence. (Pause.) No
24 other questions, Judge.

25 THE COURT: Anything on redirect?

1 MR. WHITMIRE: No, Your Honor.

2 THE COURT: State have any other witnesses?

3 MR. WHITMIRE: State rests on the record.

4 THE COURT: What I will do is I'll review the
5 transcript and my notes and I'll get back to you all with
6 my decision. Thank you very much.

7 MR. WHITMIRE: Thank you, Your Honor.

8 THE COURT: You all have a wonderful evening.

9 END OF PROCEEDINGS: 6:30 p.m.

10 CERTIFICATE OF REPORTER

11 STATE OF SOUTH CAROLINA)

12 COUNTY OF AIKEN)

13 I, Cheri L. Young, Registered Professional Reporter
14 and Official Court Reporter for the State of South
15 Carolina, Second Circuit-At Large, do hereby certify that
16 the foregoing proceedings were written stenographically by
17 me using computer-aided translation; further, that the
18 foregoing is a true, accurate and complete record, to the
19 best of my skill and ability, of all the proceedings had
20 and evidence introduced in the hearing of the captioned
21 case, relative to appeal, in the Court of Common Pleas for
22 Orangeburg County, on the 22nd day of May, 2013.

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

25 I have hereunder set my hand this 6th day of March,
2014.

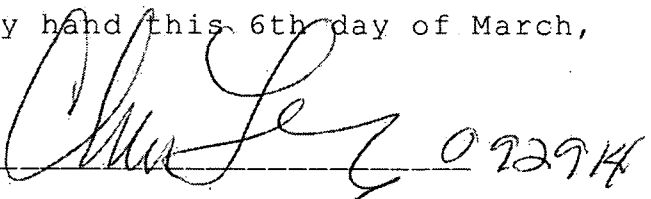
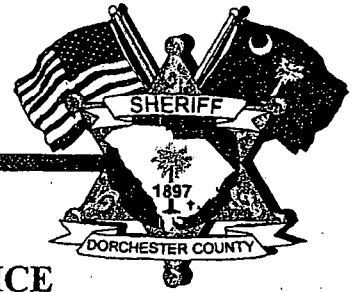

Cheri L. Young, RPR
Official Court Reporter

Exhibit A



Office of the Sheriff**DORCHESTER COUNTY, SOUTH CAROLINA***Ray Nash, Sheriff***DORCHESTER COUNTY SHERIFF'S OFFICE**
POLYGRAPH REPORT

I have been informed that the results of the polygraph examination administered to Travis North by **Det. Sgt. T. A. Van Doran**, on 09 July 2003, of the Dorchester County Sheriff's Office are as follows:

() NDI - No response indicative of attempted deception were noted to relevant test questions.

(XX) DI - Responses indicative of attempted deception were noted to relevant test questions.

R-5 DID YOU SHOOT MARK? A: NO

R-7 WHILE IN THE HOUSE ON [REDACTED] ROAD DID YOU SHOOT MARK? A: NO

R-10 DO YOU KNOW FOR SURE WHO SHOT MARK? A: NO

() NDR - The truthfulness or attempted deception of the examinee could not be determined.

() DNT - Did not test examinee. (see comments)

() Re-examination recommended by examiner.

COMMENTS / REMARKS:

The opinion should be considered a final report; however, all examinations undergo a Quality Control Review. Should this Quality Control Review change the results of this examination, you will be promptly notified by written report.

IT IS MY OPINION THAT TRAVIS NORTH HAS SHOWN DECEPTION DURING THIS EXAMINATION. I CAN NOT DETERMINE TO WHAT EXTENT, HOWEVER, I BELIEVE HE IS WITHHOLDING INFORMATION ON WHO SHOT MARK.

