

Vol II OF II

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Aiken County

R. Ferrell Cothran, Jr., Circuit Court Judge

RECEIVED

JAN 16 2015

S.C. Supreme Court

RUSTY DUNBAR,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000565

APPENDIX

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1 THE VICTIM MR. HYNES: Your Honor, Daniel Hynes;
2 H-Y-N-E-S. What happened to me October last year has
3 taken a sense of security I'll never get back. I don't
4 feel safe in my own house. I still wake up in the middle
5 of the night, just hear something brush up outside of the
6 house, sleep with the lights on. I don't feel like he's
7 shown any remorse for what he's done and just looking at
8 his record I believe that he would do the it again if he
9 had the chance. I just feel like he needs to get the max.

10 THE COURT: Do some what?

11 THE VICTIM MR. HYNES: The maximum time.

12 THE COURT: Well, I hope you have seen how quickly
13 you can be the victim of something like this.

14 THE VICTIM MR. HYNES: Yes, sir.

15 THE COURT: Consider yourself lucky that you didn't
16 get killed.

17 THE VICTIM MR. HYNES: I do everyday.

18 THE COURT: I'm sorry you've had to endure this.
19 There's, obviously, been some allegations disparaging to
20 you. I don't know whether they're true or not true.
21 That's not for me to decide, but you see how the drug life
22 can be an awful shady life and dangerous life. So, if
23 you're in that realm, I would certainly suggest you
24 turning your life around. Good luck to you.

25 You need to serve him or anything?

1 THE PROBATION OFFICER: I'll serve him in just a few
2 minutes.

3 THE COURT: Mr. Dunbar, these convictions also
4 violate your probation. She is going to serve you.

5 (Whereupon, the Probation Officer spoke with the
6 Defendant.)

7 THE COURT: Mr. Dunbar, I have been doing it a long
8 time. I practiced for 30 years and have been now the
9 Judge for almost six. I have seen meaner people than you
10 in the courtroom. I see some people who just slice people
11 up and kill them for nothing, but, you know, to listen to
12 you testify yesterday -- and I discussed this with some
13 people -- it is shocking that somebody would I guess
14 devote their lives to letting crack cocaine and marijuana
15 and alcohol just take total control and be the most
16 important thing going. It's shocking that it is so
17 readily available in our community and it's shocking to
18 what it's done to you.

19 I mean, you look like, but for that, a decent person.
20 You got two children, but it has, I assume, ruined your
21 life. I guess it has. I think you'd want to trade places
22 with most anybody today.

23 THE DEFENDANT: Yes, sir.

24 THE COURT: And you would probably want to undo it,
25 but, you know, people who choose not to smoke crack, get

1 drunk, do all of this crazy stuff, we're entitled to live
2 without having to worry about somebody who is high on
3 crack and wanting money breaking in our houses and
4 hog-tying us and stabbing us. You just don't deserve to
5 be with us. You got a significant record since 1992. I
6 guess you told me yesterday you started smoking crack when
7 you were 13 so I assume that's the reason for the record.

8 As to the burglary first the sentence of this court
9 is that you be committed to the State Department of
10 Corrections for a period of 30 years.

11 As to the kidnapping the sentence of this court is
12 that you be committed to the State Department of
13 Corrections for a period of 30 years.

14 As to the armed robbery the sentence of this court is
15 that you be committed to the State Department of
16 Corrections for a period of 30 years.

17 As to the possession of a weapon during the
18 commission of a violent crime the sentence of the court is
19 that you be committed to the State Department of
20 Corrections for a period of 5 years.

21 I will terminate -- revoke his probation in full.
22 They'll all run concurrent, but you understand this is an
23 85 percent sentence?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: So you'll do 85 percent of 30 years.

1 Maybe when you get out you'll have the crack out of your
2 system. Good luck to you.

3 MR. MIMS: Your Honor, we have one motion.

4 THE COURT: Hmm?

5 MR. MIMS: We just have to move for a new trial.

6 THE COURT: I'll give you 10 days to file your
7 motion. How about that?

8 MR. MIMS: Okay.

9 (End of Transcript of Record.)

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CERTIFICATE OF REPORTER

State of South Carolina)
County of Aiken)

I, Lisa H. Davenport, Official Court Reporter for the Second Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Aiken County, South Carolina, on the 15th - 17th days of December, 2009.

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

June 6, 2010



Lisa H. Davenport, Court Reporter

STATE OF SOUTH CAROLINA)

County of AIKEN)294996
Rusty Dunbar #~~294996~~)

Full name and prison number, if any, of applicant.)

v.)

State of South Carolina)

Name of Respondent)
_____)

K-207942

K-207941

In the Court of Common Pleas

K-207940

K-207939

APPLICATION FOR
POST-CONVICTION RELIEF

2012-CP-02-00795

2009-GS-02-90,91,92,93

Filed 29 March 2012Cl. & Seal
C.C.C.P. & G.S. Aiken County

Deputy Clerk: AM: _____ PM: 12:25 pm

Trial Judge: David A. EasleyTrial Atty: M. J. MartinCourt Reporter: LISA DAVENPORT

Sec: PCR Petitioner _____ Solicitor _____

General Sessions _____ Atty. Gen. _____

Appointed Atty. _____

INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention Lumber Corr. Inst. P.O. Box 205 S-A-4
Pickensville S.C. 29472
2. Name and location of Court which imposed sentence Aiken County Court of
General Sessions
3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:
 - (a) 09-GS-02-90-93 (kidnapping, burglary 1st degree; armed
 - (b) robbery; possession of knife during the commission of a
 - (c) violent crime)
4. The date upon which sentence was imposed and the terms of the sentence:
 - (a) December 17, 2009, 30 years for kidnapping, armed robbery
 - (b) and burglary 1st degree, 5 years for the weapons offense all
 - (c) sentences order to run concurrent to 30 years

5. Check whether a finding of guilty was made
- (a) after a plea of guilty _____
 - (b) after a plea of not guilty trial by jury and a judge
 - (c) after a plea of nolo contendere _____
6. Did you appeal from the judgment of conviction or the imposition of sentence? yes
7. If you answered "yes" to (6), list
- (a) the name of each Court to which you appealed:
 - i. South Carolina Court of Appeals
 - ii. _____
 - iii. _____
 - (b) the result in each such Court to which you appealed:
 - i. denied
 - ii. _____
 - iii. _____
 - (c) the date of each such result:
 - i. submitted Feb. 1, 2012 - Filed Feb. 22, 2012
 - ii. _____
 - iii. _____
 - (d) if known, citations of any written opinion or orders entered pursuant to such results:
 - i. Unpublished Opinion No. 2012-UP-093
 - ii. _____
 - iii. _____
8. If you answered "no" to (6), state your reasons for not so appealing:
- (a) n/a
 - (b) _____
 - (c) _____
9. 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 Fifth, Sixth and Fourteenth Amendments,
 - (c) denial of due process of law

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

(a) see attached memorandum and facts

same as above

(b) same as above

(c) same as above

11. 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 petitions in State or Federal Courts for habeas corpus or post-conviction relief?

no

(c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (7) no

(d) any other petitions, motions or applications in this or any other Court?

no

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

(a) the specific nature thereof:

i. 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. _____

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

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

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

(a) first filing for post conviction relief

(b) _____

(c) _____

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

(a) your arraignment and plea? _____

(b) your trial, if any? yes

(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 application with respect to this conviction, which you filed? no

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

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

i. M. Justin Mims, Esq and De grant Gibbons, Esq

ii. Aiken County Public Defenders Office

iii. South Carolina Office of Appellate Defense

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

i. trial and sentencing

ii. same as above

iii. direct appeal

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

vacate sentence and conviction and remand for new trial

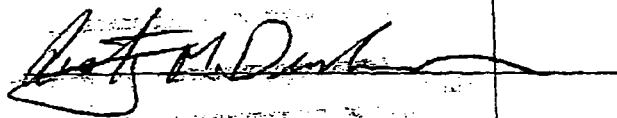
19. Are you now under sentence from any other court that you have not challenged?

no

STATE OF SOUTH CAROLINA)
)
 COUNTY OF _____)

VERIFICATION

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



Sworn to and subscribed before me

This 9th day of Mar, 2012

Sylvia Jones L.S.

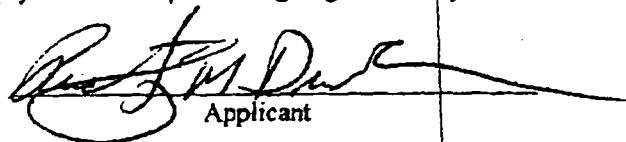
Notary Public for South Carolina

My Commission Expires 1/24/2018

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

I, Rusty Dunbar, 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 or 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 proceeding or give security therefor.



Applicant

Sworn to and subscribed before me

This 9th day of March, 2012

Sylvia Jones L.S.

Notary Public for South Carolina

My Commission Expires: 1/24/2018

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN
IN THE COURT OF COMMON PLEAS

Indict. No. 09-GS-02-90-93

Rusty Dunbar -- Applicant,

-Vs-

State of South Carolina -- Respondent,

APPLICANT'S MEMORANDUM IN SUPPORT OF
APPLICATION FOR POST CONVICTION RELIEF
PURSUANT TO S.C. CODE ANN.
§§ 17-27-20 THROUGH § 17-27-160

Rusty Dunbar
Lieber Corr. Inst.
P.O. Box 205
136 Wilborn Ave.
Ridgeville, SC. 29472

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

Rusty Dunbar,) Indict. No. 09-GS-02-90-93
Applicant,)
-v-) APPLICANT'S MEMORANDUM IN SUPPORT
State of South Carolina) OF APPLICATION FOR POST CONVICTION
Respondent,) RELIEF PURSUANT TO: S.C. CODE ANN
) §§ 17-27-20 THROUGH § 17-27-160

COMES NOW, above captioned Applicant, Rusty Dunbar, pro-se, respectfully seeking relief in this Honorable Court pursuant to S.C. Code Ann. §§ 17-27-20 through § 17-27-160, claiming that his constitutional rights were violated in a number of ways including but not limited to his Sixth Amendment right to the effective Assistance of Counsel, and his Fourteenth Amendment right to due process of law that is protected under the United States Federal Constitution.

Applicant, through the issues presented, citations of authorities relied on will show unto this Honorable Court his entitlement to the requested relief sought herein.

ISSUE (A) WAS COUNSEL INEFFECTIVE FOR ELICITING PRIOR BAD ACTS TESTIMONY FROM A STATE'S WITNESS CONCERNING APPLICANT'S DRUG USE, AFTER SUCCESSFULLY OBJECTING AND RECEIVING CURATIVE INSTRUCTIONS PRECLUDING THE JURY FROM CONSIDERING APPLICANT'S PRIOR BAD ACTS, THAT "OPENED THE DOOR"?

FACTS

During trial Jerry Thornton testified for the State. During Thornton's testimony the Prosecution elicited testimony referencing Applicant's use of "crack cocaine" (Tr.p.104, L.1-3). Counsel lodged a timely objection (Tr.p.104, L.4), and the Court instructed the jury that the fact Thornton and Applicant bought crack cocaine is not relevant to this case, just regard it (Tr.p.104, L.12-15).

Subsequently, thereafter during cross-examination Applicant's trial couns[el elicited] testimony from Thornton referring to Applicant's drug use (crack cocaine)(Tr.p.113, L.1-20). The Trial Court intervened sua sponte and stated: "Hold on, you just objected to all of that and now you're right back into it, so the objection is out the window (Tr.p.113, L.23-25). (emphasis supplied).

Applicant asserts counsel was ineffective for objecting to the introduction of prior bad acts and then eliciting prior bad acts testimony from the same State's witness, that "opened the door" and denied Applicant his right to fair trial.

DISCUSSION

In 1923, the South Carolina Supreme Court stated, "the familiar and salutary general rule, universally recognized and firmly established in all English-speaking countries, that evidence of other distinct crimes committed by the accused may [not] be adduced merely to raise the inference or to corroborate the prosecution's theory of the defendant's guilt of the particular crime charged". State v. Lyle, 125 S.C. 406, 118 S.E. 803, 807 (1923). Under our system of justice, a conviction must be based upon evidence of the offense for which the accused is on trial rather than prior criminal or immoral acts. State v. Gore, 283 S.C. 318, 322 S.E.2d 12, 13 (1984).

The objections, from this view point of English jurisprudence, to the admission of this class of evidence are patent. Proof that a defendant has been guilty of another crime equally heinous prompts to a ready acceptance of and belief in the prosecution's theory that he is guilty of the crimes charged. State v. Lyle, supra. Evidence of other crimes is not admissible to prove the character of a person to show that he acted in conformity therewith. State v. Bailey, 275 S.C. 444, 272 S.E.2d 439, 440 (1980)(citing State v. Lyle).

Although relevant, evidence may be excluded as unduly prejudicial. State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991). In Alexander, the Supreme Court adopted the language of Federal Rule of Evidence 403: "although relevant, evidence may be excluded if it's probative value is substantially outweighed by the danger of unfair prejudice. The definition of 'unfair

prejudice" is "unfair prejudice within it's context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one". e.g. State v. Smith, 300 S.C. 216, 387 S.E.2d 245 (1989). Interestingly in the case at bar the trial Court upon counsel's initial objection instructed the jury to disregard the reference to drugs, upon finding it irrelevant in the instant case, only to have counsel turn around and "opening the door", Id. (emphasis supplied).

In State v. Bostick, 307 S.C. 226, 414 175 (Ct.App.1992), reversible error was committed when a witness testified that the police had information that the defendant had been selling crack cocaine prior to the occasion which led to his being charged. This was found improper testimony of a prior unadjudicated bad act. "Even if evidence of other crimes is deemed relevant and admissible, the evidence may still be excluded if it's probative value is substantially outweighed by the danger of unfair prejudice. The probative value of the evidence in the instant case is greatly diminished by it's very nature.

It is well established that evidence of other crimes or prior bad acts is inadmissible to show criminal propensity or to demonstrate the accused is a bad person. See e.g. State v. Johnson, 293 S.C. 321, 360 S.E.2d 317, 319-320 (1987). Furthermore, evidence of other crimes is never admissible unless necessary to establish a material fact or element of the crime charged. Id at 319, see United States v. Johnson, 610 F.2d 194 (4th Cir.1979).

In the instant case counsel initially lodged an objection to Jerry Thornton testifying about Applicant's prior bad acts (crack cocaine), and the Trial Court immediately instructed the jury to disregard that portion of Thornton's testimony. Subsequently on cross-examination "Counsel elicited the very same testimony that was previously objected to as being highly prejudicial and irrelevant, thus opening the door for the jury to consider the prior bad acts" the Court had already deemed inappropriate for the jury's consideration.

It was all the more prejudicial since the State therefore unbridled to run the gauntlet through trial relying on Applicant's use of crack cocaine in order to obtain a conviction. During closing summation the Solicitor argued: "All right finally we have the testimony of Rusty Dunbar which I've already referred to briefly. Mr. Mims says that Rusty is not on trial because he uses crack and that's very true in this case. He is not on trial because he uses crack, He told you that he used crack since he was 13 years old, but I disagree with Mr. Mims when he said that this trial is not about crack [Tr.p.467, L.10-16]. I mean, y'all heard it. Crack was the reason behind the whole day. You can't take crack out of the equation because that's what they were doing. They were getting crack. The whole purpose of the day was smoking crack. The whole point of the day was getting crack. [Tr.p.467, L.23-25, - p.468, L.1-2]. Ladies and gentlemen, at the time they left Laura's Daddy's house they didn't have any more money, but Rusty and Chris wanted some more crack. So crack is important in this case, and I think you should bear in mind

"Rusty has using crack since he was 13. They wanted more crack that night and they were going to do whatever it took to get it even if that meant breaking into somebody's home. [Tr.p.468, L.8-15], They just wanted to get more crack. That's what the whole day was about. [Tr.p.468, L.17-18]."

Clearly this cannot be considered trial strategy, or an attempt to champion Applicant's defense that misfired. Instead this was a classic example of ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984); especially since counsel's inactions resulted in a spill-over of prejudice, as the jury was allowed to consider the unadjudicated prior bad acts in assessing and determining Applicant's guilt. Applicant is entitled to a new trial on this issue, as there is a reasonable probability, that but for counsel's error the result of the trial would have been different.

Applicant is entitled to a new trial.

ISSUE (B) WAS COUNSEL INEFFECTIVE FOR FAILING TO IMPEACH STATE'S WITNESS JERRY THORNTON WITH HIS PRIOR WRITTEN STATEMENT THAT WAS INCONSISTENT WITH THE TESTIMONY GIVEN DURING TRIAL?

FACTS

During trial the State presented the testimony of Jerry Thornton [Tr.p.94 thru p.117]. Thornton had given law enforcement a prior written statement. The testimony given during trial was filled with inconsistencies when compared to the written statement. Applicant therefore asserts counsel was ineffective for failing to impeach Thornton with the prior inconsistent statement. In order to sufficiently develop this issue Applicant will present Thornton's written statement and testimony in support thereof during the PCR hearing.

The failure to impeach Thornton was compounded because the Prosecution was allowed to "cherry pick" what the Prosecution believed to be true during Thornton's trial testimony. The Prosecution told the jury: "But I'd like to point out one thing about Jerry Thornton's testimony that I thought was remarkable because it's to me is very believable [Tr.p.463, L.21-23]; Jerry knew something was going to happen. He knows he told you he dropped off Rusty and Chris. For him to just, you know, deny that he didn't think anything was going to happen, well that's not believable, you know, he is trying to protect himself [Tr.p.464, L.1-5]; That's a little suspicious [Tr.p.464, L.8]; He ends up getting picked up by Jerry and Jerry confirms that in his "testimony", and when Jerry was asked about Bull's Bar to me he had the most believable reaction of all [Tr.p.466, L.6-9].

DISCUSSION

The prior inconsistent statement must be inconsistent with trial testimony. The variance between the statements must be material. *Anderson v. Elliot*, 228 S.C. 371, 90 S.E.2d 367 (1955). The witness must be confronted with the prior statement before he/she can be impeached. *State v. Roper*, 274 S.C. 14, 260 S.E.2d 705 (1979).

In 1982, the South Carolina Supreme Court changed the traditional rule. *State v. Copeland*, 278 S.C. 572, 300 S.E.2d 63 (1982), cert. denied 460 U.S. 1103 (1983). Under *Copeland*, a prior inconsistent statement is admissible as substantive evidence, as well as for impeachment, when a declarant testifies at trial and is available for cross-examination.

The Court gave three (3) reasons for changing the rule, (1) the oath is not as strong a guaranty of truth as it may have been in the past, (2) the traditional rule requires the court to give unrealistic and confusing instructions to the jury, and (3) the declarant is present and subject to cross-examination so the jury can determine the credibility of the witness and his/her statement. This aspect of *Copeland*, supra, is preserved in the South Carolina Rule of Evidence in Rule 801(d)(1), SCRE.

Since *Copeland*, the Court has had the opportunity to clarify when a prior inconsistent statement can be used as substantive evidence. A prior statement can only be used as substantive evidence, at least in a criminal trial when the opposing party has an effective opportunity to cross-examine the declarant. In

State v. Pfirman, 300 S.C. 84, 386 S.E.2d 461 (1989), the declarant refused to admit the statement imputed him and the Supreme Court held that the defendant was denied effective cross-examination. Generally, a party must satisfy five (5) requirements to impeach a witness with a prior inconsistent statement. These requirements are, (1) the statement must have been made prior to the trial testimony to be impeached; (2) the prior statements must be inconsistent with the trial testimony; (3) the witness must be confronted with the prior statement before impeachment; (4) the cross-examiner must complete the impeachment by proving the prior statement; and (5) the prior statement must not be on a collateral matter.

Prior inconsistent statement may be found from any number of sources and they may be written or oral. Sources for prior inconsistent statements include, (1) statements made to a friend or acquaintance, State v. Galloway, 263 S.C. 585, 211 S.E.2d 885 (1975); or (2) statements made to an investigator. See Varnadore v. Nationwide Mut. Ins., 289 S.C. 155, 345 S.E.2d 711 (1986); also see State v. Thompson, 305 S.C. 496, 409 S.E.2d 420 (Ct.App.1991)(law enforcement investigator).

Other cases in South Carolina recognizing impeachment by omission include an omission from a statement during a case investigation. See State v. Thompson, supra, which is similar to the case at hand. The Court has also recognized that failure to come forward with evidence is a proper omission for impeachment. See Taylor v. State, 258 S.C. 396, 188 S.E.2d 850 (1970); also

see State v. Nathari, 303 S.C. 188, 399 S.E.2d 597 (Ct.App.1990).

As was seen supra, the Prosecution was allowed to "cherry pick" Thornton's testimony in a calculated manner before the jury as to what the "State believed and did not believe" in a calculated manner in an attempt to bolster Thornton's credibility and the State's case. Counsel should have used Thornton's prior inconsistent written statement that was provided to law enforcement to impeach Thornton's trial testimony. The failure to do so denied Applicant his right to cross-examination witness' against him. See Pointer v. Texas, 380 U.S. 400 (1965).

Had counsel of impeached Thornton there is a reasonably probability that but for counsel's error the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668 (1984). Applicant is entitled to a new trial on this issue.

ISSUE (C) WAS COUNSEL INEFFECTIVE FOR FAILING TO REQUEST AN ALIBI INSTRUCTION, WHERE APPLICANT'S SOLE DEFENSE WAS THAT OF ALIBI?

ISSUE (D) WAS COUNSEL INEFFECTIVE FOR NOT TURNING APPLICANT'S ALIBI WITNESSES STATEMENTS OVER TO THE STATE, AND THE FAILURE TO DO SO ALLOWED THE STATE BADGER AND PIT APPLICANT'S ALIBI WITNESS CONCERNING THE VERACITY OF HER TESTIMONY?

These issues will be argued together since the facts of one encompass the other.

FACTS

Applicant asserts he was denied the effective assistance of counsel when counsel "failed" to request a jury instruction on "alibi", that resulted in Applicant being denied his constitutional right to present a complete defense, that denied him his right to fair trial.

Applicant's girl friend Laura Smith testified for the defense. During Smith's testimony the Court admonished Smith numerous times in front of the jury: "Ma'am, ma'am. You know that ain't relevant to this case. All this living in tents. Come on; Ma'am kicking him out. That's not relevant. Get to the point [Tr.p.377, L.16-21]; Ma'am, ma'am, I am not going to warn you again. Don't be testifying to what somebody said. Do you understand me [Tr.p.378, L.10-12].

During Smith's testimony the State questioned Smith: "So after that you never got your daddy or anybody to go with you and go up to the police and when you felt safe and tell them this story, Even though this happened in October of 2008 [Tr.p.389, L.22-25 - p.390, L.1]. The following colloquy was record:

A. Yes, ma'am.

Q. And Rusty wasn't there because he was with you?

A. Yes, ma'am.

Q. You never told anybody that story before today?

A. I gave a statement to the Public Defender's Office. I thought y'all would have a copy of that statement.

Q. You gave a written statement?

A. Yes, ma'am.

Q. When did you give that?

A. Probably a few weeks, maybe a month after Rusty turned himself in.

Q. Did you ever -- but you never took it to the police?

A. No ma'am.

Q. You never asked them to go tell them he wasn't there because he was with you at Tommy's house.

A. No ma'am.

Q. That's because it's not true; right?

A. It's true.

Q. It's true but you never told anybody else because it's not important.

A. I thought the Public Defender's Office would give you a copy just like Tommy did make a statement, too to the Public Defender's Office. We thought that ya'll would get a copy of it. I mean, it made sense to me.

Q. Tommy gave a written statement, also?

A. I believe a written or a verbal statement. I am not sure. You'd have to --

Q. You said that was months ago?

A. ~~I don't know when Tommy~~ I did months ago. I don't know when Tommy did.

Q. And in between months ago and now you never went to the police and you never told them this story?

A. No ma'am. [Tr.p.390, L.2-25, - p.391, L.1-13].

After Smith's testimony the Court told Smith: "Step down, ma'am. Don't you leave this courtroom. Next witness. [Tr.p.392, L.1-2]. At which time Smith was immediately placed in the opposite jury box across from the jury during Applicant's entire testimony. After Applicant testified the jury was excused. After the jury was excused the Court excused Smith, out of the presence of the jury. When the jury was returned to the courtroom, the jury no longer seen Smith, thus leaving the jury no doubt but to question what happened to Smith and also raising questions in the jury's minds concerning Smith's testimony in front of the jury. (emphasis supplied). After Applicant testified and the jury was excused to the jury room, the following colloquy was recorded:

The Court: Let me see that statement.

Mr. Gibbons: Your Honor, if you want to look at the rule real quick.

The Court: I just want to see the statement.

Mr. Gibbons: I don't know if I can disclose it.

The Court: You can't disclose it to me?

(Whereupon, a bench conference was held)
[Tr.p.431, L.14-20].

During closing summation to the jury, the Solicitor argued: "So we get to the alibi witnesses who have testified on behalf of Rusty. We had his brother Tommy who's obviously been related to him his whole life. We have his girlfriend Laura Smith [Tr.p.460, L.25 - p.461, L.1-3]; "Found it curious that both Rusty -- excuse me, Laura and Tommy said the same thing, Rusty was here with me all day, I never left his side. I had my eyes on him the whole time. That's just not believable" [Tr.p.463, L.2-5].

After the defense rested the Court asked if either side had any specific charges requested to instruct the jury [Tr.p.431, L.21-25], the State requested circumstantial evidence [Tr.p.431, L.25], and hand of one hand of all [Tr.p.432, L.1-4]. Counsel stated: "I wouldn't add anything [Tr.p.432, L.9].

Coming directly after the Trial Court instructed the jury, "Once you decide, obviously; who to believe, you then determine what the true facts are and you'll apply the law as I'm giving it to you right now (Tr.p.479, L.7-9).

DISCUSSION

Applicant asserts counsel was constitutionally ineffective for "failing" to present an "alibi" defense, and was further ineffective for "failing" to request an alibi instruction. Counsel's errors were compounded and exploited to the maximum by the Prosecution's improper cross-examination of Laura Smith that nullified Smith's and Tommy's testimony in the eyes of the jury, especially since counsel failed to turn over copies of Smith's and Tommy's statements to the prosecution, that is actually required as reciprocal discovery.

The United States Constitution guarantees a criminal defendant "a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S.Ct. 2142.

Counsel's failure to present an alibi defense and request an alibi instruction where Applicant's sole theory was "alibi" was ineffective assistance. See *State v. Riddle*, 418 S.E.2d 308 (S.C.1992). The prejudice is easily seen from the prosecution's cross-examination of Laura Smith and the actions of the trial Court undermining Applicant's defense.

Subsequently, the absence of any instruction on alibi would clearly give rise to a conclusion by the jury that it was impermissible for the jury to even consider alibi since the trial Court instructed the jury they must apply the law as the Court instructs them, and since counsel failed to request the charge of alibi and the Court failed to sua sponte instruct the jury regarding alibi, the jury was precluded from even considering alibi as an option, thus denying Applicant effective assistance

of counsel and his constitutional right to present a complete defense. (emphasis supplied).

Clearly [if] counsel would have put forth and requested an alibi instruction there is a reasonable probability, that but, for counsel's errors the results of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668 (1984).

Applicant is entitled to a new trial on this issue.

ISSUE (E) WAS COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO THE SOLICITOR'S IMPROPER CLOSING ARGUMENT THAT RESULTED IN IMPROPER VOUCHING FOR THE STATE'S WITNESS' AND WAS DAMAGING SINCE CREDIBILITY ISSUES ARE TO BE DETERMINED BY THE JURY?

FACTS

During closing summation to the jury the following was recorded:

It makes a little sense that Christopher Herndon knew what happened and he told Investigator Sanders what happened and it makes sense because what he told him was the truth and the truth was Rusty Dunbar was there. Rusty Dunbar was with him. Rusty Dunbar was just as involved as Christopher Herndon. [Tr.p.453, L.4-9].

The reason he didn't have to go through all those mental acrobatics is because what he said was the truth. Rusty Dunbar was with him. [Tr.p.454, L.3-5].

I submit to you that Chris Byars is the most reliable source because he didn't say anything about smoking crack. [Tr.p.459, L.11-13].

...but I'd like to point out one thing about Jerry Thornton's testimony that I thought was remarkable because it is just very believable. [Tr.p.463, L.21-23].

First of all, he says that, you know, even though his memory is hazy and whether or not you choose to believe that or maybe, you know -- Jerry knew something was going to happen. He knows he told you he dropped off Rusty and Chris. For him to just, you know, deny that he didn't think anything was going to happen, well that's not believable. You know he is trying to protect himself, but he did he know something was going to happen? Sure, because they said they dropped us out here at the

road and go to the gas station. [Tr.p.463, 24-25 -- p.464, L.1-8].

