

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
G. Edward Welmaker, Circuit Court Judge

Appellate Case No. 2014-000925
Circuit Court Case No. 2012-CP-23-07837

Gerald Brown, #174505,

PETITIONER,

v.

State of South Carolina,

RESPONDENT.

**APPENDIX TO
PETITION FOR WRIT OF CERTIORARI**

ALAN WILSON
South Carolina Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY ELLIOTT
Assistant Deputy Attorney General

KAREN RATIGAN
Assistant Deputy Attorney General

Office of the Attorney General
State of South Carolina
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR THE RESPONDENT

**JOSHUA SNOW KENDRICK
CHRISTOPHER S. LEONARD**

Kendrick & Leonard, P.C.
P.O. Box 6938
Greenville, SC 29606
(864) 760-4000

ATTORNEYS FOR THE PETITIONER

INDEX

Trial transcript (April 14 – 16, 2009)	1
Pretrial matters	7
Jury selection	21
State's motion in limine	45
<i>Jackson v. Denno</i> hearing	49
Dan Accord	
Direct	51
Cross	52
Hal Harris	
Direct	55
Cross	57
Re-direct	60
Defense motion on timing of indictment	62
Opening statement – State	65
Opening statement – Defense	71
Trial testimony	
<u>State's case</u>	
Jarecus Howard	
Direct	77
Cross	91
George Howard	
Direct	92
Cross	104
Michael Thompson	
Direct	122
Cross	125
Dan Acord	
Direct	136
Cross	150
Redirect	164
Cross	164
Chuck Porter	
Direct	166

Cross.....	176
Michael Bryan	
Direct	192
Cross.....	210
Redirect.....	239
Recross.....	240
Ron Lendway	
Direct	244
Cross.....	255
Travis Wyatt	
Direct	272
Cross.....	279
Hal Harris	
Direct	284
Cross.....	296
Redirect.....	301
<u>Defense case</u>	
Gerald Brown	
Examination by the Court.....	306
Direct	314
Cross.....	328
Redirect.....	354
Recross.....	355
Redirect.....	355
<u>State's Rebuttal case</u>	
George Howard	
Direct	359
Cross.....	361
Defense Closing Argument	368
State's Closing Argument.....	408
Jury charge.....	425
Verdict.....	447
Sentencing.....	450

Indictments and Sentencing Sheets	457
Notice of Intent to Seek Life Without Parole Sentence	483
Final Brief of Appellant.....	484
Final Brief of Respondent.....	506
Opinion of the Court of Appeals	534
Post-Conviction Relief Application.....	536
Motion for Post-Conviction Relief.....	543
Memorandum in Support of Post-Conviction Relief.....	551
Addendum to Memorandum in Support of Post-Conviction Relief.....	572
State's Return to Application for Post-Conviction Relief	576
Reply to State's Return to Application for Post-Conviction Relief.....	582
SCDC Records.....	586
Transcript of Post-Conviction Relief Hearing	593
 Andrell Terry	
Direct	597
Cross.....	608
 Gerald Brown	
Direct	613
Cross.....	651
 Randall Chambers	
Direct	657
Cross.....	666
Court's Exhibit 1 – Addendum.....	681
Order of Dismissal	690
Notice of Appeal.....	702

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

STATE OF SOUTH CAROLINA)

VS.)

Gerald Brown ,)
DEFENDANT)

DOB: 9-23-1973)

COURT OF GENERAL SESSIONS

NOTICE OF STATE'S INTENTION
TO SEEK SENTENCING
PURSUANT TO S.C. CODE SEC. 17-25-45

INDICTMENTS 2007-GS-23-7605

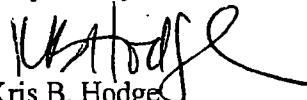
2007-GS-23-7606

2007-GS-23-7622

BURGLARY 1ST; ARMED ROBBERY;
KIDNAPPING

Pursuant to South Carolina Code Section 17-25-45(A), the State is seeking the sentence of life with out the possibility of parole, should the defendant be convicted of the above listed most serious offenses of Burglary 1st degree, Armed Robbery, and Kidnapping. The defendant has prior most serious convictions for three counts of Assault & Battery with Intent to Kill, Indictments 1991-GS-23-0620,0621,0622; and Armed Robbery, Indictment 1991-GS-23-0619. Pursuant to 17-25-45(G), the decision to invoke sentencing under 17-25-45(A) is mandatory. This shall serve as written notice to the defendant and his attorney, as required by 17-25-45(H), of the State's intention to seek sentencing of the defendant under South Carolina Code Section 17-25-45(A).

Respectfully,


Kris B. Hodge
Assistant Solicitor
13th Judicial Circuit

Date: Sept. 2, 2008

Certified Copy
B. W. Wicks
Clerk of Court C.P. & G.S.
Greenville County, SC
Dated 9-2-08

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County

John C. Few, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

GERALD BROWN,

APPELLANT

FINAL BRIEF OF APPELLANT

TRISTAN M. SHAFFER
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.

TABLE OF CONTENTS

TABLE OF CONTENTS.....	1
TABLE OF AUTHORITIES.....	2
STATEMENT OF ISSUES ON APPEAL.....	4
STATEMENT OF THE CASE.....	5
ARGUMENT.....	8
CONCLUSION.....	18

TABLE OF AUTHORITIES

Cases

<i>Ewing v. California</i> , 538 U.S. 21; 123 S.Ct. 1179, 1185 (2003).....	14, 15
<i>Graham v. Florida</i> , 130 S.Ct. 2011 (2010).....	passim
<i>Harmelin v. Michigan</i> , 501 U.S. 957, 1001	10
<i>Kennedy v. Louisiana</i> , 128 S.Ct. at 2657 (2008).....	9, 13
<i>Miller v. State</i> , 231 Ga. App. 869, 870 S.E.2d 42, 44 (1998).....	12
<i>Riggs v. California</i> , 525 U.S. 1114, 119 S.Ct. 890 (1999).....	14
<i>Roper v. Simmons</i> , 543 U.S. 551, 569 (2005).....	14
<i>Rummel v. Estelle</i> , 445 U.S. 263, 284-285, 100 S.Ct. 1133).....	14
<i>Solem v. Helm</i> , 463 U.S. 277 (1983).....	9
<i>State v. Ellis</i> , 345 S.C. 175, 547 S.E.2d 490 (2001).....	7, 12
<i>State v. Standard</i> , 351 S.C. 199, 569 S.E.2d 325 (2002).....	7, 8, 11
<i>State v. Williams</i> , 380 S.C. 336, 669 S.E.2d 640 (Ct. App. 2008).....	passim
<i>Tison v. Arizona</i> , 481 U.S. 137, 149 (1987).....	15

Statutes

Cal. Penal Code § 667(D)(3)(a)	12
Ga. Code Ann. §15-11-2(6)	12
Ky. Rev. Stat. Ann. §532.080(2) (2010).....	12
N.D. Cent. Code §12.1-32-09(1)(c) (2007)	12
N.M. Stat. § 31-18-23(c) (2005).....	12
Or. Rev. Stat. § 161.725(3)(a) (2005).....	12
<u>S.C. Code §17-25-45</u>	passim

Other Authorities

37 Sw. U. L. Rev. 375, 390 (2008)..... 12

Three Strikes Laws: Past and Present, Sentencing and Corrections Policy Updates (National
Conference of State Legislatures) Oct. 2010 13

Constitutional Provisions

Eight Amendment..... 8

STATEMENT OF ISSUES ON APPEAL

Whether under the South Carolina State and United States Constitutions, the trial judge erred in sentencing Appellant to life without parole under S.C. Code § 17-25-45, based on a nineteen year-old conviction for a crime committed when Appellant was a juvenile?

STATEMENT OF THE CASE

Procedural History

Appellant was indicted by the Greenville County Grand Jury for the offenses of armed robbery, three counts of kidnapping, burglary in the first degree, assault and battery of a high and aggravated nature, impersonating a police officer, possession of a weapon during a violent offense, resisting arrest, and injury to a police dog. On April 14, 2009, Appellant was tried before the honorable Edward Miller. The State was represented by Douglas Webb. Appellant was represented by Randall Chambers.

On April 16, 2009 the jury returned a guilty verdict on all charges. The trial judge sentenced pursuant to S.C. Code § 17-25-4. R. 362, ll. 14-15. For armed robbery, the court sentenced Appellant to life without parole. For each of the three counts of kidnapping, the court sentenced Appellant to life without parole. For burglary in the first degree, the court sentenced Appellant to life without parole. For assault and battery of a high and aggravated nature, the court sentenced Appellant to ten years. For impersonating an officer, the court sentenced Appellant to one year. For possession of a weapon during a violent offense, the court sentenced Appellant to five years. For resisting arrest, the court sentenced Appellant to one year. For injury to a police dog, the court sentenced Appellant to five years.

Factual History

On June 12, 2007, George Howard was coming home with his two sons, Jarecus H. and Javon H. George was a convicted drug dealer who had allegedly turned his life around. George was on his cell phone with his friend Michael Thomas. As George was opening his front door, a man dressed as a police officer came from behind and pointed a

gun at George. R. 30, ll. 3-17. The man forced George and his children to lay on the ground. The man was wearing a paintball mask making it impossible to identify him. R. 30, ll. 16-17. The man handcuffed George Howard and duct-taped Jarecus. He then asked five year-old Javon to stand in the corner. The man demanded money from George. George told the man that the money is in the attic. The man then retrieved around \$20,000 in cash, but the man demanded more money from George. R. 34, ll. 13-21. When George refused to tell him where the rest of the money was, the man began shocking George with a stun gun.

While this was going on, George dropped his cellular phone, but he never ended the call. Michael had stayed on the line and was able to hear everything that was happening. Michael then called 911. While the masked man was still inside, police arrived on the scene and surrounded the house. When the masked man tried to leave, he saw that the house was surrounded and that deputies were standing in the front yard. The masked man ran out of the front door and into the woods behind the house. After telling the man to stop, the police then released a K-9 dog which went into the woods after the man. R. 129-131.

While this took place Appellant was in the woods. The K-9 began attacking Appellant. Appellant defended himself by punching the dog and choking the dog. Eventually, police caught up to the dog and wrestled Appellant to the ground. R. 122, 5-12. Police found a paintball mask, gun, and bullet proof vest in the woods.

During the struggle, Appellant sustained dog bites. He was taken to the hospital. While at the hospital, Appellant told police that it was just a drug deal. R. 279, ll. 12-13. Appellant was charged with burglary in the first degree, armed robbery, three counts of

kidnapping, assault and battery of a high and aggravated nature, impersonating a police officer, possession of a weapon during a violent offense, resisting arrest, and injury to a police dog.

At his trial, Appellant maintained that he was not the masked man. Appellant went to George's house to buy drugs carrying a bag containing \$23,000. R. 248, ll. 13-21. When Appellant arrived at the house, he looked through the front door and noticed that someone was bound on the floor. R. 249, ll. 2-12. Knowing that something was wrong, Appellant did not go in. Fearing what would happen if police caught him with \$23,000, Appellant hid in the woods while waiting on his ride to return. R. 250, ll. 3-9. While waiting in the woods, Appellant was attacked by the police dog. R. 252, ll. 11-17. Despite his story, Appellant was found guilty. R. 355, ll. 5-23.

Prior to trial, the State served notice of its intention to seek a mandatory life without parole sentence pursuant to S.C. Code § 17-25-45. The triggering offense was a 1991 conviction for armed robbery and three counts of assault and battery with intent to kill. Appellant was sixteen at the time of the prior offense. R. 359, ll. 21-22. Appellant argued that because he was under eighteen at the time of the triggering offense, the prior conviction should not be used to enhance his current sentence under the recidivist statute. R. 359, l. 23 – p. 360, l. 4. The trial court disagreed with Appellant's argument. R. 360, ll. 14-17. The court held that it did not have any discretion in sentencing under the recidivist statute. R. 362, ll. 14-15. Appellant, now thirty-seven, is currently serving five life sentences without the possibility of parole.

ARGUMENT

Under the South Carolina State and United States Constitutions, the trial judge erred in sentencing Appellant to life without parole under S.C. Code § 17-25-45, based on a nineteen year-old conviction for a crime committed when Appellant was a juvenile.

In 2008, this Court held that a mandatory sentencing enhancement under S.C. Code § 17-25-45, was not cruel and unusual punishment even though the triggering offense was committed while the defendant was a minor. *State v. Williams*, 380 S.C. 336, 669 S.E.2d 640 (Ct. App. 2008). But *Williams* was called into question earlier this year when, the United States Supreme Court held that life without parole sentences for non-homicide offenses committed while a defendant is still a minor are categorically cruel and unusual punishment. *Graham v. Florida*, 130 S.Ct. 2011 (2010).

A. The Court should adopt the test used in *Graham* for determining whether using juvenile convictions to trigger a mandatory life without parole sentence is cruel and unusual punishment.

South Carolina Case Law

South Carolina Courts have allowed offenses committed while a defendant was a juvenile to trigger its recidivist statute. But offenses tried in family court, even most serious offenses, do not trigger the recidivist Statute. See *State v. Ellis*, 345 S.C. 175, 547 S.E.2d 490 (2001). In 2002 the South Carolina Supreme Court found that *juvenile conviction*¹ used to trigger a life without parole sentence did not constitute cruel and unusual punishment. See *State v. Standard*, 351 S.C. 199, 569 S.E.2d 325 (2002). In *Standard* the defendant

¹ Juvenile convictions means a general sessions conviction for a crime committed when the defendant was under the age of eighteen.

received a life without parole sentence based on a prior robbery conviction that was committed while the defendant was a juvenile. The Court looked at whether enhancement based upon the prior juvenile conviction constituted cruel and unusual punishment. The Court found that based upon the sentences imposed in other cases where juveniles offenders received life without parole, that using juvenile conviction to trigger S.C. Code § 17-25-45, did not violate the Eight Amendment. See *Standard*, 351 S.C. at 205, 569 S.E.2d at 329. The *Standard* Court cited various cases where a juvenile was sentenced to a mandatory life without parole sentence. But these sentences were later deemed unconstitutional by *Graham*.

The Court of Appeals has also addressed this issue as recently as 2008. In *Williams*, the Court's analysis was based upon "(1) the evolving standards of decency that mark the progress of a maturing society and (2) the proportionality between the punishment and the offense." *Williams*, 380 S.C. at 346, 669 S.E.2d at 645. The Court found "in light of our courts' decisions in finding sentences of [life without parole] imposed upon juveniles do not violate contemporary standards of decency so as to constitute cruel and unusual punishment and that an enhanced sentence based upon a prior [juvenile convictions] does not offend evolving standards of decency so as to constitute cruel and unusual punishment." *Williams*, 351 S.C. at 349, 669 S.E.2d at 647. But *Williams* was decided before *Graham*.

Graham and its changes to the *Williams* test

In 2010 the Supreme Court categorically found that life without parole sentences for juvenile non-homicide offenders violated the Eight Amendment. *Graham v. Florida*. The majority's analysis hinged upon simply whether or not the *Graham* case implicated a particular type of sentence as it applies to an entire class of offenders. As such, the Supreme

Court found that a comparison between the severity of the penalty and the gravity of the crime does not advance the analysis. *Graham*, 130 S.Ct. at 2022-23; *see also Solem v. Helm*, 463 U.S. 277 (1983). This is opposed to Chief Justice Roberts' concurring opinion, in which the Chief Justice examines the proportionality of the sentence to the individual offense. *Graham*, 130 S.Ct. at 2026 (Roberts *dissenting*). The majority first considers whether sentencing non-homicide juvenile offenders to life without the possibility of parole, offends current standards of decency. *Graham*, 130 S.Ct. at 2022. This is supported through objective indicia of current values. *Id.* Next the court used its own judgment to determine whether the punishment as applied to juveniles violates the constitution. *Id.* At the heart of this second inquiry, the Court examined the justifications for life without parole sentences. The Court compared how those justifications applied to juvenile offenders with how the justifications applied to non-juvenile offenders. *See Graham*, 130 S.Ct. at 2026-2030.

As one sign of current values, the Court considered legislation enacted by various states. The Court found that thirty seven states, the District of Columbia, and federal law allowed possible of life without parole sentences for juvenile offenders. *Graham*, 130 S.Ct. at 2023. But the Court also noted there are other measures of consensus besides legislation. *Graham*, 130 S.Ct. at 2023 (*citing Kennedy v. Louisiana*, 128 S.Ct. at 2657 (2008)). The Court also noted that although many states allowed juveniles to be sentenced to life without parole, that does not conclusively prove that states intended on sentencing juveniles to life without parole. *Graham*, 130 S.Ct. at 2025. In viewing the community consensus the Court looked at the fact that few states sentenced non-homicide offenders to life without parole sentences. In its opinion the Court also noted "the overwhelming weight of international

opinion" against life without parole for non-homicide offenses committed by juveniles. *Graham*, 130 S.Ct. at 2034.

The Court found that community consensus is not itself determinate of whether a punishment is cruel and unusual and that it was the task of the courts to interpret the Eight Amendment. *Graham*, 130 S.Ct. at 2026. In this determination the Court looked at the harshness of a life without parole sentence, noting that it was the second most severe penalty permitted by law. *Graham*, 130 S.Ct. at 2027 (citing *Harmelin v. Michigan*, 501 U.S. 957, 1001). The Court reviewed the penological justifications for the sentence. The court found that penological theory is not adequate to justify life without parole for juvenile non-homicide offenders. *Graham*, 130 S.Ct. at 2030. In the end the majority held that "a state need not guarantee the offender of eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term." *Graham*, 130 S.Ct. at 2034.

The *Williams* test is inconsistent with the test used by the Court in *Graham*. In *Williams*, the Court of Appeals considered the proportionality of the sentence to the defendant's crime. *Williams*, 380 S.C. at 346, 669 S.E.2d at 645. But when deciding whether a sentencing practice is cruel and unusual as applied to an entire category of offender, the severity of the defendant's *individual*² crime does not advance the analysis. *Graham*, 130 S.Ct. at 2023. In other words, the court did not consider proportionality. Here like in *Williams*, Appellant is arguing that the practice of allowing juvenile convictions to

² In the second part of the analysis, the *Graham* Court examines the severity of the punishment and the culpability of the *offenders*. But this is not done comparing individual offenses to individual punishments. Instead this examination is done on a categorical

trigger a mandatory life without parole sentence is cruel and unusual. Appellant makes a categorical challenge that similar to the challenge at issue in *Graham*. As a result, the Court's analysis should not include a finding of proportionality.

Graham also altered the *Williams* and *Standard* analysis by suggesting a change in contemporary values. The holdings in both *Standard* and *Williams* are based on cases that held sentencing a juvenile to life without parole does not violate contemporary standards of decency. *Standard*, 351 S.C. at 205, 569 S.E.2d at 329; *Williams*, 380 S.C. at 348-349. The reasoning was that if it was cruel and unusual to sentence a juvenile to life without parole then it is not cruel and unusual to use juvenile convictions to trigger life without parole sentence. But after *Graham* found it was unconstitutional to sentence non-homicide juvenile offenders to life without parole, this reasoning is also called into question.

B. Using juvenile convictions to trigger a mandatory life without parole sentence offends modern values.

"Society changes. Knowledge accumulates. We learn, sometimes, from our mistakes. Punishments that did not seem cruel and unusual at one time may, in the light of reason and experience, be cruel and unusual at a later time." *Graham*, 130 S.Ct. at 2036 (Stevens concurring).

Modern society does not believe that the mistakes made by juveniles should plague them for eternity. This is not only shown in recent Supreme Court precedent. But it can also be seen in decisions from state courts, legislatures, and scholarly research.

level. The Court Examined the culpability of non-homicide juvenile offenders as an entire class. *Graham*, S.Ct. at 2025-2030.