Signature of Officer

Dorchester County Sheriff's Office

Terrance A. Van Doran
Signature of Examiner

09 JULY 2003

NAME OF DECEDENT: MARK COOK

DATE: 7/4/03

AUTOPSY NUMBER: FA03-370

RACE: B

AGE: 30

SEX: M

PATHOLOGIST(S): J. SEXTON, MD AND J. ROSS, MD

Date of Death: 7/3/03

County of Death: DORCHESTER

27. PART I: Enter the diseases, injuries or complication that causes the death. Do not enter the mode of dying, such as *cardiac or respiratory arrest* shock or heart failure. List only one cause on each line

Approximate Interval
Between Onset and Death

IMMEDIATE CAUSE (Final) A. EXSANGUINATION MINUTES
DUE TO (OR AS A CONSEQUENCE OF):

B. PERFORATION OF HEART AND LUNGS MINUTES
DUE TO (OR AS A CONSEQUENCE OF):

C. GUNSHOT WOUND OF RIGHT ARM (CHEST) MINUTES
DUE TO (OR AS A CONSEQUENCE OF):

D. _____
DUE TO (OR AS A CONSEQUENCE OF):

PART II. Other significant conditions contributing to death but not resulting in the underlying
Causes given at Part I.

28a. Autopsy 28b. WERE AUTOPSY FINDINGS
Yes or No CONSIDERED IN DETERMINING
CAUSE OF DEATH? YES OR NO

YES YES

29. MANNER OF DEATH 30a. DATE OF INJURY 30b. TIME OF INJURY 30c. INJURY AT WORK 30d. DESCRIBE HOW INJURY
OCCURRED
Natural Pending 7/3/03 11:40 PM NO SHOT BY SOMEONE
Investigation 30e. PLACE OF INJURY - At home, farm, street, factory, office 30f. LOCATION (Street and Number of Rural Number, City
or Town, State, building etc. (Specify)
Accident Could not
Suicide be determined
X Homicide RESIDENCE ██████████, ST. GEORGE, SC

Janice E. Ross, M.D.

Signature

Forensic Pathologist
TitleNewberry Pathology Associates
185 Executive Dr., Newberry, S. C. 29108

Joel S. Sexton, M.D.

Signature

Forensic Pathologist
TitleNewberry Pathology Associates
185 Executive Dr., Newberry, S. C. 29108

Inas Z. Yacoub, M.D.

Signature

Forensic Pathologist
TitleNewberry Pathology Associates
185 Executive Dr., Newberry, S. C. 29108Date Signed 7/4/03

1118

Carter's Guns and Ammo

163 Applewood Dr.
Danville, VA 24541
(804) 791-3906

EX. C 2042

Sales Receipt

DATE	SALE NO.
1/30/01	4839

SOLD TO

Coles, Helen Briscoe

Danville, Va 24540

CHECK NO.

PAYMENT METHOD

PROJECT

DESCRIPTION	QTY	RATE	AMOUNT
CLX763US, 4446, Glock, 10, 29		550.00	550.00T
Virginia State Police Fee		2.00	2.00
Ammo		0.00	0.00T
sales tax		4.50%	24.75
PLAINTIFF'S EXHIBIT 3		Total	\$576.75

EXHIBIT C

1120

EX. C 1 OF 2

Carter's Guns and Ammo

163 Applewood Dr.
Danville, VA 24541
(804) 791-3906

Sales Receipt

DATE	SALE NO.
5/10/1999	3402

SOLD TO
Coles, Helen Briscoe [REDACTED] Danville, Va 24540 [REDACTED]

CHECK NO.	PAYMENT METH...	PROJECT

DESCRIPTION	QTY	RATE	AMOUNT
1364645. B653 Jennings, C-9MM, M-Nine		179.00	179.00T
Ammo		0.00	0.00T
Virginia State Police Fee		2.00	2.00
sales tax		4.50%	8.06
		Total	\$189.06

STATE OF SOUTH CAROLINA)

COUNTY OF DORCHESTER)

Steven C. Briscoe,
S.C.D.C. No. 312254,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS

FOR THE FIRST JUDICIAL CIRCUIT

Case No. 2009-CP-18-0305

ORDER OF DISMISSAL

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed February 18, 2009¹. Respondent made its Return on February 4, 2010. An evidentiary hearing into the matter was convened on May 22, 2013 at the Orangeburg County Courthouse. The Applicant was represented by Charles T. Brooks, III., Esq. The Respondent was represented by Walt Whitmire, Esq., of the Office of the Attorney General. Applicant and counsel testified.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Dorchester County Clerk of Court. The Applicant was indicted at the October 2005 term of the Dorchester County Grand Jury for murder (2005-GS-18-1100). He was represented by Kevin Kearse, Esq., 'counsel.' On October 31, 2005, the State called its case to trial and the jury found Applicant guilty as indicted. The Honorable Deadra L. Jefferson sentenced Applicant to thirty (30) years imprisonment for murder.