He ends up getting picked up by Jerry and Jerry confirms that in his testimony and when Jerry was asked about Bull's Bar, to me he had the most believable reaction of all. [Tr.p.466, L.6-9].

DISCUSSION

Applicant asserts he was denied the effective assistance of counsel when counsel failed to object to the prosecution's improper vouching during closing summation, that ultimately denied Applicant his right to a fair trial.

In trying to bolster the credibility of a prosecution witness the prosecution [may not] over step the bounds of fairness. It is a well established principle that a prosecutor has a special obligation to avoid improper suggestions, insinuations and especially assertion of personal knowledge." *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629 (1935).

Improper vouching occurs when the prosecution places the government's prestige behind a witness by making explicit personal assurances of a witness' veracity, or where a prosecutor implicitly vouches for a witness' veracity by indicating information not presented to the jury supports the testimony. See *State v. Kelly*, 343 S.C. 350, 540 S.E.2d 851 (2001); 75A Am.Jur. Trial §700 (1991).

Vouching occurs when a prosecutor implies he has facts that are not before the jury for their consideration. *Missouri v. Wolfe*, 13 S.W.3d 248 (Mo.2000); also see *State v. Shuler*, 344 S.C. 604 (2001).

The Third Circuit has good discussion on vouching that lends significant support to the issue at hand. In *U.S. v. Walker*, 155 F.3d 180 (3rd Cir. 1998), the Court said vouching constitutes an assurance by the prosecuting attorney of the credibility of a government witness through personal knowledge or by other information outside of the testimony before the jury. *United States v. Lawn*, 355 U.S. 339, 359 n.15, 78 S.Ct. 311, 323 n.15 (1958). See also *United States v. Necoechea*, 986 F.2d 1273, 1276 (9th Cir. 1993).

A prosecutor's vouching for the credibility of a government witness raises two concerns: (1) such comments can convey the impression that evidence not presented to the jury, but known to the prosecution, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and (2) the prosecutor's opinion carries with it the imprimatur of the government and may induce the jury to trust the government's judgement rather than its own view of the evidence. *United States v. Young*, 470 U.S. 1, 18, 105 S.Ct. 1038, 1048 (1985); *United States v. Molina-Guevara*, 96 F.3d 698, 704 (3rd Cir. 1996).

A solicitor's role in a criminal prosecution is not purely adversarial. His purpose is not simply to convict, rather his duty is to ensure that justice is done. See *State v. Jones*, 541 S.E.2d 813, 822 (2001); *State v. Quattlebaum*, 338 S.C. 441, 449, 527 S.E.2d 105, 109 (2000); *State v. Davis*, 239 S.C. 280, 284, 122 S.E.2d 633, 635 (1961), accordingly his closing argument must

be carefully tailored not to arouse the passions and prejudices of the jury. Id.

In the instant case the Solicitor has ignored his special obligation to avoid improper suggestions and insinuations, for a prosecutor has no business telling the jury his individual impression of the evidence because he is to be the Sovereigns Representative.

Applicant asserts that the jury was mislead into thinking the solicitor's conclusions have been validated by the State investigatory apparatus.

Under the standard of Strickland v. Washington, 466 U.S. 668 (1984), Applicant believes he has shown that counsel has rendered ineffective assistance of counsel under the prevailing professional norms and that he was prejudiced by counsel's deficient performance.

Applicant believes he is entitled to a new trial on this issue.

CONCLUSION

WHEREFORE, based on the foregoing, through the issues presented, citations of authorities relied on, and testimony given in support during the PCR hearing, Applicant, believes he is entitled to the requested relief sought herein and should be granted a new trial.

Respectfully Submitted,

1s/ *Rusty M. Dunbar*
Rusty Dunbar

FORM 5

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF AIKEN	)	
	)	CASE NO.: 2012-CP-02-00795
Rusty Dunbar # 294996	)	
Full name and prison number (if any) of Applicant.	)	AMENDED
	)	
v.	)	APPLICATION FOR
	)	
State of South Carolina	)	POST-CONVICTION RELIEF
	)	

INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention Lieber Correctional Institute, 136 Wilborn Avenue, Ridgeville, SC 29472
2. Name and location of Court which imposed sentence Aiken County Court of General Sessions
3. Name(s) of co-defendant(s) (if any) Christopher Herndon
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2009-GS-02-00090
 - (b) 2009-GS-02-00091
 - (c) 2009-GS-02-00092, 2009-GS-02-00093
5. The date upon which sentence was imposed and the terms of the sentence:

Revised 3/2003

- (a) December 17, 2009 (Sentence was imposed)
 - (b) Kidnapping - 30 years, Burglary 1st Degree - 30 years
 - (c) Armed Robbery - 30 years, Possess Weapon During Comm. Viol. Crime - 5 years
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
 - (b) after a plea of not guilty X
 - (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes.
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
 - i. The South Carolina Court of Appeals
 - ii. _____
 - iii. _____
 - (b) the result in each such Court to which you appealed:
 - i. Denied
 - ii. _____
 - iii. _____
 - (c) the date of each such result:
 - i. Submitted Feb. 1, 2012
 - ii. Filed Feb. 22, 2012
 - iii. _____
 - (d) if known, citations of any written opinion or orders entered pursuant to such results:
 - i. Unpublished Opinion No. 2012-UP-093
 - ii. _____
 - iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (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 - Counsel elicited prior bad acts testimony from a state's witness after successfully objecting and receiving curative instructions from the trial judge which precluded the jury from considering the prior bad acts. This opened the door for the state to then go into the prior bad acts which included the use of crack cocaine.

(b) Ineffective assistance of Counsel - Counsel failed to request an alibi instruction, where applicant's sole defense was that of alibi.

(c) Ineffective assistance of Counsel - Counsel failed to turn over alibi witness statements to the state prior to trial.

(d) Ineffective assistance of Counsel - Counsel failed to object to improper arguments made during solicitor's closing argument.

(e) SC Rule of Criminal Procedure 5 and Brady Violations

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

(a) Counsel successfully objected to the state presenting evidence of applicant's prior bad acts regarding drug use. Counsel for applicant then elicited testimonial evidence regarding applicant's prior use of crack cocaine and opened the door for the state to then present evidence of prior bad acts.

(b) Applicant presented two alibi witnesses during the trial. Applicant's defense was alibi. Counsel failed to request an alibi instruction.

(c) Prior to trial, applicant's alibi witnesses gave statements to applicant's counsel concerning his whereabouts during the crimes. These statements were never turned over to the state prior to trial which violated reciprocal discovery. This gave the state the opportunity to question the veracity of the statements in front of the jury and badger the witnesses.

(d) Counsel failed to object to the solicitor's mischaracterization of the DNA evidence during the solicitor's closing argument. Counsel failed to object to the solicitor's improper vouching and injecting personal opinions into solicitor's closing argument.

(e) The State violated SC Rule of Criminal Procedure 5 and Brady when they failed to turn over statements that had been made by a state's witness to law enforcement concerning the

crimes.

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. N/A
 - iii. N/A
 - iv. N/A
 - (b) the name and location of the Court in which each was filed:
 - i. N/A
 - ii. N/A
 - iii. N/A
 - iv. N/A
 - (c) the disposition thereof:
 - i. N/A
 - ii. N/A
 - iii. N/A
 - iv. N/A
 - (d) the date of each such disposition:
 - i. N/A
 - ii. N/A
 - iii. N/A
 - iv. N/A
 - (e) if known, citations of any written opinions or orders entered pursuant to each such

disposition:

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

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?

N/A

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

(a) which grounds have been presented:

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

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

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

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 the applicant's first time filing for post-conviction relief.

(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. M. Justin Mims, Esq. and De Grant Gibbons, Esq. of the Aiken County Public Defender's Office. 410 Barnwell Avenue Aiken, SC 29801
 - ii. Appellate Defender Robert M. Pachak of the SC Commission on Indigent Defense. PO Box 11589 Columbia, SC 29211
 - iii. Paige Weeks Johnson, Esq. and Brett H. Lancer, Esq. - Johnson, Johnson & Whittle Attorneys, P.A. - PO Box 2619 Aiken, SC 29802
 - (b) the proceedings at which each such attorney represented you:
 - i. Trial and Sentencing
 - ii. Appeal
 - iii. PCR Application
19. State clearly the relief you seek in filing this application:
Vacate sentence and conviction and remand for new trial.
20. Are you now under sentence from any other court that you have not challenged?
No.

STATE OF SOUTH CAROLINA

County of AIKEN

VERIFICATION

I, Paige Weeks Johnson, 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.

Paige Weeks Johnson
Paige Weeks Johnson

SWORN to and subscribed before me this 24th
day of JUNE, 2013.

Brett H. Lamer (L.S.)
Notary Public

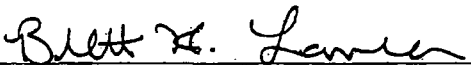
My Commission Expires: 4/4/2022

STATE OF SOUTH CAROLINA : IN THE SECOND JUDICIAL CIRCUIT
 :
 COUNTY OF AIKEN : COURT OF COMMON PLEAS
 :
 RUSTY DUNBAR # 294996, :
 : CASE NO.: 2012-CP-02-00795
 APPLICANT, :
 : **CERTIFICATE OF MAILING**
 VS. :
 :
 STATE OF SOUTH CAROLINA, :

I do hereby certify that I have served an Amended Application for Post-Conviction Relief in the above referenced case, on the attorney for the defendant by depositing a copy of same in the United States Mail, first class, postage prepaid, addressed as follows:

Megan Elizabeth Harrigan
 Attorney General
 P.O. Box 11549
 Columbia, SC 29211

This 28th day of June, 2013, in Aiken, South Carolina.


 Brett H. Lancer
 Attorney for Plaintiff
 P.O. Box 2619
 Aiken, SC 29802-2619

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

) IN THE COURT OF COMMON PLEAS
) FOR THE SECOND JUDICIAL CIRCUIT

Rusty Dunbar, #294996,

) Case No. 2012-CP-02-0795

) Applicant,

) **RETURN**

) v.

) State of South Carolina,

) Respondent.
)
_____)

The Respondent, making its Return to the application for post-conviction relief filed March 29, 2012, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Aiken County Clerk of Court. The Applicant was indicted during the January 2009 term of the Aiken County Grand Jury for Kidnapping (2009-GS-02-93); burglary in the first degree (2009-GS-02-92); armed robbery (2009-GS-02-91); possession of a knife during the commission of a violent crime (2009-GS-02-90). Justin Mims, Esquire, represented the Applicant. On September 22, 2011, the Applicant went to trial and was convicted all charges as indicted. The Applicant was sentenced by the Honorable Doyet A. Early, III, to the following sentence structure:

- 2009-GS-02-92 30 years
- 2009-GS-02-93 30 years, concurrent
- 2009-GS-02-91 30 years, concurrent
- 2009-GS-02-90 5 years, concurrent

A timely notice of appeal was filed. Following the submission of an Anders brief, the South Carolina Court of Appeals dismissed the appeal. State v. Dunbar, Op. No. 2012-UP-093 (S.C. Ct. App. filed February 22, 2012). The Remittitur was sent on May 12, 2012.

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

II.

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

1. Ineffective Assistance of Counsel

- a. "Was counsel ineffective for eliciting prior bad acts testimony from a state's witness concerning applicants drug use, after successfully objecting and receiving curative instructions precluding the jury from considering applicants prior bad acts, that 'opened the door'?"
- b. "Was counsel ineffective for failing to impeach state's witness Jerry Thornton with his prior written statement that was inconsistent with the testimony given during trial?"
- c. "Was counsel ineffective for failing to request an Alibi instruction, where Applicants sole defense was that of an Alibi?"
- d. "Was counsel ineffective for not turning Applicants Alibi witnesses statements over the state, and the failure to do so allowed the state badger and pit applicant's alibi witness concerning the veracity of her testimony?"
- e. "Was counsel ineffective for failing to object to the Solicitor's improper closing argument that resulted in improper vouching for the state's witness' and was damaging since credibility issues are to be determined by the jury?"

2. Due Process Violation

- a. "Fourteenth Amendment right to due process of law that is protected under the United States Federal Constitution.

Any claims not specifically enumerated in the post-conviction application or amendments will be opposed by the State at an evidentiary hearing, and the State will seek summary dismissal of

vague or general claims at an evidentiary hearing. S.C. Code §17-27-50. All amendments should be made well in advance of an evidentiary hearing by counsel of record. Rule 11, SCRCP.

III.

In a post-conviction relief proceeding, the applicant bears the burden of establishing that he is entitled to relief. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). First, a post-conviction relief applicant must show that his counsel's performance was deficient such that it falls below an objective standard of reasonableness. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984); Alexander v. State, 303 S.C. 539, 541, 402 S.E.2d 484, 485 (1991). Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry v. State, 300 S.C. 115 at 117, 386 S.E.2d 624 at 625 (1989), *citing Strickland*.

Second, an applicant must show there is a reasonable probability, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 687, 104 S.Ct. at 2064, 80 L.Ed.2d at 693; Alexander, 303 S.C. at 541-42, 402 S.E.2d at 485. The Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, *Id.* Applicant must overcome this presumption in order to receive relief. Cherry, *Id.*

Where there has been a guilty plea, the applicant must prove prejudice by showing that, but for counsel's errors, there is a reasonable probability he would not have pleaded guilty and instead would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203, 210 (1985); Jordan v. State, 297 S.C. 52, 54, 374 S.E.2d 683, 684 (1988). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the post-conviction relief hearing. Harres v. Leeke, 282 S.C. 131, 133, 318 S.E.2d

360, 361 (1984).

Respondent submits that Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

The Applicant further alleges that he was denied due process of law. The Applicant's allegation claims infringement of his rights under certain amendments to the United States Constitution. However, the Applicant fails to set forth with specificity the grounds upon which these constitutional violations are based. The Uniform Post-Conviction Procedure Act requires that the Applicant must "... specifically set forth the grounds upon which the application is based." S.C. Code § 17-27-50 (2003). In an application for post-conviction relief, it is incumbent upon the Applicant to make at least a *prima facie* showing which would entitle him to relief before an evidentiary hearing will be scheduled and held. Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965); Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965). Since the Applicant has failed to make even a *prima facie* showing, the Respondent would submit that this allegation should be dismissed for failing to meet the requirements of the Uniform Post-Conviction Procedures Act. This allegation is so vague that it is impossible for the State to respond.

V.

The State therefore requests that this Court convene an evidentiary hearing solely on the issues of ineffective assistance of trial. As to all other allegations, the State moves for summary dismissal pursuant to S.C. Code Ann. § 17-27-70 on the basis that there is no genuine issue of

material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

VI.

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

VII.

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

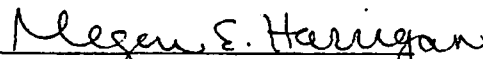
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

MEGAN E. HARRIGAN
Assistant Attorney General


ATTORNEYS FOR RESPONDENT

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

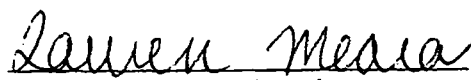
June 25, 2012

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF AIKEN	)	
	)	
	)	2012-CP-02-0795
	)	
RUSTY DUNBAR, 294996,	)	
	)	
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:

**Paige Weeks Johnson, Esquire
Johnson, Johnson & Whittle
Post Office Box 2619
Aiken, SC 29802**

DATED this 29th day of June, 2012.


Lauren Meara, Legal Assistant
For Respondent

1 State of South Carolina) In the Court
2 County of Aiken) Of Common Pleas
3
4 Docket No. 2012-CP-02-0795
5
6 Rusty Dunbar,)
7 Applicant,)
8 vs.) Transcript of Record
9
10 State of South Carolina,)
Respondent.)
11
12 July 10, 2013
13 Aiken, South Carolina
14
15 B E F O R E:
16 The Honorable R. Ferrell Cothran, Jr., Judge.
17
18 A P P E A R A N C E S:
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POST CONVICTION RELIEF HEARING

1 **MS. HARRIGAN:** Your Honor, the next matter is Rusty
2 Dunbar versus the State of South Carolina, Docket No.
3 2012-CP-02-0795. Applicant was indicted during the January
4 2009 term of Aiken County Grand jury for kidnapping,
5 burglary in the first-degree, armed robbery and possession
6 of a knife during a violent crime. Applicant was
7 represented by Justin Mimms. He proceeded to a jury trial
8 with the Honorable Doyet A. Early, III, and was convicted
9 as indicted on all counts.
10

11 Judge early sentenced the applicant to a aggregate
12 term of thirty years imprisonment. A notice of appeal was
13 filed and an appeal was perfected on his behalf. Following
14 the submission of an Ander's Brief, the South Carolina
15 Court of Appeals affirmed his conviction and sentence and a
16 remittitur was sent on September 22, 2011.

17 He filed a timely application for post conviction
18 relief thereafter on March 29th, 2012. The State answered
19 with a return on June 25th 2012. Applicant through his
20 counsel answered, amended his application to include the
21 following allegations: Counsel was ineffective for
22 eliciting testimony of applicant's use of crack cocaine;
23 counsel's ineffective for failing to request an alibi
24 ~~instruction to the injury; counsel was ineffective for~~
25 failure to turn over alibi witness statements to the State

1 prior to trial; counsel failed to object to improper
2 arguments made during the solicitor's closing arguments;
3 and a Brady violation for the State's failure to turn over
4 statements made by applicant's codefendant to law
5 enforcement at the time of his arrest.

6 THE COURT: Okay.

7 MR. LANCER: Thank you, Your Honor. Judge, I have
8 copied some pages from the trial transcript that we're
9 going to be referencing today as well as some cases for
10 Your Honor. May I pass this up?

11 THE COURT: Certainly.

12 MR. LANCER: Your Honor, we would call Mr. Rusty
13 Dunbar.

14 THE COURT: Okay.

15 RUSTY DUNBAR,
16 having been duly sworn, testified as follows:

17 THE CLERK: Have a seat in the witness box. State
18 your full name for the Court.

19 THE WITNESS: My name is Rusty Merritte Dunbar.

20 THE COURT REPORTER: Rusty what?

21 THE WITNESS: Merritte, M-e-r-r-i-t-t-e.

22 THE COURT REPORTER: Thank you.

23 THE WITNESS: Uh-huh.

24 ///

25 ///

Rusty Dunbar - Direct Examination by Mr. Lancer

DIRECT EXAMINATION

BY MR. LANCER:

Q Mr. Dunbar, are you here today to ask this court to vacate your conviction and sentence and remand your case for a new trial?

A Yes, sir.

Q In your PCR application, you cite several instances of ineffective assistance of counsel; is that correct?

A Yes, sir.

Q And you also cite in your application a Rule 5 and Brady violation; is that correct?

A Yes, sir.

Q Okay. I wanted to discuss and develop each of these one at a time and give the Court the best understanding of each of your allegations. Does that sound good?

A Yes, sir.

Q Okay. Mr. Mimms was your attorney at trial; is that correct?

A Yes, sir.

Q And you were convicted on December 17th, 2009; is that right?

A That's correct.

Q Okay. Would you please tell the Court what you were convicted of and the sentences that you received.

Rusty Dunbar - Direct Examination by Mr. Lancer

1 A I received thirty years for first-degree burglary;
2 thirty years for armed robbery; thirty years for assault --
3 excuse me, five years for possession of a weapon during the
4 commission of a violent crime and twelve years probation
5 violation and also armed robbery, thirty years also.

6 Q Okay. Mr. Dunbar, I want to start with your first
7 ground for ineffective assistance of counsel and to just
8 make sure we're on the same page, I'm going to read it as
9 it is written in your application.

10 Counsel elicited prior bad acts testimony from a
11 State's witness after successfully objecting and receiving
12 curative instructions from the trial judge, which precluded
13 the jury from considering the prior bad acts. This opened
14 the door for the State to then go into the prior bad acts,
15 which included the use of cocaine; is that correct?

16 A Yes, sir.

17 Q Okay. And all of this testimony occurred during
18 the testimony of which witness?

19 A Jerry Thornton.

20 THE COURT REPORTER: Excuse me.

21 THE WITNESS: Jerry Thornton, T-h-o-r-n-t-o-n.

22 THE COURT REPORTER: Speak up for me.

23 THE WITNESS: Okay. I'm sorry.

24 BY MR. LANCER:

25 Q And Mr. Thornton, was he a witness for the State or

Rusty Dunbar - Direct Examination by Mr. Lancer

1 the defense?

2 A For the State.

3 Q Okay. You have your trial transcript with you,
4 sir?

5 A Yes, sir.

6 Q All right. I'd like to go into the trial
7 transcript, page 103, please line 25. At this point in the
8 trial, Mr. Dunbar, is it accurate that assistant solicitor
9 Beth Ann Young has Mr. Thornton on direct exam?

10 A Yes, sir.

11 Q Would you please read line 25 on 103 to line 15 on
12 page 104?

13 A Yes, sir.

14 We went and got some drugs.

15 What kind of drugs did you get?

16 Crack.

17 Who got the crack?

18 Objection Your Honor.

19 What is the objection?

20 Relevance, Your Honor.

21 How is that relevant?

22 I think it's relevant to what they were doing that
23 day and also the witnesses -- can we have a side bar, Your
24 Honor.

25 Statement of Whereupon a bench conference was held.

Rusty Dunbar - Direct Examination by Mr. Lancer

1 All right. The fact that they bought crack cocaine
2 that day is not relevant to this case. Just disregard
3 that.

4 Q So at this point in the trial, Mr. Mimms had
5 successfully kept the prior bad acts of crack cocaine use
6 out of the trial; is that correct?

7 A That's correct.

8 Q And specifically, he kept out the use and purchase
9 of crack cocaine on the day that the crimes were committed;
10 is that right?

11 A That's right.

12 Q Okay. And is it also correct that the jury was
13 instructed by the judge that -- to disregard that
14 mentioning of crack cocaine?

15 A That's right.

16 Q Okay. Mr. Dunbar, let's turn to Mr. Mimms'
17 cross-examination of Jerry Thornton on page 113, please.
18 And if you would, please read lines 17 through 25 on that
19 page?

20 A Well, earlier you testified that y'all sold the
21 cement mixer for drugs, right?

22 Yes. I took them to get drugs.

23 But that wasn't your drugs?

24 Mr. Mimms, I mean, I was doing drugs with them --
25 hold on. You just objected to all that and now you're

Rusty Dunbar - Direct Examination by Mr. Lancer

1 right back into it, so the objection is out the window. Go
2 ahead.

3 Q So, Mr. Dunbar, is it your argument that that
4 question that Mr. Mimms posed to Mr. Thornton opened the
5 door for the State to then go into prior drug use?

6 A Yes, sir, that was my intention.

7 Q Okay. The fact that the State was then allowed to
8 go into your drug use on that day, is it your position that
9 you were prejudiced by that?

10 A Yes, sir.

11 Q Okay. Would you discuss how you were prejudiced by
12 that?

13 A I feel like it inflamed the jury to believe that
14 just because I was a user of crack cocaine that I would
15 also do these things in order to get drugs as Ms. Young
16 stressed in her closing, that I would do these things in
17 order to obtain crack and that was the whole purpose of my
18 day.

19 Q Was it the State's theory at that point that you
20 had been using drugs that day, ran out of drugs and
21 burglarized the victim's home in order to get drugs or
22 money for more drugs?

23 A Yes, sir.

24 Q Okay. Was that essentially your motive for that
25 they presented for you committing this crime?

Rusty Dunbar - Direct Examination by Mr. Lancer

1 A Yes, sir.

2 Q Mr. Dunbar, let's turn to page 467 of the trial
3 transcript. This is the State's closing. Would you please
4 read lines 14 through 16?

5 MS. HARRIGAN: 467?

6 MR. LANCER: Yes.

7 THE WITNESS: Okay. He told you that he used crack
8 since he was 13 years old, but I disagree with Mr. Mimms
9 when he said this trial is not about crack. Well, it's not
10 about crack, it's the about Daniel Hines getting his home
11 burglarized, getting a knife held to his throat and having
12 things, you know, taken from him while that knife was held
13 to his throat and held against his will at knife point,
14 that's what this trial is about, but crack is important.

15 I mean, y'all heard it, crack was the reason behind
16 the whole day. You just can't take crack out of the
17 equation because that's what they were doing. They were
18 getting crack. The whole purpose of the day was smoking
19 crack. The whole point of the day was getting crack, you
20 know. They sold the brick saw and they sold a cement
21 mixer.

22 Where did you tell me to go to sir? I'm sorry,

23 I --

24 Q Mr. Dunbar, please continue until line 18.

25 A Line 18. I'm sorry. Okay. But at this point in

Rusty Dunbar - Direct Examination by Mr. Lancer

1 time, they brought some more beer. There's a discussion
2 about that because they were drinking J. R.'s beer and you
3 just don't drink J. R.'S beer.

4 Ladies and gentlemen, at the time they were there
5 at Jerry's house, they didn't have any money, but Rusty and
6 Chris didn't have anymore money. But Rusty and Chris
7 wanted some more crack. So crack is important in this case
8 and I think you should bear that in mind. Rusty has been
9 using crack since he was 13. They wanted more crack that
10 night and they were going to do whatever it took to get it
11 even if they meant breaking into someone's -- somebody's
12 home, tying them up, holding a knife to their throat and
13 taking their things, even if that was somebody they knew,
14 they didn't care about that. They just wanted to get more
15 crack. And that's what the whole day was about.

16 Q So Mr. Dunbar, when Mr. Mimms successfully kept
17 crack cocaine out of the trial, is it your argument that he
18 took away their theory of the case?

19 A Yes, sir.

20 Q Is it also your position that he took away their
21 motive that they were -- they were going to present to the
22 jury?

23 A Yes, sir.

24 Q Finally, on this issue, is it your position that
25 the trial judge kept crack cocaine out of the trial because

Rusty Dunbar - Direct Examination by Mr. Lancer

1 any relevance that it did have was unduly prejudicial?

2 A Yes, sir.

3 Q Mr. Dunbar, I'm going to now turn to your second
4 allegation for ineffective assistance of counsel and this
5 is -- I'm going to read this from your application.

6 Counsel failed to request an alibi instruction
7 where applicant's defense was that of alibi. Did you
8 present a defense in this case, Mr. Dunbar?

9 A Yes, I did.

10 Q And what was your defense?

11 A That I was at my brother's home on -- I forget the
12 name of the road -- Old Friar Road at the time of the crime
13 and that I couldn't have done it because I was not there.
14 I had an alibi.

15 Q So your defense was that of alibi defense, correct?

16 A Yes.

17 Q Did you have any other defense?

18 A No, sir. I tried to third party it, but it was
19 never looked into. I don't know why.

20 Q And so, did you have alibi witnesses?

21 A Yes, sir.

22 Q Who were your alibi witnesses?

23 A Tommy Dunbar and Laura Smith.

24 Q Who at the time was Laura Smith?

25 A That was my girlfriend.

Rusty Dunbar - Direct Examination by Mr. Lancer

1 Q Okay. Who is Tommy Dunbar?

2 A My brother.

3 Q Did they testify at trial?

4 A Yes, sir, they did.

5 Q And at trial, where did those two alibi witnesses
6 put you at the time of the crime?

7 A At my brother's home on Old Friar Road.

8 Q Both of them did?

9 A Yes, sir.

10 Q Okay. Mr. Dunbar, let's turn to page 432 in the
11 trial transcript. Let me ask you first, I understand this
12 claim for ineffective assistance of counsel is essentially
13 that your attorney did not request an alibi instruction; is
14 that correct?

15 A That's correct.

16 Q Would you please read lines 5 through 9 on page
17 432?

18 A Yes, sir.

19 Hand of one is the hand of all, write this down.
20 Prior record for impeachment on it. He testified so we
21 don't have that. What else, Mr. Mimms?

22 I wouldn't add anything.

23 Q Is that illustrating, just for the record that
24 there was never a request for an alibi instruction?

25 A Yes, sir.

Rusty Dunbar - Direct Examination by Mr. Lancer

1 Q Okay. This dialogue that you just read, was that
2 prior to closing or after closings?

3 A This was prior -- before.

4 Q Okay. In the State's closing, did they address
5 your defense of alibi?

6 A In my closing?

7 Q In the State's closing, did the assistant solicitor
8 address your alibi -- excuse me, your defense of alibi?

9 A Yes, sir, she went into it. Downgrading it, saying
10 it's unbelievable and stuff like that.

11 Q Mr. Dunbar, let's look at page 460 of the trial
12 transcript. And if you would, read line 25 on 460 and stop
13 at line 7 on page 461?