In 2001, the Supreme Court found that a juvenile *adjudication* cannot be used to enhance a sentence under S.C. Code §17-25-45. *State v. Ellis*, 345 S.C. 175, 179, 547 S.E.2d at 492. Although the *Ellis* opinion hinged on statutory interpretation, its holding is indicative of a trend emerging in many states. Many states, like South Carolina, interpret their recidivist statutes as not being triggered by family court *adjudications*. See Melanie Deutsch *Minor League Offenders Strike Out in the Major League: California's improper use of Juvenile Adjudications as Strikes*, 37 Sw. U. L. Rev. 375, 390 (2008). Other states have enacted statutory prohibitions against juvenile convictions being used to trigger recidivism statutes. See *id.*

Legislation enacted by the states can be objective evidence of contemporary values. See *Williams*, 380 S.C. at 346-347, 669 S.E.2d at 647. Many states have put statutory age limits on convictions that trigger recidivist statutes. New Mexico and North Dakota will not use an offense to trigger their recidivist statutes unless it was committed after the defendant was eighteen. N.M. Stat. § 31-18-23(c) (2005); N.D. Cent. Code § 12.1-32-09(1)(c) (2007). Likewise, Kentucky's persistent felon statute is only triggered by offenses committed after the defendant was eighteen. Ky. Rev. Stat. Ann. § 532.080(2) (2010). Oregon and California only allow offenses committed after a defendant was sixteen to trigger their recidivist statutes. Or. Rev. Stat. § 161.725(3)(a) (2005); Cal. Penal Code § 667(D)(3)(a). Georgia does not allow out-of-state adult convictions of defendants under seventeen to trigger its recidivist statute. *Miller v. State*, 231 Ga. App. 869, 870 S.E.2d 42, 44 (1998) (Citing Ga. Code Ann. § 15-11-2(6)).

In addition to legislation directed at juveniles, many states have altered their recidivist statutes in recent years. Some states have increased discretion in recidivist statute

sentencing while others have eliminated the possibility of life without parole for recidivist. *Three Strikes Laws: Past and Present*, Sentencing and Corrections Policy Updates (National Conference of State Legislatures) Oct. 2010. Recently, the South Carolina legislature has increased judicial discretion in recidivist sentencing by allowing the possibility of work release for some defendant's sentenced under South Carolina's recidivist statute. S.C. Code Section 17-25-45(d). At least ten other states have also increased judicial discretion when dealing with the recidivist sentencing. *Three Strikes Laws: Past and Present*, Sentencing and Corrections Policy Updates (National Conference of State Legislatures) Oct. 2010. Montana, North Carolina, and Nevada have all eliminated life without parole for recidivist and replaced it with a determinate sentence. See *Id.* At least four other states have also narrowed the circumstances which a person can receive life without parole under their recidivist statutes. *Id.*

C. Using prior juvenile convictions to trigger a mandatory life without parole sentence does not serve the same purpose as using prior adult convictions to trigger the recidivism statute.

"Community consensus, while 'entitled to 'great weight', is not it self determinative of whether a punishment is cruel and unusual. *Graham*, 130 S.Ct. at 2026 (*Citing Kennedy*, 125 S.Ct. at 2658). The court must also use its own judgment to determine whether a punishment violates the constitution. *Graham*, 130 S.Ct. 2022. This determination involves two inquires. First, the Court examined at the culpability of the *category* of "offenders at issue in light of their crimes and characteristics." *Graham*, 130 S.Ct. at 2026. In this first inquiry the Court should also consider the severity of the sentencing practice in question. *Id.*

In the second inquiry the Court should determine whether the sentencing practice served legitimate penological goals. *Id.*

Culpability

A repeat offender is seen as deserving a harsher sentence than a first time offender. A defendant with prior convictions is seen as having the "onus of one who is unable to bring his conduct within the social norms." *Ewing v. California*, 538 U.S. 21; 123 S.Ct. 1179, 1185 (2003) (citing *Rummel v. Estelle*, 445 U.S. 263, 284-285, 100 S.Ct. 1133). Society views defendants with that onus as more culpable in their crimes and therefore more deserving of increased sentences. *See id.*, 538 U.S. at 29-30, 123 S.Ct. at 1189-1190. As such, the prior offense is considered to aggravate the later offense. *See Williams*, 380 S.C. at 348, 669 S.E.2d at 647 (citing *Riggs v. California*, 525 U.S. 1114, 119 S.Ct. 890 (1999)).

Offenders with prior juvenile convictions have diminished culpability when compared to offenders with prior adult convictions. As compared to adults, juveniles lack maturity and have an undeveloped sense of responsibility. *Graham*, 130 S.Ct. at 2026; *see also Roper v. Simmons*, 543 U.S. 551, 569 (2005). Juveniles are seen as less culpable than adults. *See id.* Therefore, a prior juvenile conviction does not aggravate the subsequent offense to the same extent that a previous adult conviction would. This makes a defendant with a prior juvenile conviction less culpable in the subsequent offense than a similarly situated defendant with a prior adult conviction.

Penological Justifications

When looking at penological justifications for South Carolina's recidivist statute there is diminished support for a mandatory enhanced sentence based off of prior juvenile convictions when compared to prior adult convictions. Retribution, deterrence,

incapacitation, and rehabilitation are legitimate penological justifications for sentencing practices. *See Graham*, 130 S.Ct. at 2028-30. But when dealing with life without parole sentences rehabilitation is not a legitimate penological goal. *See Graham*, 130 S.Ct. at 2029-30. Therefore the Court should only address the other penological justifications.

Retribution should not be seen as a legitimate reason for a juvenile conviction to trigger a life without parole sentence. "The heart of the retribution rational is that a criminal sentence must be directly related to the personal culpability of the criminal offender." *Graham*, 130 S.Ct. at 2028 (citing *Tison v. Arizona*, 481 U.S. 137, 149 (1987)). The mandatory nature of South Carolina's recidivist statute defeats the purpose of retribution because the Court is not allowed in its discretion to sentence a defendant to a punishment which fits the crime. Furthermore, since a defendant with a prior juvenile conviction has diminished culpability compared with a defendant with a prior adult conviction *supra*, the retribution rational is diminished when dealing with defendants with prior juvenile convictions.

Likewise, the deterrence rational is also diminished when dealing with defendants with prior juvenile convictions. Labeling a crime as "most serious" deters an offender from committing that crime because it carries with it, the chance that a later conviction could result in a life without parole sentence. But as noted in *Graham*, juveniles are less susceptible to deterrence. *Graham*, 130 S.Ct. at 2028. As such, allowing juvenile convictions to trigger South Carolina's recidivist statute has less deterrent effect than allowing adult convictions to trigger the statute.

Incapacitation is often used to justify recidivist statutes. *See Ewing v. California*, 538 U.S. 11, 26 (2003). The basis of incapacitation is ensuring that individuals whose

character will never conform to society's standards are separated from the population. *See id.* But *Graham* found that offenses committed by juveniles are not necessarily indicative of their character. *See Graham*, 130 S.Ct. at 2029. When looking at incapacitation there is a fundamental difference between a juvenile conviction and an adult conviction. Juvenile convictions are not as reliable of an indication of the offender's character as are adult convictions. *See id.* Despite their unreliable nature, S.C. Code § 17-25-45 mandates that a sentencing court use juvenile convictions to in determining that a defendant warrants incapacitation.

Using prior juvenile convictions to enhance under the recidivist statute is not justified by penological theory. Offenders with prior juvenile convictions are also less culpable than an offender with prior adult convictions. Therefore it would be unfair for this Court to find that based off his juvenile convictions, Appellant warranted a mandatory life without parole sentence under the recidivist statute.

CONCLUSION

Based on the foregoing argument, this Court should find that use of juvenile convictions to trigger a mandatory life without parole sentence constitutes cruel and unusual punishment under the South Carolina Constitution and the United States Constitution. Appellant respectfully requests the Court remand his case for resentencing.

Respectfully submitted,



Tristan M. Shaffer
Appellate Defender

ATTORNEY FOR APPELLANT.

This 5th day of May, 2011.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

May 5th, 2011



Tristan M. Shaffer
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
John C. Few, Circuit Court Judge

THE STATE,

RESPONDENT,

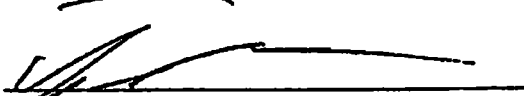
V.

GERALD BROWN,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Mark R. Farthing, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 5th day of May, 2011.


Tristan M. Shaffer
Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 5th day of May, 2011.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: October 2, 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable Edward W. Miller, Circuit Court Judge

THE STATE,

Respondent,

vs.

GERALD BROWN,

Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

MARK R. FARTHING
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

WILLIAM W. WILKINS, III
Solicitor, Thirteenth Judicial Circuit

Greenville County Courthouse
305 East North Street, Suite 325
Greenville, SC 29601
(864) 467-8282

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUE ON APPEAL.....	1
STATEMENT OF THE CASE.....	2
STATEMENT OF THE FACTS	3
ARGUMENT	9
Any issue regarding whether or not Appellant's sentence constituted cruel and unusual punishment was not preserved for appellate review because Appellant never raised the issue during trial. Regardless, the trial judge properly sentenced Appellant to life imprisonment without the possibility of parole under S.C. Code Ann. § 17-25-45. Furthermore, the use of a prior juvenile conviction to enhance Appellant's sentence under the statute did not constitute cruel and unusual punishment.	
CONCLUSION.....	21

TABLE OF AUTHORITIES

Cases:

<u>Graham v. Florida</u> , ___ U.S. ___, 130 S. Ct. 2011 (2010).	15, 16
<u>Gryger v. Burke</u> , 334 U.S. 728 (1948).	17
<u>Harmelin v. Michigan</u> , 501 U.S. 957 (1991).	13
<u>In re Care and Treatment of Corley</u> , 365 S.C. 252, 616 S.E.2d 441 (Ct. App. 2005).	11
<u>In re Walter M.</u> , 386 S.C. 387, 688 S.E.2d 133 (Ct. App. 2009).	9
<u>Lee v. State</u> , 267 Ga. App. 834, 600 S.E.2d 825 (Ga. Ct. App. 2004).	15
<u>Mullins v. State</u> , 571 S.W.2d 852 (Tenn. Crim. App. 1978).	19
<u>Solem v. Helm</u> , 463 U.S. 277 (1983).	20
<u>State v. Adams</u> , 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003).	10
<u>State v. Bailey</u> , 298 S.C. 1, 377 S.E.2d 581 (1989).	10
<u>State v. Dunbar</u> , 356 S.C. 138, 587 S.E.2d 691 (2003).	10
<u>State v. Elders</u> , 386 S.C. 474, 688 S.E.2d 857 (Ct. App. 2010).	11
<u>State v. Ellis</u> , 345 S.C. 175, 547 S.E.2d 490 (2001).	12
<u>State v. Ferguson</u> , 221 S.C. 300, 70 S.E.2d 355 (1952).	12
<u>State v. Fleming</u> , 254 S.C. 415, 175 S.E.2d 624 (1970).	9
<u>State v. Freiburger</u> , 366 S.C. 125, 620 S.E.2d 737 (2005).	9
<u>State v. Hicks</u> , 377 S.C. 322, 659 S.E.2d 499 (Ct. App. 2008).	12
<u>State v. Johnson</u> , 350 S.C. 543, 567 S.E.2d 486 (Ct. App. 2002).	18
<u>State v. Johnson</u> , 363 S.C. 53, 609 S.E.2d 520 (2005).	10
<u>State v. Jones</u> , 344 S.C. 48, 543 S.E.2d 541 (2001).	19
<u>State v. Morris</u> , 307 S.C. 480, 415 S.E.2d 819 (Ct. App. 1991).	10
<u>State v. Patterson</u> , 324 S.C. 5, 482 S.E.2d 760 (1997).	11

<u>State v. Pittman</u> , 373 S.C. 527, 647 S.E.2d 144 (2007).	14
<u>State v. Prioleau</u> , 345 S.C. 404, 548 S.E.2d 213 (2006).	10
<u>State v. Rogers</u> , 361 S.C. 178, 603 S.E.2d 910 (Ct. App. 2004).	19
<u>State v. Sampson</u> , 317 S.C. 423, 454 S.E.2d 721 (Ct. App. 1995).	17
<u>State v. Sheldon</u> , 344 S.C. 340, 543 S.E.2d 585 (Ct. App. 2001).	11
<u>State v. Sidell</u> , 262 S.C. 397, 205 S.E.2d 2 (1974).	12
<u>State v. Standard</u> , 351 S.C. 199, 569 S.E.2d 325 (2002).	12, 14
<u>State v. Thomason</u> , 355 S.C. 278, 584 S.E.2d 143 (Ct. App. 2003).	10
<u>State v. White</u> , 349 S.C. 33, 562 S.E.2d 305 (2002).	20
<u>State v. Williams</u> , 380 S.C. 336, 669 S.E.2d 640 (Ct. App. 2008).	14, 15
<u>State v. Wilson</u> , 306 S.C. 498, 413 S.E.2d 19 (1992).	13
<u>State v. Wilson</u> , 345 S.C. 1, 545 S.E.2d 827 (2001).	11
<u>Trops v. Dulles</u> , 356 U.S. 86 (1958).	14
<u>United States v. Graham</u> , 622 F.3d 445 (6th Cir. 2010).	16
<u>United States v. Mays</u> , 466 F.3d 335 (5th Cir. 2006).	19
<u>United States v. Rodríguez</u> , 553 U.S. 377 (2008).	17
<u>United States v. Salahuddin</u> , 509 F.3d 858 (7th Cir. 2007).	19
<u>United States v. Scott</u> , 610 F.3d 1009 (8th Cir. 2010).	16
<u>United States v. Wilks</u> , 464 F.3d 1240 (11th Cir. 2006).	16
<u>Other Authorities:</u>	
U.S. Const. amend. XIII.	13
Cal. Penal Code § 667(d)(3)(A).	14
Or. Rev. Stat. Ann. § 161.725(1)(3)(a).	15

STATEMENT OF ISSUE ON APPEAL

Any issue regarding whether or not Appellant's sentence constituted cruel and unusual punishment was not preserved for appellate review because Appellant never raised the issue during trial. Regardless, the trial judge properly sentenced Appellant to life imprisonment without the possibility of parole under S.C. Code Ann. § 17-25-45. Furthermore, the use of a prior juvenile conviction to enhance Appellant's sentence under the statute did not constitute cruel and unusual punishment.

STATEMENT OF THE CASE

Appellant Gerald Brown was arrested after law enforcement officers responded to a report of a home invasion in progress. In September of 2007, the Greenville County grand jury indicted Appellant for burglary in the first degree, armed robbery, three counts of kidnapping, assault and battery of a high and aggravated nature, possession of a weapon during the commission of a crime, impersonating a law enforcement officer, malicious injury to a police dog, and resisting arrest. Prior to trial, the solicitor served timely notice on Appellant indicating the State would seek a life sentence without the possibility of parole upon conviction. On April 14, 2009, a jury trial was commenced in the Greenville County court of general sessions with the Honorable Edward W. Miller, circuit court judge, presiding. At the conclusion of trial, the jury convicted Appellant of all indicted offenses. Pursuant to S.C. Code Ann. § 17-25-45, the trial judge sentenced Appellant to terms of imprisonment of life without parole for the burglary conviction, the armed robbery conviction, and the three kidnapping convictions. Additionally, the trial judge sentenced Appellant to terms of imprisonment of ten years for the assault and battery conviction, five years for the possession of a weapon conviction, five years for malicious injury to a police dog, one year for impersonating an officer, and one year for resisting arrest. Subsequently, Appellant filed a timely notice of appeal.

STATEMENT OF FACTS

Around midnight on June 12, 2007, George Howard returned to his home with his fifteen-year-old son, Jarecus H., and his five-year-old son, Javon H., after visiting his mother. (R. p. 14; pp. 28-29; p. 36). Howard stepped inside of the house, heard Jarecus yell, turned around, and saw a masked man wearing a shirt with "police" written on it running towards them with a gun. (R. p. 15; pp. 30-31; p. 42). The intruder ordered everyone to get down, and they complied. (R. pp. 15-16; p. 31). While getting onto the floor, Howard, who had been speaking on his cell phone with a friend, placed the phone down with his call still active. (R. p. 33). The intruder then bound Howard and Jarecus with hand-cuffs and duct tape and threatened to kill them. (R. p. 16; p. 18; pp. 31-32). The man demanded money and threatened to bind Javon with duct tape if Howard did not reveal its location. (R. p. 17; p. 33). Howard informed the man the money was in a container in the attic. (R. p. 33). The intruder moved Howard to a back room, retrieved \$23,000 in cash from the attic, returned downstairs, called an accomplice, and told him all he could find was \$20,000. (R. pp. 18; pp. 33-34; p. 37). The man then ordered Howard to reveal the location of the "real" money, repeatedly shocked Howard with a taser, and rummaged through the house. (R. pp. 18-19; pp. 34-35). Afterwards, he instructed Javon to count down from eleven several times, which was as high as Javon could count, before fleeing Howard's home. (R. pp. 19; pp. 36).

Meanwhile, Michael Thompson, who had been talking to Howard on the phone, heard Howard's phone drop followed by someone saying: "Get down." (R. pp. 58-59). Thompson knew something was wrong, immediately called 911 on another phone, and linked the calls together. (R. p. 59). As he continued to listen, he heard screaming and someone demanding money. (R. pp. 59-60). Based on the emergency call, law

enforcement officers were dispatched to Howard's home and quickly responded to the scene. (R. p. 69; p. 98; p. 124; p. 202; p. 215).

Multiple officers from the Greenville County Sheriff's Office arrived at the location and surrounded Howard's house. (R. p. 69; p. 98; p. 124; p. 202; p. 215). Master Deputy Dan Acord positioned himself at the rear of the house and looked inside one of the windows. (R. p. 71). He observed a bound individual on the floor and a man walking throughout the house. (R. p. 72). He watched the man, who was wearing a bullet-proof vest and a shirt with "police" on it, for several minutes and reported his movements to the other officers. (R. pp. 72-73).

Deputy Chuck Porter was positioned on the right side of the house when he observed a man wearing a mask and vest and armed with a handgun exit the front door. (R. p. 98; p. 100). Deputy Porter immediately ordered the man to drop the weapon, and the man took off around the right side of the house. (R. p. 101). No one else came out from inside the home. (R. p. 102). Deputy Travis Wyatt immediately went into the house to secure it after the suspect fled. (R. p. 204). He found the victims bound inside, but he located no drugs, money, or other suspects in his search of the house. (R. pp. 205-206). Meanwhile, Master Deputy Acord heard the commotion, moved towards the front of the house, and saw a man wearing the same clothes as the suspect he previously observed moving around inside Howard's home. (R. p. 73). The deputy commanded the man to stop, but he ignored the commands and continued to flee. (R. p. 74).

Deputy Michael Bryan, Deputy Hal Harris, and his police dog, Cash, were positioned at the back of the house when they heard Deputy Porter shouting commands at a suspect around front. (R. pp. 126-127; pp. 215-216). Seconds later, the officers observed an armed man wearing a vest, a mask, a badge, and shirt with "police" on it run

around the corner from the front of the house. (R. pp. 129-130; p. 216). The man ran towards a black bag Deputy Bryan found positioned next to the house and then saw the officers. (R. p. 129). They commanded him to stop, and the suspect immediately turned and fled into the woods. (R. p. 129; p. 217). The officers quickly pursued, and Deputy Harris released Cash to apprehend the suspect. (R. pp. 130-131; p. 218).