¹ Received by Respondent on January 21, 2010.

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A Notice of Appeal was filed on the Applicant's behalf and was perfected by Joseph L. Savitz, III, Esq., of the Office of Appellate Defense. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence in an unpublished opinion, Op. No. 08-UP-259 (filed on May 14, 2008). The Remittitur was issued on May 30, 2008. A timely PCR application followed.

At the PCR hearing, Applicant moved forward on the following claims:

1. Ineffective assistance of counsel:
 - a. failure to investigate enplanement documents from the grand jury;
 - b. failure to present polygraph evidence of a State witness at trial;
 - c. failure to object to allegedly improper opinion testimony from the State's crime scene investigator;
 - d. failure to object to the State's allegedly improper impeachment of defense witness through an audio recording;
 - e. failure to object to the State's use of impeachment evidence that allegedly constituted a discovery violation;
 - f. failure to object to the State's use of impeachment evidence that allegedly violated Federal Law;
 - g. failure to present evidence to rehabilitate a defense witnesses' credibility;
 - h. failure to object to an allegedly erroneous jury instruction that unconstitutionally shifted the burden of proof to Applicant;
 - i. failure to object to allegedly prejudicial comments made by the solicitor during his closing argument;
 - j. failure to object to comments made by the solicitor during his closing argument that allegedly constituted vouching;
 - k. failure to object to comments made by the solicitor during his closing argument that allegedly were improper references to matters not presented to the jury at trial.

SUMMARY OF TRIAL TESTIMONY

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The State presented evidence that showed: Applicant was convicted for killing the victim in a foiled narcotics transaction. R. North and Turner negotiated the purchase of a substantial amount of cocaine from Turner. Turner and Applicant departed from Virginia and met R. North at a pre-determined location. R. North was accompanied by his confederates. Several witnesses testified that Turner and Applicant traveled in a Pontiac Grand AM that had a Virginia license plate. The State presented evidence that showed Applicant's mother owned a notably similar vehicle. The failed narcotics transaction occurred at a residence occupied by Green. R. North testified that Turner and Applicant were hesitant to enter the residence and appeared nervous. While Applicant was packaging the cocaine, the victim made the fatal decision to attempt to steal a quantity of the product. R. North testified Applicant pulled out a black handgun that appeared to be a Glock or an unspecified .9 mm and shot the victim numerous times before fleeing. R. North identified Applicant as the shooter. Other witnesses, including Turner and T. North, also identified Applicant as the shooter. Turner testified to the sequence of events that surrounded the murder. The State presented phone records that generally corroborated the testimonies of Turner and R. North.

Bullet fragments retrieved during victim's autopsy exhibited "polygimal rifling" unique to four known handguns; one which was a .10 mm Glock. Furthermore, markings on cartridges found at the scene bared markings unique to the Glock brand. SLED Agent Paaval testified that .10 mm. Glocks are rare in the industry. Inauspiciously, Applicant reported his accidental discharge of a .10 mm Glock to Virginia police nearly six months prior to the murder. The firearm identified in the Virginia incident belonged to Applicant's mother, Coles.

Applicant presented an alibi defense. He testified that he was in Danville, VA with his girlfriend Graves on July 4, 2003. Applicant detailed his activities that day and testified that he

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shopped at a nearby mall then attended a neighborhood barbecue that night. Graves testified to her interactions with Applicant on July 4, 2003. She testified that she knew all of Applicant's friends and acquaintances in the community. She also testified that she was certain Applicant did not father children with other women during their relationship. She stated, "I don't think we know where everyone is every minute of the day, but [Applicant] knew I was pregnant and, I mean, we just, we've always been close." (Trial Tr. p.691). As a result of Applicant's dishonest testimony, the State presented a recording of a phone call between Applicant and his paramour regarding the paternity of the paramour's child. Applicant also testified that Turner had an alleged motive to falsely accuse him of the murder based upon a long held grudge regarding infidelity. Yet, Applicant testified Turner visited his hometown to see him just two months prior to the murder. Coles testified she drove her Pontiac Grand AM vehicle to the Salem State Fair in Southwest Virginia on July 4, 2003. The State also presented extrinsic evidence to impeach Coles' credibility. Outside of testimony from Graves and Coles, Applicant did not present evidence to corroborate his alibi.