14 A Okay. So we get to the alibi witnesses who have
15 testified on behalf of Rusty Dunbar. We had his brother
16 Tommy, who's obviously been related to him his whole life.
17 We have a girlfriend, Laura Smith. She's a young girl.
18 She's been with him for three years. She has a 10 month
19 old baby with him. She lives with his Mammy. She doesn't
20 have a way of getting around except for his family. She
21 loves Rusty.

22 Q And the solicitor continues to discuss your alibi
23 witness, correct?

24 A That's correct.

25 Q And actually continues to discuss your alibi

Rusty Dunbar - Direct Examination by Mr. Lancer

1 witnesses until page 463; is that correct?

2 A That's right.

3 Q Obviously, the State made a big deal of your alibi
4 witnesses, would you agree with that?

5 A Yes, sir.

6 Q At any time after the State's closing did your
7 attorney request an alibi instruction?

8 A No, sir..

9 Q Is it your position that the jury had heard from
10 two alibi witnesses that they had heard the solicitor
11 discuss you're alibi in closing and then the jury does not
12 get an alibi instruction, so is it your position that they
13 may have been under the impression that they are not
14 permitted to consider your alibi witnesses?

15 A Yes, sir.

16 Q Is that your position?

17 A Yes, sir.

18 Q Okay. Mr. Dunbar, is there anything you would like
19 to add to this claim?

20 A No, sir. No, sir.

21 Q Okay. Mr. Dunbar, I will move onto your third
22 ground for ineffective assistance of counsel and I will
23 read it as it appears in your application.

24 ~~Counsel fails to turn over alibi witness statements~~
25 to the State prior to trial; is that correct?

Rusty Dunbar - Direct Examination by Mr. Lancer

1 A That's correct.

2 Q Okay. To your knowledge, prior to trial, did your
3 alibi witnesses make statements?

4 A Yes, sir.

5 Q Who did they make statements -- who did they gave
6 these statements to?

7 A My girlfriend, Laura Smith had one typed up on the
8 computer and she give it to Bennie Williams, the
9 investigator for the public defender's office and Tommy
10 Dunbar spoke to Mr. Mimms verbally but he never gave a
11 written statement.

12 Q Okay. So just to make sure I understand. Laura
13 Smith gave a printed written statement to Investigator
14 Bennie Williams?

15 A Yes, sir, that's correct.

16 Q That was prior to trial?

17 A Yes, sir.

18 Q Any idea how prior to trial?

19 A Yes, I have a copy of that. Bennie Williams
20 received it on October 6, 2014. Excuse me, I'm sorry. He
21 witnessed it -- she gave it to him on 2/3/09, 2014.

22 Q February 3 rd, 2009?

23 A Yes, sir.

24 Q And how long before your trial was that?

25 A Ten months.

Rusty Dunbar - Direct Examination by Mr. Lancer

1 Q Okay. Mr. Dunbar, may I see that statement,
2 please?

3 A Yes, sir.

4 MR. LANCER: Your Honor, may I have in marked as --

5 THE COURT: Why -- explain to me why this
6 statement -- why is that an issue that it wasn't given to
7 the State.

8 MR. LANCER: Why is that an issue, Judge?

9 THE COURT: Yes.

10 MR. LANCER: Judge, that is an issue because at
11 trial the State was able to question Mr. Dunbar's alibi
12 witness as to why this was the first time she was making
13 this statement, when in fact, Mr. Dunbar's position is that
14 it was not the first time. So in essence, the State was
15 able to make his alibi witness look untruthful to the jury.

16 THE COURT: Okay. And he didn't bring out -- she
17 didn't bring out the fact that she had given the statement
18 in front of the jury some 10 months before to the
19 investigator.

20 MR. LANCER: She did, Judge.

21 THE COURT: So the jury heard that?

22 MR. LANCER: The jury did hear that.

23 THE COURT: Okay. Okay.

24 BY MR. LANCER:

25 Q Mr. Dunbar, do you know who Levi Bryant is?

Rusty Dunbar - Direct Examination by Mr. Lancer

1 A Yes, sir, that's my stepbrother.

2 Q Okay. Do you know who Martha Rudd is?

3 A That's a girlfriend of his. My girlfriend sent her
4 back and she typed that up on the computer -- on her
5 computer and then printed it out because my girlfriend
6 didn't have a computer to print it at that time and she
7 just done that for her, just to have it typed out.

8 Q May I have this marked as Petitioner's Exhibit No.
9 1 for identification?

10 MS. HARRIGAN: The State does have an objection on
11 that coming into evidence, sir.

12 THE COURT: All right. I'll overrule the
13 objection.

14 BY MR. LANCER:

15 Q Mr. Dunbar, did you review this document with your
16 attorney prior to trial?

17 A Yes, I believe so, yes, sir.

18 Q So would it be your assessment that Mr. Mimms would
19 have a copy of this statement in his file?

20 A He should. Yes, sir. Yes, sir. He should. He
21 give me that copy.

22 Q He gave you this -- Mr. Mimms gave you this copy?

23 A Yes, sir. I got it as a copy -- as a part of my
24 Rule 5, he gave it to me.

25 Q Okay.

Rusty Dunbar - Direct Examination by Mr. Lancer

1 (WHEREUPON Applicant's Exhibit No. 1 was marked and
2 entered into evidence.)

3 BY MR. LANCER:

4 Q Mr. Dunbar, at trial, did the State question Laura
5 Smith as to why this was the first time she was ever coming
6 forward with your alibi?

7 A Yes, sir.

8 Q Okay. Is it your position that the State was able
9 to show that she was not credible because this was the
10 first time she was coming forward with it?

11 A Yes, sir.

12 Q Okay. Mr. Dunbar, would you please turn with me to
13 page 389 of the trial transcript? And would you please
14 read that page, sir.

15 A Yes, sir.

16 Well, this happened back in October 2008 and I said
17 investigators came to your house.

18 Yes, ma'am.

19 But you didn't tell them about this story then, did
20 you?

21 No, ma'am. I didn't want to say anything. I
22 just -- I really didn't have any -- have nothing to say.

23 You didn't think it was important to tell them that
24 ~~Rusty couldn't have been there because he was at his~~
25 brother's house?

Rusty Dunbar - Direct Examination by Mr. Lancer

1 I tried that and they was kind of like badgering me
2 a little bit trying to say well, we got this, this and this
3 and we know you're lying and if you don't tell us where
4 Rusty is, we don't care if your pregnant we're going to
5 take your behind to jail too, and this and that and it
6 really kind of freaked me out a little bit.

7 So you're saying you were scared to talk to the
8 police?

9 Well, the way they were coming out toward me, yeah,
10 yes, ma'am.

11 So after that you never got your daddy or anybody
12 to go with you and go up to the police and when you felt
13 safe tell them this story?

14 No, ma'am.

15 Q Would you please read page 390.

16 A Even though this happened in October 2008?

17 Yes, ma'am.

18 And Rusty wasn't there because he was with you?

19 Yes, ma'am.

20 You never told anybody that story before today?

21 I give a statement to the public defender's office.

22 I thought that y'all would have a copy of that statement.

23 You gave a written statement?

24 Yes, ma'am.

25 When did you give that?

Rusty Dunbar - Direct Examination by Mr. Lancer

1 Probably a few weeks, maybe a month after Rusty
2 turned himself in.

3 Did you ever -- but you never took it to the
4 police?

5 No, ma'am.

6 You never asked them to take it to the police?

7 No, ma'am.

8 You never asked them to go tell them he wasn't
9 there because he was with you at Tommy's house?

10 No, ma'am.

11 All these months you never did that?

12 That's because it's not true, right?

13 It's true. It's true.

14 But you never told anybody because it's not
15 important?

16 Q Would you continue on 391 until line 13?

17 A I thought the public defender's office would give
18 you a copy just like Tommy's did, make a statement to the
19 public defender's office. We thought that y'all would get
20 a copy of it. I mean, it made sense to me.

21 Tommy gave a written statement also?

22 I believe a written statement or a verbal
23 statement. I'm not sure.

24 ~~You'd have to -- you said that was months ago? I~~
25 don't know when Tommy -- I did months ago -- I don't know

Rusty Dunbar - Direct Examination by Mr. Lancer

1 when Tommy did.

2 And in between months ago and now you never went to
3 the police and you never told them this story?

4 No, ma'am.

5 Q So Mr. Dunbar, is it your position that Laura
6 Smith's credibility was tarnished because at this point,
7 the jury was made to believe that this was the first time
8 she's ever come up with this story?

9 A Yes, sir.

10 Q Mr. Dunbar, let's turn to page 392. Would you read
11 just lines 1 and 2, please.

12 A Step down, ma'am. Don't you leave the courtroom.
13 Next witness.

14 Q Mr. Dunbar, what was the judge's demeanor at this
15 point to Ms. Smith, your alibi witness?

16 A I would say he was being aggressive, being -- I
17 would rather say rude. He was being really rude towards
18 her to tell you the truth.

19 Q Is it your testimony that he had become frustrated
20 with her?

21 A Yes, sir.

22 Q Is that a better way to put it?

23 A I guess frustrated. I guess frustrated, yes, sir.
24 Frustrated would be like a better term, yes, sir.

25 Q Okay. And in fact, this -- the statement that you

Rusty Dunbar - Direct Examination by Mr. Lancer

1 just read was during Mr. Mimms redirect of your alibi
2 witness; is that correct?

3 A That's correct.

4 Q So when we look at page 391, how many questions did
5 Mr. Mimms get to Laura Smith on redirect?

6 A One.

7 Q And after that one question, what happened?

8 A She was instructed to step down off the stand, not
9 to leave the courtroom and shown to the other jury box and
10 made to sit there in front of the jury while I testified.

11 Q Okay. And was this done in the presence of the
12 jury?

13 A Yes, sir.

14 Q And is it your position that this prejudiced you in
15 that Laura Smith was made to look untruthful to the jury?

16 A Yes. I felt that discredited my witness and that
17 by -- I believe that prejudiced me, yes, sir. And I feel
18 it discredited my witness and hindered my alibi.

19 Q All right. Mr. Dunbar, please turn to page 431 in
20 the trial transcript. Starting online 14, this is actually
21 an exchange between the trial judge and your attorneys,
22 another attorney assisting Mr. Mimms, correct?

23 A Correct.

24 Q And that individual was Grant Gibbons who was
25 assisting Mr. Mimms; is that right?

Rusty Dunbar - Direct Examination by Mr. Lancer

1 A Yes, sir.

2 Q Okay. Would you please read that exchange between
3 court and Mr. Gibbons, lines 14 through 19?

4 A Let me see that statement.

5 Your Honor, if you want to look at the rule real
6 quick --

7 I just want to see the statement.

8 I don't know if I can disclose it.

9 You can't disclose it to me?

10 Q So, Mr. Dunbar, does that show that in fact, there
11 was a statement?

12 A Yes, sir. It's -- yes, sir.

13 Q Okay. Is there anything else you'd like to add to
14 this ground of ineffective assistance of counsel, Mr.
15 Dunbar?

16 A Yes, sir, as far as, Your Honor, my witness was
17 instructed to get off the stand. He told her, he said step
18 down off the stand and don't you leave this courtroom. He
19 instructed her to walk across -- while my jury is sitting
20 there, he instructed her to walk across there and sit in
21 this box right here, but we was in the other courtroom, the
22 big courtroom. They were sitting there and they watched
23 her come over here and sit down.

24 She was scared and they held a side bench -- I know
25 it's not part of the record, but it was in the open court,

Rusty Dunbar - Direct Examination by Mr. Lancer

1 he told them, he said, I want to see that statement, he
2 said; and if she's lying, her behind's going to jail for
3 perjury. He was off the stand and they was holding a
4 little side bar. I heard it, you know. I'm pretty sure
5 the jurors could have heard it. So the jurors -- so she
6 sat there through my testimony. They couldn't -- they
7 couldn't find it. So they called me. I testified. The
8 jury was dismissed for the day and then they disclosed the
9 statement after the jury was gone. And so that left the
10 jury with the impression that possibly she's a liar and
11 that she's to be discredited.

12 Her alibi pertains to the same thing my other
13 witnesses-- her story was the story of my brother's.
14 Everybody's story was together, but to discredit one is to
15 discredit all. As I feel, because just the way it was
16 handled. And they never brought the jury in and corrected
17 this entire thing. It wasn't like, Oh, well, we're sorry,
18 you know, here's her statement. She was found to be a
19 credible witness or nothing like that.

20 It was just when they came back in it was like,
21 well, you know, where she at, you know. As far as they
22 know she's going to jail for perjury.

23 Q All right. Mr. Dunbar. Thank you.

24 ~~I'm going to move onto your fourth ground or~~
25 ineffective assistance of counsel. This ground, DNA

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1 evidence; is that correct?

2 A Yes, sir.

3 Q And this relates -- you are alleging that your
4 attorney should have objected to certain statements in the
5 State's closing; is that correct?

6 A That's correct.

7 Q Okay. Mr. Dunbar, did the State present DNA
8 evidence against you at trial?

9 A They did.

10 Q Okay. Do you remember who the State's DNA expert
11 was?

12 A Katherine Lysse (phonetic).

13 Q Okay. Mr. Dunbar, would you please turn to page
14 341. And if you would read lines 7 through 20, please.

15 A There were two swabs submitted that were identified
16 as being taken from the steering wheel. To a reasonable
17 degree of scientific certainty, what conclusions were you
18 able to perform about the swabs from the steering wheel?

19 The DNA obtained from the swab of the steering
20 wheel, identified as SLED Item 1, is a mixture of at least
21 two individuals. The DNA profile developed from the major
22 contributor, this mixture matches the DNA profile of Daniel
23 Hines.

24 The probability of randomly collecting an unrelated
25 individual having the DNA profile matching a major

Rusty Dunbar - Direct Examination by Mr. Lancer

1 contributor is approximately one in 12 quadrillion.

2 Q Please read the end of that sentence, sir.

3 A Rusty Dunbar cannot be excluded as a possible minor
4 contributor to this mixture.

5 Q Mr. Dunbar, to be clear on this, this -- at this
6 point in the trial, Assistant Solicitor Young had Katherine
7 Lysse, the DNA expert on direct; is that correct?

8 A That's correct.

9 Q Okay. So isn't it correct that there were two
10 swabs analyzed from the steering wheel of this vehicle that
11 is in reference in the trial here?

12 A That's right.

13 Q Okay. As far as the first swab is concerned, what
14 was the DNA expert's conclusion as to the first swab?

15 A First swab was -- this one I just read?

16 Q I think it's going to be on line 19?

17 A Yeah, that was -- I cannot be excluded as a
18 possible minor contributor to a mixture.

19 Q Okay. Rusty Dunbar cannot be excluded as a
20 possible minor contributor to the mixture; is that correct?

21 A That's correct.

22 Q Okay. Mr. Dunbar, let's move over to page 342 and
23 if you would, read lines 3 through 11, please.

24 A ~~Going back to the steering wheel, were there two~~
25 swabs that you analyzed? There were.

Rusty Dunbar - Direct Examination by Mr. Lancer

1 Did you reach a conclusion to a reasonable degree
2 of scientific certainty regarding the second swab?

3 The DNA obtained from the second swab from the
4 steering wheel is also a mixture of two individuals, Daniel
5 Hines and Rusty Dunbar cannot be excluded as possible
6 contributors to the mixture. The probability of randomly
7 selecting you know -- oh, okay.

8 Q That's good, Mr. Dunbar.

9 A Yes.

10 Q Okay. So that is the second swab from the steering
11 wheel they're discussing there, correct?

12 A That's correct.

13 Q And on that second swab, does it read Rusty Dunbar
14 cannot be excluded as a possible contributor to the
15 mixture?

16 A That's correct.

17 Q Okay. If you would turn to the next page, page 343
18 and if you would read lines 7 through 13.

19 A And did you finally -- did you do some analysis as
20 far as the interior door driver's handle?

21 The DNA obtained from the interior door -- excuse
22 me, the interior handle on the driver's door is a mixture
23 of at least two individuals. Daniel Hines and Rusty Dunbar
24 cannot be excluded as possible contributors to this
25 mixture.

Rusty Dunbar - Direct Examination by Mr. Lancer

1 Q Okay. So again, on this third swab, the language
2 used is, Rusty Dunbar cannot be excluded as a possible
3 contributor to the mixture; is that correct?

4 A That's correct.

5 Q Okay. Was there any other DNA evidence presented
6 against you?

7 A No, sir.

8 Q Your DNA -- strike that question.

9 Was the DNA testimony of the expert consistent with
10 the forensic report that was done?

11 A Yes, sir.

12 Q Okay.

13 May I have this marked as Petitioner's No. 2 for
14 identification?

15 (WHEREUPON Applicant's Exhibit No. 2 was marked for
16 evidence.)

17 BY MR. LANCER:

18 Q Mr. Dunbar, would you please identify this
19 document?

20 A Yes, sir. That's a report from the SLED -- South
21 Carolina Law Enforcement Division, from Katherine Lysse,
22 Forensic Laboratory Report.

23 Q Okay. Would you take a look and just verify in
24 ~~that document that the testimony of Katherine Lysse at~~
25 trial was consistent with her report?

Rusty Dunbar - Direct Examination by Mr. Lancer

- 1 A Yes, sir, it is.
- 2 Q Mr. Dunbar, was this document given to you by your
3 attorney, Mr. Mimms?
- 4 A Yes, sir.
- 5 Q Has this document been altered in any way since you
6 received it?
- 7 A No, sir.
- 8 MR. LANCER: Your Honor, I would at this time, ask
9 that Petitioner's Exhibit No. 2 be admitted into evidence.
- 10 THE COURT: What says the State?
- 11 MS. HARRIGAN: No objection.
- 12 THE COURT: All right. It's in without objection.
- 13 (WHEREUPON Applicant's Exhibit No. 2 was entered
14 into evidence.)
- 15 BY MR. LANCER:
- 16 Q Mr. Dunbar, let's turn our attention now to the
17 State's closings, would you please turn to page 470.
- 18 A (Concurring).
- 19 Q And if you would please read lines 17 through 21.
- 20 A Now, she also testified to you that Rusty's DNA was
21 found in the car and she said that it was a mixture of DNA
22 samples and because it was a mixture in one of the samples,
23 she could say that Daniel Hines was the major contributor.
- 24 Okay. She said --
- 25 Q Mr. Dunbar, are you saying at this point your

Rusty Dunbar - Direct Examination by Mr. Lancer

1 attorney should have objected?

2 A Yes, sir.

3 Q Please tell the Court why your attorney should have
4 objected at this time?

5 A Because she misstated the facts -- that Kathryn
6 Lysse said I could not be excluded, but that does not
7 include me, specifically. She specifically include me in
8 this -- in this testimony that she's submitting as part of
9 her closing.

10 Q Are you saying that it is your position that the
11 jury heard the State say your DNA was found in the car?

12 A Yes, sir.

13 Q And is it your position that your attorney should
14 have objected?

15 A Yes, sir.

16 Q Mr. Dunbar, would you please read line 24 on page
17 470 to line 7 on page 471.

18 A Mr. Mimms suggested some to you and thrown out some
19 numbers and things about the numbers, but if you just focus
20 on the fact that Rusty Dunbar's DNA cannot be excluded from
21 being in that car or you can flip it around and say Rusty
22 's DNA is included as being found in that mixture, ladies
23 and gentlemen, I submit to you that that is very compelling
24 evidence. ~~It's found in three places, not just one place.~~
25 It's found on the driver's door handle and two places on

Rusty Dunbar - Direct Examination by Mr. Lancer

1 the steering wheel.

2 Q And you were saying at that point, again, your
3 attorney should have done what?

4 A Objected.

5 Q And why?

6 A Because she is -- she's including -- she's giving
7 damaging testimony. That's not the way the -- you can't
8 draw a reasonable inference from that. You can't just say
9 well, you can flip it and then turn the evidence how you
10 want to and make it -- she's instructing them that, you
11 know, you can flip it around and say Rusty's DNA is
12 included as being found in that mixture.

13 Q And are you saying that that was prejudicial?

14 A Yes, sir.

15 Q That the jury heard that your DNA was found in
16 three places in the car and you're saying that's not what
17 is DNA person says, right?

18 A Yes, sir, that's correct.

19 Q Mr. Dunbar, let's turn to page 472, please. And if
20 you would read lines 11 through 14.

21 A Eleven through fourteen. When he told them that he
22 did that -- when he told him that he did that and that
23 Rusty did that he had no way in the world of knowing that
24 Rusty's DNA was going to be found in that car. He had no
25 way of knowing that and ladies and gentlemen -- yeah.

Rusty Dunbar - Direct Examination by Mr. Lancer

1 Q And, again, are you saying that your attorney
2 should have objected to this?

3 A Yes, sir.

4 Q Why should he have?

5 A Because she again is including me in that car,
6 prejudicing me by evidence -- misinterpreting evidence.

7 Q Did the State's DNA expert ever say Rusty Dunbar's
8 DNA was found in the car?

9 A No, sir.

10 Q Mr. Dunbar, I'm not going ask you anymore questions
11 on this ground, was there anything that you would like to
12 add to that?

13 A No, sir.

14 Q Mr. Dunbar, I'm going to turn to the fifth ground
15 that you are alleging for ineffective assistance of
16 counsel. As it reads in your application, counsel failed
17 to object to the solicitor's vouching and personal opinions
18 in the solicitor's closing argument. Is that accurate?

19 A Yes, sir.

20 Q So again, you're saying that your attorney should
21 have objected to certain things during the closing; is that
22 right?

23 A Yes, sir.

24 Q Okay. Is it your position that there was some
25 improper vouching?

Rusty Dunbar - Direct Examination by Mr. Lancer

1 A Yes, sir.

2 Q Okay. Mr. Dunbar, would you please turn to page
3 453 in the transcript. And if you would read lines 4
4 through 9.

5 A It made sense that Christopher knew what happened
6 and he told Investigator Sanders what happened and it made
7 sense because what he told him was the truth, the truth was
8 Rusty Dunbar was there. Rusty Dunbar was with him. Rusty
9 Dunbar was just as involved as Christopher Hyman.

10 Q Would you explain why you wanted to present these
11 two sentences today. What significance do they have?

12 A Well, the State's case hinged on his testimony,
13 Christopher Herndon's testimony against me. They -- so
14 when the solicitor got up there and she's telling -- she's
15 placing the government behind him, saying, you know, Hey,
16 he's telling the truth, ladies and gentlemen. If you don't
17 believe anything, just believe this man right here. He's
18 telling you the truth. He's on our behalf and what he's
19 telling me made sense. That's what's, sadly, that's the
20 truth. And --

21 Q And you believe your attorney should have done what
22 at that?

23 A Objected.

24 Q Why should he have objected?

25 A Because she was improperly, she was bouncing (sic)

Rusty Dunbar - Direct Examination by Mr. Lancer

1 for him. She was giving him credit wherein there was --

2 Q And you're talking about with your codefendant?

3 A Yes, sir, my codefendant.

4 Q Okay. Your codefendant testified against you at
5 trial?

6 A Yes, sir.

7 Q Mr. Dunbar, would you please turn to page 454 and
8 look at the -- or read for the Court lines 3 through 7,
9 please.

10 A The reason he didn't have to go through all of
11 those mental acrobats was because what he said was the
12 truth. Rusty Dunbar was with him. That's what makes the
13 most sense. That's what happened that night.

14 Q Would you please explain to the Court why you have
15 chosen to focus on that.

16 A Again, she's -- she's vouching and like I said it's
17 everyone -- this is a jury -- she's taking the questions
18 from the jury. She's placing the government behind him
19 saying look, he's telling the truth. Y'all don't even have
20 to deliberate on this because we believe him. I'm the
21 solicitor and I'm telling y'all, he's telling the truth.
22 And this is the truth as I know it and just feel
23 comfortable in that. That's the way I take it.

24 Q Okay. And again, you're saying your attorney
25 should have objected to this?

Rusty Dunbar - Direct Examination by Mr. Lancer

1 A Yes, sir.

2 Q Okay. Would you please turn to page 459, Mr.
3 Dunbar, and read lines 11 through 13.

4 A Do they really know what time they left? I said --

5 Q Lines -- I'm sorry, go ahead, Mr. Dunbar.

6 A Okay. Do they really know what time they left? I

7 submit to you that Chris is the most reliable source

8 because he didn't say anything about smoking crack.

9 Q Please turn to page 463, Mr. Dunbar. And if you
10 would, please read lines 21 through 23.

11 A But I'd like to point out one thing about Jerry
12 Thornton's testimony that I thought was remarkable because
13 it just, to me, was very believable.

14 Q And again, you're saying your attorney should have
15 objected; is that right?

16 A Yes, sir.

17 Q And is that because you perceive that as being the
18 State injecting a personal opinion about a witness'
19 credibility?

20 A Yes, sir.

21 Q And would you please turn to page 464, Mr. Dunbar
22 and read lines 3 through 5?

23 A For him to just, you know, deny that he didn't
24 think anything was going to happen, well that's not
25 believable. You know he's trying to protect himself.

Rusty Dunbar - Direct Examination by Mr. Lancer

1 Q And that is the same argument there, Mr. Dunbar; is
2 that correct?

3 A Yes, sir.

4 Q Okay. And finally, would you look at page 466 and
5 if you would read lines 6 through 9?

6 A He gets up -- he ends up getting picked up by Jerry
7 and Jerry confirms that in his testimony and when Jerry was
8 asked about Bulls Bar, to me it -- that had the most
9 believable reaction at all. It was like he had never heard
10 that before.

11 Q And why did you decide to pick out this statement
12 from the trial? Why is that significant?

13 A Because that's taking away from my alibi and
14 she's -- she's discredited him -- she's vouching for the
15 witness -- what it is, she's cherry picking what it is that
16 she wants the jury to believe and not believe and, you
17 know, I understand she could draw reasonable inferences and
18 everything in the evidence, but she's vouching for this
19 witness and this same witness, she'll go into testimony --
20 in her closing she'll go in saying, Well, you know, he's --
21 he's just not even a reliable witness. But she's going in
22 and saying things that she believes and all these things,
23 you know, making everything convenient for her case.

24 Q ~~All right, Mr. Dunbar, is there anything else you~~
25 would like to say on this ground for ineffective assistance

Rusty Dunbar - Direct Examination by Mr. Lancer

1 of counsel before we move on?

2 A No, sir.

3 Q Okay. I want to move to your final ground that you
4 have raised. You are alleging that there was a Rule 5
5 Brady violation; is that correct?

6 A Yes, sir.

7 Q Okay. And specifically, are you saying that there
8 were statements that were brought up at trial that were not
9 turned over prior to the trial?

10 A Yes, sir.

11 Q Okay. Prior to trial, did you file a request and
12 motion for discovery?

13 A Yes, I did.

14 MR. LANCER: I'd like to get this marked as
15 Petitioner's Exhibit No. 3 for identification.

16 (WHEREUPON Applicant's Exhibit No. 3 was marked for
17 identification.)

18 BY MR. LANCER:

19 Q Mr. Dunbar, would you please identify this document
20 for us.

21 A Yes, sir, this is a request and motion for
22 discovery filed on my behalf by Justin Mimms.

23 Q Okay. Was that provided to you by Mr. Mimms?

24 A Actually -- this one here is --

25 THE COURT REPORTER: Speak up.

Rusty Dunbar - Direct Examination by Mr. Lancer

1 THE WITNESS: This one here is actually the wrong
2 one. This one right here is the one with a pending assault
3 and battery with intent to kill that I have. But I do
4 have -- just in case you don't, I do have a copy of the
5 other one.

6 BY MR. LANCER:

7 Q Mr. Dunbar, do you have a copy of the request for
8 motion for discovery that was filed by your attorney?

9 A That's it, I believe. Isn't that my request?
10 (WHEREUPON there was a pause in the proceedings.)

11 THE WITNESS: I'm sorry. I'm sorry.
12 (WHEREUPON there was further pause in the
13 proceedings.)

14 THE WITNESS: Sorry, about that.

15 MR. LANCER: I'd like to mark this as Petitioner's
16 Exhibit No. 4, please.

17 (WHEREUPON Applicant's Exhibit No. 4 was marked for
18 identification.)

19 BY MR. LANCER:

20 Q Mr. Dunbar, would you please identify this
21 document.

22 A Yes, sir, this is a request and motion for
23 discovery for indictments against me submitted by Justin
24 ~~Mimms to Barbara Morgan, Solicitor, 2nd Judicial Circuit in~~
25 reference to my case.

Rusty Dunbar - Direct Examination by Mr. Lancer

1 Q Has it been changed or altered in any way since
2 your trial?

3 A No, sir.

4 MR. LANCER: Your Honor, I would at this time, move
5 that this document be admitted into evidence.

6 MS. HARRIGAN: No objection.

7 THE COURT: All right. It's in without objection.

8 (WHEREUPON Applicant's Exhibit No. 4 was entered
9 into evidence.)