Cash caught the suspect and engaged him just inside the wood line. (R. p. 131; p. 218). Deputy Harris followed behind and never lost sight of the suspect after seeing him run around from the front of the house. (R. pp. 218-219). Deputy Harris and Deputy Bryan both followed the suspect into the woods, while Master Deputy Acord and other officers attempted to cut off the man's escape. (R. p. 75; p. 219). During the pursuit, the man the officers were pursuing, Appellant Gerald Brown, repeatedly struck, punched, and choked Cash while trying to evade the officers. (R. p. 82; p. 220). Additionally, he slammed Cash into a tree and attempted to yank one of his ears off.¹ (R. p. 220). Deputy Harris continuously commanded Appellant to stop, but Appellant ignored those commands. (R. p. 131; p. 220). Eventually, Deputy Harris tackled Appellant, and multiple officers attempted to subdue Appellant. (R. pp. 221-222). Appellant fought with the officers, attempted to crawl away, and continued to struggle to get free. (R. p. 76; p. 77; pp. 131-132; p. 222). During the ensuing struggle, Cash ripped off Appellant's vest, tore his shirt, and bit Appellant multiple times. (R. p. 91; p. 104). With the combined efforts of four officers, Appellant was finally hand-cuffed and arrested. (R. p. 78; p. 103; p. 222). A cell phone was located in Appellant's pocket with the last call

¹ Shortly after the incident, Cash was exhausted and uncharacteristically lethargic. (R. p. 222). One of his teeth fell out a few days later. (R. p. 223).

placed to "Duke." (R. p. 90). Appellant was then transported out of the woods, informed of his rights, and treated by paramedics. (R. pp. 81-82; p. 105).

After being treated at the scene, Appellant was transported to the hospital. (R. pp. 81-82; p. 224). Deputy Harris spoke with Appellant at the hospital and asked him why he refused to surrender. (R. p. 225). Appellant stated: "Ain't nobody want to go to jail." (R. p. 225). Appellant then sighed and stated: "[I]t's just a crack dealer." (R. p. 225). The officer asked Appellant who he was referring to, and Appellant stated he meant Howard.² (R. p. 225).

During the investigation of the crime scene, officers discovered a handgun on a tree in the woods where Master Deputy Acord initially encountered Appellant. (R. pp. 78-79; p. 179). Additionally, they recovered the body armor discovered underneath Appellant after he was subdued along with the remnants of his shirt with "police" written on it. (R. p. 105; p. 134). A large quantity of money was discovered in the backyard of Howard's home, and a taser was located in the woods behind Howard's home. (R. pp. 121-122; p. 177; p. 184). The officers also recovered the black bag Appellant ran towards after fleeing from the front of the house. (R. p. 140). Inside, they found a gun holster, two flashlights, gloves, a screw driver, a crowbar, gum, and other tools. (R. p. 140; pp. 176-177). The following day, officers also found a "special police" badge and a hand-cuffs case at the location where Appellant was arrested. (R. pp. 138-139). Subsequently, Appellant was indicted for numerous offenses, and he proceeded to trial.

During trial, the victims recounted the circumstances of the invasion of their home. Additionally, the officers testified about their experiences in subduing and

² Howard was previously convicted of a drug offense. (R. p. 38). He received a probationary sentence and completed that sentence. (R. p. 38).

arresting Appellant during the incident. In response, Appellant testified in his own defense, offering a substantially different account of the events of June 12, 2007. (R. p. 244). Appellant testified he had known Howard his whole life and Howard was drug partners with his cousin, Andrea "Duke" Terry. (R. pp. 245-246). Appellant admitted he was involved with selling drugs. (R. p. 247). He alleged he went to Howard's house on the night of the incident with \$23,000 he received from Terry in order to purchase fifty-four ounces of cocaine. (R. p. 248). He stated he heard noises inside Howard's home, looked inside, and saw people tied up in the floor. (R. p. 249). Appellant testified he then called Terry and was instructed to go through the woods behind Howard's house to be picked up. (R. p. 249). Appellant asserted he waited in the woods for twenty minutes, saw lights, jumped up to run, and was attacked by a dog. (R. p. 252; pp. 265-266). He acknowledged he then fought with the officers and the police dog before he was subdued, arrested, and taken to the hospital. (R. pp. 253-254). He testified he did not give up when the officers confronted him because he did not want to go to jail. (R. p. 275). However, Appellant denied wearing a shirt with "police" on it and denied having a gun, black bag, badge, or hand-cuffs. (R. pp. 254-255). He further denied saying anything about a crack dealer to the officer at the hospital and insisted he really said: "It was a drug deal." (R. p. 256).

At the conclusion of trial, the jury convicted Appellant of all indicted offenses. (R. p. 355). During sentencing, the solicitor noted Appellant had a prior armed robbery conviction from 1991 and three prior convictions for assault and battery with intent to kill.³ (R. p. 358). He further stated Appellant had been timely served with notice of the

³ Appellant had been released in April of 2006 based on these prior convictions, which was a little over a year before the incident at Howard's home. (R. p. 241).

State's intent to seek a sentence of life without the possibility of parole based on the prior convictions. (R. pp. 358-359). Defense counsel then asserted:

I've looked into this some, couldn't find anything that was on point, but my client's prior convictions that would make him eligible for the life without the opportunity for parole happened when he was 16 years old. So he was a juvenile. Obviously, he was tried as an adult and he was sentenced as an adult, but I would still make the argument for the record that given the fact that he was under the age of 18 and not legally an adult that those convictions should not apply to enhance his sentence in this instance. So he should not, therefore, be eligible for life without parole.

(R. pp. 359-360). The trial judge inquired whether defense counsel had any supporting authority for his position, and defense counsel responded he did not locate any cases on point and the issue was one of first impression. (R. p. 360). The trial judge then ruled he had no discretion in sentencing Appellant under the applicable statute. (R. p. 360). Subsequently, Appellant received five life sentences without the possibility of parole for the burglary, armed robbery, and kidnapping convictions along with an aggregate term of imprisonment of ten years for the other convictions. (R. p. 362).

ARGUMENT

Any issue regarding whether or not Appellant's sentence constituted cruel and unusual punishment was not preserved for appellate review because Appellant never raised the issue during trial. Regardless, the trial judge properly sentenced Appellant to life imprisonment without the possibility of parole under S.C. Code Ann. § 17-25-45. Furthermore, the use of a prior juvenile conviction to enhance Appellant's sentence under the statute did not constitute cruel and unusual punishment.

Appellant maintains his sentence of life imprisonment without the possibility of parole constituted cruel and unusual punishment because the sentence was enhanced based on Appellant's prior juvenile conviction for crimes committed when he was sixteen years old. Initially, the issue is not preserved because Appellant did not raise a constitutional challenge to the enhancement of his sentence during trial. Regardless, the trial judge properly sentenced Appellant under S.C. Code Ann. § 17-25-45 because Appellant's prior juvenile conviction for a most serious offense constituted a qualifying prior conviction for enhancement purposes under the statute. Furthermore, the enhancement of Appellant's sentence with the prior juvenile conviction did not offend modern standards of decency and did not constitute cruel and unusual punishment. Appellant's convictions and sentence should be affirmed.

A. Issue Preservation

"Generally, an issue must be both raised to and ruled upon by the trial court in order to be preserved for appellate review." In re Walter M., 386 S.C. 387, 392, 688 S.E.2d 133, 136 (Cl. App. 2009). If an error is not presented to and ruled upon by the trial judge, it cannot be raised for the first time to the appellate court. State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005). The appellate court will not consider any issues that were not presented to or passed upon by the trial judge. State v. Fleming, 254 S.C. 415, 421, 175 S.E.2d 624, 627 (1970).

An issue must be raised in a sufficiently specific manner to call attention to the exact error to the trial court. State v. Johnson, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005); see State v. Prioleau, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001) ("[A]n objection should be sufficiently specific to bring into focus the precise nature of the alleged error so it can be reasonably understood by the trial judge."). "Where an objection and the ground therefor is not stated in the record, there is no basis for appellate review." State v. Morris, 307 S.C. 480, 485, 415 S.E.2d 819, 823 (Cl. App. 1991).

An objecting party need not use the exact name of a legal doctrine in order to preserve an objection, but it must be clear that the argument has been presented on the ground alleged. State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003). A defendant cannot raise one argument in support of an issue at trial and then raise a different argument in support of that issue to the appellate court. State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989); see State v. Thomason, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (Cl. App. 2003) ("[A] party cannot argue one theory at trial and a different theory on appeal."); State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Cl. App. 2003) ("[A] defendant may not argue one ground below and another on appeal.").

In the case sub judice, Appellant's trial counsel argued Appellant's prior conviction occurred when he was a juvenile and, therefore, should not be applied to enhance his sentence. Defense counsel further asserted the issue was an issue of first impression in South Carolina. At no point during trial did defense counsel ever contend the enhancement of a sentence with a prior juvenile conviction constituted cruel and unusual punishment. Subsequently, on appeal, Appellant has conceded the question as to whether or not a juvenile conviction can be used to enhance a sentence under our

recidivist offender statute has been settled. However, for the first time, Appellant now asserts such a sentence enhancement constitutes cruel and unusual punishment.

Appellant has raised an entirely new argument in opposition to his sentence on appeal, and that argument was never presented to or ruled upon by the trial judge. Appellant never argued the imposition of a mandatory life sentence would constitute cruel and unusual punishment to the trial judge, and the trial judge never made a ruling on that particular question. Appellant failed to properly raise the issue argued on appeal to the trial judge. Therefore, the issue is not preserved for appellate review. Appellant is bound to his trial argument and is not entitled to raise new constitutional issues for the first time on appeal. See State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial."); see also In re Care and Treatment of Corley, 365 S.C. 252, 258, 616 S.E.2d 441, 444 (Ct. App. 2005) ("Constitutional issues, like most others, must be raised to and ruled upon by the trial court to be preserved for appeal."). As the issue raised on appeal was not properly preserved during trial, Appellant's convictions and sentence should be affirmed.

B. Propriety of the Sentencing Enhancement

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). "[T]he trial court's ruling will not be disturbed absent a prejudicial abuse of discretion amounting to an error of law." State v. Sheldon, 344 S.C. 340, 342, 543 S.E.2d 585, 585-586 (Ct. App. 2001). An abuse of discretion occurs where the trial court's conclusions lack evidentiary support or are controlled by an error of law. State v. Elders, 386 S.C. 474, 480, 688 S.E.2d 857, 861 (Ct. App. 2010).

Generally, the trial judge has broad discretion in imposing a sentence within the statutory limits: State v. Sidell, 262 S.C. 397, 398, 205 S.E.2d 2, 3 (1974). "A judge or other sentencing authority is to be accorded very wide discretion in determining an appropriate sentence, and must be permitted to consider any and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed." State v. Hicks, 377 S.C. 322, 325, 659 S.E.2d 499, 500 (Ct. App. 2008). Appellate courts typically only interfere in a trial judge's discretionary sentencing decision in rare and unusual circumstances. State v. Ferguson, 221 S.C. 300, 307, 70 S.E.2d 355, 358 (1952).

However, under S.C. Code Ann. § 17-25-45(A), the trial judge has no discretion in sentencing and must sentence a defendant to a term of imprisonment of life without the possibility of parole where the defendant was convicted of a most serious offense and has either one or more prior convictions for a most serious offense or two or more prior convictions for a serious offense. Kidnapping, first-degree burglary, armed robbery, and assault and battery with intent to kill are all classified as most serious offenses under the statute. S.C. Code Ann. § 17-25-45(C)(1).

A "conviction" for purposes of the recidivist offender statute means any conviction, guilty plea, or plea of nolo contendere. S.C. Code Ann. § 17-25-45(C)(3). A juvenile adjudication in family court does not qualify as a conviction for purposes of sentencing enhancement under the statute. State v. Ellis, 345 S.C. 175, 179, 547 S.E.2d 490, 492 (2001). However, where a juvenile is tried as an adult in general sessions court, a resulting conviction or guilty plea is a conviction for enhancement purposes. State v. Standard, 351 S.C. 199, 203, 569 S.E.2d 325, 328 (2002).

In the case at bar, Appellant argued at trial he should not be eligible for a mandatory sentence of life without the possibility of parole based on his prior convictions because the offenses were committed when he was a juvenile. However, Appellant conceded he had been tried and convicted as an adult for those offenses. To the extent Appellant contended it was improper to enhance his sentence with juvenile convictions, Appellant's contentions were incorrect.

Based on the incident at the Howards' home, Appellant was convicted of five most serious offenses. Prior to being convicted of these crimes, Appellant had been convicted of an earlier most serious offense stemming from crimes he committed as a juvenile. His prior conviction was not a juvenile adjudication, meaning it constituted a conviction for statutory sentencing enhancement purposes. Therefore, due to the fact Appellant was convicted of several most serious offenses and had a prior conviction for a most serious offense, the trial judge properly determined he was required to sentence Appellant to a term of life imprisonment without the possibility of parole. The trial judge committed no error in enhancing Appellant's sentence under the clear and unambiguous requirements of S.C. Code Ann. § 17-25-45. Appellant's convictions and sentence should be affirmed.

C. Sentence Enhancement and Cruel and Unusual Punishment

The Eighth Amendment of the United States Constitution prohibits the imposition of cruel and unusual punishment. U.S. Const. amend. VIII. However, the Eighth Amendment only forbids extreme sentences that are grossly disproportionate to the crime. Harmelin v. Michigan, 501 U.S. 957, 1001 (1991). What constitutes cruel and unusual punishment is an evolving standard and involves looking to how society presently views a particular punishment. State v. Wilson, 306 S.C. 498, 509-510, 413

S.E.2d 19, 26 (1992). "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Trops v. Dulles, 356 U.S. 86, 101 (1958).

The clearest and most reliable expression of society's contemporary values is derived from legislation enacted by this country's legislatures. State v. Pittman, 373 S.C. 527, 563, 647 S.E.2d 144, 162 (2007). However, a reviewing court's own judgment should also be employed by asking whether there is reason to disagree with the judgment reached by the citizenry and the legislature. Id. at 563, 647 S.E.2d at 163. In order to establish that evolving standards of decency preclude a particular punishment, the defendant bears the heavy burden of showing our culture and laws have emphatically and virtually universally rejected a particular sentencing practice. Id. at 565, 647 S.E.2d at 164. "It is not the burden of the state to establish a national consensus approving what their citizens have voted to do; rather, it is the heavy burden of the defendant to establish a national consensus against it." State v. Williams, 380 S.C. 336, 347, 669 S.E.2d 640, 646 (Cl. App. 2008).

In State v. Standard, the South Carolina Supreme Court determined the enhancement of a sentence under S.C. Code Ann. § 17-25-45 with a prior juvenile conviction did not constitute cruel and unusual punishment. Id., 351 S.C. at 204, 569 S.E.2d at 328. "[The Court held] that an enhanced sentence based upon a prior most serious conviction for a crime which was committed as a juvenile does not offend evolving standards of decency so as to constitute cruel and unusual punishment." Id. at 206, 569 S.E.2d at 329 (emphasis in original). Subsequently, in State v. Williams, the Court of Appeals also found the imposition of a sentence of life without parole based on a

prior juvenile conviction did not constitute cruel and unusual punishment. Id., 380 S.C. at 348-349, 669 S.E.2d at 647.

In the present case, Appellant is categorically challenging the use of a juvenile conviction for enhancement purposes under South Carolina's recidivist offender statute. Appellant contends the recent holding of the United States Supreme Court in Graham v. Florida, ___ U.S. ___, 130 S. Ct. 2011 (2010), suggested a change in contemporary values and called into question our courts' holdings in both Standard and Williams. Appellant asserts modern society does not believe juveniles' prior mistakes should plague them for eternity and cites to several other states which limit the use of prior convictions committed by juveniles of a certain age.⁴ He further maintains a prior juvenile conviction should not aggravate a subsequent offense to the same degree as a prior adult conviction because juvenile offenders are less culpable. Finally, Appellant asserts the use of a juvenile conviction for enhancement purposes does not justifiably serve any penological goals because juveniles are less susceptible to deterrence and juvenile convictions are not reliable indicators of character. Assuming the issue was properly preserved, the use of juvenile convictions for enhancement purposes under S.C. Code Ann. § 17-25-45 does not constitute cruel and unusual punishment.

Initially, the United States Supreme Court's holding in Graham had no impact on our courts holdings' in Standard and Williams. In a sharply divided decision, the

⁴ Notably, of the six recidivist statutes referenced by Appellant, Appellant's conviction in the present case would have been enhanced with his prior juvenile conviction under three of the statutes based on his age at the time of the commission of the earlier offenses. See Cal. Penal Code § 667(d)(3)(A) (stating a prior juvenile adjudication shall constitute a prior felony conviction for purposes of sentencing enhancement under the habitual criminal statute if the offender was sixteen years of age or older at the time of the offense); Or. Rev. Stat. Ann. § 161.725(1)(3)(a) (precluding the use of a prior conviction committed by an offender less than sixteen years of age for sentencing enhancement purposes); Lee v. State, 267 Ga. App. 834, 837, 600 S.E.2d 825, 829 (Ga. Ct. App. 2004) (holding the enhancement of Lee's sentence under Georgia's recidivist statute was constitutional where the sentence was enhanced with a prior conviction stemming from when Lee was tried as an adult for offenses committed when he was thirteen-years-old).

Supreme Court in Graham determined the Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit a homicide. Id. at 2034. In reaching this holding, the Court concluded juveniles have lessened culpability compared to adult offenders, meaning their crimes are less morally reprehensible than those committed by adults. Id. at 2026. Due to minors' potential to reform their character deficiencies, the Court found the sentencing practice to be unconstitutional because "[a] life without parole sentence improperly denies the juvenile offender a chance to demonstrate growth and maturity." Id. at 2029. However, the Court instructed: "Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives." Id. at 2031.

Importantly, while the Court in Graham found sentences of life without parole were unconstitutional for non-homicide juvenile offenders, the Court did not directly or indirectly state offenses committed by juveniles could not be used to enhance sentences for adults under recidivist offender statutes. The Court merely concluded juveniles were less culpable for their crimes while specifically noting juvenile offenders are "not absolved of responsibility for [their] actions[.]" Id. at 2026. The holding in Graham is simply not applicable or relevant to the situation in Appellant's case. See United States v. Graham, 622 F.3d 445, 463 (6th Cir. 2010) (finding the imposition of a sentence of life imprisonment under a recidivist statute based upon a prior juvenile conviction was not unconstitutional because the instant offense was committed by an adult offender and not a juvenile with lessened culpability as discussed in Graham v. Florida); United States v. Scott, 610 F.3d 1009, 1018 (8th Cir. 2010) ("The Court in Graham did not call into question the constitutionality of using prior convictions, juvenile or otherwise, to enhance the sentence of a convicted adult."); see, e.g., United States v. Wilks, 464 F.3d 1240,

1243 (11th Cir. 2006) ("Our conclusion that youthful offender convictions can qualify as predicate offenses for sentencing enhancement purposes remain valid because Roper does not deal specifically – or even tangentially – with sentence enhancement. It is one thing to prohibit capital punishment for those under the age of eighteen, but an entirely different thing to prohibit consideration of prior youthful offenses when sentencing criminals who continue their illegal activity into adulthood. Roper does not mandate that we wipe clean the records of every criminal on his or her eighteenth birthday.").

Critically, Appellant committed the crimes for which he was sentenced to life without parole as an adult. Appellant did not receive the life sentence for any offense he committed before reaching the age of maturity. See Gryger v. Burke, 334 U.S. 728, 732 (1948) ("The sentence as a fourth offender or habitual criminal is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes. It is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one."). Instead, he was sentenced for the extremely serious offenses he committed as an adult without any excuse of lessened or reduced culpability. At the time Appellant carefully planned and executed his most recent egregious crimes, Appellant could no longer claim he had any diminished responsibility for his actions based on his age or maturity.⁵ Therefore, there is no rational basis to exclude his prior juvenile convictions from consideration for sentencing purposes.

Appellant's enhanced sentence is entirely consistent with the rationale behind recidivist offender statutes, which is to more severely punish offenders who continue to break the law time and time again. See United States v. Rodriguez, 553 U.S. 377, 385

⁵ Notably, Appellant has not raised any challenge to his convictions on appeal and, instead, has only objected to his sentence. Thus, Appellant's convictions are the law of the case. See State v. Sampson, 317 S.C. 423, 427, 454 S.E.2d 721, 723 (Cl. App. 1995) (finding unchallenged and unappealed rulings are the law of the case).