The jury found Applicant guilty as indicted. Prior to pronouncing Applicant's sentence, the trial judge commented:

"It is really unfortunate, the place the defendant finds himself in, because quite frankly, I think if he had simply come to terms with the truth and told it he would be in much -- I don't know whether his position would be different but I think at least he will have some peace with himself. But I think he has convicted himself of his own reality of what took place on that evening. And I think he is grappling with the fact that in a split second -- and I say, split second relative, because I mean, probably in the span of a week or two he made a decision that has inextricably altered his life and his victim's life, because now a man is dead." (Trial Tr. p.1004).

APPLICABLE LAW

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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, (1984); Butler, 286 S.C. at 441, 334 S.E.2d at 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. at 668, 104 S.Ct. at 2064. 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, *supra*. 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.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court reviewed the Clerk of Court records regarding the subject

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convictions, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, Applicant's appellate records, the transcripts and documents from the prior proceedings, and legal arguments of the attorneys. Pursuant to S.C. Code Ann. §17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

As a matter of general impression, this Court finds counsel's testimony more credible than Applicant's testimony. This Court finds counsel's performance concerning the claims presented to have been diligent and constitutionally effective. Counsel testified he met with Applicant on at least six occasions, discussed the State's case and evidence with Applicant, and formulated a theory of the case based on Applicant's version of the facts. This Court finds counsel's testimony here credible. As a result of counsel's investigation of the case and his interviews with police officers and witnesses, counsel presented a competent case at trial. Compelling evidence shows counsel reasonably investigated all relevant matters at the request of Applicant regarding the claims presented. Furthermore, Applicant raises a number of ineffective assistance of counsel allegations for failure to object that are mostly without merit and misguided. Regardless, this Court finds the State presented convincing evidence of Applicant's guilt at trial, comparison to Applicant's suspect alibi testimony. Most troubling to Applicant's cause, he lied under oath at trial.

A.

Applicant failed to meet his burden to prove counsel was ineffective for failing to investigate empanelment documents from the grand jury. "An indictment is a 'notice document,' albeit one required by our state constitution and statutes." Evans v. State, 363 S.C. 495, 508, 611 S.E.2d 510, 517 (2005). Applicant failed to present relevant evidence to even make a *prima facie*

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showing that his due process rights were allegedly violated by the composition of the grand jury or by the manner in which he was indicted for murder. Furthermore, the record shows that Applicant was on adequate notice of the murder charge prior to trial. During the sentencing phase of the trial, Applicant apprised the trial judge that he labored over every fact and piece of evidence during his sixteen month pre-trial detention. (Trial Tr. pp.994-95). Regardless, Applicant's insinuation that the grand jury was unconstitutionally empaneled rested on mere speculation. Therefore, this allegation is denied and dismissed.

B.

Applicant failed to meet his burden to prove counsel was ineffective for failing to adequately present evidence of T. North's polygraph results. "Our supreme court has often held the results of polygraph examinations are generally not admissible because the reliability of the tests is questionable." State v. Council, 335 S.C. 1, 23-24, 515 S.E.2d 508, 519-20 (1999). Counsel brought the matter before the Court in a pre-trial motion, and then abandoned it during the course of trial. (Trial Tr. pp.117-18; p.398). This Court finds Applicant has failed to meet his burden to produce credible evidence in support of the allegation. See Jones v. Barnes, 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983) (The law does not require counsel to raise every available nonfrivolous defense.). Applicant proffered an exhibit purported to be T. North's polygraph; this Court finds the exhibit to be inadmissible because a lack of authentication. See Rule 901, SCRE. Applicant did not produce the examiner to explain his finding and establish the reliability of polygraph test. In addition, Applicant failed to make a *prima facie* showing of prejudice where the matter constituted cumulative impeachment evidence. Counsel impeached the witness during cross-examination and elicited testimony that the witness provided prior dishonest statements to police. See State v. Merriman, 287 S.C. 74, 79-80, 337 S.E.2d 218, 222