10 BY MR. LANCER:

11 Q Mr. Dunbar, in the request and motion for
12 discovery, do you request all statements made by anyone
13 whether oral, or written?

14 A Yes, sir.

15 Q Okay. And the statements that you are alleging
16 were not turned over prior to trial, were those oral
17 statements or written statements?

18 A They were oral statements to Sargent Kenneth Mooney
19 and to Investigator J. D. Sanders.

20 Q Okay. Let's go to the trial transcript. Please
21 turn to page 172. Would you please read lines 20 through
22 25.

23 A Did you notice anyone at -- did you notice at some
24 point -- did you notice anyone at some point in the area?

25 Sometime later, yes, sir. Much later.

Rusty Dunbar - Direct Examination by Mr. Lancer

1 After the bloodhound team had arrived, I was
2 conducting a search for the suspect and they were about to
3 wind up that portion. Then I saw from -- and I was in my
4 vehicle at the time facing the suspect vehicle at the
5 grocery store --

6 Q Would you continue on the next page to line 15.

7 A -- when I just turned around and looked and saw a
8 male subject walking from the rear of me, which is near the
9 bridge where -- near the bridge there walking up towards
10 the parking lot where I was located. And at that time I
11 exited the vehicle and asked him where he was going and at
12 that time, he kind of pointed -- I didn't -- couldn't make
13 out what he was saying and he kind of pointed and I thought
14 he had mumbled something like a friend or something like
15 that and I said, where you going and he said, I'm the one
16 you're looking for.

17 I'm the what -- like he said, I asked him where he
18 was going. He kind of pointed. I thought I heard him say
19 to a friend's house or a friend and at that time I said
20 where you going. I repeated that again and he said I'm the
21 one you're looking for.

22 Q Okay. Did this include the statement that your
23 referring to that was not turned over prior to trial?

24 A Yes, sir.

25 Q Would you -- let the Court know specifically what

Rusty Dunbar - Direct Examination by Mr. Lancer

1 in here you are talking about.

2 A Okay. Christopher Herndon walked out of the woods,
3 my codefendant came out of the woods and he -- he made
4 contact with Kenneth Mooney --

5 Q Who is Kenneth Mooney?

6 A He's a sargent for the sheriff's office.

7 Q Very good.

8 A And he made contact with him and he started trying
9 to give -- whatever -- he was trying to tell him he was on
10 his way to such and such, somewhere to a friend's house.
11 This is what he was understanding and he asked him where he
12 was going and he asked him again, he told him, I'm the one
13 you're looking for. So he gave an exculpatory and
14 inculpatory statement at the time.

15 Q Okay. So exactly what you're referring to, is it
16 the sentence, I'm the one you're looking for?

17 A That's part of it, yes, sir.

18 Q Okay.

19 A The other part is where he was saying, he kind of
20 pointed. I couldn't make out what he was saying, but he
21 kind of pointed. I thought he mumbled something like a
22 friend or something. He kept trying to tell him he was
23 going to a friend's house, pointing.

24 Q Was it this whole interaction that you were not
25 aware of before trial?

Rusty Dunbar - Direct Examination by Mr. Lancer

1 A The whole -- yes, sir, the whole interaction.

2 Q So the statements made by your codefendant to
3 Officer Mooney and the interaction, you did not know about
4 prior to trial?

5 A No, sir. I did not know.

6 Q To your knowledge, did your attorney know about it
7 prior to trial?

8 A To my knowledge, no, sir.

9 Q Why is this important?

10 A For impeachment purposes because he was -- like I
11 say he was the crux of the State's case. He was
12 presented -- I didn't have any evidence to show motive,
13 bias, I couldn't impeach him, I couldn't discredit him.
14 Those are just things that were just critical to my
15 defense. You know.

16 Q Okay. And are -- would you please turn to page
17 204, Mr. Dunbar. And would you please read lines 10 -- on
18 that -- on page 204, to line 9 on page 205.

19 A What happened next?

20 Investigator J. D. Sanders came on the scene and of
21 course, I was denying everything to begin with and then he
22 asked me -- I'm sorry, what did you just say -- I said I
23 was denying everything to begin with.

24 ~~What does that mean?~~

25 I was telling him I didn't have anything to do with

Rusty Dunbar - Direct Examination by Mr. Lancer

1 it. I didn't know what he was talking about.

2 Prior to speaking with him, had you been advised
3 your Miranda warning?

4 Yes, ma'am.

5 So you were denying it and then what happened.

6 Investigator Sanders said, you know, this would be
7 easier on you if you tell the truth and I was pretty shook
8 up. I never been involved in anything like that. And I
9 said, yeah, he's probably right. So I told him exactly
10 what happened.

11 What did you tell him?

12 I told him that me and Rusty Dunbar went to go rob
13 Daniel Heinz.

14 What else did you tell him?

15 I just told him the whole truth, everything that
16 happened from the start of the day on through.

17 Q Would you let the Court know specifically in that
18 text what statement was not turned over to you prior to
19 trial?

20 A Investigator Sanders submitted a recorded
21 statement, but in his recorded statement, it was just a
22 statement including me. But Investigator Sanders, when he
23 first came on the scene, he was given -- he was denying
24 everything to begin with. He was like, Well, I don't know
25 what you're talking about.

Rusty Dunbar - Direct Examination by Mr. Lancer

- 1 Q Christopher Herndon was denying everything?
- 2 A Yes, sir.
- 3 Q To Investigator Sanders?
- 4 A Yes, sir. He was telling him he don't know what
- 5 he's talking about, you know, he's denying everything,
- 6 so --
- 7 Q And this statement, you're saying, was not turned
- 8 over to you prior to trial?
- 9 A Yes, sir.
- 10 Q To your knowledge, was it given to your attorney
- 11 prior to trial?
- 12 A No, sir.
- 13 Q The statement you just read and the statement prior
- 14 to that, those two statements that you're talking about,
- 15 they're both from Christopher Herndon to law enforcement,
- 16 correct?
- 17 A Correct.
- 18 Q Do the two statements conflict each other or are
- 19 they consistent?
- 20 A They conflict with each other.
- 21 Q On the one hand, you have Officer Mooney saying
- 22 Christopher Herndon walked out of the woods or said -- told
- 23 me he was going to a friend's house and one second later
- 24 said, I'm the one you're looking for, correct?
- 25 A Correct.

Rusty Dunbar - Direct Examination by Mr. Lancer

1 Q And is that different than what Christopher Herndon
2 told J. D. Sanders.

3 A Yes, sir, he told J. D. Sanders, made contact with
4 him, told him, he said, I don't know what you're talking
5 about. I -- I didn't have nothing to do with this. And
6 then he gave a statement including myself.

7 Q And that was after Investigator Sanders said it's
8 going to be a lot easier on you if you come forward and
9 tell the truth. Is that what you're saying?

10 A That's correct.

11 Q Okay. And so you're saying that these statements
12 would have been material for their exculpatory or -- for
13 exculpatory purposes?

14 A Yes, sir.

15 Q Okay. Mr. Dunbar, is there anything else that you
16 would like to add to this ground?

17 A Yes, sir. I have here from my -- this is the
18 transcript of record from my codefendant's hearing and this
19 right here is just what -- page 11, Ms. Young, she tells
20 the judge, she said, You heard his testimony, you heard his
21 trial, it's my opinion his testimony was integral in the
22 trial in obtaining the conviction of the codefendant.

23 So, you know, that again shows where his testimony
24 was very much needed and convicted me in this case, because
25 like I said, it was his word against mine, you know.

Rusty Dunbar - Cross-Examination by Ms. Harrigan

1 Q So are you saying that these statements with so
2 important because he was essentially the case against you?

3 A Yes, sir.

4 Q Okay. Is there anything else you would like to
5 add?

6 A No, sir.

7 (WHEREUPON there was a pause in the proceedings.)

8 BY MR. LANCER:

9 Q Mr. Dunbar, I don't have anymore questions for you.
10 Is there anything you would like to add on anything for
11 your PCR application?

12 A No, sir. To tell you the truth, no.

13 Q Mr. Dunbar, please answer all questions that the
14 attorney general asks of you.

15 A Yes, sir.

16 MS. HARRIGAN: May it please the Court?

17 THE COURT: Yes, ma'am.

18 CROSS-EXAMINATION

19 BY MS. HARRIGAN:

20 Q Mr. Dunbar, how many times did you meet Mr. Mimms
21 before going to trial?

22 A I'd say four, maybe five.

23 Q Four or five times?

24 A Yes.

25 Q Do you recall how long these meetings were?

Rusty Dunbar - Cross-Examination by Ms. Harrigan

1 A I'd say maybe 30 minutes to an hour.

2 Q Each?

3 A Yes.

4 Q Did you discuss the case with him by telephone?

5 A Yes, sometimes, but it was really -- those were
6 very brief conversations. It was mainly me asking for
7 discovery.

8 Q Did you discuss the case by letter? Did you write
9 him letters about your case?

10 A Yes, ma'am, none were ever answered.

11 Q Were you detained prior to your trial?

12 A Yes, ma'am.

13 Q You said that in your phone calls and your letters,
14 you asked him for your discovery. Do you recall getting a
15 copy of your discovery?

16 A Yes, ma'am.

17 Q Did Mr. Mimms review this with you?

18 A Yes, ma'am.

19 Q Do you recall discussing possible defenses with Mr.
20 Mimms?

21 A Yes, ma'am.

22 Q Was it your idea to set forth the alibi defense to
23 him?

24 A Right -- I mean, yes, ma'am.

25 Q Did you provide him with the necessary witnesses?

Rusty Dunbar - Cross-Examination by Ms. Harrigan

1 A Yes, ma'am.

2 Q Do you know -- do you have the names of these
3 possible alibi witnesses?

4 A I have Ricky Smith, Mable Metts, Laura Smith, Tommy
5 Dunbar and Dana Langley.

6 Q Did you provide him with address and phone numbers
7 of these individuals?

8 A Yes, I did.

9 Q Do you know if he filed any sort of notice to the
10 State giving the State this information?

11 A Yes, ma'am, he did.

12 MS. HARRIGAN: May I approach, Your Honor?

13 THE COURT: Yes, ma'am.

14 BY MS. HARRIGAN:

15 Q Would you look at this? It's a reciprocal Rule 5
16 that was filed by your attorney, Mr. Mimms? Do you
17 recognize that?

18 A Yes, ma'am.

19 Q Do those appear to be the five names you just gave
20 me?

21 A Yes, ma'am.

22 Q And the correct addresses and phone numbers.

23 A Yes, ma'am.

24 ~~MS. HARRIGAN: The State would like to get this~~
25 marked as Respondents 1.

Rusty Dunbar - Cross-Examination by Ms. Harrigan

1 (WHEREUPON Respondent's Exhibit No. 1 was marked
2 for evidence.)

3 MS. HARRIGAN: I can put that into evidence at this
4 time, I believe without objection.

5 MR. LANCER: No objection.

6 THE COURT: Okay. In without objection.

7 (WHEREUPON Respondent's Exhibit No. 1 was entered
8 into evidence.)

9 BY MS. HARRIGAN:

10 Q So based on that document, your attorney had given
11 the State notice that they intended to go forward with an
12 alibi defense, correct?

13 A Yes, ma'am.

14 Q And there was some testimony that your previous
15 girlfriend, Laura, had given a written statement, correct?

16 A Yes, ma'am.

17 Q Do you know who she gave that written statement to?

18 A Bennie Williams.

19 Q Okay. And that was an e-mail that you had before,
20 correct?

21 A The e-mail was between my brother -- well, my
22 stepbrother and his girlfriend from -- I'm not sure which
23 computers, but the statement is from my girlfriend to her
24 to have printed because she really doesn't have neat
25 handwriting or whatever.

Rusty Dunbar - Cross-Examination by Ms. Harrigan

1 Q Do you have any of those people who sent or
2 received that e-mail here today to verify that?

3 A No, ma'am. I believe my attorney should have a
4 copy of that in his box.

5 Q In regards to your other alibi witness, your
6 brother, your brother Thomas. Do you know if he gave a
7 written statement or was it --

8 A He didn't.

9 Q -- just a verbal? So his was just a verbal
10 statement?

11 A Yes, ma'am.

12 Q Okay. And the State cross-examined him about his
13 alibi as well, correct?

14 A Correct.

15 Q Just like they had with Laura, your girlfriend?

16 A Uh-huh.

17 Q And the statement that he had written, the written
18 statement you're claiming she gave him that was never
19 handed over to the State, that statement, she never
20 voluntarily went and brought that to police on your behalf,
21 did she?

22 A No, ma'am. I told her not to. I told her --

23 Q You told her not to.

24 A -- not to have any interaction with law
25 enforcement. If she had any interaction with anybody, it

Rusty Dunbar - Cross-Examination by Ms. Harrigan

1 would be with my attorney.

2 Q So when the assistant solicitor was questioning her
3 as to why she didn't voluntarily come forward to the
4 police, you knew she never came forward to the police. You
5 told her not to talk to the police and give an alibi for
6 you, correct?

7 A Yes, that's correct.

8 Q All right. Besides these alibi witnesses, did you
9 give your attorney any other possible defenses or --

10 A Yes.

11 Q -- to investigate?

12 A Yes, ma'am.

13 Q What witnesses?

14 A I told him that we had picked up a guy, Jerry
15 Thornton, me, Chris, Laura, had picked up a guy at Bulls
16 Bar and Grill, a guy named Craig, which was their friend
17 and I don't know -- I don't know who he is because he was
18 their friend.

19 Q Uh-huh.

20 A So, I mean, as far as I know that was never
21 investigated and it was never presented.

22 Q So I think you said Jerry Thornton, who did testify
23 at trial, correct?

24 A Yes, ma'am.

25 Q And then a Craig, but you don't know his last name,

Rusty Dunbar - Cross-Examination by Ms. Harrigan

1 correct?

2 A Yes, ma'am.

3 Q Were you able to give your attorney anymore
4 identifications besides a Craig that you didn't know his
5 last name?

6 A I give him a place where he may be located, yes,
7 ma'am.

8 Q May be located, okay. Are you aware as to whether
9 he was able to track down Craig based on this first name
10 and a possible whereabouts?

11 A As far as I know, Mr. Bennie Williams said he -- he
12 never -- he was going to look into it. He said he's not
13 even going to do it.

14 Q So those are the only two witnesses, potential
15 witnesses, Mr. Thornton and Craig?

16 A No, Thornton was the State's witness.

17 Q Yes. But you testified before that that was a
18 possible witness that you gave your attorney?

19 A No, he was with us --

20 Q All right.

21 A -- that night when we picked him up, Craig. That's
22 when I said he is a possible witness that -- see he's the
23 one -- I'm telling you, they went and did this crime. It
24 wasn't me. That's what I was trying to tell him. It was
25 third party. It was not me. And they never even

Rusty Dunbar - Cross-Examination by Ms. Harrigan

1 investigated it to my knowledge.

2 Q And you told your attorney that Craig was a
3 possible witness and you wanted to pursue a third party to
4 get with him, correct?

5 A Yes, ma'am.

6 Q So your attorney was never able to track down
7 Craig.

8 A He's never even attempted.

9 Q And you didn't give him Craig's last name. Do you
10 know Craig's last name?

11 A I don't know him. All I knew is where I picked him
12 up from, where I'd seen him at previously and that that's
13 all I knew of him.

14 Q Have you contacted Craig since your trial to --

15 A No, I've been incarcerated ever since.

16 Q You don't have an affidavit from Craig today.

17 A No, ma'am.

18 Q Craig is not here to testify in your behalf,
19 correct?

20 A I have no way --

21 Q So it's just speculation as to what his testimony
22 would have been, correct?

23 A Correct.

24 Q Did the State ever offer you any plea deals prior
25 to trial?

Rusty Dunbar - Cross-Examination by Ms. Harrigan

- 1 A Yes, ma'am, I believe so.
- 2 Q Do you recall what those were?
- 3 A Twenty years.
- 4 Q And did your attorney timely communicate those to
- 5 you before trial?
- 6 A Yes, ma'am.
- 7 Q But it was your decision to turn that down then --
- 8 A Yes, ma'am.
- 9 Q -- and proceed with trial.
- 10 You testified at trial, correct?
- 11 A That's correct.
- 12 Q And during your testimony, you admitted to drinking
- 13 throughout the day of the incident, correct?
- 14 A That's correct.
- 15 Q And to smoking some marijuana or reefer, I think
- 16 you called it?
- 17 A Uh-huh.
- 18 Q And during your direct testimony, you voluntary
- 19 brought up crack use, correct?
- 20 A Yes, ma'am, that was elicited from my attorney,
- 21 yes.
- 22 Q If you would turn to your testimony on page 395;
- 23 you voluntarily brought up your use of crack that day,
- 24 correct?
- 25 A Yes, yes.

Rusty Dunbar - Cross-Examination by Ms. Harrigan

1 Q Okay. In fact --

2 A Well --

3 Q -- you testified you've been smoking crack since
4 you were 13, voluntarily, correct?

5 A Correct.

6 Q And you admitted that to the jury in your testimony
7 several times, correct?

8 A Well, no, I brought it -- the use one time.

9 Q You only mentioned to the jury one time that you've
10 been smoking crack since you were 13?

11 A Yes, I believe the solicitor kept going into that.

12 Q Okay. Do you recall sort of bragging to the jury
13 about the amount of crack you have smoked in your lifetime?

14 A I told them I may have had enough crack to submit a
15 new wing on this courthouse is what I told them.

16 Q You mentioned that a few times and it caught Judge
17 Early's attention, correct?

18 A I mentioned it one time.

19 MS. HARRIGAN: Court's indulgence.

20 (WHEREUPON there was a pause in the proceedings.)

21 BY MS. HARRIGAN:

22 Q So your testimony is that you only made that
23 comment about smoking enough crack to build an entire wing
24 on the building once?

25 A I made mention of it. He asked me what I said and

Rusty Dunbar - Cross-Examination by Ms. Harrigan

1 then I repeated it, yes, ma'am.

2 Q So you repeated that twice when the jury was here?

3 A Yes, ma'am. He asked me what it was.

4 Q One of your allegations is that your attorney, Mr.
5 Mimms was ineffective for bringing up your use of crack,
6 right?

7 A Yes, ma'am.

8 Q And that you were prejudiced by this because it
9 looks to the jury like your whole motive was to get more
10 money for crack? You're just this crack fiend, correct?

11 A Correct.

12 Q But you highlighted to the jury that you've been
13 consuming crack since you were 13, voluntarily, correct?

14 A Yes, ma'am, I wanted them to know --

15 Q You highlighted that you've smoked enough crack to
16 build an entire wing on this courthouse, correct?

17 A Yes, ma'am.

18 Q Okay. So there's really no prejudice because you
19 highlighted it to the jury throughout your entire
20 testimony, correct?

21 A No, ma'am. It's prejudice because it was brought
22 in. It was elicited by my counsel. My counsel brought it
23 in --

24 Q ~~But then it was highlighted by you, correct?~~

25 A -- he added this huge --

Rusty Dunbar - Cross-Examination by Ms. Harrigan

1 Q During your direct testimony?

2 A No, she asked me how long I'd been smoking it and I
3 answered the question.

4 Q You're the one that voluntarily brought up crack
5 during your direct, though, correct? If the --

6 A I'm not sure.

7 Q -- record shows that you're the first person that's
8 mentioned crack during your direct testimony, would you
9 refute that?

10 A Um --

11 Q I think it's page 395 is the first time crack's
12 mentioned and it's mentioned by you.

13 A 395 --

14 Q If you'll look at 395, line 9. Each throw in a 30
15 piece and we get a hundred, we can smoke dope. Well, we
16 all out there, I called the guy to find that dope --

17 A Okay. Says -- what did you say it was? 391.

18 Q 395.

19 A Okay.

20 Q Line 9.

21 A Okay. Line 9. Okay. It said Chris was -- it said
22 who was fussing.

23 Chris and Jerry was fussing. I asked him, well,
24 what are y'all fussing about. Man, I'm tired of every time
25 we get money you get paid, I don't get paid. I was like,

Rusty Dunbar - Cross-Examination by Ms. Harrigan

1 man, I don't have nothing do with that, but you know, why
2 don't we throw in -- I knew we smoked dope together.

3 You know, it wasn't the first time -- and I knew
4 what they was fussing about. Jerry done gave him twenty or
5 thirty dollars to smooth him over and so I was like, yeah,
6 well, well, why don't we throw in together. I'll throw in
7 forty bucks, y'all throw in thirty a piece and we'll get a
8 hundred and smoke it --

9 Q If you'll --

10 A -- together.

11 Q -- flip to the next page, your testimony starts on
12 page 392. If you'll just briefly review that for yourself
13 and see if crack is mentioned any other time before then?

14 A What is it now?

15 Q Your testimony starts on page 392, if you'd briefly
16 look at that for yourself?

17 A Uh-huh.

18 Q And tell me if that's the first mention of crack
19 during your direct testimony.

20 A Yes, ma'am. All this right here is -- all this
21 testimony that's being asked is about the prior bad act of
22 cement mixing that was being sold for crack. See that's
23 the thing -- see, the cement mixer -- all this is going
24 ~~towards that and I was trying to explain away what my~~
25 lawyer has done elicited. That's what I'm trying do. I'm

-Rusty Dunbar - Cross-Examination by Ms. Harrigan

1 trying to explain it away.

2 Q Okay. By bragging about your crack use since you
3 were 13?

4 A No, I never bragged about it. I was telling them a
5 fact. It's just a fact that the man turned me onto crack
6 when I was 13 years old. Yes, ma'am, he ruined my life.
7 Yes, ma'am, he did. It wasn't bragging.

8 Q But you voluntarily elicited that information to
9 the jury, correct? During your direct testimony?

10 A No, I would have -- I would never have had that in
11 my trial had my lawyer not opened that door. I would have
12 never put that in my trial. No, ma'am, it wasn't
13 voluntary.

14 Q Okay.

15 MS. HARRIGAN: Court's indulgence.

16 (WHEREUPON there was a pause in the proceedings.)

17 BY MS. HARRIGAN:

18 Q In regards to your allegation that your attorney
19 was ineffective for not objecting to the DNA comments made
20 by the solicitor in her closing, have you had an
21 opportunity to review the State's DNA expert prior to
22 coming in here today?

23 A To review --

24 Q Have you reviewed her testimony from trial?

25 A Oh, yes. Yes.

Rusty Dunbar - Cross-Examination by Ms. Harrigan

1 Q Would you disagree that the testimony all clearly
2 states for the three portions of the car that was swabbed
3 that your codefendant, Chris Herndon is completely excluded
4 as a possible match, correct?

5 A That's correct.

6 Q And the portions you read during your direct were
7 just that you couldn't be excluded as a possible
8 contributor. You didn't read the part about your
9 codefendant being excluded as a contributor, correct?

10 A Okay. Well, no, what I didn't read also is that I
11 had a one in 12,000 chance of being excluded as a possible
12 contributor to a mixture of an unknown amount of people as
13 his 1 is 7.8 quadrillion as being his DNA.

14 See, we're talking a lot of zero differences and my
15 lawyer, he never got into the facts of the -- how you
16 figure out how many other people could have been with the
17 12,000, 1 in 12,000 is a far cry from 1 in 7.8 quadrillion.

18 Q But for each of those three spots in the car, your
19 codefendant is excluded as a possible contributor?

20 A That's correct.

21 Q And the testimony from the State's DNA expert from
22 SLED is that you cannot be excluded, not that your -- you
23 couldn't be excluded, correct?

24 A That's correct.

25 Q And your testimony in regards to the alibi

Rusty Dunbar - Cross-Examination by Ms. Harrigan

1 statement your girlfriend, Laura Smith -- your testimony is
2 that she did hand that over to the public defender's
3 office, but that your brother never gave a written
4 statement, correct?

5 A Correct.

6 Q And you told her not to bring the alibi statement
7 to the police, correct?

8 A Correct.

9 Q Do you have a copy of your transcript in front of
10 you?

11 A Yes, ma'am.

12 Q Would you please turn to page 431. This portion
13 was read during direct. It's when co-counsel, Mr. Gibbons
14 and the judge are talking about a statement.

15 A Uh-huh.

16 Q Does it say in here what statement they're talking
17 about in the record?

18 A Yes, it's in reference to the statement of
19 Ms. Smith. That's what the whole thing is, he says --

20 Q Where does it say in that portion? I just need you
21 to let me see that statement?

22 A Hold on a second. Okay. Well, no, ma'am, he never
23 asked for anything. Ms. Smith's statement -- but this is
24 in inference you would receive -- if you was reading the
25 whole transcript, that you would know that's the statement

Rusty Dunbar - Cross-Examination by Ms. Harrigan

1 he's referring to.

2 Q In regards to your allegation that counsel was
3 ineffective for failing to request an alibi charge --

4 A Uh-huh.

5 Q If you'll flip to page 432, whenever the discussion
6 between all the parties about possible charges?

7 A Uh-huh.

8 Q Do you see at the bottom where the Court says, let
9 me see y'all in chambers?

10 A Uh-huh.

11 Q Did you attend that chambers conference?

12 A No, ma'am.

13 Q So you don't know what was discussed in there? If
14 jury charge was possibly discussed?

15 A No, ma'am. I just know it was never given to my
16 jury.

17 Q In regards to your comments that Judge Early became
18 aggressive and rude and frustrated with Smith, that's just
19 your speculation as to Judge Early's demeanor, correct?

20 A No, that's how it was.

21 Q Have you appeared in front of Judge Early before?

22 A No, but the --

23 Q So this is your first interaction with Judge Early,
24 correct?

25 A -- the change in his demeanor, that's the way I

Rusty Dunbar - Redirect Examination by Mr. Lancer

1 took that, yes, ma'am. It was -- as far as I know it was
2 all 15 of -- me and the jury, it's quite possible they took
3 it the same way.

4 Q In regards to your allegation regarding a Brady
5 violation on behalf of the State. I believe the first one
6 you said is the statement by your codefendant to
7 Mr. Mooney, the, I'm the one you're looking for. Do you
8 know if your attorney received a copy of any statements or
9 did you just not know about it?

10 A As far as I know, none was ever given to me. If he
11 gave me everything that he's given me as I've requested
12 every time, no, ma'am, he did not receive a copy of it.

13 MS. HARRIGAN: No further questions, Your Honor.

14 **REDIRECT EXAMINATION**

15 **BY MR. LANCER:**

16 Q Mr. Dunbar, just very, very briefly, prior to you
17 discussing crack cocaine at your trial, the door was
18 already opened, correct?

19 A Yes, sir, by my attorney.

20 Q By you further discussing crack cocaine, was it
21 your testimony that you were trying to mitigate your use of
22 crack cocaine?

23 A Yes, sir. Trying to explain the -- yes, sir,
24 trying to -- yes, sir.

25 Q Had that door not been opened, would you have been

Justin Mimms - Direct Examination by Mr. Lancer

1 discussing crack cocaine?

2 A No, sir.

3 MR. LANCER: No further questions.

4 MS. HARRIGAN: No recross examination.

5 THE COURT: You can step down.

6 MR. LANCER: I would call attorney Mimms, Your
7 Honor.

8 MS. HARRIGAN: Your Honor, could we please have a
9 brief break before...

10 THE COURT: Sure, we'll be back.

11 (WHEREUPON a recess was observed.)

12 THE COURT: Are we ready?

13 MS. HARRIGAN: Yes, Your Honor.

14 THE COURT: Everybody ready?

15 MR. LANCER: Yes, Your Honor.

16 THE COURT: All right.

17 MR. LANCER: I would call Justin Mimms to the
18 stand, Your Honor.

19 THE COURT: He's still under oath.

20 (Referring to an earlier hearing.)

21 DIRECT EXAMINATION

22 BY MR. LANCER:

23 Q Mr. Mimms, you represented Mr. Dunbar; is that
24 right?

25 A Yes.

Justin Mimms - Direct Examination by Mr. Lancer

1 Q And that was when you were with the Aiken County
2 Public Defender's Office?

3 A That's right.

4 Q How long were you with the Aiken County Public
5 Defender's Office?

6 A It was about two years.

7 Q And you are no longer with them?

8 A Correct.

9 Q Was that your first job out of law school?

10 A Yes.

11 Q Was this your first jury trial?

12 A Yes.

13 Q Was it your only jury trial?

14 A During my time at --

15 Q During your time with the Aiken County Public
16 Defender's Office?

17 A Yes.

18 Q Okay. What area of law do you practice now?

19 A Now, I do personal injury and some Social Security
20 Disability.

21 Q Okay. All right. I'm going to get right into Mr.
22 Dunbar's first allegation concerning the prior bad acts and
23 opening the door.