(2008) ("[A]n offense committed by a repeat offender is often thought to reflect greater culpability and thus to merit a greater punishment. Similarly, a second or subsequent offense is often regarded as more serious because it portends greater future danger and therefore warrants an increased sentence for purposes of deterrence and incapacitation."). Appellant's sentence was properly enhanced based on the increased culpability inherent in his status as an offender who had previously been convicted of an earlier most serious offense. Although aware of the consequences of his earlier crimes committed as a juvenile, Appellant elected to continue to engage in highly serious and dangerous criminal conduct after being released from prison. Appellant cannot claim any diminished culpability for the crimes he committed as an adult, especially in light of the knowledge and experience he should have gained following his juvenile conviction.

Few people would be in a better position than Appellant to appreciate the serious nature of the offenses he was convicted of and their consequences. Prior to committing his most recent crimes, Appellant was convicted as a juvenile of committing an armed robbery and three counts of assault and battery with intent to kill. He served a substantial and lengthy prison sentence based on those earlier crimes, and that sentence extended well into his adult years. Then, despite having served a lengthy term of incarceration for his juvenile offenses, Appellant committed numerous highly serious offenses, including kidnapping, first-degree burglary, and another armed robbery, within fourteen months of his release from incarceration. See State v. Johnson, 350 S.C. 543, 547, 567 S.E.2d 486, 488 (Ct. App. 2002) ("[F]ew would argue that first-degree burglary, armed robbery, and kidnapping are anything other than grave offenses of the 'most serious' nature."). Appellant's actions subsequent to his release illustrate exactly why his earlier juvenile conviction should be used to enhance his sentence.

Our courts have repeatedly found S.C. Code Ann. § 17-25-45 to be constitutional, and it is consistent with the recidivist offender statutes adopted in many other states. See State v. Rogers, 361 S.C. 178, 188, 603 S.E.2d 910, 915 (Cl. App. 2004) (finding no error in the enhancement of a sentence with a nineteen-year-old prior conviction and noting the recidivist offender statute has repeatedly withstood constitutional challenges); see also United States v. Mays, 466 F.3d 335, 340 (5th Cir. 2006) (concluding there is no national consensus that a sentencing enhancement to life imprisonment based on a juvenile conviction violates modern standards of decency); United States v. Salahuddin, 509 F.3d 858, 864 (7th Cir. 2007) (holding the enhancement of an adult offender's sentence with a prior juvenile conviction does not constitute cruel and unusual punishment); Mullins v. State, 571 S.W.2d 852, 858 (Tenn. Crim. App. 1978) ("[I]t must be remembered that the defendant is not being punished for his prior [juvenile] crimes. Those crimes brought about his status, but his present sentence is the enhanced punishment for this 23 year old defendant's present crime."). Appellant has failed to establish a clear or universal rejection of the use of prior juvenile convictions for enhancement purposes under recidivist offender statutes. Without a clear showing to the contrary, there is no basis to determine the statutory sentencing practice is unconstitutional. See State v. Jones, 344 S.C. 48, 58, 543 S.E.2d 541, 546 (2001) ("When the issue is the constitutionality of a statute, every presumption will be made in favor of its validity and no statute will be declared unconstitutional unless its invalidity appears so clearly as to leave no doubt that it conflicts with the constitution.").

The use of prior convictions for most serious offenses, regardless of whether the offenses were committed by juvenile or adult offenders, serves the legitimate penological goals of discouraging and preventing the commission of crimes by habitual offenders.

See Solem v. Helm, 463 U.S. 277, 296 (1983) ("[A] State is justified in punishing a recidivist more severely than it punishes a first offender."). Therefore, even assuming Appellant properly preserved his constitutional challenge to the enhancement of his sentence, the statutory enhancement based on his juvenile conviction was not unconstitutional. Appellant's sentence was neither cruel and unusual nor grossly disproportionate to his offense.⁶ There was no legitimate reason to ignore Appellant's prior juvenile conviction when considering his sentence for subsequent crimes. Appellant's convictions and sentence should be affirmed.

⁶ Notwithstanding the enhancement of Appellant's sentence based on his prior convictions, Appellant's offenses were extremely serious, exposing him to a maximum potential punishment of life imprisonment plus 142 years prior to any enhancement. See State v. White, 349 S.C. 33, 37, 562 S.E.2d 305, 306-307 (2002) ("Given that a life sentence is possible for even first offense first-degree burglary convictions, a life sentence without parole for a recidivist with one or more previous convictions of most serious offenses does not constitute cruel and unusual punishment.").

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

MARK R. FARTHING
Assistant Attorney General

WILLIAM W. WILKINS, III
Solicitor, Thirteenth Judicial Circuit

BY:


Mark R. Farthing

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

April 20, 2011

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable Edward W. Miller, Circuit Court Judge

THE STATE,

Respondent,

vs.

GERALD BROWN,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

MARK R. FARTHING
Assistant Attorney General

WILLIAM W. WILKINS, III
Solicitor, Thirteenth Judicial Circuit

BY:


Mark R. Farthing

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

April 20, 2011

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable Edward W. Miller, Circuit Court Judge

THE STATE,

Respondent,

vs.

GERALD BROWN,

Appellant.

PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Tristan M. Shaffer, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 20th day of April, 2011.

Ellen R. DuBois
ELLEN R. DuBOIS
Legal Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

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

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

The State,

Respondent,

v.

Gerald Brown,

Appellant.

Appeal from Greenville County
Edward W. Miller, Circuit Court Judge

Unpublished Opinion No. 2012-UP-262
Submitted April 2, 2012 – Filed May 2, 2012

AFFIRMED

Appellate Defender Tristan M. Shaffer, of Columbia,
for Appellant.

Attorney General Alan Wilson, Chief Deputy
Attorney General John W. McIntosh, Senior
Assistant Deputy Attorney General Salley W. Elliott,
and Assistant Attorney General Mark R. Farthing, all
of Columbia; and Solicitor W. Walter Wilkins, III, of
Greenville, for Respondent.

PER CURIAM: Gerald Brown appeals his sentence of life imprisonment without the possibility of parole for his convictions of armed robbery, first-degree burglary, and three counts of kidnapping. Brown argues the trial court's use of his prior juvenile convictions to enhance his sentence under section 17-25-45 of the South Carolina Code (Supp. 2011) constituted cruel and unusual punishment. We affirm¹ pursuant to Rule 220(b)(1), SCACR, and the following authorities: State v. Porter, 389 S.C. 27, 38, 698 S.E.2d 237, 243 (Ct. App. 2010) (holding issues not raised and ruled upon in the trial court will not be considered on appeal); State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground."); In re Care & Treatment of Corley, 365 S.C. 252, 258, 616 S.E.2d 441, 444 (Ct. App. 2005) ("Constitutional issues, like most others, must be raised to and ruled on by the trial court to be preserved for appeal.").²

AFFIRMED.

PIEPER, KONDUROS, and GEATHERS, JJ., concur.

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

² Even if we were to find the issue preserved, we would affirm. See State v. Standard, 351 S.C. 199, 206, 569 S.E.2d 325, 329 (2002) (holding the enhancement of a sentence under section 17-25-45 of the South Carolina Code (Supp. 2011) with a prior juvenile conviction did not constitute cruel and unusual punishment).

FORM 5

STATE OF SOUTH CAROLINA)

County of GREENVILLE)

Gerald Brown (Inmate #174505))

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

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

APPLICATION FOR

POST-CONVICTION RELIEF

2012-CP-23- 07837

INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention Lee Correctional Institute, Bishopville, SC
2. Name and location of Court which imposed sentence Greenville County Court of General Sessions
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) See continuation sheet
 - (b) _____

- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) April 6, 2009
- (b) _____
- (c) _____
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. South Carolina Court of Appeals
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Conviction affirmed
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. May 2, 2012
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. None
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) N/A
- (b) _____

- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Ineffective assistance of trial and appellate counsel
- (b) _____
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) See attached Motion and MEMorandum of Law
- (b) _____
- (c) _____
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? No
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No
- (d) any other petitions, motions or applications in this or any other Court? _____
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. _____
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. _____
- ii. _____
- iii. _____
- iv. _____

(c) the disposition thereof:

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

(d) the date of each such disposition:

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

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

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

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

No

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

(a) which grounds have been presented:

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

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

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

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

(a) Not required

(b) _____

(c) _____

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

(a) your arraignment and plea? Yes

(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. Randall Chambers, Esq.
804 Laurens Rd, Greenville, SC 29607

ii. Tristan Shaffer, Esq. SC Comm. on Indigent Defense
P.O. Box 11589, Columbia, SC 29211

iii. James P. Craig
2001 Assembly St., STe. 201, Columbia, SC 29201

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

i. Chambers - pretrial, trial and sentencing

ii. Shaffer - Appeal

iii. Craig - PCR Application

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

Order vacating conviction and sentence and/or evidentiary hearing on
these issues

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

No

Date: December 4, 2012

James P. Craig
Attorney for Petitioner

STATE OF SOUTH CAROLINA)

County of LEE)

VERIFICATION

I, Gerald Brown, 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.

Gerald Brown
Gerald Brown

SWORN to and subscribed before me this 29
day of Nov. 2012.

Debra S. [Signature] (L.S.)
Notary Public

My Commission Expires: 11-4-2015

(Verification appended to attached motion)

Revised 3/2003

(continuation sheet)

- 4 & 5. a. Indictment numbers I516947, I516948, I516949, Kidnapping (3 counts); life without parole for all three counts
- b. Indictment number I516945; armed robbery; life without parole
- c. Indictment number I516946; first degree burglary; life without parole
- d. Indictment number I516950; assault and battery; ten years
- e. Indictment number I798222; impersonating an officer; one year
- f. Indictment number I516951; possession of a weapon during the commission of a crime; five years
- g. Indictment number I516953; resisting arrest; one year
- h. Indictment number I516954; malicious injury to a police dog; five years

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	
COUNTY OF GREENVILLE	)	
	)	
GERALD BROWN (Inmate #174505)	)	Civil No.
	)	
Defendant-Petitioner,	)	Orig. Crim. No. 2007-GS-23-7600;
	)	2007-GS-23-7602 thru -7606;
v.	)	2007-GS-23-7622; and
	)	2007-GS-23-7633
STATE OF SOUTH CAROLINA,	)	
	)	
Plaintiff-Respondent.	)	

**MOTION FOR POST-CONVICTION RELIEF PURSUANT TO THE UNIFORM
POST-CONVICTION PROCEDURE ACT, S.C. CODE §17-27-10, *et seq.***

COMES NOW, the Petitioner herein, GERALD BROWN, by and through the undersigned counsel, and moves this Honorable Court to vacate the sentence and conviction heretofore imposed, based upon the denial of the Petitioner's right to effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution. Trial counsel failed to conduct proper pre-trial investigation in this matter, in that counsel failed to investigate and call an exculpatory witness. Further, counsel failed to introduce the blood stained white tee-shirt being worn by the Petitioner when he was attacked by police dogs, along with a blue tee-shirt and bullet proof vest taken from the assailant in this matter that showed no signs of blood. Counsel also failed in cross-examining the key government witnesses regarding prior criminal conduct by said witness. regarding the utilization of a "license" checkpoint by police which operated in violation of the Petitioner's Fourth Amendment protections against unreasonable searches and seizures. Faulty cross-examination also occurred as to the alleged victim herein, in that counsel failed to inquire as to why the victim lied when he stated that he

did not know the Petitioner prior to the events at issue. Counsel also failed in that his opening statement merely attempted to refute the State's case instead of presenting the Petitioner's theory of defense. The Petitioner also received ineffective assistance of appellate counsel, in that counsel failed to raise a preserved issue regarding error in the issuing of jury instructions. The Petitioner's Sixth Amendment right to counsel of choice was also violated when the trial court ignored a request by the Petitioner to obtain new counsel. The Petitioner also submits that he has been denied his right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, as he has been sentenced to an inaccurate sentence. In support hereof, the Petitioner states the following:

1. The grand jury for Greenville County, South Carolina returned several indictments against the Petitioner. The Petitioner was charged with: three counts of kidnaping in violation of S.C. Code §16-3-910 (indictment number I516947, I516948, I516949); armed robbery in violation of S.C. Code §16-11-330 (indictment number I516945); first-degree burglary in violation of S.C. Code §16-11-311 (indictment number I516946); assault and battery of a high and aggravated nature in violation of South Carolina common law (indictment number I516950); impersonating a law enforcement official in violation of S.C. Code §16-17-720 (indictment number I798222); possession of a weapon during the commission of a crime in violation of S.C. Code §16-23-490 (indictment number I516951); resisting arrest in violation of S.C. Code §16-09-320(A) (indictment number I516953); malicious injury to a police dog in violation of S.C. Code §47-03-620 (indictment number I516954); and attempted violent crime while wearing body armor in violation of S.C. Code §16-03-1080(A) (indictment number I516955).

The events giving rise to this case occurred on June 12, 2007. On said date, George Howard, along with his sons, Jarecus and Javon, was returning home. As Howard entered the residence and while speaking on his cell phone, a man dressed as a police officer approached Howard while armed with a firearm. The man forced Howard and his sons to lay on the ground. The assailant was wearing a paint ball mask.

Howard was handcuffed. Jarecus was duct-taped. Javon was told to stand in the corner. The assailant demanded money from Howard. Howard said there was money in the attic. The assailant recovered \$20,000 from the attic, and demanded more money. Howard refused to reveal the location of more money, so the assailant stunned Howard with a stun gun.

During the assault, Howard dropped his cell phone. The calls recipient heard the events, as the call was not ended. The recipient called 9-1-1. Police arrived at the residence and surrounded the house. The assailant fled the house, and was pursued into the woods by a police K-9 unit. The K-9 unit caught and attacked the assailant. The assailant responded by punching and choking the dog. Police arrived, finding a paint ball mask, a gun, a blue tee-shirt, and a bullet proof vest.

The assailant, later identified as the Petitioner, sustained dog bites wounds from the struggle, as evidenced from the blood stained white tee-shirt that the Petitioner was wearing. While being treated at the hospital, the Petitioner stated that the events at issue were merely a drug deal.

Prior to trial, the Petitioner informed defense counsel of the existence of an alibi

witness, Andrell Terry. (Brown Affidavit). However, counsel failed to contact Terry and call Terry as a witness. Terry would have testified [insert facts once Mr. Terry's statement is received].

2. On April 14, 2009, the Petitioner proceeded to a jury trial in the Greenville County Court of General Sessions before the Honorable Edward W. Miller. Prior to evidence being presented, the Petitioner requested that his attorney be replaced, as counsel had spent only four hours with the Petitioner reviewing the case. (Transcript at 8-9). The request was denied, as the trial judge knew counsel, and stated that counsel "is an excellent trial attorney." (Transcript at 11). The Petitioner's theory of defense was that the Petitioner was not the assailant at issue. Counsel did not raise this theory during opening statements, but merely attempted to refute the government's case. The Petitioner went to the Howard residence with a bag containing \$23,000 to buy drugs, when he observed that Howard was bound on the floor. Fearing the repercussions of being found by police holding \$23,000, the Petitioner hid in the woods. While waiting in the woods, the police dog attacked the Petitioner. During cross-examination of Howard, defense counsel asked only if Howard had been involved in drug distribution with Andrell Terry. (Transcript at 116-117). Counsel failed to inquire as to whether Howard had a lengthier history of distributing controlled substances. Counsel also failed to inquire as to why Howard lied when he stated that he did not know the Petitioner prior to the events at issue. (Transcript at 119). The Petitioner testified that he had known Brown for "all my life." (Transcript at 315). The court issued a jury instruction regarding offenses committed by two or more people, stating that when two or more people engage in criminal activity together, "the

act of one is the act of all.” (Transcript at 430). Counsel objected to this instruction, arguing that the State had only presented evidence that the Petitioner was the individual who had committed the crime, but was overruled. (Transcript at 367-368). On April 16, 2009, the jury returned a guilty verdict on all counts.

3. The Petitioner was also sentenced on April 16, 2009. The court noted that the Petitioner had a 1991 conviction for armed robbery, along with three prior convictions for assault and battery with intent to kill. Defense counsel argued, unsuccessfully, that the prior convictions occurred when the Petitioner was sixteen years old, and should not be used to issue a mandatory life sentence. The sentence, issued pursuant to S.C. Code §17-25-4, was as follows: life incarceration without parole for the armed robbery conviction; life incarceration without parole for each of the kidnaping convictions; life incarceration without parole for the burglary conviction; ten years incarceration for the assault and battery conviction; one year incarceration for the impersonating an officer conviction; five years incarceration for the weapon possession conviction; one year incarceration for the resisting arrest conviction; and five years incarceration for the injuring a police dog conviction.
4. Thereafter, a timely notice of appeal was filed. On appeal to the South Carolina Court of Appeals, the Petitioner argued that the trial judge erred in sentencing the Petitioner to life without parole under S.C. Code §17-25-45 based upon a nineteen year old prior conviction committed when the Petitioner was a juvenile, based upon the decision issued in Graham v. Florida, 130 S.Ct. 2011 (2010).

On May 2, 2012, the Court of Appeals affirmed the lower court, finding that the

issue was not preserved for appellate review. Even if properly preserved, the Court found that the issue lacked merit.

5. During pre-trial, trial, and at sentencing, the Petitioner was represented by Randall Chambers, Esq., address unknown. On appeal, the Petitioner was represented by Tristan M. Shaffer, Esq., South Carolina Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, South Carolina 29211-1589.
6. The Petitioner submits that his detention is unlawful, and argues that:
 - I. The Petitioner received ineffective assistance of counsel during trial in violation of the Sixth and Fourteenth Amendments to the United States Constitution when counsel failed to conduct proper pre-trial investigation regarding: (a) the existence of an exculpatory witness; (b) the existence of exculpatory evidence; (c) the existence of Howard's criminal past; (d) the extent of Howard's prior contact with the Petitioner; and (e) the failure to present the Petitioner's theory of defense during opening statements.
 - II. The Petitioner received ineffective assistance of appellate counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution when counsel failed to argue that the jury instruction regarding multiple offenders was improper.
 - III. The Petitioner's right to counsel of choice as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution was violated when the trial court failed to permit the Petitioner time to obtain new counsel.
 - IV. The Petitioner's right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution was violated when he was sentenced to a five year consecutive term of incarceration for possession of a weapon under S.C. Code §16-23-490, when he received a term of life incarceration without parole for the underlying violence crime.
 - V. The Petitioner is entitled to an evidentiary hearing on these matters.
7. The Petitioner is currently incarcerated in the Lee Correctional Institution in Bishopville, South Carolina. The Petitioner's inmate registration number is 174505.

WHEREFORE, in consideration of the foregoing as well as argument of law contained in the Memorandum of Law filed herewith, the Petitioner respectfully prays that this Court issue an Order vacating the conviction and subsequent sentence imposed in this case based upon violations of the Petitioner's rights effective assistance of counsel and counsel of choice. At a minimum, the Petitioner requests an evidentiary hearing on these issues.

Respectfully submitted,



James P. Craig, Esq.
Attorney for the Petitioner
2001 Assembly Street, Suite 201
Columbia, South Carolina 29201
Phone: 803-252-5178
E-mail: jcraig@craiglawfirm.com

December 4, 2012
Columbia, South Carolina

AFFIDAVIT OF GERALD BROWN

The Affiant, Gerald Brown, being the Petitioner herein and being first duly sworn, says:

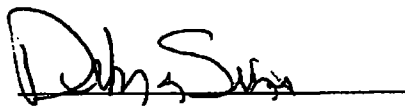
1. He affirms and confirms all of the facts contained in the attached Motion and its accompanying Memorandum of Law attributed to him, as if fully reiterated herein;
2. The facts stated in the Motion and the Memorandum of Law attributed to the Affiant, including those not reflected in the Record, are true to the best of his information and belief.
3. Specifically, the Affiant swears and affirms as to the following matters not reflected in the record:
 - A Prior to trial, I informed my attorney of the existence of an alibi witness, Andrell Terry.
4. Further Affiant sayeth naught.