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(Ct.App.1985) ("Admission of the results of Hogg's polygraph examination would have been merely cumulative to the other evidence impeaching his credibility."). In the alternative, Applicant failed to prove how the matter would have constituted admissible evidence of third party guilt. See State v. McLeod, 362 S.C. 73, 82, 606 S.E.2d 215, 220 (Ct. App. 2004) ("Evidence offered by a defendant as to the commission of the crime by another person is limited to facts which are inconsistent with the defendant's guilt."). Therefore, this allegation is denied and dismissed.

C.

Applicant failed to meet his burden to prove counsel was ineffective for failing to object to allegedly improper opinion testimony from Lt. Asbell regarding his investigation of the crime scene. "The expertise, reliability, and the ability of the testimony to assist the trier of fact are all threshold determinations to be made prior to the admission of expert testimony, and generally, a witness's expert status will be determined prior to determining the reliability of the testimony." State v. Tapp, 398 S.C. 376, 388, 728 S.E.2d 468, 474-75 (2012). Lt. Asbell testified to his investigation of the crime scene. Applicant claimed this witness' testimony regarding "blood splatter" was inadmissible because the solicitor did not move to qualify him as an expert. Applicant posited that the splatter might not have even been the victim's blood. Counsel testified at the PCR hearing that Lt. Asbell was qualified to testify on the matter. Counsel testified that he was aware of Lt. Asbell's experience and training at the South Carolina Criminal Justice Academy. This Court agrees with counsel's assessment where the record shows that the witness had fourteen years of experience in crime scene investigation and over twelve years of continued training in blood splatter analysis. (Trial Tr. p.455; pp.463-64). See Brown v. Carolina Emergency Physicians, P.A., 348 S.C. 569, 580, 560 S.E.2d 624, 629 (Ct.App.2001) ("Any

defect in the education or experience of an expert affects the weight and not the admissibility of the expert's testimony."').

Furthermore, this court agrees with counsel that the allegedly improper opinion testimony was inconsequential to Applicant's case. Here, Applicant's claimed an alibi defense. Thus, the identification of blood splatter was immaterial in the context of defense theory of the case. Again, counsel demonstrated effective performance in cross-examining the State's witnesses in eliciting testimony that there was no forensic evidence that placed Applicant at the scene. *Compare State v. Ellis*, 345 S.C. 175, 178, 547 S.E.2d 490, 491 (2001) (citing *Fordham v. State*, 254 Ga. 59, 325 S.E.2d 755 (1985) (An officer's improper opinion which goes to the heart of the case is not harmless.)); Therefore, this allegation is denied and dismissed.

D.

Applicant failed to meet his burden to prove counsel was ineffective for failing to object to the admissibility of Det. Van Doran's audio recording of an interview with Coles as extrinsic impeachment evidence:

Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made, and is given the opportunity to explain or deny the statement. If a witness does not admit that he has made the prior inconsistent statement, extrinsic evidence of such statement is admissible.

State v. McLeod, 362 S.C. 73, 80-81, 606 S.E.2d 215, 219 (Ct. App. 2004) (citing Rule 613(b), SCRE); "Generally, where the witness has responded with anything less than an unequivocal admission, trial courts have been granted wide latitude to allow extrinsic evidence proving the statement." *State v. Carmack*, 388 S.C. 190, 201, 694 S.E.2d 224, 229-30 (Ct. App. 2010). This Court finds Applicant failed to present credible evidence or justification that the audio recording

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in question constituted inadmissible extrinsic evidence. During the defense's case-in-chief, Coles testified she owned a .10 mm Glock handgun that Applicant accidentally discharged from the January 2003 incident. (Trial Tr. p.700). She testified she transferred possession of the gun to her former lover, Wilson, prior to July of 2003 as collateral on a personal loan. When cross-examined on why she told Det. Van Doran a different story on the matter, she testified that she mistakenly disclosed information on a different handgun. She posited that Det. Van Doran did not specifically inquire about the .10 mm Glock handgun in question. Thus, the State presented an audio recording of Det. Van Doran's interview in its rebuttal case. This Court finds an objection to its admissibility lacked merit. Therefore, this allegation is denied and dismissed.