24 At the beginning of the trial, you successfully
25 kept out the -- any evidence of crack cocaine use; is that

Justin Mimms - Direct Examination by Mr. Lancer

1 right?

2 A Yes.

3 Q And that was during Jerry Thornton's testimony; is
4 that right?

5 A Correct.

6 Q Okay. Then on cross of Jerry Thornton, you opened
7 the door to the crack cocaine use; is that right?

8 A Right.

9 Q Basically you just asked a question regarding crack
10 cocaine and Judge Early said your objection is out the
11 door; is that right?

12 A Right. In looking at the transcript, it was just a
13 mistake. I think what I was doing was sort of recapping
14 what we had gone over so far, what we had discussed even
15 though I objected and the judge told the jury to disregard
16 it. It was still said and it was still in my head and then
17 I just made a mistake.

18 Q Basically just a mistake, right?

19 A Right.

20 Q But a mistake that it could change -- it changed
21 the trial, really, didn't it?

22 A Well, I -- Assistant Solicitor Young, you know, she
23 definitely seized the opportunity and I guess in all of my
24 ~~meetings with Mr. Dunbar leading up to the trial, you know,~~
25 his position was never that he had not used drugs and that,

Justin Mimms - Direct Examination by Mr. Lancer

1 you know, he had discussed that he had used drugs with
2 these people that had admitted being involved, you know,
3 Mr. Herndon, but that he didn't -- he didn't do this crime.
4 They were kind of -- I guess in all of your meetings they
5 were all sort of separate and distinct things. I mean, now
6 I sort of see it as the State using it as a motivation for
7 the crime and so it was kind of drawn into that.

8 Q So it's kind of like you said, the State seized on
9 this to really present Mr. Dunbar's motivation for
10 committing a crime, do you agree with that?

11 A Yeah, I think that's fair.

12 Q Okay. Did it allow for the State to really present
13 their theory of the case? For example, was their theory
14 that Mr. Dunbar, if you're going to break it down to it's
15 simplest form, that Mr. Dunbar and his codefendant had been
16 drinking and doing drugs all day essentially, had run out
17 of drugs and this was a crime they committed so they could
18 keep doing drugs?

19 A Right. I mean, I think if I had not opened the
20 door during my cross of Mr. Thornton, I think that was
21 still coming out with the codefendant, Mr. Herndon, at
22 least in regards to himself. You know, maybe he couldn't
23 have gotten in what Rusty was doing, but he definitely was
24 going to get into what he was doing and say that Rusty was
25 with him.

Justin Mimms - Direct Examination by Mr. Lancer

1 Q So you think that --

2 A I'm saying I think the theory of the case -- their
3 theory of the case, the motivation for the robbery, didn't
4 solely hinge on the questioning of Mr. Thornton.

5 Q Certainly gave a better case, though, didn't it?

6 A Somebody may say that.

7 Q Do you recall in the State's closing, Assistant
8 Solicitor Young saying crack was the reason behind the
9 whole day?

10 A I definitely read it in the transcript.

11 Q It seemed like crack became sort of the theme of
12 the State's case. Would you agree with that?

13 A I guess reading the transcript, I noticed the word
14 a lot more that I remembered it being said during the
15 trial.

16 Q It was said a lot, wasn't it?

17 A Yeah. But, you know, no crack was actually taken
18 from the victim's house. I think it was a small amount of
19 marijuana. No crack was found on Mr. Herndon or in --
20 there was no crack in evidence anywhere, you know.

21 Q Do you think that the evidence that the State
22 brought in regarding the crack was prejudicial to Mr.
23 Dunbar?

24 A ~~I think so. I mean, if I could do it over again, I~~
25 wouldn't have opened the door. I would have kept all of my

Justin Mimms - Direct Examination by Mr. Lancer

1 client's drug use out.

2 Q Mr. Mimms, I'm going to go ahead and move onto the
3 whole alibi instruction question that Mr. Dunbar has
4 raised. At trial, you presented the defense of alibi, is
5 that right?

6 A Yes.

7 Q And you had two alibi witnesses, Laura Smith and
8 Tommy Dunbar; is that correct?

9 A Right.

10 Q Okay. During the State's closing, did Assistant
11 Solicitor Young argue to the jury as to why Laura Smith's
12 and Tommy Dunbar's testimony was not credible?

13 A Yes.

14 Q One -- and Laura Smith was Rusty's girlfriend at
15 the time that this was happening; is that right?

16 A Right. And the mother of his child.

17 Q Okay. During the State's cross-examination of
18 Laura Smith, did you perceive that the trial judge became
19 frustrated with her?

20 A Yeah. In reading the transcript, I mean, I can --
21 I have a vague memory of Judge Early, you know, kind of
22 frustrated, I think is the word that you and Mr. Dunbar
23 used. I don't remember exactly what that was about, you
24 know. I'm not sure how much of an effect -- I don't know
25 how much the jury saw of that or how much of an effect it

Justin Mimms - Direct Examination by Mr. Lancer

1 had on anybody else.

2 Q During your redirect of Laura Smith, do you
3 remember the trial judge actually seemingly cutting you off
4 from asking her more questions.

5 A I saw I asked her one question. I mean, I don't
6 know if I went -- I don't know if I sat down or maybe
7 gestured that I was done or if he --

8 Q You certainly didn't say, Your Honor, I have no
9 further questions, correct?

10 A Right. It's not reflected in the record. I really
11 don't remember.

12 Q Is it basically the trial judge telling Laura Smith
13 to have a seat, don't go anywhere. Would you agree with
14 that?

15 A Right.

16 Q And that was done right in front of the jury; is
17 that right?

18 A Yeah.

19 Q When you -- when you look it together, the
20 solicitor arguing about the alibi in her closing and then
21 the jury not getting the alibi instruction, can you see how
22 it may have been possible that the jury believed they were
23 not permitted to consider the defense of alibi?

24 A ~~I mean, it's certainly possible. I don't know why~~
25 I didn't ask for an alibi instruction. Looking back, the

Justin Mimms - Direct Examination by Mr. Lancer

1 only thing I can think of is that initially, early on in
2 my -- early on in my representation, Mr. Dunbar, alibi was
3 a huge topic of discussion. We were going to do it, no
4 doubt about it. That was the crux of our defense. There
5 was some difficulty later on with sort of obtaining the
6 statements from these people. And then there was a little
7 bit of vacillation by Mr. Dunbar as to whether or not, you
8 know, you want me to really go after getting these -- do we
9 want present a defense.

10 So basically to get to my point, when we actually
11 got to trial, I thought our strategy was going to be that
12 we weren't going to be presenting a case, we were going to
13 attack what the State was presenting at last argument.
14 After they rested, Mr. Dunbar indicated that he wanted to
15 testify. Prior to that day and then definitely right
16 before he did testify, you know, it was my advice that he
17 shouldn't, was my legal advice, but once he wanted to,
18 then -- and Laura and Tommy had come to court that day,
19 which -- I'm not even sure if I subpoenaed them. I vaguely
20 remember asking Rusty if he wanted me to subpoena them,
21 make sure they're there, so I kind of did not expect them
22 to be there, honestly; and so, the only excuse that I can
23 make for myself in not making the alibi instruction, I kind
24 of didn't think we were going to be doing that until the
25 day of and it was just an oversight.

Justin Mimms - Direct Examination by Mr. Lancer

1 Q Okay. Mr. Mimms, I'm going to move onto Mr.
2 Dunbar's next claim. Again, staying with the alibi
3 witnesses, concerning the statements that they made at
4 trial. Did -- do you know -- did Laura Smith and Tommy
5 Dunbar make statements before the trial?

6 A Yeah. While -- when Rusty was testifying, I was
7 going through the file and I came across what I imagine is
8 a -- Rusty had a copy of what I have, which is an e-mail
9 from Levi Bryant's e-mail address to Martha Rudd and it's
10 dated January 22nd.

11 The investigator on this case who was helping me
12 was Bennie Williams. So Laura Smith signed this printed
13 out e-mail on February 3rd and Mr. Williams wrote that he
14 witnessed her signature. I don't have one from Tommy.

15 Q May I see that e-mail?

16 A Yeah.

17 MR. LANCER: Your Honor, I'm going to go ahead and
18 move that this statement be admitted into evidence .

19 MS. HARRIGAN: No objection.

20 THE COURT: All right. In without objection.

21 MR. LANCER: This would be petitioner's Exhibit No.
22 5, I believe.

23 (WHEREUPON Applicant's Exhibit 5 was marked and
24 entered into evidence.)

25 ///

Justin Mimms - Direct Examination by Mr. Lancer

1 BY MR. LANCER:

2 Q Mr. Mimms, does this statement give an alibi to Mr.
3 Dunbar?

4 A Yes.

5 Q Do you know whether or not Tommy Dunbar made an
6 oral statement regarding an alibi for Mr. Dunbar prior to
7 trial?

8 A If he did, it would have been to Mr. Williams. I
9 thought I saw in one of my notes where they had either met
10 in person or talked on the phone. I don't remember, you
11 know, having that conversation with him, but I think that I
12 was at least generally aware that he was a possible alibi
13 witness.

14 Q Okay. At trial, by looking at the trial
15 transcript, it appears that the statement given by Laura
16 Smith was not turned over to the State prior to trial. Can
17 you confirm or refute that? Do you know it was -- did you
18 turn this over to the State prior to trial?

19 A I don't know if I -- if I did or not. You know, I
20 know I certainly -- I certainly would have turned it over
21 at Mr. Dunbar's request. Again, I was kind of -- I don't
22 know if we were on the same page as to how much he wanted
23 me to actively pursue this defense. I guess I kind of saw
24 it as a club that we would keep in the bag but not use
25 unless we had to and that that's why I had put the State on

Justin Mimms - Direct Examination by Mr. Lancer

1 notice of the defense, but I was not intending on actually
2 calling those witnesses when we went to trial.

3 I did see a note where I had discussed alibis with
4 Ms. Young and so if it wasn't the actual verbatim
5 statement, you know, she knew -- she knew it was something
6 that my client was asserting at least to me, that it wasn't
7 something that they -- it wasn't carrying a lot of weight
8 with the State's case.

9 Q Okay. Would you agree that looking at the trial
10 transcript it certainly appeared that the State was unaware
11 of this alibi prior to trial?

12 A That statement or just the whole concept of --

13 Q Just that statement. Just the statement.

14 A Would it appear that way from the transcript?

15 Well, in her questioning, I mean she -- I'd have to look at
16 what the questions were. I know she mentioned why didn't
17 you come to the police. I don't know if she only meant,
18 you know -- I mean the statement is still months after the
19 fact.

20 I don't know if she meant why wasn't there more of
21 a contemporary need to let them know what was going on or
22 if she meant that she had never received an actual
23 statement from her.

24 Q ~~Would you agree that the State was able to attack~~
25 Laura Smith's credibility because the State -- it appears

Justin Mimms - Direct Examination by Mr. Lancer

1 that the statement was not turned over per the trial
2 transcript?

3 A Well, I mean, that's her job on cross is to attack
4 the credibility. Personally, I rather her be attacking it
5 in that way then I guess something more substantive where
6 you could show it to be untrue or contradicted by another
7 source or -- I mean it's -- just because you didn't come to
8 the police earlier, doesn't necessarily mean that what
9 you're saying isn't true. Versus being able to prove what
10 she's saying is the truth.

11 Q But it seems like it certainly gave the State some
12 ammunition to attack her credibility by looking at the
13 transcript. Do you agree that the State used the fact that
14 they did not have this statement against Ms. Smith?

15 A Yeah. They used it to their advantage.

16 Q All right. Mr. Mimms, I'm going to move onto Mr.
17 Dunbar's next allegation. Regarding the DNA evidence.
18 Several -- it seems like, from the trial transcript, that
19 during the State's closing, it was said that Rusty Dunbar's
20 DNA was found in the car. Do you agree with that?

21 A Yeah, verbatim. It says he was in the sample, I
22 think a few sentences later, she rephrases it as can't be
23 excluded. But I think that was her point was that
24 depending on how you couch it, you can say it can't be
25 excluded and you can say --

Justin Mimms - Direct Examination by Mr. Lancer

1 Q Do I agree with that?

2 A I don't agree with that scientifically. They're
3 different things.

4 Q So you don't agree with the statement that because
5 it cannot be excluded, that means you can also look at it
6 like it's included. You don't agree with that?

7 A Right.

8 Q Do you -- is that something that you think you
9 should have objected to?

10 A I think -- I can kind of see it both ways, like
11 I -- I thought that we -- I thought one of the better parts
12 of our defense was the cross-examination of their DNA
13 experts and sort of minimizing their DNA evidence and I
14 guess in one way I can see that I didn't want to draw more
15 attention to the DNA evidence. I thought we'd done a
16 pretty good job of kind of showing what, you know, showing
17 what not being excluded meant and showing that it wasn't a
18 match, you know, and that there were X amount of people in
19 Aiken County that also couldn't be excluded and we don't
20 know this individual's race or nationality, you know, and
21 all this stuff.

22 In one way I can see that I wouldn't want to draw
23 more attention to it or acted really defensive. You know,
24 ~~it was her closing and maybe I didn't want to seem overly~~
25 argumentative or bias them against my side. But on the

Justin Mimms - Direct Examination by Mr. Lancer

1 other way, I can see it where if somebody was taking that
2 literally like, you know, there were three samples of his
3 DNA on the car, then I certainly would have wanted to
4 object to it.

5 Q Just so I'm clear, do you agree that in a few
6 instances the State did say that Mr. Dunbar's DNA was found
7 in the car, in the closing?

8 A At least on one of the sentences that he discussed
9 before, it was phrased that way.

10 Q At least on one?

11 A Yeah.

12 Q Okay. Can you see how that may be prejudicial for
13 a jury to hear that DNA was included -- was found in the
14 car when, I guess in reality what the DNA expert said was,
15 it cannot be excluded?

16 A Yeah, I can see it having the potential of being
17 prejudicial.

18 Q Mr. Mimms, I'm going to move onto an allegation
19 brought by Mr. Dunbar regarding the State's vouching for
20 certain witnesses. Do you agree that in a closing an
21 attorney has to stay within the evidence presented and
22 reasonable inferences that can be drawn from the evidence?

23 A Yes.

24 Q Do you think there was any instances during the
25 State's closing where they had gone outside the bounds a

Justin Mimms - Direct Examination by Mr. Lancer

1 little bit and possibly could be perceived to be some
2 vouching going on or injected personal opinions into the
3 closing? For example on page 453, lines 4 through 9, it
4 reads: It makes sense that Christopher Herndon knew what
5 happened and he told Investigator Sanders what happened and
6 it made sense because what he told him was the truth and
7 the truth was Rusty Dunbar was there. Rusty Dunbar was
8 with him. Rusty Dunbar was just as involved as
9 Christopher?

10 A Yeah, I can see it from your perspective.

11 Q Or is it possible that there are some other
12 examples that Mr. Dunbar illustrated as well?

13 A It's certainly possible.

14 Q Mr. Mimms, I'm going to move onto the final
15 allegation brought by Mr. Dunbar that there was a Rule 5
16 and/or Brady violation regarding some statements not being
17 disclosed to you or Mr. Dunbar prior to trial. Just -- do
18 you --

19 THE COURT: Is your contention that statement
20 violates the Rule 5 or the Brady violation?

21 MR. LANCER: Judge, our contention is that it
22 violates both.

23 THE COURT: Okay. Well, Rule 5 doesn't require the
24 ~~State to turn over their evidence -- they're witness~~
25 statements until the witness takes the stand and testifies.

Justin Mimms - Direct Examination by Mr. Lancer

1 They don't have to give you statements beforehand if the
2 witness gets on the stand and testifies. And so does --
3 and then the other issue is the Brady violation. My
4 understanding of the record the officer testifies first of
5 the codefendant coming out from behind the store, behind
6 the bush and then the codefendant gets right behind him.
7 So in cross-examining the codefendant, he has the benefit
8 of what the codefendant had robbed the bank, and impeach
9 his credibility.

10 So how is it a violation of Rule 5 or Brady?
11 Any -- you know, they have to give you the Brady material,
12 but on it's face, it doesn't appear to be Brady they recall
13 because it's not -- you know, he didn't say I didn't get it
14 and they don't have to give you Rule 5, the statement of
15 their witnesses until that witness takes the stand.

16 MR. LANCER: Your Honor, Mr. Dunbar's contention is
17 that in his request for discovery, he --

18 THE COURT: He asked for all that stuff, that don't
19 mean you got to give it to him. Just because he wants them
20 doesn't mean they have to give it. They just have to
21 follow the rules. I understand in his statement he wanted
22 everything, but he's not entitled to everything under the
23 rules. He's only entitled to Brady and exculpatory
24 materials and he's only entitled to what the Rule 5 says
25 he's entitled to and under Rule 5, he's not entitled to the

Justin Mimms - Direct Examination by Mr. Lancer

1 State's witnesses until that witness takes the stand.

2 Isn't that right?

3 MR. LANCER: Your Honor, I think Mr. Dunbar's
4 contention is that statements that can be used to impeach
5 witnesses, if they are material or exculpatory --

6 THE COURT: I understand that. But he had that
7 information prior to the witness taking the stand. He had
8 the information from the -- because the police officer
9 testified about the statement and then the witness, the
10 codefendant got on stand, so he had the benefit of
11 cross-examining him on that statement before he got on the
12 stand.

13 He had -- that was the statement, he came out of
14 the woods and said I'm the one you're looking for. And the
15 police officer testified to that and the very next witness
16 was that witness. So you would have had an opportunity to
17 cross-examine him if you felt that somehow you could
18 impeach him on that statement. But, anyway, it doesn't
19 seem to me that it is a Brady or a Rule 5 issue. But you
20 can cover the record on it.

21 I might be wrong and somebody else from above me,
22 but that's my understanding of the rules and when I look at
23 the record...the witnesses you could have used to impeach
24 testified after the information came out.

25 Go ahead.

Justin Mimms - Direct Examination by Mr. Lancer

1 THE WITNESS: Your Honor, during my trial, I was
2 also separated from Mr. Mimms. I was -- someone else sat
3 here and somebody else sat here and I sat here myself and
4 if I may, these are the notes that I took from --

5 THE COURT REPORTER: I can't hear him.

6 THE WITNESS: If I may, these are the notes that I
7 took from any trial writing on napkins and everything
8 because I couldn't confer with my lawyer. Right here it
9 says, I don't have a report from Mooney. I'm the one
10 you're looking for. I was trying to pass these notes over
11 to my attorney but Bennie Williams was saying and decided
12 that it's not important. So it's one --

13 THE COURT: I understand that and I can't help
14 that, but the fact that you weren't entitled to that note.

15 THE WITNESS: And I understand where you're coming
16 from.

17 THE COURT: It's not discoverable under Rule 5 and
18 then it's a question of whether it's discoverable under
19 Brady. On it's face, it may not be, but you had it before
20 you cross-examined the guy.

21 THE WITNESS: Okay. And that's what I was trying
22 to show my attorney. During the trial, look, like he said
23 this is my first trial and I was trying to show him, did
24 you hear that, check this -- listen and then I tried to
25 relay this to him and was denied by somebody who -- an

Justin Mimms - Cross-Examination by Ms. Harrigan

1 investigator.

2 THE COURT: Well, I mean, the investigator was
3 working for you he don't work for -- I mean, I understand
4 that, but you have to be able to communicate with your
5 attorney.

6 THE WITNESS: Exactly, and I was denied that.

7 THE COURT: Well, and the record's covered on that.
8 And I'll think about all that.

9 MR. LANCER: No further questions, Judge.

10 THE COURT: Okay.

11 MS. HARRIGAN: Just briefly, Your Honor.

12 CROSS-EXAMINATION

13 BY MS. HARRIGAN:

14 Q Mr. Mimms, do you recall the number of times you
15 met with Mr. Dunbar?

16 A I've got my notes here and it looks like there's,
17 in person, no, a rough estimate is four or five or six
18 times, where we met, which is about what he said. The only
19 thing I would disagree on is that the meetings were a lot
20 longer than thirty minutes.

21 Q During these meetings, were you able to go over
22 discovery with him?

23 A Yes.

24 Q ~~Would you briefly review the evidence the State had~~
25 ~~against your client for the Court?~~

Justin Mimms - Cross-Examination by Ms. Harrigan

1 A Yes. I mean, the main evidence was the
2 codefendant's confession. He -- it was a home invasion.
3 The victim's car was stolen and crashed, you know, several
4 miles from the victim's home. The codefendant was found in
5 close proximity to the car, implicated himself and Mr.
6 Dunbar. There were DNA swabs from the victim's car where
7 Mr. Dunbar couldn't be excluded. Mr. Dunbar -- or
8 Mr. Thornton's testimony sort of put him with the
9 codefendant earlier in the day and the moments leading up
10 to the crime.

11 Q And Thornton's testimony was that he dropped off
12 the codefendant Herndon and your client at the scene,
13 correct?

14 A Right. And then I think he went onto say that he
15 went to the -- he was with Laura and that they went to the
16 gas station after dropping them off.

17 Q And then picked him back up afterwards?

18 A Right.

19 Q And you reviewed all this evidence with Mr. Dunbar
20 prior to trial?

21 A Yes.

22 Q Based on these discussions, were you able to review
23 his version of the facts?

24 A Yes.

25 Q And what sort of defense did he put up to you

Justin Mimms - Cross-Examination by Ms. Harrigan

1 during these discussions?

2 A Well, essentially, he split off. He was with this
3 group during the day, just as they stated, but split off
4 late in the evening and went home whereas Mr. Herndon, you
5 know, was off to do, whatever he said he did, but that he
6 wasn't with him.

7 Q So an alibi defense, he was with other people at
8 the time?

9 A Right.

10 Q You stated that you were kind of keeping the alibi
11 as a club in your pocket, you didn't want to use it in case
12 you needed to use it. What was the reasoning behind that?

13 A Well, it was my opinion that I thought I'd be more
14 successful to just sort of try to knock down what the State
15 was putting up and show, you know, the ways that he could
16 not have physically be put at the scene.

17 You know, the fact that the victim was able to
18 identify the codefendant, but not Mr. Dunbar; that the DNA
19 evidence wasn't completely conclusive, you know, there
20 weren't fingerprints or videos or -- we didn't have a
21 confession that we had given or -- just sort of working on
22 the stuff that the State didn't have as opposed to putting
23 up our own witnesses.

24 Q ~~Do you feel like you were able to -- successfully~~
25 able to highlight these inconsistencies and the weaknesses

Justin Mimms - Cross-Examination by Ms. Harrigan

1 of the State's case through your cross-examination of their
2 twenty-one witnesses?

3 A I -- you know, I -- I know I tried my best.

4 Q At the close of the State's case, is that when you
5 made the decision to pursue an alibi defense?

6 A Well, it was more Mr. Dunbar's request.

7 Q Can you explain what you mean by that to the Court?

8 A The way I remembered it, was, you know, I think
9 that Mr. Dunbar testified on the -- the trial went into
10 three days and that I did not think that he was going to be
11 testifying until the State had rested and maybe he didn't
12 know he was going to either. You know maybe he thought
13 that things weren't looking good and it was worth a shot.
14 I don't know if that answers your question.

15 Q Okay. And I believe you testified on direct that
16 it was against your advice for him to the testify?

17 A Right.

18 Q Why did you not want him to testify?

19 A Well, I mean, one reason is even though -- I
20 thought that the -- I didn't want to give -- I didn't want
21 to give Beth Ann anything to work with for one. She's very
22 good at her job and would have -- any little slip up, she
23 would have jumped on it. I didn't -- the more people we've
24 got up there that are trying to tell the same story, the
25 more likely it is to become inconsistent.

Justin Mimms - Cross-Examination by Ms. Harrigan

1 I just didn't think it was -- I didn't think that
2 we could get a lot to gain from it, you know, as opposed to
3 a different alibi where it could be documented with credit
4 card receipts, video, something that was indisputable
5 versus loved ones saying, yeah, he was at my house. And
6 there was certainly a lot to lose from it.

7 Q So it's a strategic decision to recommend that he
8 not testify and that you don't put up alibi witnesses,
9 correct?

10 A Yes.

11 Q And against your advice, he asked you to please
12 pursue the alibi defenses?

13 A Yes.

14 Q Do you recall whether any chambers meetings you
15 requested alibi instruction?

16 A I don't recall.

17 Q Do you recall if you ever did -- you clearly don't
18 on the record, correct?

19 A I did not see it on the record, no.

20 Q Okay. And you testified before that this was your
21 first trial, correct?

22 A It was.

23 Q But did you have another attorney sitting with you?

24 A I did.

25 Q Who is this other attorney?

Justin Mimms - Cross-Examination by Ms. Harrigan

1 A It's Mr. Grant Gibbons who was our chief public
2 defender at the time.

3 Q And he sat with you throughout the trial, correct?

4 A He did, yes.

5 Q Did you feel prepared to try this case?

6 A With his help, yes. I prepared extensively.

7 Q In regards to his first allegation that you opened
8 the door to prior bad acts regarding crack cocaine use, I
9 believe you testified before that that was a mistake. That
10 you didn't mean to do so and the State moved in on the
11 crack?

12 A Right.

13 Q And then Mr. Dunbar takes the stand later in your
14 defense?

15 A Right.

16 Q Do you recall his testimony?

17 A I do.

18 Q Were you aware that he was going to so freely
19 discuss his extensive use of crack cocaine in front of the
20 jury?

21 A No.

22 Q Did you advise him to do so?

23 A No.

24 Q Okay. In regards to the allegation that the State
25 didn't turn over the Brady and Rule 5 material in regards

Justin Mimms - Cross-Examination by Ms. Harrigan

1 to this statement from Christopher Herndon coming out of
2 the woods to Detective -- Officer Mooney, do you find those
3 statements to be exculpatory?

4 A I guess you're referring to the part where he
5 initially tried to --

6 Q Deny it and then said, I'm the one you're looking
7 for. Is that exculpatory toward your client? In your
8 professional opinion?

9 A I'm not sure. I mean, I guess you could argue that
10 he's changing his story and so, you know, can we trust what
11 he's saying about Mr. Dunbar now. Truthfully, I didn't
12 think it was too much help. The -- the stuff that we did
13 have from the State which I believe was an audio CD of
14 Mr. Herndon's interview, I'm not sure if it was with
15 Detective Sanders or Mooney.

16 I want to say he made some kind of reference to
17 initially lying about what he was doing and then realized
18 you got me and then told what had happened.

19 Q So you weren't surprised by that testimony of
20 Officer Mooney during trial?

21 A Not really.

22 Q And Officer Mooney did testify before Chris
23 Herndon, correct?

24 A Yes.

25 Q And you had an opportunity to cross-examine Chris

Justin Mimms - Cross-Examination by Ms. Harrigan

1 Herndon, correct?

2 A Yes, I believe Mr. Gibbons actually cross-examined
3 him.

4 Q In regards to the alibi statements from the two
5 alibi witnesses that you called, his brother Tommy and his
6 girlfriend Laura, you testified you recalled seeing that
7 statement from Laura in your file, correct? And it's in
8 your notes by your investigator?

9 A Yes, ma'am.

10 Q Why wouldn't you turn that over to the State?

11 A Again, I'm not sure. I don't know if -- I don't
12 know.

13 Q I believe you testified prior that it might have
14 been a strategic decision not to have something in writing
15 that they could impeach her with, correct?

16 A Right.

17 MS. HARRIGAN: Court's indulgence..

18 (WHEREUPON there was a pause in the proceedings.)

19 BY MS. HARRIGAN:

20 Q In regards to the first ground, again, I'm sorry
21 I'm jumping around a little bit, Your Honor. I'm trying to
22 read my notes here.

23 I believe you testified why you did open the door,
24 you didn't think it was prejudicial because the codefendant
25 Herndon was still able to testify about his extensive crack

Justin Mimms - Cross-Examination by Ms. Harrigan

1 use during the day, correct?

2 A Right.

3 Q And that Mr. Dunbar was with him throughout the
4 entire day?

5 A Right.

6 Q Okay.

7 THE COURT: Herndon's already testified though.

8 MS. HARRIGAN: Pardon?

9 THE COURT: Herndon had already testified by then.

10 MS. HARRIGAN: When the crack comments came out?
11 No, the door was opened during Jerry Thornton's testimony
12 who was the second witness and the codefendant Chris
13 Herndon was the 11th witness called by the State.

14 THE COURT: Okay.

15 BY MS. HARRIGAN:

16 Q I believe you testified before on direct that you
17 believed your cross-examination of the State's DNA expert
18 was one of the best part of your case. Can you discuss
19 that a little bit more and elaborate for the Court?