Gerald Brown
Affiant

On this 29 day of Nov, 2012, the above-signed appeared before me, a notary public in and for the State of SC, and executed the foregoing instrument.

Notary Public:

SC 

My commission expires:

11-4-2015

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	
COUNTY OF GREENVILLE	)	
	)	
GERALD BROWN,	)	Civil No.
	)	
Defendant-Petitioner,	)	Orig. Crim. No. 2007-GS-23-7600;
	)	2007-GS-23-7602 thru -7606;
v.	)	2007-GS-23-7622; and
	)	2007-GS-23-7633
STATE OF SOUTH CAROLINA,	)	
	)	
Plaintiff-Respondent.	)	
	)	

**MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR RELIEF PURSUANT
TO THE UNIFORM POST-CONVICTION PROCEDURE ACT,
S.C. CODE §17-27-10, *et seq.***

As a matter of introduction, the Petitioner respectfully submits that the events which transpired in the instant case constitute a denial of the Petitioner's rights to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and to the right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. These errors was not merely procedural, but substantially infringed upon the Petitioner's constitutional rights. At a minimum, the Petitioner requests a hearing be held on these issues.

STATEMENT OF THE ISSUES

- I. The Petitioner received ineffective assistance of counsel during trial in violation of the Sixth and Fourteenth Amendments to the United States Constitution when counsel failed to conduct proper pre-trial investigation regarding: (a) the existence of an exculpatory witness; (b) the existence of exculpatory evidence; (c) the existence of Howard's criminal past; (d) the extent of Howard's prior contact with the Petitioner; and (e) the failure to present the Petitioner's theory of defense during opening statements.
- II. The Petitioner received ineffective assistance of appellate counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution when counsel failed to argue that the jury instruction regarding multiple offenders was improper.
- III. The Petitioner's right to counsel of choice as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution was violated when the trial court failed to permit the Petitioner time to obtain new counsel.
- IV. The Petitioner's right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution was violated when he was sentenced to a five year consecutive term of incarceration for possession of a weapon under S.C. Code §16-23-490, when he received a term of life incarceration without parole for the underlying violence crime.
- V. The Petitioner is entitled to an evidentiary hearing on these matters.

STATEMENT OF JURISDICTION

South Carolina law provides an avenue for those whose convictions have been obtained in violation of the Constitution of the United States. The Uniform Post-Conviction Procedure Act, S.C. Code §17-27-10, *et seq.*, provides an avenue for redress of federal constitutional violations in a South Carolina court. A prisoner in custody under sentence of a South Carolina court may challenge his conviction and sentence if such were obtained "in violation of the Constitution of the United States or the Constitution or laws of South Carolina." S.C. Code §17-27-20(a)(1). The Petitioner feels that his best opportunity to obtain fair and substantial justice regarding his conviction is through this petition, as the procedural remedy utilized herein has historically served as a safety net for those who have had their constitutional rights violated.

LAW AND ARGUMENT

In order to succeed in a post-conviction proceeding, the Petitioner must show that the adjudication of a claim in South Carolina court resulted in a conviction or sentence that was imposed in violation of the Constitution or laws of the United States. S.C. Code §17-27-20(a)(1). The Constitution, as the framework from which all South Carolina law springs, must not be violated as applied to the Petitioner.

- I. **The Petitioner Received Ineffective Assistance of Counsel During Trial in Violation of the Sixth and Fourteenth Amendments to the United States Constitution When Counsel Failed to Conduct Proper Pre-trial Investigation Regarding: (A) the Existence of an Exculpatory Witness; (B) the Existence of Exculpatory Evidence; (C) the Existence of Howard's Criminal Past; (D) the Extent of Howard's Prior Contact with the Petitioner; and (E) the Failure to Present the Petitioner's Theory of Defense During Opening Statements.**

The Petitioner submits that he received ineffective assistance of counsel prior to and during his trial. The Sixth Amendment to the United States Constitution guarantees that every criminal defendant is entitled to the assistance of counsel in presenting their defense. U.S. Const., amend. VI; see also S.C. Const., Art. I, §14. The Sixth Amendment is applicable to the states through the Fourteenth Amendment of the United States Constitution. U.S. Const., amend. XIV; State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315 (2002). The Supreme Court has stated, "[t]he right to counsel is a fundamental right of criminal defendants; it assures the fairness, and thus the legitimacy, of our adversary process." Kimmelman v. Morrison, 477 U.S. 365, 374 (1986). Furthermore, the Supreme Court has recognized that "the right to counsel is the right to the effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771 (1970).

To determine whether counsel has fallen below the minimum standard needed for effective assistance of counsel under the Sixth Amendment to the Constitution, a two prong test

must be met. In Strickland v. Washington, 466 U.S. 668, 688-694 (1984), the Supreme Court held that a determination of ineffective assistance of counsel would be conditioned on two factors: (1) counsel's performance must have fallen below an objective standard of reasonableness; and (2) there must be a reasonable probability that, but for counsel's errors, the results of the proceedings would probably have been different. South Carolina has adopted the Strickland standard. See, e.g. Cherry v. State 300 S.C. 115, 386 S.E.2d 624 (1989). The right to effective assistance of counsel may be violated by even an isolated error of counsel if the error is sufficiently egregious and prejudicial. Murray v. Carrier, 477 U.S. 478 (1986).

"It is the client's right to expect that his lawyer will use every skill, expend every energy, and tap every legitimate resource in the exercise of independent professional judgment on behalf of the client and in undertaking representation of the client's interests." Frazer v. United States, 18 F.3d 778, 785 (9th Cir.1994). "Defense counsel must do his utmost to bring his legal acumen to bear on behalf of the defendant; keep the defendant fully informed of developments in the case and consult with the defendant on all major decisions to be made; conduct a reasonable pre-trial investigation, which should include contacting potential witnesses; prepare adequately and professionally for trial; conduct the trial to the best of his ability; and, at the bottom, serve as a vigorous and devoted advocate of the defendant's cause." United States Ex. Rel. Partee v. Lane, 926 F.2d 694, 702 (7th Cir. 1991).

As the Supreme Court also recognized in Strickland, "counsel bears a duty to make a 'reasonable' investigation of the law and facts in his client's case." Strickland, 466 U.S. at 691. Additionally, the ABA Standards Relating to the Administration of Criminal Justice provide:

It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to

facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty.

Standard 4-4.1.

A defendant's right to effective assistance of counsel confers a duty on counsel to conduct an adequate pre-trial investigation. When a lawyer fails to conduct a substantial investigation into any of his client's plausible lines of defense, the lawyer has failed to render effective assistance of counsel. Cobbs v. State, 3605 S.C. 299, 408 S.E.2d 223 (1991). Pre-trial preparation, principally because it provides a basis upon which most of the defense case must rest, is, perhaps, the most critical stage of a lawyer's preparation. Id. Failure to investigate evidence that would be helpful to the defense is also an indication of ineffective assistance of counsel. Id.

In the instant case, defense counsel failed to investigate: (a) the existence of an exculpatory witness; (b) the existence of Howard's criminal past; (c) the existence of Howard's criminal past; (d) the extent of Howard's prior contact with the Petitioner; and (e) the Petitioner's theory of defense during opening statements.

A. Counsel Failed to Investigate Exculpatory Witness Andrell Terry

Prior to trial, the Petitioner informed defense counsel of the existence of an alibi witness, Andrell Terry. (Brown Affidavit). However, counsel failed to contact Terry and call Terry as a witness. Terry would have testified [insert facts once Mr. Terry's statement is received]. Given the alibi provided by Terry, it is clear that the evidence in support of the Petitioner's conviction does not rise to a level beyond a reasonable doubt.

In Cage v. Louisiana, 498 U.S. 39, 40 (1990), the Supreme Court stated that the "reasonable doubt standard 'plays a vital role in the American scheme of criminal procedure. Among other things, it is a prime instrument for reducing the risk of convictions resting on factual error.'" Further, as noted in In re Winship, 397 U.S. 358, 364 (1970), "a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt." Winship itself makes clear that the requirement of proof beyond a reasonable doubt is grounded upon accuracy concerns:

The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interest of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction.

Id. at 364.

The 'demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times, [though] its crystallization into the formula "beyond a reasonable doubt" seems to have occurred as late as 1798. It is now accepted. . . as the measure of persuasion by which the prosecution must convince the trier of all the essential elements of guilt.

Id. at 361 (quoting C. McCormick, Evidence §321, pp. 681-82 (1954)).

Counsel's failure to obtain an existing exculpatory witness rendered counsel's conduct below any objective standard of reasonableness. There can be little doubt that it is counsel's duty to put forth evidence in support of a client's actual innocence. The Petitioner was prejudiced by counsel's performance, in that he was convicted of charges that, had all available evidence been presented, were not supported by evidence rising to a level of proof beyond a reasonable doubt.

Clearly, counsel was ineffective for failing to conduct proper pre-trial investigation. Unfortunately, as poor as counsel's pre-trial performance was, counsel's performance did not improve during the trial.

B. Counsel Failed to Investigate Exculpatory Evidence

In the instant case, police arrived at the residence and surrounded the house where the crime allegedly occurred. The assailant fled the house, and was pursued into the woods by a police K-9 unit. The K-9 unit caught and attacked the assailant. The assailant responded by punching and choking the dog. Police arrived, finding a paint ball mask, a gun, a blue tee-shirt, and a bullet proof vest. The assailant, later identified as the Petitioner, sustained dog bites wounds from the struggle, as evidenced from the blood stained white tee-shirt that the Petitioner was wearing. The Petitioner submits that defense counsel failed to have admitted the Petitioner's bloody white tee-shirt, as well as the blue tee-shirt and the bullet proof vest. Admission of such evidence would have established that there was no way in which the Petitioner could have been wearing the blue tee-shirt and bullet proof vest of the assailant. Further, defense counsel could have cross-examined State's witnesses regarding this inconsistency. Given this exculpatory evidence, it is clear that the evidence in support of the Petitioner's conviction does not rise to a level beyond a reasonable doubt.

In Cage v. Louisiana, 498 U.S. 39, 40 (1990), the Supreme Court stated that the "reasonable doubt standard 'plays a vital role in the American scheme of criminal procedure. Among other things, it is a prime instrument for reducing the risk of convictions resting on factual error.'" Further, as noted in In re Winship, 397 U.S. 358, 364 (1970), "a society that values the good name and freedom of every individual should not condemn a man for

commission of a crime when there is reasonable doubt about his guilt." Winship itself makes clear that the requirement of proof beyond a reasonable doubt is grounded upon accuracy concerns:

The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interest of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction.

Id. at 364.

The 'demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times, [though] its crystallization into the formula "beyond a reasonable doubt" seems to have occurred as late as 1798. It is now accepted. . . as the measure of persuasion by which the prosecution must convince the trier of all the essential elements of guilt.

Id. at 361 (quoting C. McCormick, Evidence §321, pp. 681-82 (1954)).

Counsel's failure to obtain introduce exculpatory witness rendered counsel's conduct 'below any objective standard of reasonableness. There can be little doubt that it is counsel's duty to put forth evidence in support of a client's actual innocence. The Petitioner was prejudiced by counsel's performance, in that he was convicted of charges that, had all available evidence been presented, were not supported by evidence rising to a level of proof beyond a reasonable doubt.

Clearly, counsel was ineffective for failing to conduct proper pre-trial investigation. Unfortunately, as poor as counsel's pre-trial performance was, counsel's performance did not improve during the trial.

C. Counsel Failed to Investigate the Existence of Howard's Criminal Past.

The Petitioner's theory of defense was that the Petitioner was at the Howard residence to purchase drugs from Howard. However, counsel failed to elicit from Howard the facts of his criminal past, specifically that Howard had previously engaged in the distribution of controlled substances. During cross-examination of Howard, defense counsel asked only if Howard had been involved in drug distribution with Andrell Terry. (Transcript at 116-117). Counsel did not inquire as to whether Howard had engaged in drug distribution outside of contact with Terry. [Insert facts regarding Howard's criminal history once provided].

The primary purpose of cross-examination is to impeach the credibility of the witness. Davis v. State of Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); State v. White, 273 S.C. 487, 257 S.E.2d 239 (1979). Unfortunately, the Petitioner was prevented from doing so regarding Howard, and at the same time providing support to his defense, by counsel's failure to properly cross-examine Howard. Such clearly rendered counsel's conduct below any objective standard of reasonableness. Counsel put forth a theory of defense, but failed to obtain all necessary evidence in support of said theory. The Petitioner was prejudiced by counsel's poor performance, in that he proceeded to trial with an incomplete defense, despite the existence of evidence that would have provided a complete defense.

D. Counsel Failed to Investigate the Extent of Howard's Prior Contact with the Petitioner.

The Petitioner's theory of defense was that the Petitioner was at the Howard residence to purchase drugs from Howard. Such activity was not uncommon, given that the Petitioner was a life long acquaintance with Howard. Defense counsel failed to inquire as to why Howard lied when he stated that he did not know the Petitioner prior to the events at issue. (Transcript at 119). The Petitioner testified that he had known Brown for "all my life." (Transcript at 315).

The primary purpose of cross-examination is to impeach the credibility of the witness. Davis v. State of Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); State v. White, 273 S.C. 487, 257 S.E.2d 239 (1979). Unfortunately, the Petitioner was prevented from doing so regarding Howard, and at the same time providing support to his defense, by counsel's failure to properly cross-examine Howard. Counsel failed to present Howard's testimony as being incredible. Without Howard's testimony, the State would have been without any credible adult witnesses to the events at issue. Such clearly rendered counsel's conduct below any objective standard of reasonableness. Counsel put forth a theory of defense, but failed to obtain all necessary evidence in support of said theory. The Petitioner was prejudiced by counsel's poor performance, in that he proceeded to trial with an incomplete defense, despite the existence of evidence that would have provided a complete defense.

E. Counsel Failed to Present the Petitioner's Theory of Defense During Opening Statements.

The purpose of opening statements is to permit each party to the case to present a theory of the case. State v. Mattison, 388 S.C. 469 (2010). In the instant case, the Petitioner's theory of defense was that the Petitioner was not the assailant at issue. Counsel did not raise this theory during opening statements, but merely attempted to refute the government's case.

Clearly, such failure represents conduct below any objective standard of reasonableness. Counsel failed to present any statement upon which a claim of actual innocence could be grasped by the jury. The Petitioner was prejudiced by counsel's poor performance, in that the jury was left without a theory of defense until the presentation of the Petitioner's case, thereby causing the jury to be unaware as to how to evaluate evidence in light of such a theory of defense.

As the Petitioner received ineffective assistance of trial counsel in violation of the Sixth

and Fourteenth Amendments to the United States Constitution, as well as Article I of the South Carolina Constitution, the Petitioner submits that his conviction and subsequent sentences must be vacated and this matter set for rehearing consistent with the findings of this Court and the constitutional principles of fair play and substantial justice.

II. The Petitioner Received Ineffective Assistance of Appellate Counsel in Violation of the Sixth and Fourteenth Amendments to the United States Constitution When Counsel Failed to Argue That the Jury Instruction Regarding Multiple Offenders Was Improper.

The right to counsel extends to appeals. The Sixth Amendment to the United States Constitution guarantees that every criminal defendant is entitled to the assistance of counsel in presenting their defense. U.S. Const., amend. VI; see also S.C. Const., Art. I, §14. The Sixth Amendment is applicable to the states through the Fourteenth Amendment of the United States Constitution. U.S. Const., amend. XIV; State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315 (2002). The Supreme Court has stated, “[t]he right to counsel is a fundamental right of criminal defendants; it assures the fairness, and thus the legitimacy, of our adversary process.” Kimmelman v. Morrison, 477 U.S. 365, 374 (1986). Furthermore, the Supreme Court has recognized that “the right to counsel is the right to the effective assistance of counsel.” McMann v. Richardson, 397 U.S. 759, 771 (1970).

To determine whether counsel has fallen below the minimum standard needed for effective assistance of counsel under the Sixth Amendment to the Constitution, a two prong test must be met. In Strickland v. Washington, 466 U.S. 668, 688-694 (1984), the Supreme Court held that a determination of ineffective assistance of counsel would be conditioned on two factors: (1) counsel’s performance must have fallen below an objective standard of reasonableness; and (2) there must be a reasonable probability that, but for counsel’s errors, the

results of the proceedings would probably have been different. South Carolina has adopted the Strickland standard. See, e.g. Cherry v. State 300 S.C. 115, 386 S.E.2d 624 (1989).

A defendant in a criminal case has a Sixth Amendment right to the effective assistance of counsel on direct appeal. See Evitts v. Lucey, 469 U.S. 387, 406, 83 L. Ed. 2d 821, 105 S. Ct. 830 (1985); Douglas v. California, 372 U.S. 353, 83 S.Ct. 814 (1963) (an accused is entitled to assistance of counsel on an appeal as a matter of right); Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). The test to establish a claim that *appellate* counsel was ineffective for failing to pursue a claim on direct appeal is the same Strickland standard. Strickland, 466 U.S. at 688, 694; see also Smith v. Robbins, 528 U.S. 259, 120 S. Ct. 746, 764, 145 L. Ed. 2d 756 (2000) (holding that a habeas applicant must demonstrate that "counsel was objectively unreasonable" in failing to file a merits brief addressing a non-frivolous issue and that there is "a reasonable probability that, but for his counsel's unreasonable failure * * *, he would have prevailed on his appeal"); Tisdale v. State, 357 S.C. 474, 594 S.E.2d 166 (2004).

In applying this test to claims of ineffective assistance of counsel on appeal, reviewing courts must accord appellate counsel the "presumption that he decided which issues were most likely to afford relief on appeal." Pruett v. Thompson, 996 F.2d 1560, 1568 (4th Cir. 1993). Counsel is not obligated to assert all non-frivolous issues on appeal, as "there can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review." Jones v. Barnes, 463 U.S. 745, 752, 77 L. Ed. 2d 987, 103 S. Ct. 3308 (1983); see also Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990). Indeed, "'winnowing out weaker arguments on appeal and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate

advocacy.” Smith v. Murray, 477 U.S. 527, 536, 91 L. Ed. 2d 434, 106 S. Ct. 2661 (1986) (quoting Jones, 463 U.S. at 751).

Although recognizing that “notwithstanding Barnes, it is still possible to bring a Strickland claim based on counsel’s failure to raise a particular claim” on direct appeal, the Supreme Court has recently reiterated that “when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.” Robbins, 120 S. Ct. at 765.

In the instant case, appellate counsel failed to raise a preserved issue regarding an improperly issued jury instruction. The court issued a jury instruction regarding offenses committed by two or more people, stating that when two or more people engage in criminal activity together, “the act of one is the act of all.” (Transcript at 430). Counsel objected to this instruction, arguing that the State had only presented evidence that the Petitioner was the individual who had committed the crime, but was overruled. (Transcript at 367-368).

The evidence presented at trial determines the charged jury instruction. State v. Lee, 298 S.C. 362, 380 S.E.2d 834 (1989). The purpose of a jury instruction is “to enlighten the jury and to aid it in arriving at a correct verdict. State v. Blurton, 352 S.C. 203, 207, 573 S.E.2d 802 (2002). It is error to give instructions which are calculated to confuse or mislead the jury. State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987). If a jury instruction is provided to the jury that does not fit the facts of the case, it may confuse the jury. Lee, supra; State v. Hewitt, 205 S.C. 207, 31 S.E.2d 257 (1944). Only law applicable to the case should be charged to the jury. Blurton, supra. Instructions that do not fit the facts of the case may serve only to confuse the jury. State v. Fair, 209 S.C. 439, 40 S.E.2d 634 (1946); State v. Rivers, 186 S.C.

221, 196 S.E. 6 (1938). "The law to be charged must be determined from the evidence presented at trial." State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001).