Applicant allegation that counsel was ineffective for failing to preserve his Rule 5, SCrimP, discovery objection regarding the matter is without merit. Det. Van Doran's audio recording of his August 2004 interview with Coles was solely presented as extrinsic impeachment evidence. See Rule 5(c), SCrimP. Therefore, this allegation is denied and dismissed.

Applicant's allegation that counsel was ineffective for failing to make a suppression argument on the matter and object to the admission of the audio tape based on alleged violation of the Federal Wire Tap Act is similarly without merit. Applicant has no standing to assert privacy interest of a third party witness. See State v. Crane, 296 S.C. 336, 340, 372 S.E.2d 587, 589 (1988) ("In order to have evidence suppressed on constitutional grounds, appellant "must establish that his own Fourth Amendment rights were violated."). Regardless, Applicant's testimony on the matter was illogical. See State v. Whitner, 399 S.C. 547, 565, 732 S.E.2d 861, 870 (2012) ("[O]ne party to a protected communication has no expectation of privacy under the

10/15 *EW*

Wiretap Act if the other party consents to recording or disclosure."'). Therefore, this allegation is denied and dismissed.

Last, Applicant entirely failed to meet his burden to prove counsel was ineffective for failing to present all the Coles' sales records from 'Carter's Guns and Ammo' to rehabilitate her credibility. Applicant's claim rests entirely on speculation. See Dempsey v. State, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005) ("A PCR applicant cannot show that he was prejudiced by counsel's failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence."). Applicant proffered an exhibit purported to be 'Sales Receipt No. 4839, January 30, 2001 record from Carter's Guns and Ammo.' This Court finds the exhibit to be inadmissible as a result of foundation and authentication. See Rule 901, SCRE. Applicant did not produce a custodian of record from the Virginia vendor nor did he produce Coles as a witness at the PCR hearing. Regardless, any prejudice claim was tenuous at best where Coles was impeached on her inconsistent statements to police; not whether she had proof of ownership of more than one handgun. Therefore, this allegation is denied and dismissed.

E.

Application's allegation that counsel was ineffective for failing to object to an allegedly improper jury instruction on malice is wholly without merit. "In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct.App.2003). "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." Id. at 318, 577 S.E.2d at 464. This Court finds the trial judge's instruction on malice constituted a valid pre-State v. Belcher instruction. See State v. Belcher, 385 S.C. 597,

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613, 685 S.E.2d 802, 810 (2009) ("Our ruling, however, will not apply to convictions challenged on post-conviction relief. See generally Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989)."). Therefore, this allegation is denied and dismissed.

F.

Applicant failed to meet his burden to prove counsel was ineffective for failing to object to various alleged improper comments made by the solicitor during State's closing argument. "[S]olicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury." State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). The State's closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence. Id. "A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony." Randall v. State, 356 S.C. 639, 642, 591 S.E.2d 608, 610 (2004). However, "[s]olicitors are bound to rules of fairness in their closing arguments." State v. Northcutt, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007). "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). "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.

Applicant's allegation that counsel was ineffective for not objecting to the solicitor's comment that the inconsistent testimony from eye-witnesses created an inference that they did not act in concert to fabricate a consistent story is without merit. (Trial Tr. p.938). The comment constituted a permissible inference on evidence presented at trial. The solicitor's comments that the crime scene photographs that detailed where evidence was retrieved showed a

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straightforward case on how the victim died was also permissible. (Trial Tr. p.923). Therefore, the allegation is denied and dismissed.

The solicitor's comment that the eye-witnesses testified to the best of their recollection did not constitute vouching. First, the record shows the eye-witnesses had been drinking alcohol and smoking marijuana at the time of the offense. Second, the eye-witnesses took an oath to testify truthfully. (Trial Tr. p.939). Regardless, this Court finds counsel offered a valid trial strategy for not objecting. Counsel stated that the solicitor's comments on inconsistent testimony from his witnesses accentuated Applicant's case. In addition, counsel testified that solicitor's comments here placed him in a bad light in front of the jury. Therefore, this allegation is denied and dismissed. The solicitor's comment that the mother of Applicant's daughter has a motive to testify in a matter that does not result in Applicant's incarceration was permissible. (Trial Tr. p.947). Therefore, this allegation is denied and dismissed.