20 A Well, it was something that I had put a lot of
21 effort in. I had consulted with a DNA expert and, you
22 know, met with him for a couple of hours at a McDonalds in
23 Blythewood and went over what all this DNA stuff meant and
24 ~~got his -- he had extensive knowledge in the field,~~
25 obviously, and helped me with cross-examination questions

Justin Mimms - Redirect Examination by Mr. Lancer

1 that I certainly would not have been able to do without
2 meeting with him. I thought that we did pretty well sort
3 of minimalizing that part.

4 Q And I believe you testified prior you didn't want
5 to highlight or draw the jury's attention to the fact that
6 the DNA evidence couldn't exclude, correct?

7 A Right.

8 MS. HARRIGAN: No further questions, Your Honor.

9 THE COURT: Okay.

10 MR. LANCER: Just one question, Judge.

11 **REDIRECT EXAMINATION**

12 BY MR. LANCER:

13 Q Mr. Mimms, regarding the opening the door of the
14 use of crack cocaine, you had discussed that Mr. Dunbar's
15 codefendant still could have gotten up and talked about
16 crack cocaine, his own crack cocaine use, correct?

17 A Yes.

18 Q But that wouldn't have had any impact on Mr.
19 Dunbar. I mean Mr. Herndon couldn't have gotten up and
20 said Mr. Dunbar and I were smoking crack all day, right?

21 A Right.

22 Q Okay.

23 MR. LANCER: No further questions, Judge.

24 THE COURT: Okay. You can step down.

25 Anything else?

Elizabeth Young - Direct Examination by Ms. Harrigan

1 MR. LANCER: Nothing further, Your Honor.

2 MS. HARRIGAN: Yes, the State would call
3 prosecuting attorney, Assistant Solicitor Beth Ann Young
4 briefly.

5 BETH ANN YOUNG,
6 having been duly sworn, testified as follows:

7 THE CLERK: Have a seat in the witness box and
8 state your name for the Court.

9 MS. HARRIGAN: My name is Elizabeth Young.

10 DIRECT EXAMINATION

11 BY MR. HARRISON:

12 Q Good afternoon, Ms. Young. Where are you currently
13 employed?

14 A At the 2nd Solicitor's Office.

15 Q Were you employed there during the time of Mr.
16 Dunbar's trial?

17 A I was.

18 Q And you were the prosecuting solicitor?

19 A I was.

20 Q Were you aware prior to trial that Mr. Dunbar
21 intended to put up an alibi defense?

22 A Yes.

23 Q Did you receive notice of this from his attorney,

24 Mr. Mimms?

25 A I did.

Elizabeth Young - Direct Examination by Ms. Harrigan

1 MS. HARRIGAN: May I approach, Your Honor?

2 THE COURT: Yes.

3 BY MS. HARRIGAN:

4 Q I'm going to hand you Respondents Exhibit 1. Would
5 you identify that document for me?

6 A Yes, this is the notice I received from Mr. Mimms
7 regarding the witnesses that he intended to put up as an
8 alibi for Mr. Dunbar.

9 Q Other than this notice, did you ever speak with him
10 on the phone or any other written correspondence about his
11 intention to put up an alibi defense?

12 A I'm not -- I don't recall the specific
13 conversation, but I was very -- I was very aware that that
14 was a possible defense from just the state of the evidence
15 as well as some jail phone calls of Mr. Dunbar's.

16 Q Can you elaborate when you say jail phone calls?

17 A Well, the inmates at the Aiken County Detention
18 Center can make phone calls that they're advised may be
19 recorded and monitored. We have access to those. And I
20 did hear Mr. Dunbar speaking to Ms. Smith about whether or
21 not she was going -- it was always my impression that she
22 was going to testify as an alibi witness for him.

23 Q And in regards to your cross-examination of her,
24 which has been characterized as you being surprised and
25 painted her as not credible, you knew she intended to come

Elizabeth Young - Direct Examination by Ms. Harrigan

1 forward?

2 A I did.

3 Q Is it your standard trial procedure to vigorously
4 cross-examine all defense witnesses?

5 A Some more vigorously than others, but certainly in
6 this case, I intended to try to attack her credibility and
7 bias based on her relationship with the defendant.

8 Q Do you think you would have possibly been able to
9 more vigorously impeach her had you had a written statement
10 from her?

11 A It would just depend on what her testimony was.

12 Q In regards to Mr. Dunbar's allegation that there
13 was a Brady or Rule 5 violation, did you receive a Rule 5
14 or Brady motion from Mr. Mimms?

15 A I did.

16 Q Did you comply with his motion?

17 A I did.

18 Q Did you turn over all exculpatory information to
19 Mr. Mimms?

20 A I did.

21 Q Did this include statements made to law enforcement
22 by other witnesses?

23 A Yes.

24 Q Okay. Including codefendant, Chris Herndon?

25 A That's correct.

1 MS. HARRIGAN: No further question, Your Honor.

2 THE COURT: Okay.

3 MR. LANCER: No questions, Your Honor.

4 THE COURT: Okay. You waited all day for that.

5 Okay. Anything else at this time?

6 MR. LANCER: No, Your Honor.

7 MS. HARRIGAN: No, Your Honor.

8 THE COURT: All right. And I've received some
9 cases up here, what about Roseborough, I mean it seems you
10 got a case where the defense counsel failed to request the
11 charge of alibi and they reversed it on PCR. Do you know
12 of any other cases that contradict Roseborough?

13 MS. HARRIGAN: I don't, Your Honor.

14 THE COURT: Okay. I'll let y'all know.

15 MS. HARRIGAN: Thank you, Your Honor.

16 MR. LANCER: Thank you, Your Honor.

17 * * * * * END OF TRANSCRIPT * * * * *

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1 State of South Carolina)
2 County of Aiken) Certificate of Reporter

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5
6 I, THE UNDERSIGNED, Brenda J. Sigwald,
7 Official Court Reporter for the Fifth Judicial Circuit of
8 the State of South Carolina, do hereby certify that I
9 reported the proceedings in the captioned case in the Court
10 of Common Pleas in and for the State of South Carolina on
11 the 10th day of July, 2013.

12 I FURTHER CERTIFY that the foregoing 96 pages,
13 constitute a true, accurate and complete transcript of said
14 hearing.

15 I FURTHER CERTIFY that I am neither kin, counsel,
16 nor of interest to any party hereto.

17 IN WITNESS WHEREOF, I have hereunto set my hand and
18 seal at Aiken County, this 14th day of July 2014.

19

20

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25

Brenda J. Sigwald
Brenda J. Sigwald,
Court Reporter and Notary Public
For the State of South Carolina
My commission expires
January 4, 2020.

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laura wanted to see if you would print *Deputy Clerk*From: "Levi Bryant" <ronin92774@yahoo.com> *D.C.P. & G.S.*To: martha_rudd2000@yahoo.com *Anita Knepple 420**Deputy Clerk*

Laura

648-3815 14

270-2430 Thursday

**PETITIONER'S
EXHIBIT**

#1 7.10.13

On the night in question I Laura Smith, Rusty Dunbar, Christopher Herndon and Jerry Thorton were all at my grandmother's house (Mable Metz) visiting my dad (Rickie Smith) and my uncle JR. My dad, uncle JR, Rusty, Chris and Jerry were all outside sitting around drinking beer and talking in my grandmother's yard. I was inside most of the time talking with my mother and sister my grandmother was in the bed she was not feeling good. I started getting tired around 10:30 so I went outside and told Rusty I was ready to go. Rusty told Chris and Jerry I was ready to leave. So we all said our goodbyes and left. We started down the road Chris and Jerry wanted to go somewhere and get some more dope. Rusty told them to stop by Bull's Bar and Grill and he would see if he could get some more dope. We got to Bull's we sit in the parking lot for a few minutes Rusty was looking out the window of the truck to see if he saw anybody he knew in the parking lot. Rusty told Chris and Jerry he did not see anybody he knew. We were about to leave when Chris saw somebody he knew Chris waved the guy over to the truck the guy came over and he and Chris began to talk. Chris asked the guy if he had any dope the guy said no but he could get some. Chris told the guy he did not have any money. I had money but I told them I was not giving them money for that shit I was pissed off and ready to get away from Chris and Jerry. The guy told Chris and Jerry if they take him to get some dope he would smoke it with them. Rusty knew I was tired and in a bad mood. Rusty told Chris to drop us off at his brother's house on there way to get the dope. So they dropped me and Rusty off at his brother Tommy Dunbar's house on Old Friar Rd. It was almost 12:00 am when we got to Tommy's. Tommy, Rusty, me and Tommy's girl friend Dana Langley all sit up and talked for a while then I fell asleep on the

couch. The next day Rusty had an appointment to go see his probation officer so Tommy took us up there. After we left the probation office we got back home and saw Rusty's picture on the news we did not know what to do or think.

Witnessed By
BENNIE WILLIAMS
my Commission
Expires OCT 6 2014

Lena Smith
2/3/14

SOUTH CAROLINA LAW ENFORCEMENT DIVISION

FORENSIC SERVICES LABORATORY REPORT

MARK SANFORD
Governor

7.10.13

Reginald L. Lloyd
SLED
CC.P.S. & O.S.
Anita Knoepfle
Deputy Clerk



RECEIVED
REGINALD L. LLOYD
Director

SEP - 3 2009

SOLICITOR

Ev. Custodian Gerald Turner
Aiken County Sheriff's Office
420 Hampton Avenue NE
Aiken, SC 29801-4391

DNA ANALYSIS
August 27, 2009
SLED LAB: L09-05905
Your Case No: 08056160
Incident Date: 10/7/2008
[S] Rusty Dunbar
[S] Christopher Herndon, Sr.
[V] Daniel Hynes
[V] Brian Morton

**PETITIONER'S
EXHIBIT**

#2 7.10.13

RULE 6
TO: Mims
DATE 7/3/09

This is an official report of the South Carolina Law Enforcement Division Forensic Services Laboratory and is to be used in connection with an official criminal investigation. These examinations were conducted under your assurance that no previous examinations of person(s) or evidence submitted in this case have been or will be conducted by any other laboratory or agency.

Reginald L. Lloyd, Director
South Carolina Law Enforcement Division

SUPPLEMENTAL REPORT

SEROLOGY ANALYSIS

Items Submitted:

- 1 Swab of steering wheel
- 2 Swab of steering wheel
- 3 Swab from interior door handle/driver's door
- 4 Swab from interior door handle/front passenger door
- 5 Swab from gold electrical cord
- 6 Swab from white electrical cord

Results of Examinations:

- 1 No blood indicated. See DNA analysis.
- 2 See DNA analysis.
- 3 See DNA analysis.
- 4 See DNA analysis.
- 5 Blood indicated. See DNA analysis.
- 6 No blood indicated. See DNA analysis.



SLED LAB No. L09-05905
August 27, 2009

Page 2 of 6

Items Submitted:**Results of Examinations:**

7	Cutting from Chris Herndon's white t-shirt (1.1)	7	Blood indicated. See DNA analysis.
8	Cutting from Chris Herndon's white t-shirt (1.2)	8	Blood indicated. See DNA analysis.
9	Cutting from Chris Herndon's white t-shirt (1.3)	9	Blood indicated. See DNA analysis.
10	Cutting from Chris Herndon's denim shorts - left front leg (2.1)	10	Blood indicated. See DNA analysis.
11	Cutting from Chris Herndon's denim shorts - left front leg (2.2)	11	Blood indicated. See DNA analysis.
12	Cutting from Chris Herndon's denim shorts - left front leg (2.3)	12	Blood indicated. See DNA analysis.
13	Buccal swabs from Daniel J. Hynes	13	See DNA analysis.
14	Buccal swabs from Rusty Merritt Dunbar	14	See DNA analysis.
15	Buccal swabs from Christopher Herndon	15	See DNA analysis.

DNA ANALYSIS**ITEMS ANALYZED:**

13 Buccal swabs from Daniel J. Hynes
14 Buccal swabs from Rusty Merritt Dunbar
15 Buccal swabs from Christopher Herndon

1 Swab of steering wheel
2 Swab of steering wheel
3 Swab from interior door handle/driver's door
4 Swab from interior door handle/front passenger door
5 Swab from gold electrical cord
6 Swab from white electrical cord
7 Cutting from Chris Herndon's white t-shirt (1.1)



SLED LAB No. L09-05905
August 27, 2009

Page 3 of 6

ITEMS ANALYZED (cont.):

- 8 Cutting from Chris Herndon's white t-shirt (1.2)
- 9 Cutting from Chris Herndon's white t-shirt (1.3)
- 10 Cutting from Chris Herndon's denim shorts – left front leg (2.1)
- 11 Cutting from Chris Herndon's denim shorts – left front leg (2.2)
- 12 Cutting from Chris Herndon's denim shorts – left front leg (2.3)

EXAMINATIONS

DNA analysis was performed on the items above. The results of Short Tandem Repeat (STR) PCR DNA analysis are shown in Table 1.

RESULTS

The DNA obtained from item 1 is a mixture of at least two individuals. The DNA profile developed from the major contributor to this item matches the DNA profile of Daniel Hynes. The probability of randomly selecting an unrelated individual having a DNA profile matching the major contributor to this item is approximately 1 in 12 quadrillion. Rusty Dunbar cannot be excluded as a possible minor contributor to this mixture. **Christopher Herndon is excluded as a possible contributor to this mixture.**

The DNA obtained from item 2 is a mixture of at least two individuals. Daniel Hynes and Rusty Dunbar cannot be excluded as possible contributors to this mixture. The probability of randomly selecting an unrelated individual that could have contributed to this mixture is approximately 1 in 12,000. **Christopher Herndon is excluded as a possible contributor to this mixture.**

The DNA obtained from item 3 is a mixture of at least two individuals. Daniel Hynes and Rusty Dunbar cannot be excluded as possible contributors to this mixture. **Christopher Herndon is excluded as a possible contributor to this mixture.**

The partial DNA profiles developed from items 5 and 6 also match the DNA profile of Daniel Hynes.

The DNA profile developed from items 7, 8, 9, 10, 11, and 12 matches the DNA profile of Christopher Herndon. The probability of randomly selecting an unrelated individual having a DNA profile matching these items is approximately 1 in 7.8 quadrillion.

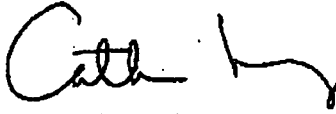
The partial DNA profile developed from item 4 also matches the DNA profile of Christopher Herndon.



SLED LAB No. L09-05905
August 27, 2009

Page 4 of 6

Note: Any remaining evidence and/or packaging will be returned to the requesting agency.



Catherine Leisy
Forensic Scientist

cc: Aiken County Solicitor's Office



Table 1 - Identifier

Item	D8S179	D1S111	D7S816	CSF1P0	D3S136	TH01	D1S317	D1S539	D2S138	D1S9433	VWA	TFOX	D1S591	D5S818	FGA	Amulo- genia
13 Hynes	13,14	30,31	10,15	10,12	14,16	6,9,3	9,12	11,13	19,24	13,14	16,17	8	10,16	12	23	XY
14 Dunbar	12,13	30,2,3,22	11	10,12	15	6	13	12,13	17,24	14,15,2	15,17	8,11	12,17	11,12	21,25	XY
15 Herridon	14,15	28,30	8	10	16,17	8,9,3	11,12	12,13	17,18	13,14	16,17	9,10	12	12,13	21,23	XY
1 Steering wheel	(12),13 14	30,31	10,(11) 15	10,12	14,15 16	6,9,3	9,12 (13)	11,(12) 13	19,24	13,14 (15,2)	16,17	8	10,16 (17)	11,12	23	XY
2 Steering wheel	12,13 14	30,30,2 31,32,2	10,11 (15)	10,12	14,15 16	6,9,3	9,12 13	11,12 13	17,19 (23),24	13,14 (15),15,2	16,17	8,11	10,12 (16),17	11,12	21,23 25	XY
3 Driver's door	12,13 14	30,2 (32,2)	(11)	10,(12)	(14),15 (16)	6	(12),13	12,(13)	(17),(24)	13,14 15,2	(15),17	8,11	-	11,12	(25)	XY
4 Passenger door	(14),(15)	-	-	-	(16)	(9,3)	-	-	-	(13),14	-	(9)	-	-	-	OOOY
5 Gold cord	13,14	30,(31)	10,(15)	(10),(12)	14,(16)	(6),9,3	(9),12	11,(13)	(19)	13,14	(16) (17)	8	(10)	12	(23)	XY
6 White cord	(13),14	-	-	(12)	(16)	9,3	-	-	-	(13),(14)	-	(8)	-	(12)	-	OOOY
7 T-shirt- Herridon	14,15	28,30	8	10	16,17	8,9,3	11,12	12,13	17,18	13,14	16,17	9,10	12	12,13	21,23	XY
8 T-shirt- Herridon	14,15	28,30	8	10	16,17	8,9,3	11,12	12,13	17,18	13,14	16,17	9,10	12	12,13	21,23	XY
9 T-shirt- Herridon	14,15	28,30	8	10	16,17	8,9,3	11,12	12,13	17,18	13,14	16,17	9,10	12	12,13	21,23	XY



Table 1 - Identifier (cont.)

Items	D8S1179	D1S11	D7S820	CSF1PO	D3S1338	TH01	D13S317	D16S539	D2S1338	D19S433	*VWA	TPOX	D18S51	D5S818	FGA	Amplified Genotype
10 Shorts - Herdon	14,15	28,30	8	10	16,17	8,9,3	11,12	12,13	17,18	13,14	16,17	9,10	12	12,13	21,23	XY
11 Shorts - Herdon	14,15	28,30	8	10	16,17	8,9,3	11,12	12,13	17,18	13,14	16,17	9,10	12	12,13	21,23	XY
12 Shorts - Herdon	14,15	28,30	8	10	16,17	8,9,3	11,12	12,13	17,18	13,14	16,17	9,10	12	12,13	21,23	XY

() = alleles between 75 and 149 rfu

- = no results

Bold = major contributor



FILED 7.10.13

Lij. Goodard
K.C.C.P. & G.S.THE STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

THE STATE OF SOUTH CAROLINA)

v.)

Rusty M Dunbar)

DEFENDANT.)

IN THE COUNTY OF AIKEN GENERAL SESSIONS
SECOND JUDICIAL CIRCUIT

Warrant/Indictment Nos.: K-207631

REQUEST AND MOTION FOR DISCOVERY

JUL 28 2008

SOLICITOR

TO: BARBARA R. MORGAN, SOLICITOR, SECOND JUDICIAL CIRCUIT:

NOW COMES the Defendant, by and through undersigned counsel of record, pursuant to Rule 5 of the South Carolina Rules of Criminal Procedure and *Brady v. Maryland*, who moves the prosecution to permit the Defendant to inspect and copy or photograph, within **thirty (30) days** of the service of this Motion and, including, but not limited to, the following, with the express provision that the duty of disclosure be a continuing one in the event that any such materials come into existence or become available after the initial disclosures:

The Defendant further moves that upon failure of the prosecution to so comply, that the Presiding Judge issue an Order prohibiting the prosecution from introducing at trial evidence not disclosed, and if the foregoing is denied, an Order permitting the discovery and inspection requested, or a continuance of the trial, or such Order as the court in its discretion deems just under the circumstances.

Defendant asserts that any item requested is material to the preparation of the defense in this case. As grounds therefore, the undersigned would show as follows:

1) Under the United States Supreme Court decision in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963), the Solicitor has an obligation to produce all *Brady* material for the Defendant well in advance of the scheduled trial date.

2) Defendant claims under *Brady*, and its progeny, as well as pursuant to the language and spirit of *Giglio v. United States*, 405 U.S. 105, 92 S.Ct. 763 (1972); *United States v. Tashman*, 478 F.2d 129 (5th Cir. 1973); *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173 (1959); *Alcorta v. Texas*, 355 U.S. 28, 78 S.Ct. 103 (1957) (1975); *Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct. 340, reh.den. *Ex parte Mooney*, 294 U.S. 732, 55 S.Ct. 571

PETITIONER'S
EXHIBIT

3 7.10.13

A TRUE AND CORRECT COPY

Lij. Goodard

By Pauline J. [Signature] Date 7/24/2008
PEF Deputy Clerk

(1935) (1935); and *Moore v. Illinois*, 408 U.S. 786, 92 S.Ct. 2562 (1972), reh.den., 409 U.S. 897, 93 S.Ct. 87 (1972)

(1962); that he/she is entitled to any and all records, memoranda and documents, as well as a statement of the Circuit

Solicitor and all appropriate state, federal and local law enforcement agencies as to:

- (a) All statements by the Defendant, whether oral or written; if written whether signed or unsigned.
- (b) All handwritten notes made by police or other investigating officers of their interview or conversation with the Defendant or any other witness.
- (c) Any oral, written or recorded statements made by any person to the Solicitor's Office, Grand Jury or any law enforcement agency in connection with this case.
- (d) A copy of all tape recordings, audio or video, made by a Defendant, witness or any other person in connection with this case. If these tape recordings have been transcribed, then a copy of the transcribed conversation is also requested.
- (e) Any and all investigation reports, information or material which tends to establish the Defendant's innocence, to mitigate punishment, or impeach, discredit, or contradict the testimony of any witness whom the State will or may call at trial. *Giles v. Maryland*, 386 U.S. 66, 87 S.Ct. 793 (1967); *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173 (1959); *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763 (1972).
- (f) The names and addresses of all witnesses interviewed by the Solicitor's Office or any other law enforcement agency who might establish the Defendant's innocence, mitigate punishment, or impeach, discredit, or contradict the testimony of any witness or the State whether or not the witness may testify at trial.
- (g) Any photographs taken of the Defendant or any portion of his body.
- (h) Any and all photographs taken at the scene of the alleged crime and/or the alleged victim or prosecuting witness and any other photographs taken in relation to the above-captioned case.
- (i) Any photographs that have been exhibited to any person for the purpose of establishing the identity of the perpetrator of the crime charged and the name and current address of the person or persons to whom the photographs were shown.
- (j) Any scientific or medical report which tends to establish the Defendant's innocence, to mitigate punishment, or impeach, discredit, or contradict the testimony of any witness whom the State will or may call at trial. *Ashley v. Texas*, 319 F.2d 80 (5th Cir.), cert.den., 375 U.S. 931, 84 S.Ct. 331 (1963). This request shall include any reports by or to the State Law Enforcement Division (SLED) criminal laboratory, Federal Bureau of Investigation laboratories, County Sheriff's Department laboratory or any other law enforcement laboratory concerning any examination made by said laboratories and/or personnel thereof, of any physical, photographic, oral or written evidence concerning the investigation of this case.

- (k) All reports from the State Law Enforcement Division (SLED), Sheriff's Department, or any other law enforcement agency, including the Federal Bureau of Investigation, concerning fingerprints checked in connection with this case.
- (l) All records of arrests or criminal convictions of the Defendant or any co-defendant and all State's witnesses in relation to this case. *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 7563 (1972).
- (m) All "inconsistent" statements made by a particular witness or between witnesses, whether written or oral, that are known to the Solicitor's Office or any other law enforcement agency.
- (n) Any statement or admission by a witness for or on behalf of the State with respect to the witness' memory or loss thereof.
- (o) Whether or not any witness called before the Grand Jury or who has or will give testimony to any investigative agency or at trial has ever been psychiatrically hospitalized or undergone psychiatric treatment, examination, mental status examination or care, and if so, a list of names and addresses of the psychiatrists, hospitals and copies of any and all relevant records and reports regarding such examination, treatment, or care.
- (p) All notes or memoranda prepared by psychiatrists or other medical or mental health examiners regarding their conversations with the Defendant.
- (q) Any and all plea bargains, promises, rewards, reductions, dismissals, agreements not to bring criminal charges or any other inducements made to any witness herein, whether or not they have testified before any State or Federal Grand Jury, or other investigative agency, and regardless of whether or not they will testify at trial.
- (r) Any offers or grants of immunity to any witness regarding loss of property, fine, forfeiture, prosecution or punishment in this case or any other case, related or otherwise.
- (s) In addition, Defendant requests copies of any and all memoranda, reports and correspondence to and from the various law enforcement agencies of the United States and all state, county, municipal and local law enforcement agencies regarding the investigation herein.
- (t) Any and all physical or tangible items in the possession, custody or control of or which could reasonably be brought within the possession, custody or control of the Solicitor's Office, State, Federal or local law enforcement agency.
- 3) Defendant contends that this Court should specifically direct the State in the spirit of fairness and

equity, to seek and produce for the Defendant the documents, letters, records and other items sought, irrespective of the State's determination of whether or a witness' statement or a particular letter or exhibit can "help" the Defendant. The Defendant and his/her attorney, not the Solicitor, should be the judge of his/her defense and the documents relevant thereto and necessary in support of same.

4) To the extent the Defendant is specifically required to demonstrate the materiality of the requested information, the Defendant submits that this requirement is satisfied in this Motion. *Unites States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392 (1976).

5) Recognizing the *Brady v. Maryland*, supra. and other authorities cited require that information favorable to the Defendant be made available, and further recognizing that a genuine disagreement may arise as to whether or not a particular item of evidence is favorable, it will be requested that the Court provide for an in camera inspection of the items sought to be discovered should you feel such items are not favorable to the Defendant. By permitting the Court to examine the items requested, the legitimate interest of the State will be protected in that no disclosure in excess of *Brady*, et al. will occur. Further, it will be requested of the Court that said Order will be a continuing one, and if prior to or during trial, the prosecution discovers additional evidence or material requested, the prosecution is hereby requested promptly to notify counsel for the Defendant of the existence of the additional evidence or material.

WHEREFORE, the undersigned prays for such an Order requiring production of the above listed materials and for that which is just and proper.

Respectfully submitted,

AIKEN COUNTY PUBLIC DEFENDER


By: _____

M. Justin Mims
Attorney for Defendant
Post Office Drawer 2247
Aiken, SC 29802
(803) 642-1732

Date: July 23, 2008

THE STATE OF SOUTH CAROLINA)
 COUNTY OF AIKEN)

IN THE COURT OF GENERAL SESSIONS
 SECOND JUDICIAL CIRCUIT
 Warrant/Indictment Nos.: K-207631

THE STATE)

v.)

DEMAND FOR PRELIMINARY HEARING

Rusty M Dunbar)

DEFENDANT.)

TO THE CENTRALIZED PRELIMINARY HEARING COURT:

PLEASE TAKE NOTICE that Rusty Dunbar, Defendant, does hereby demand a Preliminary Hearing upon the charge(s) against him/her contained in warrant number(s) K-207631.

Aiken County Public Defender

M. Justin Mims

M. Justin Mims
 Attorney for Defendant

Aiken, South Carolina
 July 23, 2008

A TRUE AND CORRECT COPY

Chris Goodard

By *Pauline Finney* Date 7/24/2008
 Deputy Clerk

CE7

THE STATE OF SOUTH CAROLINA)
 COUNTY OF AIKEN)

IN THE COURT OF GENERAL SESSIONS
 SECOND JUDICIAL CIRCUIT
 Warrant/Indictment Nos.: K-207631

THE STATE)

v.)

Rusty M Dunbar)

DEFENDANT.)

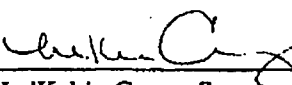
AFFIDAVIT OF SERVICE
(Hand Delivery)

NOW COMES the below signed secretary for the Aiken County Public Defender Office who states, after first being duly sworn, that they have served the below listed documents upon all parties by hand delivering a copy to the addresses listed below:

Pleadings Served: **Request and Motion for Discovery**
Demand for Preliminary Hearing

Parties Served: **The Honorable Barbara R. Morgan**
Solicitor, 2nd Judicial Circuit
109 Park Avenue SE
Aiken, South Carolina 29802

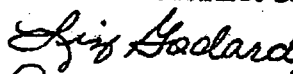
AIKEN COUNTY PUBLIC DEFENDER

By: 

Le'Kehia Curry, Secretary
 Post Office Drawer 2247
 Aiken, SC 29802
 (803) 642-1732

Date: July 23, 2008

A TRUE AND CORRECT COPY



By  Date 7/24/2008
 Deputy Clerk

PEF

FILED 7-10 2003
J. J. Gaddard
S.C.C.P. & G.S.
Anita Knoepfle
Deputy Clerk

PETITIONER'S
EXHIBIT

4 7-10-03

THE STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

THE STATE OF SOUTH CAROLINA)

v.)

Rusty M. Dunbar)

DEFENDANT.)