Under "the hand of one is the hand of all" theory, "one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose." State v. Langley, 334 S.C. 643, 648, 515 S.E.2d 98, 101 (1999). Said instruction was found to have been properly issued in State v. Ward, 374 S.C. 606, 649 S.E.2d 145 (2007). Therein, the defendant argued that the "hand of one" instruction should not have been charged to the jury because there was no evidence of a common plan or scheme between the defendant and his co-defendant in committing a murder. Id. However, evidence revealed that both defendants were with the group of men who confronted the victim, with the co-defendant stating that "some bitch is going to die tonight," and "we will handle that." Id. The defendant and co-defendant then engaged in an automobile pursuit of the victim that led to the gunshots that resulted in the victim's death. Id.

Herein, no such coordination and cooperation existed between the Petitioner and any other individual. The State's theory of the case was that it was the Petitioner who arrived at Howard's residence and committed the crimes at issue. The Petitioner's theory of the case was that he arrived at Howard's residence with the crimes against Howard already in progress, to which the Petitioner had no foreknowledge. In neither case was it alleged or did evidence demonstrate that the Petitioner acted with another.

Unfortunately, appellate counsel ignored this issue, instead raising an issue that was procedurally barred and could not be decided upon the merits. Such rendered counsel's conduct below any objective standard of reasonableness, in that a viable appellate issue was forfeited

while a barred issue was raised. The Petitioner was prejudiced by counsel's unreasonable conduct, in that he was denied the opportunity to have his conviction overturned. The challenged instruction destroyed the Petitioner's defense, giving rise to an ability of the jury to convict the Petitioner even if the Petitioner was not present at the crime scene at the time that the crimes occurred.

As the Petitioner received ineffective assistance of appellate counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I of the South Carolina Constitution, the Petitioner submits that his conviction and subsequent sentence must be vacated and this matter set for rehearing consistent with the findings of this Court and the constitutional principles of fair play and substantial justice.

III. The Petitioner's Right to Counsel of Choice as Guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution Was Violated When the Trial Court Failed to Permit the Petitioner Time to Obtain New Counsel.

The Sixth Amendment to the United States Constitution states in part that a defendant has the right to the assistance of counsel. U.S. Const., amend. VI. The Sixth Amendment is applicable to the states through the Fourteenth Amendment of the United States Constitution. U.S. Const., amend. XIV; State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315 (2002).

In an adversarial system, it is critical that criminal defendants have the right to counsel of choice. See, e.g., Hagood v. Sommerville, 362 S.C. 191, 607 S.E.2d 707 (2005). "It has long been recognized that a criminal defendant has a right to retain counsel *of his choice*." Wheat v. United States, 486 U.S. 153, 159, 100 L. Ed. 2d 140, 108 S. Ct. 1692 (1988). To indigent defendants counsel must be provided by the State unless the defendant understandably, intelligently, and competently waives the right; the right can not be waived unless an offer of

counsel has been made. Carnley v. Cochran, 369 U.S. 506, 516, 82 S. Ct. 884, 8 L. Ed.2d 70 (1962); Pitt v. MacDougall, 245 S.C. 98, 138 S.E.2d 840 (1964). Although this right is not absolute, "a trial judge ... 'cannot arbitrarily and unreasonably interfere with a client's right to be represented by the attorney [the client] has selected.'" Koblitz, at 1528. Where a defendant's right to counsel of his choice is wrongly denied, it is unnecessary to determine whether counsel who actually represents the defendant was ineffective. United States v. Gonzalez-Lopez, 126 S.Ct. 2557, 2563 (2006).

In the case of Chandler v. Fretag, 348 U.S. 3 (1954), the Supreme Court was faced with a case where a defendant's request for a continuance to obtain counsel was denied. In reversing the subsequent conviction, the Court concluded that "a defendant must be given a reasonable opportunity to employ and consult with counsel." Id. at 9-10. In South Carolina, the denial of a motion for continuance must not result in prejudice to the movant. See Morris v. State, 371 S.C. 279, 283, 639 S.E.2d 53, 56 (2006).

In the instant case, prior to evidence being presented at trial, the Petitioner requested that his attorney be replaced, as counsel had spent but four hours with the Petitioner reviewing the case. (Transcript at 8-9). The request was denied, as the trial judge knew counsel, and stated that counsel "is an excellent trial attorney." (Transcript at 11). In essence, the trial judge had failed to grant a request for a continuance so that either new counsel could be obtained or present counsel could confer further with the Petitioner. The denial was not based upon any examination as to the prejudice to the Petitioner in continuing with current counsel, but merely upon counsel's prior reputation. Such represented a violation of the Petitioner's right to counsel of choice.

As the Petitioner's right to counsel of choice was denied, in violation of the Petitioner's

rights under the Sixth and Fourteenth Amendments to the United States Constitution, the Petitioner submits that his conviction and subsequent sentence must be vacated and this matter set for rehearing consistent with the findings of this Court and the constitutional principles of fair play and substantial justice.

IV. The Petitioner's Right to Due Process of Law as Guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution Was Violated When He Was Sentenced to a Five Year Consecutive Term of Incarceration for Possession of a Weapon under S.C. Code §16-23-490, When He Received a Term of Life Incarceration Without Parole for the Underlying Violence Crime.

The Fifth Amendment to the United States Constitution provides that "[n]o person shall be. . . deprived of life, liberty, or property, without due process of law." U.S. Const., amend. XIV; see also S.C. Const. Ann. Art. I, §3. The Fifth Amendment applies to South Carolina via operation of the Fourteenth Amendment to the United States Constitution. U.S. Const., amend XIV; see State v. McClure, 342 S.C. 403; 537 S.E.2d 273 (2000).

In evaluating due process claims, this court inquires whether the practice "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Snyder v. Massachusetts, 291 U.S. 97, 105, 54 S.Ct. 330, 332, 78 L.Ed. 674 (1934). As stated by Justice Frankfurter, due process:

embodies a system of rights based on moral principles so deeply imbedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history. Due process is that which comports with the deepest notions of what is fair and right and just.

Solesbee v. Balkcom, 339 U.S. 9, 16, 70 S. Ct. 457, 461, 94 L. Ed. 604 (1950).

The Due Process Clause will be validated upon actions that "violate those fundamental conceptions of justice which lie at the base of our civil and political institutions and which define the community's sense of fair play and decency." United States v. Lovasco, 431 U.S. 783, 790, 97 S.Ct. 2044, 2049, 52 L.Ed.2d 752 (1977). The Supreme Court has "defined the category of infractions that violate 'fundamental fairness' very narrowly." Dowling, 493 U.S. at 352-53, 110 S.Ct. at 674. The "primary guide in determining whether the principle in question is fundamental is, of course, historical practice." Montana v. Egelhoff, 518 U.S. 37, 41-44, 116 S.Ct. 2013, 2017, 135 L.Ed.2d 361 (1996).

There can be little doubt that the right to be sentenced accurately is an ingrained part of the American judicial experience. The United States Supreme Court has made clear that due process accords a defendant the right to be sentenced on the basis of accurate information. United States v. Tucker, 404 U.S. 443 (1972).

In the instant case, the Petitioner was convicted of several counts, with kidnaping in violation of S.C. Code §16-3-910, armed robbery in violation of S.C. Code §16-11-330, first-degree burglary in violation of S.C. Code §16-11-311, and possession of a weapon during the commission of a crime in violation of S.C. Code §16-23-490 being amongst the convictions. At sentencing, the Petitioner was sentenced to terms of life incarceration without parole for the armed robbery, kidnaping and burglary convictions. A consecutive term of five years incarceration was issued for the firearms charge.

The Petitioner submits that the sentence issued for the firearm conviction was in error. According to S.C. Code §16-23-490(A), the five year mandatory consecutive sentence for firearm possession does not apply in cases where the death penalty or a life sentence without

parole is imposed for the violent crime. As noted, the violent crimes at issue resulted in sentences of life incarceration without parole. As such, the Petitioner should not have received the mandatory five year consecutive term of incarceration for the underlying firearm possession conviction.

Continued incarceration for the firearm conviction would result in incarceration based upon inaccuracy, and would represent a violation of the Petitioner's right to due process of law. Accordingly, the Petitioner submits that the sentence for the firearm conviction must be vacated, and this matter must be set for rehearings consistent with the findings of this Court and the constitutional principles of fair play and substantial justice.

V. The Petitioner Is Entitled to an Evidentiary Hearing on These Matters.

The Petitioner contends that he is entitled to an evidentiary hearing on these issues. According to S.C. Code §17-27-80, a hearing shall be had on any properly filed motion for post-conviction for relief. In fact, it has been ruled error to issue a conclusion of facts and law upon such a motion without first hearing the facts of the matter. McCray v. State, 305 S.C. 329, 408 S.E.2d 241 (1991). This is especially true in cases where ineffective assistance of counsel issues are raised, as such are often not able to be determined merely upon the record and must therefore rely upon evidence developed during an evidentiary hearing. Delaney v. State, 269 S.C. 555, 238 S.E.2d 679 (1977). Evaluating the precursor to the modern Post-Conviction Relief Act, the Supreme Court of South Carolina stated that an allegation in an application for post-conviction relief that a petitioner did not have the effective assistance of counsel in violation of his rights under the Sixth Amendment of the Constitution of the United States sets forth a *prima facie* violation of the petitioner's constitutional rights, and raises a question of fact that can only be

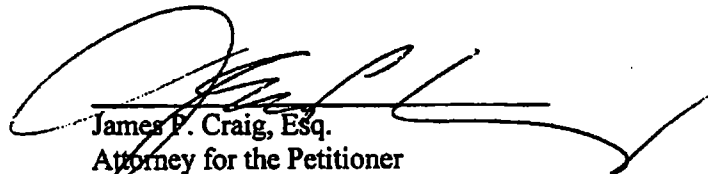
determined by a trial court by an evidentiary hearing. Rogers v. State, 261 S.C. 288, 199 S.E.2d 761 (1973).

In the present case, the Petitioner contends that he has set forth facts in his petition that entitle him to relief. Therefore, at a minimum, the Court should order an evidentiary hearing in this matter.

VI. CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that this Honorable Court grant his motion for post-conviction relief or at a minimum, grant him an evidentiary hearing.

Respectfully submitted,



James P. Craig, Esq.
Attorney for the Petitioner
2001 Assembly Street, Suite 201
Columbia, South Carolina 29201
Phone: 803-252-5178
E-mail: jcraig@craiglawfirm.com

December 4, 2012
Columbia, South Carolina

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion and accompanying Memorandum of Law has been sent this ^{17th} day of December, 2012, by regular United States Mail with sufficient postage affixed thereto to insure delivery thereof to the Office of the Attorney General of South Carolina, P.O. Box 11549, Columbia, South Carolina 29211.


Shannon Goolsby
Legal Assistant to James P. Craig, Esq.
Attorney for Petitioner

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

GERALD BROWN,

Defendant-Petitioner,

v.

STATE OF SOUTH CAROLINA,

Plaintiff-Respondent.

Civil No. 2012-CP-23-07837

Orig. Crim. No. 2007-GS-23-7600;
2007-GS-23-7602 thru -7606;
2007-GS-23-7622; and
2007-GS-23-7633

ENTERED COMPUTER

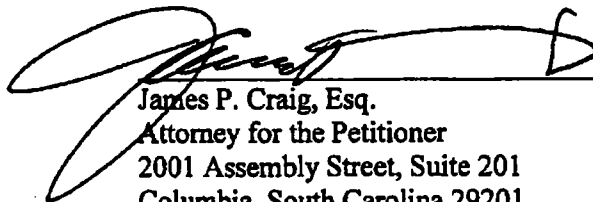
**ADDENDUM TO THE
MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR RELIEF PURSUANT
TO THE UNIFORM POST-CONVICTION PROCEDURE ACT,
S.C. CODE §17-27-10, *et seq.***

NOW COMES THE DEFENDANT-PETITIONER, Gerald Brown, by and through his undersigned attorney and files the within Addendum to the Memorandum of Law previously filed in this matter in support of the Defendant's motion for relief pursuant to the Uniform Post-Conviction Procedures Act bearing case number 2012-CP-23-07837. The Motion and accompanying Memorandum asserted that the Defendant's counsel failed to investigate exculpatory witness Andrell Terry (Memorandum pg. 5) and stated therein that the Defendant was seeking an affidavit of Mr. Terry which would be filed and made a part of the Defendant's Motion and Memorandum when received. The Defendant has now received an affidavit from Mr. Terry, a copy of which is attached herein as Exhibit "A" and incorporated herein by reference (herein the "Terry Affidavit") and makes the Terry Affidavit a part of the Defendant's Memorandum in Support of his Motion.

Mr. Terry states *inter alia* that "... had he be (sic) subpoenaed to testify at the

trial of Gerald Brown on April Fourteen Through April Sixteen Two Thousand Nine (April 14-16, 2009) he would have testified to the same as stated above" which is to say that he would have testified in conformance with the contents of the Affidavit.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "James P. Craig", is written over a horizontal line.

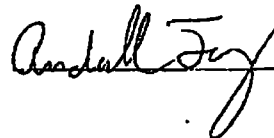
James P. Craig, Esq.
Attorney for the Petitioner
2001 Assembly Street, Suite 201
Columbia, South Carolina 29201
Phone: 803-252-5178
E-mail: jcraig@craiglawfirm.com

March 25, 2013
Columbia, South Carolina

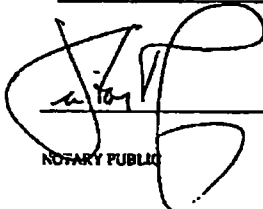
AFFIDAVIT OF ANDRELL TERRY

THE AFFIANT, ANDRELL TERRY, BEING AN ALIBI WITNESS HEREIN AND BEING FIRST DULY SWORN, SAYS:

1. HE AFFIRMS AND CONFIRMS, UNDER THE PENALTY OF PERJURY THAT THIS AFFIDAVIT IS TRUE AND CORRECT TO THE BEST OF (HIS) KNOWLEDGE AND BEHALF.
2. THAT ON THE NIGHT OF JUNE TWELVE, TWO THOUSAND SEVEN (JUNE 12, 2007) HE DROPPED OFF GERALD BROWN AT 125 TURENTINE CIRCLE (HOME OF GEORGE HOWARD) WITH A BAG CONTAINING TWENTY-THREE THOUSAND DOLLARS (\$23,000).
3. THE AFFIANT HAS NO KNOWLEDGE OF ANY ROBBERY THAT TOOK PLACE ON THAT PARTICULAR NIGHT.
4. SPECIFICALLY, THE AFFIANT SWEARS AND AFFIRMS THAT HAD HE BE SUBPEONEAD TO TESTIFY AT THE TRIAL OF GERALD BROWN ON APRIL FOURTEEN THROUGH APRIL SIXTEEN TWO THOUSAND NINE (APRIL 14-16, 2009) HE WOULD HAVE TESTIFIED TO THE SAME AS STATED ABOVE.
5. FURTHER AFFIANT SAYETH NAUGHT.


ANDRELL TERRY

ON THIS 18TH DAY OF JANUARY, 2012, THE ABOVE-SIGNED APPEARED BEFORE ME, A NOTARY PUBLIC FOR THE STATE OF S. CAROLINA, AND EXECUTED THE FOREGOING INSTRUMENT.


NOTARY PUBLIC

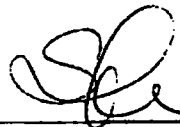
My Commission Expires
October 22, 2013

MY COMMISSION EXPIRES

CLOCK IN TIME CANCELLED
Date 3/28/13
Init.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Addendum to the Memorandum of Law has been sent this 25th day of March, 2013, by regular United States Mail with sufficient postage affixed thereto to insure delivery thereof to the Office of the Attorney General of South Carolina, P.O. Box 11549, Columbia, South Carolina 29211.



Shannon Goolsby
Legal Assistant to James P. Craig, Esq.
Attorney for Petitioner

FILED
CLERK OF COURT
SHERIFF CO. S.C.
MAR 28 2013

MAR 28 PM 4:43

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)
)

Gerald Brown,
S.C.D.C. No. 174505,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
C.A. No. 2012-CP-23-7837

RETURN

ENTERED COMPUTER

2013 JUN -3 AM 10:19
FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL A. WOODWARD

JW

In response to the post-conviction relief application filed December 14, 2012, the Respondent would show this Court:

I.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Greenville County Clerk of Court's orders of commitment. The Greenville County Grand Jury indicted the Applicant at the September 2007 term of General Sessions for possession of a weapon during commission of a violent crime (2007-GS-23-7600), assault and battery of a high and aggravated nature (ABHAN) (2007-GS-23-7602), impersonating law enforcement (2007-GS-23-7603), malicious injury to a police dog (2007-GS-23-7604), first-degree burglary (2007-GS-23-7605), armed robbery (2007-GS-23-7606), three (3) counts of kidnapping (2007-GS-23-7622, counts 1-3), and resisting arrest (2007-GS-23-7633). Randall L. Chambers, Esquire represented the Applicant.

After the State brought the case to trial, the Applicant was found guilty. On April 16, 2009, the Honorable Edward W. Miller sentenced the Applicant to concurrent terms of five years for possession of a weapon during commission of a violent crime, ten years for ABHAN, one

year for impersonating law enforcement, five years for malicious injury to a police dog, life imprisonment without parole for first-degree burglary, life imprisonment without parole for armed robbery, life imprisonment without parole for each count of kidnapping, and one year for resisting arrest.

A notice of appeal was filed at the South Carolina Court of Appeals. Tristan M. Shaffer, Esquire of the South Carolina Office of Appellate Defense perfected the appeal. The Court of Appeals affirmed the Applicant's convictions and sentences. State v. Brown, Op. No. 2012-UP-262 (S.C. Ct. App. filed May 2, 2012).

Attached herewith and incorporated herein by reference are the records of the Greenville County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the trial transcript, and the appellate records.

II.

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

1. Ineffective assistance of trial counsel:
 - a. Failed to conduct a proper pre-trial investigation.
 - b. Failed to call an exculpatory witness (Andrell Terry).¹
 - c. Failed "to introduce the blood-stained white tee-shirt worn by the [Applicant] when he was attacked by police dogs, along with a blue tee-shirt and bullet proof vest taken from the assailant in this matter that showed no signs of blood."
 - d. Failed to cross-examine the victim about his criminal history.
 - e. Failed to cross-examine the victim about his prior contact with the Applicant.
 - f. Failed to present the theory of the defense during opening statement.

¹ The Applicant filed a document captioned "Addendum to the Memorandum of Law in Support of Motion for Relief Pursuant to the Uniform Post-Conviction Procedure Act, S.C. Code Ann. 17-27-10, *et seq.*" on March 28, 2013 in which he attached an affidavit from Terry.

2. Ineffective assistance of appellate counsel:
 - a. Failed to raise the issue of whether the jury instruction about "hand of one is hand of all" was improper.
3. Violation of Constitutional rights:
 - a. Violation of Sixth and Fourteenth Amendments because trial judge did not allow the Applicant to obtain new counsel.
 - b. Violation of Due Process because the Applicant received a consecutive five-year sentence for possession of a weapon during the commission of a violent crime when he received a sentence of life imprisonment without parole for that underlying crime.

III.

The Respondent asserts the Applicant's allegation that his attorney was ineffective is without merit. The Respondent asserts the Applicant's attorney rendered effective assistance well within the standard of "reasonableness within professional norms" for a defense attorney.

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 on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. The Applicant must overcome this presumption in order to receive relief. See Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong, attorney

performance is measured by its "reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S. Ct. at 2065). 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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

The Respondent submits the Applicant cannot satisfy either requirement of the Strickland v. Washington test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983) (citing Norman v. State, 276 S.C. 278, 277 S.E.2d 707 (1981)).

IV.

The Respondent denies each allegation not expressly admitted, qualified or explained.

V.

WHEREFORE, having made its Return, the Respondent requests that a hearing be held on the allegations in the PCR application.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

KAREN C. RATIGAN
Assistant Deputy Attorney General

P.O. Box 11549
Columbia, S.C. 29211

By: 
Attorneys for Respondent

MAY 3, 2013

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

GERALD BROWN, 174505

Applicant,

vs

STATE OF SOUTH CAROLINA,
Respondent.