Applicant's accusation that the solicitor's comment, "You got to see everybody on the stand, and how they reacted. Because I guarantee you," constituted vouching is without merit. (Trial Tr. p.939). This Court finds the inchoate statement, "because I guarantee you" lacked a predicate phrase. (Trial Tr. p.939). The solicitor's previous statement, "you got to see everyone on the stand, and how they reacted," indicates the solicitor's closing argument could not be construed in any matter to have improperly invaded on the province of the jury as the sole finders of fact. Thus, this Court disagrees with counsel's assessment that this comment constituted vouching. See U.S. v. Eyman, 313 F.3d 741, 743 (2d Cir. 2000) (citing Chandler v. U.S., 218 F.3d 1305, 1316 n. 16 (11th Cir. 2000) (en banc) ("A counsel's admission of ineffectiveness is not determinative.")). Therefore this allegation is denied and dismissed.

Last, the Applicant's allegation that counsel was ineffective for failing to object to the solicitor's comments of alleged evidence that was not presented at trial. "Arguments must be confined to evidence in the record (and reasonable inferences therefrom), although failure to do so will not automatically result in reversal." State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996). The solicitor stated: "These phone records led us to Smoke, Jason Turner. And you can look at this, you can follow it. You go to page -- let me get the right page -- you can go to page six of nine, if you look at the top, and you can follow. You can see the phone records, the phone calls, you can look through all this thing..." (Trial Tr. p.929). The solicitor made further comments to the general location of the towers that picked up the calls. An itemized billing from Turner's mobile phone was admitted through a Verizon Wireless records custodian. (Trial Tr. p.452). The comments addressed State's Exh. 11. Furthermore, the exhibit was cumulative to the testimonies of R. North and Turner. Therefore, this allegation is denied and dismissed.

G.

Except as discussed above, this Court finds that the Applicant affirmatively abandons the remaining allegations set forth in his application at the hearing. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BMI, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address these issues at the hearing indicates a voluntary and intentional relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

CONCLUSION

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Based on all the forgoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. See Rule 203; SCACR Rule 71.1(g); SCRCP; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. The Applicant's attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice has been timely filed.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief shall be, and hereby is, denied and dismissed with prejudice; and
2. Applicant shall be remanded to the custody of Respondent

AND IT IS SO ORDERED this 19th day of August, 2014.


 EDGAR W. DICKSON
 Presiding Judge
 First Judicial Circuit

Orangela, South Carolina

15/15 

WITNESSES

Marshall, Tom

DCSO

DOCKET NO. 2004GS18-1100

The State of South Carolina

County of

DORCHESTER

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to

COURT OF GENERAL SESSIONS

October 04, 2004 TERM

Defendant

ARREST WARRANT NUMBER

H742756

Arrested: Aug 19, 2004

Witness:

C.C.C. PLS. AND G.S.

ACTION OF GRAND JURY

Steven Christopher Briscoe

Indictment for

MURDER

Representation of Grand Jury
ate: September 30, 2004

VERDICT

SC Code: 16-03-10 / 16-03-20

CDR Code: 0116

Class: FEL-E

Representation of Petit Jury

1136

RECORDED
2004 OCT 18 AM 11:28
DORCHESTER COUNTY

STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)

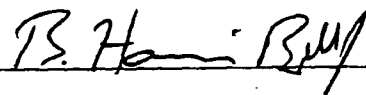
INDICTMENT
2004GS18-1100

At a Court of General Sessions, convened on October 24, 2005 the Grand Jurors of Dorchester County present upon their oath:

MURDER

The defendant, Steven Christopher Briscoe, did in Dorchester County on or about July 3, 2003, with malice aforethought, kill one Mark A. Cook by shooting the victim with a pistol, and the said victim did die as a proximate result thereof.

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


B. Harrison Bell Jr., SOLICITOR