IN THE COURT OF GENERAL SESSIONS

SECOND JUDICIAL CIRCUIT

Warrant/Indictment Nos.: K-207631; K-207938;

K-207939; K-207940; K-207941; K-207942

REQUEST AND MOTION FOR DISCOVERY

TO: BARBARA R. MORGAN, SOLICITOR, SECOND JUDICIAL CIRCUIT:

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2) Defendant claims under *Brady*, and its progeny, as well as pursuant to the language and spirit of *Giglio v. United States*, 405 U.S. 413, 92 S.Ct. 763 (91-72); *Jarvis v. United States*, 478 F.2d 129 (5th Cir. 1973); *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173 (1959); *Alonzo v. Texas*, 355 U.S. 20, 78 S.Ct. 191 (1957); *Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct. 390 (1935); *Ex parte Mooney*, 294 U.S. 210, 55 S.Ct. 571

20110118

(1935) (1935), and *Moore v. Illinois*, 408 U.S. 786, 92 S.Ct. 2562 (1972), reh' den, 400 U.S. 897, 93 S.Ct. 87 (1972).

(1962); that he/she is entitled to any and all records, memoranda and documents, as well as a statement of the Circuit Solicitor and all appropriate state, federal and local law enforcement agencies as to:

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- (b) All handwritten notes made by police or other investigating officers of their interview or conversation with the Defendant or any other witness.
- (c) Any oral, written or recorded statements made by any person to the Solicitor's Office, Grand Jury or any law enforcement agency in connection with this case.
- (d) A copy of all tape recordings, audio or video, made by a Defendant, witness or any other person in connection with this case. If these tape recordings have been transcribed, then a copy of the transcribed conversation is also requested.
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- (m) All "inconsistent" statements made by a particular witness or between witnesses, whether written or oral, that are known to the Solicitor's Office or any other law enforcement agency.
- (n) Any statement or admission by a witness for or on behalf of the State with respect to the witness' memory or loss thereof.
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- (s) In addition, Defendant requests copies of any and all memoranda, reports and correspondence to and from the various law enforcement agencies of the United States and all state, county, municipal and local law enforcement agencies regarding the investigation herein.
- (t) Any and all physical or tangible items in the possession, custody or control of or which could reasonably be brought within the possession, custody or control of the Solicitor's Office, State, Federal or local law enforcement agency.
- (3) Defendant contends that this Court should specifically direct the State in the spirit of fairness and equity, to seek and produce for the Defendant the documents, letters, records and other items sought, irrespective of the State's determination of whether or a witness' statement or a particular letter or exhibit can "help" the Defendant. The Defendant and his/her attorney, not the Solicitor, should be the judge of his/her defense and the documents relevant thereto and necessary in support of same.

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WHEREFORE, the undersigned prays for such an Order requiring production of the above listed materials and for that which is just and proper.

Respectfully submitted,

AIKEN COUNTY PUBLIC DEFENDER

By: _____

M. Justin Mims
Attorney for Defendant
Post Office Drawer 2247
Aiken, SC 29802
(803) 642-1732

Date: October 21, 2008

YAHOO! MAIL
Classic

laura wanted to see if you would print 2 copies of this - Yahoo! Mail

From: "Levi Bryant" <ronin92774@yahoo.com>

To: martha_rudd2000@yahoo.com

**PETITIONER'S
EXHIBIT**

Laura

648-3815

14 7.10.13

270-2430

Thurs, Jul 12, 2009 4:35 PM

J. J. Knesele
U.S. District Court
District of ColumbiaAmita Knesele
Deputy Clerk

5 7.10.13

On the night in question I Laura Smith, Rusty Dunbar, Christopher Herndon and Jerry Thorton were all at my grandmother's house (Mable Metz) visiting my dad (R'okie Smith) and my uncle JR. My dad, uncle JR, Rusty, Chris and Jerry were all outside sitting around drinking beer and talking in my grandmother's yard. I was inside most of the time talking with my mother and sister my grandmother was in the bed she was not feeling good. I started getting tired around 10:30 so I went outside and told Rusty I was ready to go. Rusty told Chris and Jerry I was ready to leave. So we all said our goodbyes and left. We started down the road Chris and Jerry wanted to go somewhere and get some more dope. Rusty told them to stop by Bull's Bar and Grill and he would see if he could get some more dope. We got to Bull's we sit in the parking lot for a few minutes Rusty was looking out the window of the truck to see if he saw anybody he knew in the parking lot. Rusty told Chris and Jerry he did not see anybody he knew. We were about to leave when Chris saw somebody he knew Chris waved the guy over to the truck the guy came over and he and Chris began to talk. Chris asked the guy if he had any dope the guy said no but he could get some. Chris told the guy he did not have any money. I had money but I told them I was not giving them money for that shit I was pissed off and ready to get away from Chris and Jerry. The guy told Chris and Jerry if they take him to get some dope he would smoke it with them. Rusty knew I was tired and in a bad mood. Rusty told Chris to drop us off at his brother's house on there way to get the dope. So they dropped me and Rusty off at his brother Tommy Dunbar's house on Old Friar Rd. It was almost 12:00 am when we got to Tommy's. Tommy, Rusty, me and Tommy's girl friend Dana Langley all sit up and talked for a while then I fell asleep on the

couch. The next day Rusty had an appointment to go see his probation officer so Tommy took us up there. After we left the probation office we got back home and saw Rusty's picture on the news we did not know what to do or think.

Laura Smith

2/3/09

WITNESSED BY
BENNIE WILLIAMS
my Commission
EXPIRES OCT 6 2014

Justin Mims
Regarding
Musty Vunbar

STATE OF SOUTH CAROLINA)

COUNTY OF AIKEN)

STATE OF SOUTH CAROLINA)

vs.)

RUSTY DUNBAR)
DEFENDANT)
_____)IN THE COURT OF GENERAL SESSIONS
SECOND JUDICIAL CIRCUIT

RECIPROCAL RULE 5 NOTICE

WARRANT #: K-207631; K-207632 thru 942 200

RESPONDENT'S
EXHIBIT

TO: ELIZABETH YOUNG, ASSISTANT SOLICITOR:

The Defendant, Rusty Dunbar, may offer the following witnesses to testify in his alibi defense. The defendant maintains that he was at Tommy Dunbar and Dana Langley's residence, which is located at _____ Road on the date and time the incident in question allegedly occurred; that being October 7, 2008 at approximately 12:30 AM.

- 1) Tommy Dunbar, Road, Aiken, South Carolina, 803- 1-0439.
- 2) Dana Langley, Road, Aiken, South Carolina, 803- -0439.
- 3) Laura Smith, Road, Ridge Spring, South Carolina, 803- -3815.
- 4) Mable Mets, y Road, Aiken, South Carolina, 803- -2288.
- 5) Ricky Smith, Road, Aiken, South Carolina, 803- -2288.

Respectfully submitted,

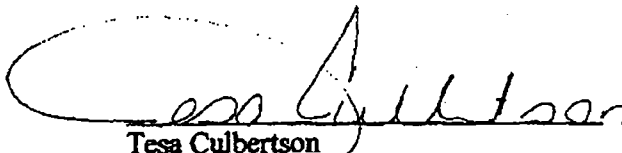
M. Justin Mims
M. Justin Mims
Attorney for Defendant

Aiken, South Carolina
September 9, 2009

CERTIFICATE OF SERVICE

I, Tesa Culbertson, do hereby certify that I have this day served the original Reciprocal Rule 5 on the Clerk of Court for Aiken County and a certified copy of the Reciprocal Rule 5 to Elizabeth Young, Assistant Solicitor, Post Office Box 3368, Aiken, South Carolina 29802.

Dated this 9th day September, 2009.



Tesa Culbertson
Secretary for Defendant's Attorney
Post Office Drawer 2247
Aiken, South Carolina 29802

NOTED
SEP 10 2009
CLERK OF COURT
AIKEN COUNTY, SOUTH CAROLINA

SEP 10 2009
CLERK OF COURT
AIKEN COUNTY, SOUTH CAROLINA

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

Rusty Dunbar, #294996,
Applicant,

v.

State of South Carolina,
Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE SECOND JUDICIAL CIRCUIT

Case No. 2012-CP-02-0795

ORDER OF DISMISSAL

3.12.14
Liz Goodrich
D.C.P. & S.
Anita Knoepfle 1230
Deputy Clerk

PROCEDURAL HISTORY

This matter comes before the Court by way of an application for post-conviction relief filed March 29, 2012. Respondent made its Return on June 25, 2012, requesting an evidentiary hearing be held. Applicant, through his counsel, filed an amended application on June 28, 2013. An evidentiary hearing into the matter was convened July 10, 2013, at the Aiken County Courthouse. Applicant was present at the hearing and was represented by counsel, Brett Lancer, Esquire. Respondent was represented by Assistant Attorney General Megan E. Harrigan of the South Carolina Attorney General's Office.

The records before this Court indicate that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Aiken County Clerk of Court. Applicant was indicted during the January 2009 term of the Aiken County Grand Jury for Kidnapping, Burglary in the First Degree, Armed Robbery, and Possession of a Knife during the Commission of a Violent Crime. (2009-GS-02-0090 to -0093). Justin M. Mims, Esquire, represented the Applicant. On December 15-17, 2009, Applicant proceeded to a jury trial before the Honorable Doyet A. Early, III, where he was convicted as indicted on all three charges. Judge Early sentenced Applicant to thirty years each for Kidnapping, Burglary in the

First Degree, and Armed Robbery and five years for Possession of a Weapon during the Commission of a Violent Crime, with all sentences to be served concurrently.

Applicant filed a notice of appeal. Following the submission of an Anders¹ brief, the South Carolina Court of Appeals dismissed the appeal. State v. Dunbar, Op. No. 2012-UP-093 (Ct. App. filed February 22, 2012). The Remittitur was sent on May 12, 2012.

In his *pro se* and amended applications, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel for counsel's elicitation of prior bad acts testimony from a state's witness after successfully objecting and receiving a curative instruction from the trial court which precluded the jury from considering the prior bad acts, thereby opening the door for the state to go into those bad acts;
2. Ineffective assistance of counsel for failing to request an alibi instruction, where applicant's close defense was that of alibi;
3. Ineffective assistance of counsel for failing to turn over alibi witness statements to the state prior to trial;
4. Ineffective assistance of counsel for failing to object to improper arguments made during the solicitor's closing arguments; and
5. Brady violations for failing to turn over statements that had been made by a state's witness to law enforcement concerning the crimes.

At the evidentiary hearing, Applicant testified on his own behalf. Respondent presented testimony from trial counsel, Justin M. Mims, Esquire (hereafter "Counsel") and prosecuting Assistant Solicitor Elizabeth Ann Young. This Court also had before it Applicant's trial transcript, the records from the Aiken County Clerk of Court regarding the subject convictions, Applicant's appellate records, and Applicant's records from the South Carolina Department of Corrections.

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

Ineffective Assistance of Counsel

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(c), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813. The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that,

but for counsel's unprofessional errors, the result of the proceeding would have been different."

Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

After careful review based on the standard discussed above, this Court finds that Applicant has failed to carry his burden in this action. Specifically, this Court finds that Counsel's testimony, as well as the testimony of prosecuting Assistant Solicitor Young, is credible while Applicant's testimony is not credible. Below are this Court's findings in regards to each of Applicant's allegations of ineffective assistance of counsel:

Allegation that Counsel was ineffective for eliciting prior bad acts testimony from a State's witness, thereby opening the door for the State to elicit testimony regarding Applicant's use of crack cocaine

Applicant asserts that after successfully objecting to the State presenting evidence of Applicant's prior drug use, Counsel elicited testimonial evidence regarding Applicant's prior use of crack cocaine and opened the door for the State to then present evidence of Applicant's prior bad acts. Specifically, Applicant alleges that during the cross-examination of State's witness Jerry Thorton, Counsel elicited testimony regarding Applicant's drug use, thus opening the door allowing the State to elude testimony regarding Applicant's drug use. See Tr. p. 113. Applicant asserts that this was deficient, as Counsel had successfully argued that the State should not be able to elicit any testimony regarding Applicant's drug use based on a lack of relevance. See Tr. p. 103 ln 23 – p. 104 ln 15. Additionally, Applicant argues that Counsel's deficiency prejudiced him, as it allowed the State to portray him as a drug addict who committed the charged offenses to obtain more drugs.

However, the record shows that shortly after the Court ruled that the State could not question the witness in question regarding drug use, the trial court overruled Counsel's objection to references of Applicant and his cohorts' drug use, indicating that the State was indeed allowed

to continue with its line of questioning on drug use during its direct examination of Horton. See Tr. p. 105 lines 6-16. This Court finds that Counsel was not deficient for questioning Horton on his drug use, as it was clear from that point forward that the Court was going to allow the State to elicit testimony regarding Applicant and his cohorts' drug use leading up to the incident.

Furthermore, this Court finds that Applicant was not prejudiced by this alleged deficiency. The trial transcript is replete with Applicant's own account of his extensive drug use. See e.g., Tr. pp 395- 396. Applicant asserted that the only reason he testified regarding his drug use is because his attorney deficiently opened the door to such testimony and he was forced to do so in his defense. This Court is not persuaded by Applicant's explanation and notes that Applicant testified about his twenty-three year crack cocaine habit at the evidentiary hearing in a seemingly boastful manner. Furthermore, both Horton and Chris Herdon, two of State's witnesses, testified extensively regarding the drug use of themselves and Applicant leading up to the incident giving rise to these charges. This Court finds that Applicant has failed to meet his burden of establishing prejudice.

As Applicant has failed to prove both deficiency and prejudice, this Court finds that this allegation must be denied and dismissed with prejudice.

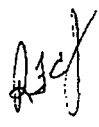
Allegation that Counsel was ineffective for failing to request a jury instruction on alibi

Applicant alleges that trial counsel was ineffective for failing to ensure that an alibi instruction was given to the jury, as his sole defense was alibi and he called two alibi witnesses at trial. Had a jury instruction on alibi been requested, the trial court would have been required to deliver such a charge because it was supported by evidence presented at trial. See State v. Burris, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999) (trial court must give requested charge if it is supported by evidence). However, this Court finds that Applicant has failed to establish that

he suffered prejudice from the lack of an alibi charge. Alibi testimony was presented to the jury, and trial counsel discussed the issue in his closing arguments. The trial court charged the jury that the State had the burden of proof to prove each and every element of each offense beyond a reasonable doubt, and that a defendant is presumed innocent of each and every offense. Importantly, the trial court also specifically charged the jury that the jury should use their common sense when considering all the evidence presented during the trial, which would include the testimony of Applicant and his two witnesses in support of his alibi defense.

This Court finds that this charge was sufficient to inform the jury that the State had to prove beyond a reasonable doubt that Applicant was, in fact, at the scene of the crime and committed the crime. In addition, in this particular case, because the jurors could believe *either* the State's identification witnesses, *or* they could believe the alibi witnesses, *but not both*, this Court finds that the crucial issue in this case was credibility. Witness credibility was argued by both sides and was thoroughly charged to the jury.

This Court notes that the present case is similar to Gibbs v. State, 403 S.C. 484, 744 S.E.2d 170 (2013). In Gibbs, the South Carolina Supreme Court found that although trial counsel was deficient for failing to ensure an alibi charge was given, the applicant failed to meet his burden of showing prejudice from this deficiency. "In evaluating whether a PCR applicant has suffered prejudice as a result of a jury charge, the jury charge must be viewed "in its entirety and not in isolation." Id. (citing Battle v. State, 382 S.C. 197, 203, 675 S.E.2d 736, 739 (2009)). In Gibbs, the applicant asserted an alibi defense, but defense counsel failed to request an alibi instruction. The post-conviction relief court determined that trial counsel's failure to request an alibi instruction constituted deficient representation, but applicant "has not proven that he suffered prejudice from the lack of an alibi charge." The post-conviction relief court relied on the



jury charge as a whole to support its finding of no prejudice. The Court held that given the clarity of the jury charge requiring the State to prove identity beyond a reasonable doubt, the post-conviction relief court's finding of no prejudice must be sustained under the any evidence standard of review.

Furthermore, this Court relies on Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1994), where the South Carolina Supreme Court held that where counsel is deficient for failing to ensure an alibi charge is given, there is a lack of the required prejudice if there is not a reasonable probability that the outcome of trial would have been different had an alibi charge been given. In the Ford case, the Court noted that the evidence was both direct and circumstantial, as it was in Applicant's case.

Additionally, this Court finds that the case of Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995), which Applicant cites to support his allegation, is distinguishable from the present case because the evidence in that case was wholly circumstantial and the solicitor implied in closing argument that the defense bore some burden of proof on the issue of alibi. The South Carolina Supreme Court found that an alibi charge was particularly critical in that case for those reasons. Roseboro, *supra*, at 295, 454 S.E.2d at 313-14. Finally, this Court finds the case of Riddle v. State to be distinguishable, because in that case, the State commented in closing argument that the judge would charge the jury on the only legal defenses available. 308 S.C. 361, 364, 418 S.E.2d 308, 310 (1992). The Supreme Court found prejudice when the trial court failed to charge alibi, finding that the jurors may have concluded, because of the solicitor's comment, that they could not consider alibi as a defense.

RSC

Based on the foregoing, under the particular facts of this case, this Court finds that Applicant has not proven prejudice from counsel's error to request an alibi instruction. Therefore, this allegation must be denied and dismissed with prejudice.

Allegation that Counsel was ineffective for failing to turn over alibi witness statements to the State prior to trial

Applicant alleges that Counsel was ineffective for failing to turn over statements from potential alibi witnesses prior to trial, resulting in the State's ability to attack the veracity of Applicant's alibi witnesses in front of the jury. However, this allegation is sharply refuted by the credible testimony of Counsel and prosecuting Assistant Solicitor Young. Counsel testified that he informed the State prior to trial that he might put up an alibi defense. This was confirmed by Young, who testified that she was "very aware that [alibi] was a possible defense" well before trial. Counsel elaborated that as Applicant was extremely hesitant to put forth an alibi defense, as he did not want to call family members or his girlfriend as witnesses at trial. Counsel further testified that due to Applicant's hesitance to call the necessary witnesses, he was unsure as to whether Applicant would be able to put up an alibi defense until it was time for him to present the defense's case. Despite his client's hesitancy, Counsel testified that he had spoken with both necessary alibi witnesses and was prepared to put forth an alibi defense at trial, contingent on his client's ultimate decision if he wanted to call the witnesses required. He testified that because of his client's reluctance, he did not turn over any statements because Applicant still was undecided as to whether to put forth an alibi defense. However, he testified that he informed the State that an alibi defense was likely and who the potential witnesses were. This Court finds that Counsel's performance was reasonable in accordance with professional standards based on the circumstances of this case.

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Furthermore, this Court finds that Applicant has failed to establish any resulting prejudice from Counsel's alleged deficiency. As Counsel and Assistant Solicitor Young both testified at the evidentiary hearing, it is a prosecutor's role to attack the veracity of defense witnesses while testifying. This Court finds that even if Counsel had turned over the statement to the State prior to the trial, it would likely have had no impact on the State's cross-examination of witness Laura Smith, as she still would not have given her statement to law enforcement immediately after Applicant's arrest, which was the focus of the cross-examination in question. This Court finds that Applicant has failed to establish any resulting prejudice for Counsel's purported deficiency.

Therefore, as Applicant had failed to establish deficiency or any resulting prejudice, this Court finds this allegation must be denied and dismissed with prejudice.

Allegation that Counsel was ineffective for failing to object to improper arguments made during the State's closing argument

Applicant alleges that Counsel was ineffective for "failing to object to the solicitor's mischaracterization of DNA evidence during the solicitor's closing argument" and "failing object to the solicitor's improper vouching and injecting personal opinions solicitor's closing arguments." Specifically, Applicant alleges that Counsel should have objected to the State's description of the DNA evidence as Applicant being a match because he could not be excluded as a contributor. See pp. 470-71. Additionally, Applicant asserted that Counsel should have objected when the State vouched for the credibility of its witness Chris Herndon during its closing argument. See pp. 453-54.

This Court finds that Applicant has failed to meet its burden of establishing deficiency of counsel. Counsel testified that he did not object to the State's comments regarding DNA because he did not want to highlight to the jury that Applicant could not be excluded as the DNA

contributor so close to jury deliberations. Counsel elaborated that he thought one of the strongest parts of his case was his cross-examination of the State's DNA expert, prepared with the assistance of his own independent DNA expert with whom he consulted, and he did not want to appear like he was hiding anything to the jury by objecting during the State's argument. This Court finds that Counsel has articulated valid strategy and therefore, was not deficient in this regard. Edwards v. State, 392 S.C. 449710 S.E.2d 60 (2011) (citing Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992) (where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance.)).

Furthermore, this Court finds that Applicant has failed to establish any deficiency for Counsel's decision not to object to the purported vouching during the State's closing argument. The State's closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence. State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996). Furthermore, the solicitor's closing argument must not appeal to the personal biases of the jurors. Id. To be entitled to a new trial for improper closing arguments, the test is whether "the Solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." State v. Hamilton, 344 S.C. 344, 362, 543 S.E.2d 586, 596 (2001). This Court finds that the comments made in the present case do not so infect the trial with unfairness to upset the resulting conviction, and therefore Counsel was not deficient. This Court finds that this allegation must be denied and dismissed with prejudice.

Brady/Rule 5 SCRCrimP Violation

Applicant alleges that the State violated Brady and Rule 5, SCRCrimP, by "failing to turn over statements that had been made by a state's witness to law enforcement concerning the crimes." Specifically, Applicant alleges that the State failed to turn over the statement by

Q 34

Applicant's co-defendant, Christopher Herndon, to law enforcement, where Herndon stated "I'm the one you are looking for." See Tr. pp. 173-74. Prosecuting Assistant Solicitor Young testified that there was no statement to turn over to defense, as Herndon's gratuitous comment was not memorialized into writing.

"[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, 373 U.S. 83, 87, (1963). A Brady claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment. Sheppard v. State, 357 S.C. 646, 659, 594 S.E.2d 462, 470 (2004). Favorable evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Id. at 660, 594 S.E.2d at 470." Simpson v. Moore, 367 S.C. 587, 600, 627 S.E.2d 701, 708 (2006).

This Court finds that Applicant has failed to establish any Brady violations, as the statement by Applicant's co-defendant was not favorable to Applicant, was not material to Applicant's guilt or innocence, and was not intentionally suppressed by the prosecution. Therefore, this Court finds that this allegation must be denied and dismissed with prejudice.

CONCLUSION

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

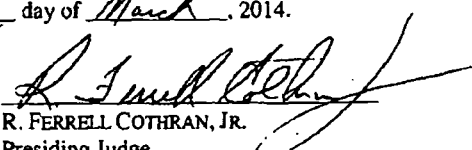
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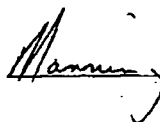
This Court notes that that Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must remain remanded to the custody of the State.

AND IT IS SO ORDERED this 7 day of March, 2014.


R. FERRELL COTHAN, JR.
Presiding Judge
Second Judicial Circuit

, South Carolina.

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF
STATE

Aiken

INDICTMENT/CASE#:

2009GS0200090

VS.

Rusty Merritt Dunbar

AW#: K207942

Date of Offense: 10/7/2008

AKA: Rusty M. Dunbar; Rusty Merritt Dunbar

S.C. Code §: 16-23-0490

Race: W Sex: M Age: 36

CDR Code #: 0549

DOB: SS#:

Address: Creek Road

City, State, Zip: Aiken, SC 29803

DL# SID# SC CD 782157

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

SENTENCE SHEET

5 years

In disposition of the said indictment comes now the Defendant who was

☒ CONVICTED OF or ☐ PLEADS

TO: Weapons / Poss. weapon during violent crime, if not also sentenced to life without parole or death

In violation of § 16-23-0490 of the S.C. Code of Laws, bearing CDR Code # 0549

☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS ☐ §17-25-45(CSC w/minor 1st or Lawd Act)The charge is: ☒ As indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury, (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Elizabeth B. Jung 13947 Solicitor SC Bar # Rusty M. Dunbar M. Justin Hines 76183 Defendant Attorney for Defendant SC Bar #

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections ☐ County Detention Center,for a determinate term of 5 days/months/years or ☐ under the Youthful Offender Act not to exceed years

and/or to pay a fine of \$; provided that upon the service of days/months/years and or payment

of \$; plus costs and assessments as applicable*; the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 92☐ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

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

SPECIAL CONDITIONS:

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

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

Payment Terms:

☐ Set by SCDPPPS

Recipient:

*Fine: \$

\$14-1-206 (Assessments 107.5%) \$

\$14-1-211 (A)(1)(Conv. Surcharge) \$100 \$ 100.00

\$14-1-211 (A)(2)(DUI Surcharge) \$100 \$

\$56-5-2995 (DUI Assessment) \$12 \$

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

\$47 12 (Public Def/Prob) \$500 \$

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

\$14-1-213 (Drug Court Surcharge) \$100 \$

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

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

\$90.7 (SCCA Surcharge) \$5 \$ 5.00

3% to County (if paid in installments) \$ 3.40

TOTAL \$ 133.90

Clerk of Court/Deputy Clerk
Court ReporterJ. P. Thayer
Lisa A. Davenport

SCCA/217 (11/2009)

Presiding Judge

Judge Code:

Sentence Date

T. B. Early
01.56
Dec 17, 2009

May serve W/E beginning

Substance Abuse Counseling ☐Random Drug/Alcohol Testing ☐

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ Beginning

\$ Paid to Public Defender Fund

Other:

☐ Appointed PD or appointed other counsel.

\$47.12 requires \$500 be paid to Clerk

during probation

STATE OF SOUTH CAROLINA)

COUNTY OF AIKEN)

THE STATE OF SOUTH CAROLINA)

Plaintiff)

vs.)

RUSTY MERRITT DUNBAR)

Defendant)

IN THE COURT OF GENERAL SESSIONS
FOR THE SECOND JUDICIAL CIRCUIT
Indictment Number: 2009-GS-02-90

VERDICT FORM

As to the offense of Possession of a Knife During the Commission of a Violent Crime,
we the Jury find the Defendant

_____ Not Guilty

 / Guilty

WE UNANIMOUSLY AGREE.

December 17, 2009

Joel Harris
foreperson

WITNESSES

J. D. Sanders, A.C.S.O.

DOCKET NO. 2009-GS-02-- 90

The State of South Carolina

County of Aiken

James D. Sanders
J.D. Sanders
A.C.S.O.

James D. Sanders
J.D. Sanders
A.C.S.O.

Deputy Clerk

COURT OF GENERAL SESSIONS

JANUARY 19, TERM 2009

ARREST WARRANT NUMBER

K-207942

THE STATE

vs.

RUSTY MERRITT DUNBAR

ACTION OF GRAND JURY

True Bill

True Bill
Foreperson of Grand Jury
Date: January 15, 2009

VERDICT

Indictment for
POSSESSION OF A KNIFE
DURING THE COMMISSION OF
A VIOLENT CRIME
SC Code: 16-23-490
CDR Code: 649
Class FEL-F

Foreperson of Petit Jury

Date:

STATE OF SOUTH CAROLINA)
)
COUNTY OF AIKEN)

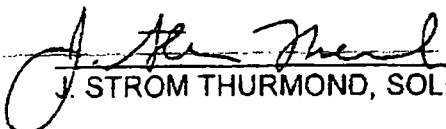
INDICTMENT

At a Court of General Sessions, convened on January 19, 2009, the Grand Jurors of Aiken County present upon their oath:

POSSESSION OF A KNIFE DURING THE COMMISSION OF A VIOLENT
CRIME

That RUSTY MERRITT DUNBAR did in Aiken County on or about October 7, 2008, possess or visibly display a knife during the commission a violent crime, to wit: Armed Robbery, all in violation of Section 16-23-490, Code of Laws of South Carolina (1976), as amended.

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


J. STROM THURMOND, SOLICITOR

ARREST WARRANT

K-207942

STATE OF SOUTH CAROLINA
☒ County/ ☐ Municipality of
AIKEN COUNTY

THE STATE 08-056160
against

RUSTY MERRITT DUNBAR

Address: ROAD SC 29803
AIKEN

Phone: SSM-1
Sex: M Race: W Height: 5 10 Weight: 180
DL State: SC in #: Agency ORI#: 0200

DOB: Prosecuting Agency: SHERIFF DEPT
Prosecuting Officer: INV J.D. SANDERS

Offense: POSSESS WEAPON DURING CO
NM. VIOL. CRIME Offense Code: 549

Code/Ordinance Sec: 16-23-490

This Warrant is CERTIFIED FOR SERVICE in the
☐ County/ ☐ Municipality of The accused

is to be arrested and brought before me to be
dealt with according to law.

Signature of Judge (L.S.)