IN THE COURT OF COMMON PLEAS

2012-CP-23-7837

AFFIDAVIT OF SERVICE BY MAIL

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
JAN 10 2013
7:19 AM

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:

James P. Craig, Esquire
Craig Law Firm, PC
2001 Assembly Street; Suite 201
Columbia SC 29201

DATED this 3rd day of May, 2013.


Judy A. C. Carey, Legal Assistant
For Respondent

IN THE STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS FOR GREENVILLE COUNTY

GERALD BROWN,

Defendant-Petitioner,

v.

STATE OF SOUTH CAROLINA,

Plaintiff-Respondent.

Civil No. 2012 CP 2307837

Orig. Crim. No. 2007-GS-23-7600;

2007-GS-23-7602 thru -7606;

2007-GS-23-7622; and

2007-GS-23-7633

ENTERED COMPUTER

**REPLY TO THE STATE'S RETURN TO THE MOTION FOR RELIEF PURSUANT
TO THE UNIFORM POST-CONVICTION PROCEDURE ACT,
S.C. CODE §17-27-10, et seq.**

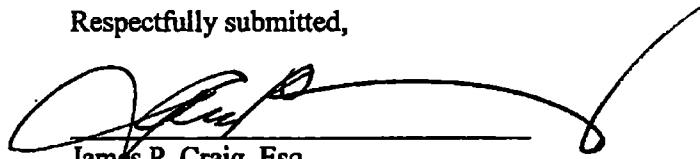
COMES NOW the Petitioner herein, GERALD BROWN, who submits the following
Reply to the State's Return to the Motion for Relief pursuant to S.C. Code §17-27-10, et seq.
The Petitioner does not concede any of his arguments, as they are well founded on fact and law.

LAW AND ARGUMENT

The State argues that the Petitioner's claims of ineffective assistance of counsel are without merit. Return at 3. However, the State concedes that the issue cannot be determined upon the record, and therefore states that an evidentiary hearing is required to resolve the issue. Return at 4. The Petitioner agrees that an evidentiary hearing would be prudent on the ineffective assistance of counsel claim.

Regarding the remaining claims raised by the Petitioner, specifically claims that the Petitioner's constitutional rights were denied when he was not permitted counsel of choice, and that his sentences were in violation of due process of law, the State has offered only a vague and generalized statement of denial. Return at 4. As such, the Petitioner again points to the detailed and supported claims as raised in his initial pleading herein, and submits that the he is entitled to relief upon said claims.

Respectfully submitted,

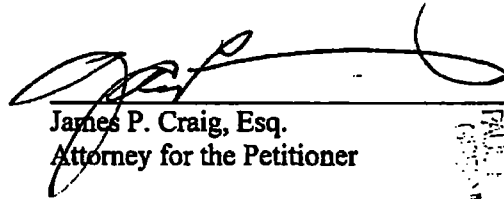


James P. Craig, Esq.
Attorney for the Petitioner
2001 Assembly Street, Suite 201
Columbia, South Carolina 29201
Phone: 803-252-5178
E-mail: jcraig@craiglawfirm.com

Columbia, South Carolina
July 29, 2013

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Reply has been sent this ___ day of
, 2013, by regular United States Mail with sufficient postage affixed thereto to insure delivery
thereof to the Office of the Attorney General of South Carolina, Karen C. Ratigan, P.O. Box
11549, Columbia, South Carolina 29211.


James P. Craig, Esq.
Attorney for the Petitioner

FILED CLERK OF COURT
PAUL J. WILSON
COLUMBIA, CO. SC

2013 AUG - 1 AM 9:12

Craig Law Firm, P.C.

Attorneys & Counselors at Law
2001 Assembly Street, Suite 201
Columbia, South Carolina 29201

Charlie M. Bru Pender
J. Kevin Craig

Of Counsel: James P. Craig

Phone (803) 252-5178
Fax (803) 252-5283

July 29, 2013

Greenville County Clerk of Court
305 E. North Street, Ste. 232
Greenville, South Carolina 29601

Re: Gerald Brown (#174505) v. State of South Carolina:

Dear Clerk Wickensimer:

Enclosed please find the original and two copies of the above named Petitioner's Reply to the State's Return to the Motion for Relief. Please clock the copies and return them to me in the envelope I have provided for your convenience. By copy of this letter I am serving the Office of the Attorney General for South Carolina with same.

If you have any questions, please do not hesitate to contact me at the above listed number.

With kindest regards, I am,

Very truly yours,


James P. Craig

2013 AUG -1 AM 9:12
FILED OFFICE COURT
CLERK WICKENSIMER
305 E. NORTH STREET
GREenville, SC 29601

JPC/sg
Enclosure
Cc: Gerald Brown
Karen Ratigan, Esq.
Wes Robinson, Esq. NLPA

3/ 6/12 LEE

INCARCERATED

ADMINISTRATIVE

CMTI330D
OMCOMITA
SCDC# > 174505
BROWN, GERALD -
OFFENDER TYPE...: ADULT-STRAIGHT SENTENCE

SCDC OFFENDER MANAGEMENT SYSTEM
RELEASE DATE SCREEN

01/02/13
C051123

LOC: LEE

SCDC CLASSIFICATION...: VIOLENT

SEXUAL REGISTRY...: N

SEXUAL PREDATOR...: NOT APP

DNA STATUS.....: COMPLETED

GPS REQUIREMENT...: N

PREA DECISION.....

CURRENT SENTENCE:

LIFE

CONSECUTIVE SENTENCE ...:

CURRENT SENT START DATE: 06/12/2007

PROJECTED COMPLETION DATES

MAXOUT DATE: 99/99/9999

YOA SIX YEAR DATE:

INITIAL PAROLE DATE: 00/00/0000

CURRENT EWC ..:

CURRENT EEC ..:

NEXT PAROLE HEARING DATE: 00/00/0000

TOTAL GT DAYS EARNED: 000000

TOTAL EARNED WORK CREDITS ...: 000000

TOTAL EDUCATION CREDITS: 000000

TOTAL EXTRA EARNED CREDITS ..: 000

TOTAL SERVICE TIME EARNED ...: 000000

LABOR CREW/WORK PROG DATE: 99/99/9999

LABOR CREW DISQ REASON:

CATEGORY 4 OR 5 OFFENSE

SUPERVISED REENTRY DATE...: 00/00/00

ISS.....:

PFKEYS: 5: HISTORY OF DATE CHANGES

4-@

1 Sess-1

167.7.50.33

SCDC1241

3/11

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS

RECORD SUMMARY REPORT DATED 01/02/13

C0511

BROWN, GERALD - FBI # 767760RC1 SID# SC00779415 SCDC # 174505

OFFENDER TYPE.: ADULT-STRAIGHT SENTENCE

INSTITUTION ...: LEE CORR INST

SECURITY/CUST.: 3 SECURITY DETENTION

CURR INCARC SENT...: 999 YRS 0 MOS 0 DYS

CENTRAL MONITORING.: YES SEPREQ

SOCIAL SECURITY #....:

DORM.....: SK0073B

RACE.....: B SEX....: M

PROJ MAXOUT DATE: 99/99/9999

PROJ PAROLE DATE: 00/00/0000

EWC JOB...: NO CURRENT JOB

EDUC PGM.: NO CURR EDUC PROGRAM

EWC LEVEL: 0 EEC LEVEL:

ASSIGNMENT...: LOCKED - UP

CURRENT PROGRAM...: NO CURRENT PROGRAM

AGE...: 39 DATE OF BIRTH...: 9/23/73

PREVIOUS NUMBERS:

** NO PREVIOUS NUMBERS **

CURRENT OFFENSES	SENTENCE			COUNTY	SENTENCE		
	YRS	MOS	DYS		START	V/NV	CATEGORY
RESISTING OFFICER	1	0	0	GREENVILLE	6/12/20	7 N	3
FIREARMS PROVISION	5	0	0	GREENVILLE	6/12/20	7 N	3
ASSLT&BATTERY-HIGH&AGG.NA	10	0	0	GREENVILLE	6/12/20	7 N	3
IMPERSONATING AN OFFICER	1	0	0	GREENVILLE	6/12/20	7 N	2
CRUELTY TO ANIMALS	5	0	0	GREENVILLE	6/12/20	7 N	1
BURGLARY-1ST DEGREE	999	99	999	GREENVILLE	6/12/20	7 V	4
ARMED ROBBERY	999	99	999	GREENVILLE	6/12/20	7 V	4
KIDNAPPING	999	99	999	GREENVILLE	6/12/20	7 V	5

PREVIOUS SCDC OFFENSES (COMPLETE)	SENTENCE			COUNTY	SENTENCE		
	YRS	MOS	DYS		START	V/NV	CATEGORY
ASSAULT W/INT TO KILL	10	0	0	GREENVILLE	9/ 8/1990	N	4
ASSLT & BATT W/INTNT KIL	20	0	0	GREENVILLE	9/ 8/1990	V	4
ARMED ROBBERY	24	0	0	GREENVILLE	9/ 8/1990	V	4

PRIOR COMMITMENTS OVER 90 DAYS:

INMATE HAS NO PRIORS

DETAINERS (HOLD, WANTED, NOTIFY):

POSSESSION OF WEAPON

HOLD

US MARSHAL BROWN, M

CATEG: 3

POSSESSION OF WEAPON

WANTED

JUDGE GARRETT

CATEG: 3

NO DETAINERS

ESCAPES:

8/26/ 9 ESCAPE

CLASS I

4/27/99 ESCAPE

CLASS II

CRIMINAL CHARGES:

NO CRIMINAL CHARGES HISTORY

ASSAULTIVE DISCIPLINARIES:

1/25/ 4 STRIKE I/M W/NO WEAPON

DROPPED

MAJOR INMATE

WEAPON

11/24/ 2 STRIKE I/M W/NO WEAPON

CONVICTED

MAJOR INMATE

11/24/96 FIGHTING WITHOUT A WEAP

CONVICTED

MINOR INMATE

NON-ASSAULTIVE DISCIPLINARIES:

8/26/ 9 CLASS I ESCAPE

CONVICTED

MAJOR

3/22/ 2 VIOLATIONS WRITE/POST IN

OTHER

12/16/ 1 POSSESSION OF CONTRABAND

OTHER

12/ 6/ 0 OUT OF PLACE

DROPPED

CHARG

8/ 3/ 0 REFUSING OR FAILING OBEY

CONVICTED

MAJOR

12/24/99 OUT OF PLACE

NOT GUILTY

MINOR

4/27/99 CLASS I ESCAPE

CONVICTED

MAJOR

5/ 8/98 OUT OF PLACE

NOT GUILTY

MAJOR

5/ 8/98 ABUSE OF PRIVILEGES

DROPPED

MAJOR

4/11/98 OUT OF PLACE

OTHER

12/11/96 INCITING/CREATING A DIST

CONVICTED

MAJOR

2/28/95 SAFETY REGULATIONS

CONVICTED

MAJOR

HISTORY OF MOVEMENTS:

BROWN, GERALD - FBI # 767760RC1 SID# SC00779415 SCDC # 174505 (CONTINUED)

3/ 6/12	RICHLAND CO	AUTH ABSENCE (AWL)	MEDICAL
1/ 5/12	LEE	INCARCERATED	ADMINISTRATIVE
1/ 5/12	RICHLAND CO	AUTH ABSENCE (AWL)	MEDICAL
10/25/11	LEE	INCARCERATED	ADMINISTRATIVE
10/25/11	EVANS	INCARCERATED	MEDICAL
9/ 1/11	LEE	INCARCERATED	ADMINISTRATIVE
9/ 1/11	RICHLAND CO	AUTH ABSENCE (AWL)	MEDICAL
4/12/11	LEE	INCARCERATED	ADMINISTRATIVE
4/12/11	KIRKLAND	INCARCERATED	MEDICAL
5/12/ 9	LEE	INCARCERATED	ADMINISTRATIVE
4/22/ 9	KIRKLAND	INCARCERATED	R&E PROCESSING
4/22/ 9	PERRY	INCARCERATED	NEW ADMISSION
10/25/ 6	UNK	RELEASE	SFII COMPLETED
4/ 3/ 6	GREENVILLE CO	SFII-SUPERVISED FURL	SUPERVISED FURLOUGH
3/ 9/ 5	TYGER RIVER	INCARCERATED	RETURN FROM COURT
3/ 9/ 5	RICHLAND CO	AUTH ABSENCE (AWL)	TO COURT
3/ 9/ 5	TYGER RIVER	INCARCERATED	RETURN FROM COURT
3/ 9/ 5	RICHLAND CO	AUTH ABSENCE (AWL)	TO COURT
6/30/ 4	TYGER RIVER	INCARCERATED	ADMINISTRATIVE
6/30/ 4	PERRY	INCARCERATED	COURT/PAROLE HEARING VIA
4/15/ 3	TYGER RIVER	INCARCERATED	ADMINISTRATIVE
1/18/ 2	ALLENDALE	INCARCERATED	RETURN FROM COURT
1/18/ 2	RICHLAND CO	AUTH ABSENCE (AWL)	TO COURT
9/26/ 1	ALLENDALE	INCARCERATED	ADMINISTRATIVE
9/11/ 1	MCCORMICK	INCARCERATED	ADMINISTRATIVE
11/27/ 0	PERRY	INCARCERATED	RETURN FROM COURT
11/27/ 0	RICHLAND CO	AUTH ABSENCE (AWL)	TO COURT
9/19/ 0	PERRY	INCARCERATED	RETURN FROM COURT
9/19/ 0	RICHLAND CO	AUTH ABSENCE (AWL)	TO COURT
6/ 7/ 0	PERRY	INCARCERATED	RETURN FROM COURT
6/ 7/ 0	RICHLAND CO	AUTH ABSENCE (AWL)	TO COURT
2/ 4/ 0	PERRY	INCARCERATED	RETURN FROM COURT
2/ 1/ 0	GREENVILLE CO	AUTH ABSENCE (AWL)	TO COURT
12/14/99	PERRY	INCARCERATED	RETURN FROM COURT
12/14/99	GREENVILLE CO	AUTH ABSENCE (AWL)	TO COURT
8/31/99	PERRY	INCARCERATED	ADMINISTRATIVE
5/20/99	EVANS	INCARCERATED	ADMINISTRATIVE
5/ 6/99	KIRKLAND	INCARCERATED	RETURN FROM COURT
5/ 6/99	RICHLAND CO	AUTH ABSENCE (AWL)	TO COURT
4/28/99	KIRKLAND	INCARCERATED	LOCKUP-INVESTIGATION
2/25/99	GOODMAN	INCARCERATED	ADMINISTRATIVE
1/19/99	NORTHSIDE	INCARCERATED	ADMINISTRATIVE
1/18/99	KIRKLAND	INCARCERATED	MEDICAL
9/29/98	NORTHSIDE	INCARCERATED	ADMINISTRATIVE
4/22/97	TYGER RIVER UPP	INCARCERATED	ADMINISTRATIVE
4/21/97	KIRKLAND	INCARCERATED	MEDICAL
11/20/96	TYGER RIVER UPP	INCARCERATED	RETURN FROM COURT
11/20/96	SPARTANBURG CO	AUTH ABSENCE (AWL)	TO COURT
9/30/94	TYGER RIVER UPP	INCARCERATED	ADMINISTRATIVE
5/10/94	KIRKLAND	INCARCERATED	ADMINISTRATIVE
3/15/94	PERRY R&E	INCARCERATED	LOCKUP-PROTECTIVE CUST.
6/ 7/91	PERRY	INCARCERATED	ADMINISTRATIVE
6/ 7/91	PERRY R&E	INCARCERATED	RETURN FROM COURT
6/ 3/91	GREENVILLE CO	AUTH ABSENCE (AWL)	TO COURT
2/21/91	PERRY	INCARCERATED	ADMINISTRATIVE
2/11/91	PERRY R&E	INCARCERATED	NEW ADMISSION

HISTORY OF EARNED WORK CREDIT ASSIGNMENTS:

JOB	START	END	TERMINATION	JOB
-----	-------	-----	-------------	-----

DESCRIPTION
GENERAL WORKER

DATE
05/15/09

DATE
8/26/ 9

REASON
PLACED IN ST/SP CUSTODY

LVL
2F5

BROWN, GERALD - FBI # 767760RC1 SID# SC00779415 SCDC # 174505 (CONTINUED)				
SUPER. FURL.	04/03/06	4/22/ 9	INSTIT TRANSFER	2F5
LAUNDRY ROOM ATTENDA	12/02/05	4/ 3/ 6	FURLOUGH	2F5
LAUNDRY ROOM ATTENDA	03/11/05	12/ 1/ 5	MI ELIGIBLE FOR LEVEL 2	3F5
LAUNDRY ROOM ATTENDA	03/08/05	3/10/ 5	ASLT/DRUG/MAJOR DISC	2F5
LAUNDRY ROOM ATTENDA	01/18/05	3/ 7/ 5	CUSTODY REVIEW	3F5
WARDKEEPER ASSISTANT	08/31/04	1/17/ 5	INMATE REQUEST	3F5
WARDKEEPER	03/25/04	8/ 9/ 4	PLACED IN ST/SP CUSTODY	3F5
GENERAL WORKER	04/17/03	1/25/ 4	PLACED IN ST/SP CUSTODY	3F5
HORTICULT/SEMI-SKILL	12/17/02	4/15/ 3	INSTIT TRANSFER	3F5
HORTICULT/SEMI-SKILL	09/27/01	11/24/ 2	PLACED IN ST/SP CUSTODY	2F5
WARDKEEPER ASSISTANT	09/13/01	9/26/ 1	INSTIT TRANSFER	2F5
CUST ATTDN VISITING	02/02/01	9/11/ 1	PLACED IN ST/SP CUSTODY	2F5
CUST ATTDN VISITING	09/13/00	2/ 1/ 1	MI ELIGIBLE FOR LEVEL 2	3F5
CUST ATTDN VISITING	08/16/00	9/12/ 0	CUSTODY REVIEW	5F5
CUST ATTDN VISITING	07/28/00	8/ 3/ 0	PLACED IN ST/SP CUSTODY	5F5
WARDKEEPER ASSISTANT	01/14/00	7/13/ 0	REDUCTION IN FORCE	5F5
FOOD SERVICE AIDE	09/03/99	1/13/ 0	INMATE REQUEST	5F5
FOOD SERVICE AIDE	06/30/99	8/31/99	INSTIT TRANSFER	5F5
SR GENERAL CONST. OP	03/02/99	4/28/99	LOCKUP-INVESTIGATION	2F5
WARDKEEPER	02/03/99	2/25/99	INSTIT TRANSFER	2F5
HOUSEKEEPER	10/02/98	2/ 2/99	LATERAL TRANSFER	2F5
GENERAL WORKER	01/09/98	9/29/98	INSTIT TRANSFER	2F5
GENERAL WORKER	10/16/97	1/ 8/98	MI ELIGIBLE FOR LEVEL 2	3F5
MACHINE OPERATOR HEL	04/29/97	10/15/97	COMPLETED EDUC PROGRAM	3F5
GENERAL WORKER	02/11/97	4/28/97	INMATE REQUEST	3F5
GENERAL WORKER	01/30/97	2/10/97	CUSTODY REVIEW	7F5
WARDKEEPER ASSISTANT	06/24/96	11/25/96	DISCIPLINARY/LOCK-UP	5F7
WARDKEEPER ASSISTANT	07/07/95	6/17/96	DISCIPLINARY/LOCK-UP	5F7
WARDKEEPER ASSISTANT	04/25/95	4/28/95	DISCIPLINARY/LOCK-UP	5F7
MACHINE OPERATOR HEL	04/10/95	4/24/95	INMATE REQUEST	5F5
SR DINING ROOM OPERA	02/15/95	2/28/95	DISCIPLINARY/LOCK-UP	3F7
FOOD SERVICE AIDE	12/12/94	2/14/95	PROMOTION	5F7
WARDKEEPER ASSISTANT	05/23/94	9/30/94	INSTIT TRANSFER	5F7
BRICKMASON HELPER	12/05/92	2/14/94	INMATE REQUEST	5P5
BRICKMASON HELPER	11/18/92	12/ 4/92	INMATE REQUEST	5F5
MACHINE OPERATOR	04/29/92	9/15/92	INMATE REQUEST	3F5
MACHINE OPERATOR HEL	03/25/92	4/28/92	PROMOTION	5F5
HORTICULTURE TRAINEE	03/04/92	3/24/92	INMATE REQUEST	7F5
ELECTRICIAN HELPER	01/10/92	1/30/92	INMATE REQUEST	5F5
COOK	09/25/91	11/ 5/91	INMATE REQUEST	3F7
FOOD SERVICE AIDE	07/30/91	9/24/91	PROMOTION	5F7

HISTORY OF EARNED EDUCATION CREDITS:

EEC	START	END	TERMINATION
DESCRIPTION	DATE	DATE	REASON
BONUS 15 OR MORE	09/27/04	2/10/ 5	TEMPORARY ABSENCE

***** END OF REPORT *****

IN THE COURT OF COMMON PLEAS

r

1

2

1

—

1

)

;

;

)

;

1

INDEX

WITNESSES	DIRECT	CROSS	REDIRECT	RECROSS
Andrell Terry Craig Ratigan	6	17		
Gerald Brown Craig Ratigan	22	60		
Randall L. Chambers Ratigan Craig	66	75		
				PAGE
				89
Certificate of Reporter				

PLAINTIFF'S EXHIBITS

NO	DESCRIPTION	ID	EV
	(NONE)		

DEFENDANT'S EXHIBITS

	(NONE)		

COURT'S EXHIBITS

C-1	Excerpts from Applicant's Petition	65	

1

FEBRUARY 19, 2014

2 (WHEREUPON, court convened with all parties present
3 and the following proceedings were had.)