RETURN

A copy of this arrest warrant was delivered to
defendant RUSTY MERRITT DUNBAR
on 10-16-08

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:
BOND HEARING COURT
435 WIRE ROAD
AIKEN SC 29801

2004-65-02-70

STATE OF SOUTH CAROLINA
☒ County/ ☐ Municipality of
AIKEN COUNTY

AFFIDAVIT

Zeiler for

Personally appeared before me the affiant INV J.D. SANDERS
being duly sworn deposes and says that defendant RUSTY MERRITT DUNBAR
did within this county and state on 10/07/08 violate the criminal laws of the
State of South Carolina (or ordinance of ☐ County/ ☐ Municipality of)
in the following particulars:

DESCRIPTION OF OFFENSE: POSSESS WEAPON DURING COMM. VIOL. CRIME
SECTION 16-23-490

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

UPON INFORMATION AND BELIEF THAT ON 10-07-08. RUSTY
MERRITT DUNBAR ALONG WITH ANOTHER, DID DURING THE NIGHT TIME
HOURS UNLAWFULLY ENTER THE RESIDENCE OF THE VICTIM DANIEL HYNES
LOCATED AT ROAD, AIKEN, AIKEN COUNTY, SC BY KICKING
OPEN THE FRONT DOOR. ONCE INSIDE THEY HELD THE VICTIM AT KNIFE
POINT, BOUND THE VICTIM WITH ELECTRIC CORDS, ASSAULTED AND CUT
THE VICTIM CAUSING SERIOUS BODILY INJURY TO THE VICTIM AND ROBBED
HIM. THIS BEING IN VIOLATION OF THE SC CODE OF LAWS. AS
AMENDED.

Signature of Affiant

STATE OF SOUTH CAROLINA
☒ County/ ☐ Municipality of
AIKEN COUNTY

Affiant's Address 420 HAMPTON AVENUE
AIKEN SC 29804
Affiant's Telephone 803 642-1753

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THE COUNTY OF AIKEN

It appearing from the above affidavit that there are reasonable grounds
on 10/07/08 to believe that the defendant RUSTY MERRITT DUNBAR
did violate the criminal laws of the State of South Carolina (or ordinance of ☐ County/ ☐ Municipality of) as set forth below:

DESCRIPTION OF OFFENSE: POSSESS WEAPON DURING COMM. VIOL. CRIME
SECTION 16-23-490

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

Sworn to and subscribed before me on 10/17/08

Judge's Address

Signature of Issuing Judge (S.S.)

Judge's Telephone AIKEN SC 29801

Judge Code: 034

Issuing Court: ☒ Magistrate ☐ Municipal ☐ Circuit

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF
STATE

Aiken

INDICTMENT/CASE#:

2009GS0200091

VS.

Rusty Merritt Dunbar

AW# K207941

AKA: Rusty M. Dunbar; Rusty Merrille Dunbar

Date of Offense: 10/7/2008

Race: W Sex: M Age: 36

S.C. Code §. 16-11-0330(A)

DOB: SS#:

CDR Code #: 0139

Address: 7 Creek Road

City, State, Zip: AIKEN, SC 29803

DL# SID# SC 00792157

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

SENTENCE SHEET

10 - 30 years

In disposition of the said indictment comes now the Defendant who was

☒ CONVICTED OF or ☐ PLEADS

TO: Robbery Armed Robbery, robbery while armed or allegedly armed with a deadly weapon

In violation of § 16-11-0330(A) of the S.C. Code of Laws, bearing CDR Code # 0139

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS ☐ \$17-25-45The charge is: ☒ As indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.The pleas is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Elizabeth B. Young 73947
Solicitor SC Bar#Rusty Merritt Dunbar
DefendantM. Justin Davis
Attorney for Defendant76183
SC Bar#WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections ☐ County Detention Center, for a determinate term of 30 days/months/years or ☐ under the Youthful Offender Act not to exceed years

and/or to pay a fine of \$; provided that upon the service of days/months/years and or payment of \$; plus costs and assessments as applicable*; the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 09-65-02-92☐ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

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

SPECIAL CONDITIONS:

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

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

Payment Terms: _____

☐ Set by SCDPPPS _____

Recipient: _____

*Fine	\$
§14-1-206 (Assessments 107.5%)	\$
§14-1-211 (A)(1)(Conv. Surcharge)	\$100
§14-1-211 (A)(2)(DUI Surcharge)	\$100
§56-5-2995 (DUI Assessment)	\$12
§56-1-286 (DUI Breath Test)	\$25
§47-12 (Public Def/Prob)	\$500
§14-1-212 (Law Enforce. Funding)	\$25
§14-1-213 (Drug Court Surcharge)	\$100
§50-21-114 (BUI Breath Test Fee)	\$50
§56-5-2942(J) (Vehicle Assessment)	\$40/ea
§90.7 (SCCJA Surcharge)	\$5
3% to County (if paid in installments)	\$
TOTAL	\$ 133.90

Obtain GED ☐

Attend Voc. Rehab. Or Job Corp. _____

May serve W/E beginning

Substance Abuse Counseling ☐Random Drug/Alcohol Testing ☐

Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ Beginning \$ Paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel, §47.12 requires \$500 be paid to Clerk during probation.Clerk of Court Deputy Clerk
Court ReporterShanna Thompson
Dis. Cl. - DavenportPresiding Judge
Judge Code
Sentence DateM. Justin Davis
0136
Dec 17, 2009

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)
THE STATE OF SOUTH CAROLINA)

Plaintiff)

vs.)

RUSTY MERRITT DUNBAR)

Defendant)

IN THE COURT OF GENERAL SESSIONS
FOR THE SECOND JUDICIAL CIRCUIT
Indictment Number: 2009-GS-02-91

VERDICT FORM

As to the offense of Armed Robbery, we the Jury find the Defendant

_____ Not Guilty

☒ _____ Guilty

WE UNANIMOUSLY AGREE.

December 17, 2009

Paul Harris
Foreperson

WITNESSES

J. D. Sanders, A.C.S.O.

DOCKET NO. 2009-GS-02-- 91

The State of South Carolina

County of Alken

January 16, 2009

J. D. Sanders
Deputy Clerk

Deputy Clerk

COURT OF GENERAL SESSIONS

January 19, TERM 2009

ARREST WARRANT NUMBER

K-207941

THE STATE

vs.

RUSTY MERRITT DUNBAR

ACTION OF GRAND JURY

True Bill

J. D. Sanders

Forfeiture of Grand Jury
Date: January 15, 2009

VERDICT

Indictment for

ARMED ROBBERY

SC Code: 16-11-330(A)

CDR Code: 0139

Class FEL-A (V)

Forfeiture of Petit Jury
Date:

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

INDICTMENT

At a Court of General Sessions, convened on January 19, 2009, the Grand Jurors of Aiken County present upon their oath:

ARMED ROBBERY

That RUSTY MERRITT DUNBAR did in Aiken County on or about October 7, 2008, while armed with a deadly weapon or while alleging either by action or words that he was armed while using a representation of a deadly weapon or an object which a person present during the commission of the robbery reasonably believed to be a deadly weapon, to wit: a knife, feloniously take from the person or presence of Daniel Hynes by means of force or intimidation goods or monies of Daniel Hynes, such goods or monies being described as follows: two (2) pairs of shoes, one (1) wallet, one (1) cell phone, and one (1) 1996 Pontiac Grand Pre, all in violation of §16-11-330, Code of Laws of South Carolina (1976), as amended.

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


J. STROM THURMOND, SOLICITOR

2004-65-02-41

Form Approved by
SCA 618

ARREST WARRANT

K-207941

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of
AIKEN COUNTYTHE STATE 08-056160
against

RUSTY MERRITT DUNBAR

Address: CREEK ROAD
AIKEN SC 29803

Phone: SSN: 180

Sex: M Race: W Height: 5 10 Weight: 180

DL State: SC DOB: Agency OIL# 0200

Prosecuting Agency: SHERIFF DEPT

Prosecuting Officer: INV J.D. SANDERS

Offense: ARMED ROBBERY

Offense Code: 0139

Code/Ordinance Sec: 16-11-330(A)

THIS WARRANT IS CERTIFIED FOR SERVICE in the
☐ County/ ☐ Municipality of The accusedis to be arrested and brought before me to be
dealt with according to law.

Signature of Judge

(L.S.)

Date:

RETURN

A copy of this arrest warrant was delivered to
defendant RUSTY MERRITT DUNBAR
on 10-07-08Signature of Constable/Law Enforcement Officer
W. J. Sanders

RETURN WARRANT TO:

BOND HEARING COURT
435 WIRE ROAD
AIKEN SC 29801

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of
AIKEN COUNTY

AFFIDAVIT

INV J.D. SANDERS
Zeigler forPersonally appeared before me the affiant INV J.D. SANDERS who
being duly sworn deposes and says that defendant RUSTY MERRITT DUNBAR
did within this county and state on 10/07/08 violate the criminal laws of the
State of South Carolina (or ordinance of ☐ County/ ☐ Municipality of)
in the following particulars:

DESCRIPTION OF OFFENSE: ARMED ROBBERY

SECTION 16-11-330

I further state that there is probable cause to believe that the defendant named above did commit
the crime set forth and that probable cause is based on the following facts:UPON INFORMATION AND BELIEF THAT ON 10-07-08, RUSTY
MERRITT DUNBAR ALONG WITH ANOTHER, DID DURING THE NIGHT TIME
HOURS UNLAWFULLY ENTER THE RESIDENCE OF THE VICTIM DANIEL HYNES
LOCATED AT ROAD, AIKEN, AIKEN COUNTY, SC BY KICKING
OPEN THE FRONT DOOR. ONCE INSIDE THEY HELD THE VICTIM AT KNIFE
POINT, BOUND THE VICTIM WITH ELECTRIC CORDS, ASSAULTED AND CUT
THE VICTIM CAUSING SERIOUS BODILY INJURY TO THE VICTIM AND ROBBED
HIM. THIS BEING IN VIOLATION OF THE SC CODE OF LAWS. AS
AMENDED.

Signature of Affiant

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of
AIKEN COUNTYAffiant's Address 420 HAMPTON AVENUE
AIKEN SC 29801

Affiant's Telephone 803 642-1753

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY
It appearing from the above affidavit that there are reasonable grounds
on 10/07/08 did violate the criminal laws of the State of South Carolina (or ordinance of) as set forth below:
☐ County/ ☐ Municipality of

DESCRIPTION OF OFFENSE: ARMED ROBBERY

SECTION 16-11-330

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

Sworn to and subscribed before me

on 10/07/08

Judge's Address

AIKEN

SC 29801

Signature of Issuing Judge

Judge Code: 034

Issuing Court: ☐ Magistrate ☐ Municipal ☐ Circuit

ORIGINAL

FILED

James Thompson
Deputy Clerk

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF
STATE

Aiken

VS.

Rusty Merritt Dunbar

AKA: Rusty M. Dunbar; Rusty Merrille Dunbar

Race: W Sex: M Age: 36

DOB: SS#: _____

Address: Creek Road

City, State, Zip: AIKEN, SC 29803

DL# (SID# SC 00782157)

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

in disposition of the said indictment comes now the Defendant who was

TO: Burglary (After June 20, 1985) - First degree

in violation of § 16-11-0311 of the S.C. Code of Laws, bearing CDR Code # 0079

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS☐ Mandatory GPS
(CSC w/minor 1st or Lawd Act)☐ §17-25-45The charge is: ☒ As indicted, ☐ Lesser Included Offense.☐ Defendant Waives Presentment to Grand Jury.

(defendant's initials)

The pleas: ☐ Without Negotiations or Recommendation.☐ Negotiated Sentence.☐ Recommendation by the State.Solicitor *Elizabeth B. Hargis* SC Bar # 73947 Defendant *Rusty M. Dunbar*Attorney for Defendant *M. J. Hargis* SC-Bar # 76113WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections ☐ County Detention Center,for a determinate term of 30 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years

and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and or payment

of \$ _____ plus costs and assessments as applicable*; the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

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

SPECIAL CONDITIONS:

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

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

Payment Terms: _____

☐ Set by SCDPPPS _____

Recipient: _____

*Fine:	\$
§14-1-206 (Assessments 107.5%)	\$
§14-1-211 (A)(1)(Conv. Surcharge)	\$100
§14-1-211 (A)(2)(DUI Surcharge)	\$100
§56-5-2995 (DUI Assessment)	\$12
§56-1-286 (DUI Breath Test)	\$25
§47.12 (Public Def/Prob)	\$500
§14-1-212 (Law Enforc. Funding)	\$25
§14-1-213 (Drug Court Surcharge)	\$100
§50-21-114 (BUI Breath Test Fee)	\$50
§56-5-2942(J) (Vehicle Assessment)	\$40/ea
§90.7 (SCCJA Surcharge)	\$5
3% to County (if paid in installments)	\$
TOTAL	\$ 133.90

Clerk of Court/Deputy Clerk
Court Reporter*Therese Kipper*
Lisa Dunfort

SCCA/217 (11/2009)

INDICTMENT/CASE#: 2009GS0200092

AW#: K207940

Date of Offense: 10/7/2008

S.C. Code §: 16-11-0311

CDR Code #: 0079

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADS

15 years to Life

Obtain GED ☐

Attend Voc. Rehab. Or Job Corp. _____

May serve W/E beginning
Substance Abuse Counseling ☐Random Drug/Alcohol Testing ☐
Fine may be pd. in equal, consecutive weekly/monthly
mnts. of \$ _____ Beginning _____
\$ _____ Paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel,
§47.12 requires \$500 be paid to Clerk
during probation.Presiding Judge
Judge Code:
Sentence Date*M. J. Hargis*
0136
Dec 17, 2009

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN
THE STATE OF SOUTH CAROLINA

Plaintiff

VS.

RUSTY MERRITT DUNBAR

Defendant

IN THE COURT OF GENERAL SESSIONS
FOR THE SECOND JUDICIAL CIRCUIT
Indictment Number: 2009-GS-02-92

VERDICT FORM

As to the offense of Burglary in the First Degree, we the Jury find the Defendant

Not Guilty

Guilty

WE UNANIMOUSLY AGREE.

December 17, 2009

Foreperson

WITNESSES

J. D. Sanders, A.C.S.O.

DOCKET NO. 2009-GS-02- 92

The State of South Carolina

County of Alken

John D. Sanders
J. D. Sanders

Spencer Thomas
Spencer Thomas
Clerk

COURT OF GENERAL SESSIONS

January 19, TERM 2009

ARREST WARRANT NUMBER

K-207940

THE STATE

VS.

RUSTY MERRITT DUNBAR

ACTION OF GRAND JURY

True Bill

Spencer Thomas
Spencer Thomas
Clerk

Foreperson of Grand Jury
Date: January 15, 2009

VERDICT

Indictment for

BURGLARY IN THE FIRST DEGREE

SC Code: 16-11-311(A)(3)

CDR Code: 079

Class FEL-EX(MV)

Foreperson of Petit Jury
Date:

STATE OF SOUTH CAROLINA)

INDICTMENT

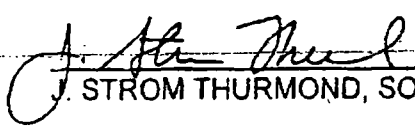
COUNTY OF AIKEN)

At a Court of General Sessions, convened on January 19, 2009, the Grand Jurors of Aiken County present upon their oath:

BURGLARY IN THE FIRST DEGREE

That RUSTY MERRITT DUNBAR did in Aiken County on or about October 7, 2008, wilfully and unlawfully enter the dwelling of Daniel Hynes located at Road, Aiken, South Carolina, without consent and with the intent to commit a crime therein and the defendant did enter or remain in the dwelling in the nighttime, all in violation of §16-11-311, Code of Laws of South Carolina (1976), as amended.

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


J. STROM THURMOND, SOLICITOR

ARREST WARRANT

K-207940

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

AIKEN COUNTY

THE STATE 08-056160

Aggravated

RUSTY MERRITT DUNBAR

Address: CREEK ROAD

AIKEN SC 29803

Phone: SSN: 180

Sex: M Race: W Height: 5 10 Weight: 180

DL State: SC DL #: Agency ORA: 0200

DOB: Prosecuting Agency: SHERIFF DEPT

Prosecuting Officer: INV J.D. SANDERS

Offense: BURGLARY - FIRST DEGREE

Offense Code: 079

Code/Ordinance Sec: 16-11-311

This Warrant is CERTIFIED FOR SERVICE in the County/ Municipality of

County/ Municipality of

The accused is to be arrested and brought before me to be dealt with according to law.

Signature of Judge

(I.S.)

Date:

RETURN

A copy of this arrest warrant was delivered to defendant RUSTY MERRITT DUNBAR on 10-6-08

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

BOND HEARING COURT
435 WIRE ROAD
AIKEN

SC 29801

2007-00-00-74

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

AIKEN COUNTY

AFFIDAVIT

INV J.D. SANDERS

Personally appeared before me the affiant INV J.D. SANDERS being duly sworn deposes and says that defendant RUSTY MERRITT DUNBAR did within this county and state on 10/07/08 violate the criminal laws of the State of South Carolina (or ordinance of County/ Municipality of) in the following particulars:

DESCRIPTION OF OFFENSE: BURGLARY - FIRST DEGREE SECTION 16-11-311

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

UPON INFORMATION AND BELIEF THAT ON 10-07-08, RUSTY MERRITT DUNBAR ALONG WITH ANOTHER, DID DURING THE NIGHT TIME HOURS UNLAWFULLY ENTER THE RESIDENCE OF THE VICTIM DANIEL HYNES LOCATED AT ROAD, AIKEN, AIKEN COUNTY, SC BY KICKING OPEN THE FRONT DOOR. ONCE INSIDE THEY HELD THE VICTIM AT KNIFE POINT, BOUND THE VICTIM WITH ELECTRIC CORDS, ASSAULTED AND CUT THE VICTIM CAUSING SERIOUS BODILY INJURY TO THE VICTIM AND ROBBED HIM. THIS BEING IN VIOLATION OF THE SC CODE OF LAWS. AS AMENDED.

Signature of Affiant

STATE OF SOUTH CAROLINA)
☒ County/ ☐ Municipality of)
AIKEN COUNTY)

Affiant's Address 420 HAMPTON AVENUE

AIKEN

Affiant's Telephone 803 642-1753

ARREST WARRANT

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

It appearing from the above affidavit that there are reasonable grounds to believe that the defendant RUSTY MERRITT DUNBAR did violate the criminal laws of the State of South Carolina (or Ordinance of) as set forth below:

DESCRIPTION OF OFFENSE: BURGLARY - FIRST DEGREE SECTION 16-11-311

SECTION 16-11-311

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

Sworn to and subscribed before me on 10/07/08

Signature of Issuing Judge

Judge Code: 034

Judge's Address

AIKEN

SC 29801

Issuing Court: ☒ Magistrate ☐ Municipal ☐ Circuit

ORIGINAL

Form Approved by
S.C. Attorney General
April 11, 2005
SCA 616

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF
STATE

Aiken

INDICTMENT/CASE#:

2009GS0200093

VS.

Rusty Merritt Dunbar

AW#: K207939

AKA: Rusty M. Dunbar, Rusty Merrille Dunbar

Date of Offense: 10/7/2008

Race: W Sex: M Age: 36

S.C. Code §: 16-03-0910

DOB: SS#:

CDR Code #: 0095

Address: sk Road

City, State, Zip: Aiken, SC 29803

DL#

SID#

SC 00782157

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

In disposition of the said indictment comes now the Defendant who was

☒ CONVICTED OF or ☐ PLEADS

TO: Kidnapping: Kidnapping

In violation of § 16-03-0910

of the S.C. Code of Laws, bearing CDR Code # 0095

☐ NON-VIOLENT☒ VIOLENT☐ SERIOUS☒ MOST SERIOUS☐ Mandatory GPS(CSC w/minor 1st or Lowd Act)☐ \$17-25-45The charge is: ☒ As indicted, ☐ Lesser/Included Offense,☐ Defendant Waives Presentment to Grand Jury,

(defendant's initials)

The pleas: ☐ Without Negotiations or Recommendation,☐ Negotiated Sentence,☐ Recommendation by the State.

TEST:

Elizabeth B. Young

Solicitor

73947
SC Bar #

Rusty M. Dunbar

Defendant

M. Merritt Dunbar

Attorney for Defendant

76183
SC Bar #WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections ☐ County Detention Center,for a determinate term of 30 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years

and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and or payment of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 09-65-02-92☐ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

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

SPECIAL CONDITIONS:

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

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

Payment Terms: _____

☐ Set by SCDPPPS _____

Recipient: _____

*Fine:

\$14-1-206 (Assessments 107.5%)	\$	
\$14-1-211 (A)(1)(Conv. Surcharge)	\$100	\$ 100.00
\$14-1-211 (A)(2)(DUI Surcharge)	\$100	\$
\$56-5-2995 (DUI Assessment)	\$12	\$
\$56-1-286 (DUI Breath Test)	\$25	\$
\$47.12 (Public Def/Prob)	\$500	\$
\$14-1-212 (Law Enforce. Funding)	\$25	\$ 25.00
\$14-1-213 (Drug Court Surcharge)	\$100	\$
\$50-21-114 (BUI Breath Test Fee)	\$50	\$
\$56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
\$90.7 (SCCJA Surcharge)	\$5	\$ 5.00
3% to County (if paid in installments)	\$	\$ 3.90
TOTAL		\$ 133.90

Clerk of Court/Deputy Clerk
Court Reporter:Shanna Thompson
Lisa H. Dawson

SCCA/217 (11/2009)

Obtain GED ☐

Attend Voc. Rehab. Or Job Corp. _____

May serve W/E beginning

Substance Abuse Counseling ☐Random Drug/Alcohol Testing ☐

Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ _____ Beginning _____

\$ _____ Paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel.

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

Presiding Judge

Judge Code: 0136

Sentence Date

V. B. Early III
Dec 17, 2013

STATE OF SOUTH CAROLINA
 COUNTY OF AIKEN

THE STATE OF SOUTH CAROLINA

Plaintiff

vs.

RUSTY MERRITT DUNBAR

Defendant

IN THE COURT OF GENERAL SESSIONS
 FOR THE SECOND JUDICIAL CIRCUIT
 Indictment Number: 2009-GS-02-93

VERDICT FORM

As to the offense of Kidnapping, we the Jury find the Defendant

_____ Not Guilty

_____ ☒ Guilty

WE UNANIMOUSLY AGREE.

December 17, 2009

Jacob Harris
 Foreperson

WITNESSES

J. D. Sanders, A.C.S.O.

DOCKET NO. 2009-GS-02-- 93

The State of South Carolina

County of Aiken

J. D. Sanders, A.C.S.O.

J. D. Sanders, A.C.S.O.

J. D. Sanders, A.C.S.O.

ARREST WARRANT NUMBER

K-207939

ACTION OF GRAND JURY

True Bill

Foreperson of Grand Jury
Date: January 15, 2009

VERDICT

RUSTY MERRITT DUNBAR

THE STATE

vs.

COURT OF GENERAL SESSIONS

JANUARY 19, TERM 2009

Indictment for

KIDNAPPING

SC Code: 16-3-910
CDR Code: 0095
Class FEL-AForeperson of Petit Jury
Date:

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

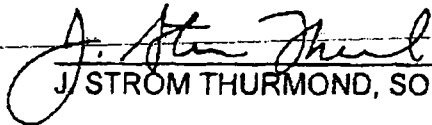
INDICTMENT

At a Court of General Sessions, convened on January 19, 2009, the Grand Jurors of Aiken County present upon their oath:

KIDNAPPING

That RUSTY MERRITT DUNBAR did in Aiken County on or about October 7, 2008, unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away Daniel Hynes without authority of law, all in violation of §16-3-910 of the Code of Laws of South Carolina (1976), as amended.

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


J. STROM THURMOND, SOLICITOR

ARREST WARRANT

K-207939

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of
AIKEN COUNTY

THE STATE 08-056360
against

RUSTY MERRITT DUNBAR

Address: 3 CREEK ROAD

AIKEN SC 29803

Phone: SSN: 5 10 Weight: 180

Sex: M Race: W Height: 5 10 Weight: 180

DL State: SC DL#: Agency CR#: 0200

DOB: Prosecuting Agency: SHERIFF DEPT

Prosecuting Officer: INV J.D. SANDERS

Offense: KIDNAPPING

Offense Code: 0095

Code/Ordinance Sec: 16-3-910

This Warrant is CERTIFIED FOR SERVICE in the
☐ County/ ☐ Municipality of

The accused is to be arrested and brought before me to be dealt with according to law.

Signature of Judge

(L.S.)

Date:

RETURN

A copy of this arrest warrant was delivered to
defendant RUSTY MERRITT DUNBAR
on 10-16-08

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

BOND HEARING COURT
435 WIRE ROAD

AIKEN SC 29801

2009-GS-02-73

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of
AIKEN COUNTY

AFFIDAVIT

Personally appeared before me the affiant INV J.D. SANDERS

being duly sworn deposes and says that defendant RUSTY MERRITT DUNBAR

did within this county and state on 10/07/08

Violate the criminal laws of the

State of South Carolina (or ordinance of ☐ County/ ☐ Municipality of

in the following particulars:

DESCRIPTION OF OFFENSE: KIDNAPPING
SECTION 16-3-910

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

UPON INFORMATION AND BELIEF THAT ON 10-07-08, RUSTY MERRITT DUNBAR ALONG WITH ANOTHER, DID DURING THE NIGHT TIME LOCATED AT 4 WIRE ROAD, AIKEN, AIKEN COUNTY, SC BY KICKING OPEN THE FRONT DOOR, ONCE INSIDE THEY HELD THE VICTIM AT KNIFE POINT, BOUND THE VICTIM WITH ELECTRIC CORDS, ASSAULTED AND CUT THE VICTIM CAUSING SERIOUS BODILY INJURY TO THE VICTIM AND ROBBED HIM. THIS BEING IN VIOLATION OF THE SC CODE OF LAWS. AS AMENDED.

Signature of Affiant

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of
AIKEN COUNTY

AIKEN COUNTY

Affiant's Address 420 HAMPTON AVENUE

AIKEN

SC 29801

Affiant's Telephone 803 642-1753

ARREST WARRANT

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

It appearing from the above affidavit that there are reasonable grounds

on 10/07/08 defendant RUSTY MERRITT DUNBAR

did violate the criminal laws of the State of South Carolina (or ordinance of ☐ County/ ☐ Municipality of

as set forth below:

DESCRIPTION OF OFFENSE: KIDNAPPING
SECTION 16-3-910

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

Sworn to and subscribed before me

on 10/07/08

Signature of Issuing Judge (L.S.)

Judge Code: 034

ORIGINAL

Judge's Address

AIKEN

SC 29801

Judge's Telephone

Issuing Court: ☒ Magistrate ☐ Municipal ☐ Circuit

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Aiken County

Doyet A. Early, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RUSTY DUNBAR,

APPELLANT

INITIAL ANDERS BRIEF OF APPELLANT

ROBERT M. PACHAK
Appellate Defender

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

ATTORNEY FOR APPELLANT

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TABLE OF AUTHORITIES

Cases

State v. Grovenstein, 335 S.C. 347, 517 S.E.2d 216 (1999)..... 5

STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in removing a juror for premature deliberation without an inquiry to determine if any other jurors were involved?

STATEMENT OF THE CASE

Appellant was convicted of first degree burglary, kidnapping, armed robbery, and possession of a knife after a jury trial held before the Honorable Doyet A. Early, III on December 15-17, 2009, in Aiken County. Respective sentences of thirty (30) years, thirty (30) years, thirty (30) years, and five (5) years were imposed.

This appeal follows.

ARGUMENT

The trial court erred in removing a juror for premature deliberation without an inquiry to determine if any other jurors were involved.

About one-third the way through appellant's trial juror #31 sent in a note that had some questions about the trial which evidenced some premature deliberation on the juror's part. Defense counsel said they should find out if this juror talked to any of the other jurors. (Tr. p. 161, line 18 – p. 162, line 21) There was a bench conference, the juror was brought in, and he was excused from the remainder of the case. (Tr. p. 163, lines 1-7)

It was error for the trial court not to inquire if the juror had talked to any of the other jurors about the case. The South Carolina Supreme Court has held that when "some extraneous influence is brought to the trial court's attention during trial, then it is incumbent on the trial judge to ascertain whether such influence was prejudicial." State v. Grovenstein, 335 S.C. 347, 517 S.E.2d 216 (1999). In this case the trial court could not determine prejudice without an inquiry of the jury to see if any other jurors were involved.

CONCLUSION

Petitioner's convictions should be reversed.

Respectfully submitted,

Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

This 11th day of August, 2010.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Aiken CountyDoyet A. Early, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RUSTY DUNBAR,

APPELLANT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Rusty Dunbar states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge Doyet A. Early, III, which was held on December 17, 2009, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, he asks the Court to relieve him as counsel for Rusty Dunbar.

Respectfully submitted,

Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

This 11th day of August, 2010.