4 THE COURT: Ms. Ratigan.

5 MS. RATIGAN: Thank you, Your Honor, may it
6 please the court. This is the case of Gerald Brown
7 versus the State of South Carolina. Docket number is
8 2012-CP-23-7837. Mr. Brown was indicted for possession
9 of a weapon during the commission of a violent crime,
10 assault and battery of a high and aggravated nature,
11 impersonating law enforcement, malicious injury to a
12 police dog, first degree burglary, armed robbery, three
13 counts of kidnaping and resisting arrest. He was
14 represented on these charges by Mr. Chambers.

15 The State brought the case to trial in April of
16 2009 before Judge Miller. Mr. Brown was found guilty of
17 the charges as indicted. On April 16th of 2009, Judge
18 Miller levied concurrent sentences of five years for the
19 weapons charge, ten years for ABHAN, one year for
20 impersonating law enforcement, five years for malicious
21 injury to a police dog, life without parole for burglary
22 first, life without parole for armed robbery, and three
23 counts of life without parole for kidnaping, one year
24 for resisting arrest.

25 The case was appealed to the Court of Appeals, who

1 confirmed Mr. Brown's convictions and sentences in May
2 of 2012. This application was timely filed. The
3 state's ready to proceed.

4 THE COURT: Mr. Craig.

5 MR. CRAIG: Thank you, Your Honor. I believe
6 the background -- this involves an alleged home invasion
7 of a Mr. Howard, George Howard, in June of, I think,
8 2006, I think it was on the 3rd. And Mr. Brown, at
9 trial, was found guilty. And we're alleging ineffective
10 assistance of counsel by Mr. Chambers, who was appointed
11 at that time, through the Public Defender's Office to
12 represent Mr. Brown. And some of the elements that we
13 contend were constituting ineffective assistance of
14 counsel was failure to call a very key witness at that
15 time. And so as our first witness, we'd like to call
16 that person, Mr. Andrell Taylor -- excuse me -- Andrell
17 Terry.

18 THE COURT: All right, sir. Come around and
19 be sworn, please, Mr. Terry.

20 THE CLERK: Mr. Terry, place your left hand on
21 the bible. Raise your right hand.

22 You do solemnly swear or affirm that the testimony
23 you're about to give in this case will be the truth, the
24 whole truth and nothing but the truth, so help you God?

25 THE WITNESS: Yes, ma'am.

1 THE CLERK: Thank you. Please state your full
2 name and spell it.

3 THE WITNESS: Andrell Terry, A-N-D-R-E-L-L
4 T-E-R-R-Y.

5 THE CLERK: Thank you. You may be seated.

6 ANDRELL TERRY,

7 HAVING BEEN DULY SWORN, TESTIFIED AS FOLLOWS:

8 DIRECT EXAMINATION

9 BY MR. CRAIG:

10 Q. Mr. Terry, where do you live?

11 A. Taylors, 107 Drewry Road.

12 Q. Okay. How long have you lived there?

13 A. About seven, eight years.

14 Q. Okay. Were you living there back in 2009 when Mr.
15 Brown went to trial?

16 A. Yes, sir, I was.

17 Q. Did you have the same telephone number now as you
18 did then?

19 A. Yes, sir, I do.

20 Q. Okay. How do you know Mr. Brown?

21 A. He's my cousin.

22 Q. And did you and he grow up together?

23 A. Yes, sir.

24 Q. Okay. From what age until -- did you start
25 associating with Mr. Brown?

- 1 A. From birth up until we were teenagers.
- 2 Q. And what -- you say you're first cousins?
- 3 A. Yes, sir.
- 4 Q. And what exactly is the relation? Is it your
- 5 mother and his mother are sister?
- 6 A. My mother and his mother are sisters.
- 7 Q. Okay. And what neighborhood was it that y'all
- 8 grew up in?
- 9 A. Oakview, Oakview Village Apartments.
- 10 Q. Okay. Where is that?
- 11 A. That's in Taylors.
- 12 Q. And did you know that Mr. Brown was charged with a
- 13 crime back in 2006 and went to trial in 2009?
- 14 A. Yes, sir, I did.
- 15 Q. How did you find out about that?
- 16 A. The first time I found out about it was on the
- 17 news. Then I spoke with his mother after the fact.
- 18 Q. Okay. And did you eventually talk with Mr. Brown
- 19 directly about it?
- 20 A. No, I didn't.
- 21 Q. Have you talked with him about this case?
- 22 A. I talked to him after he had been sentenced.
- 23 Q. After he had been sentenced?
- 24 A. Yes, sir.
- 25 Q. Was Mr. Brown incarcerated during the time he was

1 awaiting trial, as far as you know?

2 A. Yes, sir, he was.

3 Q. Did you know if he tried to call you or contact
4 you?

5 A. Not to my knowledge. I spoke to his mother, but I
6 never talked to him directly.

7 Q. Okay. So you never talked to him?

8 A. No.

9 Q. Until after he was sentenced?

10 A. Yes, sir.

11 Q. Okay. Do you now know the circumstances around
12 Mr. Brown's charges against him and what he was
13 convicted of?

14 A. Yes, sir, I do.

15 Q. It has to do with a home invasion of Mr. George
16 Howard; is that correct?

17 A. Yes, sir.

18 Q. Do you know Mr. Howard?

19 A. Yes, sir, I do.

20 Q. How do you know Mr. Howard?

21 A. He was raised in the same apartment neighborhood
22 we all grew up in.

23 Q. Okay. Age-wise, how is Mr. Howard's age compared
24 to yours and Mr. Brown's?

25 A. I think they might be three years, maybe four,

1 older than me.

2 Q. Okay. Is Mr. Brown and Mr. Howard about the same
3 age?

4 A. I think so. Yes, sir.

5 Q. Did you -- the three of y'all go to school
6 together?

7 A. I didn't. I was a little under those guy. But, I
8 mean, I remember playing with them, all of them.

9 Q. You played with Mr. Brown, Mr. Howard and ---

10 A. Yes, sir.

11 Q. --- all of them together?

12 A. Yes, sir.

13 Q. No question in your mind that Mr. Howard and Mr.
14 Brown knew each other?

15 A. Oh, no doubt.

16 Q. And had known each other for a very long time?

17 A. Yes, sir.

18 Q. Do you recall around the time this alleged home
19 invasion took place, taking Mr. Brown to Mr. Howard's
20 residence?

21 A. Yes, sir.

22 Q. Tell me about that. How did that evolve? Why did
23 you take him there? How did it evolve?

24 A. Well, basically I was at my grandmother's house
25 visiting her and Mr. Brown called me and I came outside.

1 His mother lived across the street from my grandmother.

2 And I came out and he asked me to take him to a friend's
3 house.

4 Q. Take him to a friend's house?

5 A. Yes, sir.

6 Q. Okay. Did he tell you whose -- who the friend was
7 at that time?

8 A. No, sir, he didn't go into any details.

9 Q. Okay. What did you tell him?

10 A. I told him that was fine.

11 Q. What time of day was this? Do you recall?

12 A. It was night. It wasn't extremely late, but I
13 know it was dark.

14 Q. Okay. What kind of vehicle did you have at that
15 time?

16 A. A silver Expedition, 2004.

17 Q. And how far away was Mr. Howard's house from where
18 you and Mr. Brown were at that time?

19 A. I'd say ten, twelve minutes.

20 Q. Okay. And did you agree to take Mr. Brown to Mr.
21 Howard's house?

22 A. Yes, sir.

23 Q. Did you know it was Mr. Howard's house you were
24 taking him to at the time?

25 A. No, I didn't.

1 Q. Did you ever find out that where you dropped Mr.

2 Brown off was Mr. Howard's residence?

3 A. Yes, sir, after I saw it on the news.

4 Q. And on the way over there, in this ten or twelve

5 minute drive you were taking him to Mr. Howard's house,

6 did you and Mr. Brown have a conversation?

7 A. Yes, sir.

8 Q. Okay. What did you talk about?

9 A. He was basically just -- I thought he was just

10 showing off. He showed -- had like a shopping bag of

11 cash. And he showed me the cash and told me there was

12 like twenty-three, twenty-two or twenty-three thousand

13 dollars. And said he was going to get some merchandise.

14 Q. Merchandise?

15 A. Yes, sir.

16 Q. Okay. And did you actually see the cash?

17 A. Yes, sir, I touched it.

18 Q. You touched it?

19 A. Yes, sir.

20 Q. What was it located in? You said a shopping bag?

21 A. It was like a plastic shopping bag.

22 Q. And twenty-two or twenty-three thousand dollars,

23 how was it bundled? How much volume was ---

24 A. I mean, I was driving. I mean, I glanced at it.

25 You know, I touched it. So it was probably like in a --

1 if I had to guess, like thousand dollar stacks or
2 something like that.

3 Q. Did it have rubber bands around it? How was it
4 wrapped?

5 A. It may have been. I mean, like I said, I really
6 just didn't look at it good. But I think it -- I think
7 they were individually wrapped.

8 Q. Okay. And what did Mr. Brown tell you about that
9 cash?

10 A. Nothing specific. Myself personally, I thought he
11 was going to probably get some bags. I don't know, I
12 thought the bags might have been high, because he had a
13 little boutique at the time, Mr. Brown, and I thought he
14 might have been going to guy high-end purses, because he
15 was selling the bags at his boutique.

16 Q. Did Mr. Brown tell you anything about what he
17 exactly was going to do with that cash?

18 A. No, sir.

19 Q. Did you ask him?

20 A. No, sir.

21 Q. So that was just an assumption on your part?

22 A. That was my assumption, yes, sir.

23 Q. But you recall him saying, Mr. Brown saying, that
24 was about twenty-two or twenty-three thousand dollars
25 and he told you the amount?

1 A. Yes, sir.

2 Q. Okay. And how was Mr. Brown dressed when you were
3 taking him over there, if you recall?

4 A. He had on a white t-shirt and some jeans.

5 Q. Was he carrying any other kind of bag besides his
6 bag that had the cash in it?

7 A. No, sir.

8 Q. Did he have like a duffle bag or anything like
9 that?

10 A. No, sir.

11 Q. Now, during the course of the trial, it was
12 alleged that Mr. Brown was wearing a bulletproof vest
13 when he got to Mr. Howard's house. Did you see him
14 wearing a bulletproof vest?

15 A. No, I did not.

16 Q. Did you see him have anything large enough that
17 would contain a bulletproof vest?

18 A. He didn't have anything when he got in my vehicle.

19 Q. Okay. Or when he got out?

20 A. Or when he got out.

21 Q. Okay. What about -- it's also alleged that he was
22 wearing a blue t-shirt, maybe like a polo shirt like
23 you're wearing, that had the word police written on it.

24 Did you see that?

25 A. No, sir.

1 Q. Did he have anything that could have concealed
2 that?

3 A. No, sir. I mean, the bag that he had was just
4 large enough to have the money in it.

5 Q. What about -- it's also alleged that he was
6 wearing a paint ball mask. Do you know what a paint
7 ball mask is?

8 A. Not really, no.

9 Q. Okay. Do you know what the paint ball game is?

10 A. Yes, sir.

11 Q. Okay. And have you seen pictures of or maybe
12 heard about people wearing masks to protect them when
13 they're playing paint ball?

14 A. Oh, I think I know what you're talking about.
15 It's like a -- something like skiing goggles or
16 something like that?

17 Q. Something like that, yes.

18 A. Yes, I know what you're talking about.

19 Q. Did you see that on Mr. Brown?

20 A. No, sir, I did not.

21 Q. Did you see anything that would have been large
22 enough to contain a paint ball mask?

23 A. No, sir, I didn't.

24 Q. It's also been alleged that Mr. Brown had a pistol
25 when he got to Mr. Brown's (verbatim) house. Did you

1 see a pistol?

2 A. No, sir, I didn't.

3 Q. If Mr. Brown had been carrying a pistol, do you
4 think you would have noticed that?

5 A. Yeah. I mean, the t-shirt was real fitted on him.
6 I mean, he's a slender guy, so I mean I would have
7 noticed stuff, a bulge in them.

8 Q. What about a taser? It's also alleged that he had
9 a taser on him at Mr. Howard's house. Did you see a
10 taser?

11 A. No, sir. I did not.

12 Q. Okay. Do you think you would have noticed if he
13 had a taser on him?

14 A. Yes, sir.

15 Q. And when you dropped Mr. Brown off at Mr. Howard's
16 house, did you see him get out of your vehicle?

17 A. Who? Mr. Brown?

18 Q. Yes, sir.

19 A. Yes, sir.

20 Q. When he got out of your vehicle what did he take
21 with him?

22 A. The bag with the money in it.

23 Q. Anything else?

24 A. That's it.

25 Q. Just the bag?

1 A. Yes, sir.

2 Q. And he was dressed in jeans and a white t-shirt?

3 A. Yes, sir.

4 Q. Okay. Now, did you testify about these facts in
5 Mr. Brown's trial?

6 A. No, I did not.

7 Q. Did -- are you aware of any efforts by Mr. Brown's
8 attorney, Mr. Chambers, to contact you to testify?

9 A. No one contacted me about that, sir.

10 Q. No one?

11 A. No one.

12 Q. Had you been contacted prior to the trial, would
13 you have been willing to come testify as you're doing
14 today?

15 A. Yes, sir. I would have.

16 Q. And I think you said your cell phone number was
17 the same back then as it is now?

18 A. Yes, sir.

19 Q. Okay. And when I called you, you answered your
20 cell phone?

21 A. Yes, sir.

22 Q. And even without knowing who it was?

23 A. Yes, sir.

24 Q. And you and I have talked several times in the
25 past month or so; have we not?

1 A. Yes, sir.

2 Q. And you live at the same residence now that you
3 did back then?

4 A. Yes, sir.

5 Q. Do you know of any efforts that anybody made to
6 serve a subpoena on you at your residence?

7 A. No one made any effort to contact me, sir.

8 Q. In any fashion whatsoever?

9 A. No.

10 Q. Anybody ever brought you a letter prior to Mr.
11 Brown's trial?

12 A. Nothing.

13 MR. CRAIG: One moment, Your Honor.

14 Thank you, Mr. Terry. Answer any questions Ms.
15 Ratigan has for you.

16 THE WITNESS: Yes, sir.

17 **CROSS EXAMINATION**

18 **BY MS. RATIGAN:**

19 Q. Mr. Terry, is your nickname Duke?

20 A. Yes, ma'am.

21 Q. And you and Mr. Brown are first cousins through
22 your moms?

23 A. Yes, ma'am.

24 Q. Okay. And you knew at some point that he had been
25 arrested?

1 A. Yes, ma'am.

2 Q. And did you know that he had been arrested for a
3 home invasion the very night that you had dropped him
4 off?

5 A. No, ma'am.

6 Q. Okay. So when did you find out that the night
7 that you dropped him off he was arrested that very
8 night?

9 A. I found out the next morning.

10 Q. Okay. So you dropped him off and the next morning
11 you found out he had been arrested, but you didn't put
12 the dots together that you had dropped him off and that
13 he had gone and allegedly committed this crime?

14 A. What do you mean, put the dots together?

15 Q. Did you know -- this is all kind of complicated to
16 explain. When you dropped him off that night, he was
17 going to a friend's house; ---

18 A. Right.

19 Q. --- is what he told you? And then you found out
20 he got arrested?

21 A. Right.

22 Q. When did you find out that he got arrested for
23 something that happened right after you dropped him off?

24 A. Probably a few months after the fact. Because, I
25 mean, I had never been to that house before.

1 Q. Okay.

2 A. And I mean, they just showed -- when they showed
3 it on the news, they showed the inside.

4 Q. Okay. So at that point when you found out a few
5 months later that your cousin had been arrested for
6 allegedly breaking into a house right after you dropped
7 him off, at that point you knew that you may have had
8 something you could have told the police or told his
9 attorney? It had been a few months afterwards?

10 A. Not necessarily. I mean, because he could have
11 left there and went somewhere different.

12 Q. Okay. Did you ever contact the police and say,
13 you know, I have some information I could maybe give you
14 that my cousin didn't commit these crimes?

15 A. No, ma'am, I didn't.

16 Q. Did you ever contact his lawyer and say the same
17 thing, you know, I saw him that night, he already had
18 the money with him. Did you ever contact him to try to
19 ---

20 A. I never knew who his attorney was.

21 Q. Could you have found out?

22 A. Probably.

23 Q. Through perhaps your mother or his mother?

24 A. His mother.

25 Q. Okay.

1 A. But during that course he didn't have the attorney
2 he had when he went to trial.

3 Q. Okay. And so you're testifying today that if you
4 had been called at trial, you could have testified that
5 you saw him that night, he already had a bag of cash,
6 and he didn't have any of these other items with him?

7 A. Yes, ma'am.

8 Q. And you never gave him that money?

9 A. No, ma'am.

10 Q. Did you know that he testified at trial that you
11 did give him that money?

12 A. No, ma'am.

13 Q. You didn't know that?

14 A. No.

15 Q. And do you have any prior criminal record?

16 A. Yes, ma'am.

17 Q. And your testimony today is you had nothing to do
18 with any kind of transaction between your cousin and the
19 victim?

20 A. Yes, ma'am.

21 Q. And you didn't know anything about the money other
22 than that he showed it to you?

23 A. That's it.

24 Q. Okay. Were you suppose to pick up Mr. Brown later
25 that day?

1 A. No, ma'am.

2 Q. You just dropped him off? There was no plans for
3 you to ever come get him?

4 A. No, ma'am.

5 Q. Did he ever call you once he was inside the --
6 Howard's house?

7 A. Did he ever call me? No, ma'am, he didn't.

8 Q. So once you dropped him off, you just never heard
9 from him again until you found out he had been arrested?

10 A. Yes, ma'am.

11 Q. Okay.

12 MS. RATIGAN: That's all I have, Your Honor.

13 THE COURT: Any redirect?

14 MR. CRAIG: No, Your Honor.

15 THE COURT: Thank you, sir. You may step
16 down.

17 MR. CRAIG: I call Mr. Brown to the stand.

18 THE CLERK: Place your left hand on the bible.
19 Raise your right hand.

20 You do solemnly swear or affirm that the testimony
21 you're about to give in this case will be the truth, the
22 whole truth and nothing but the truth, so help you God?

23 THE WITNESS: I do.

24 THE CLERK: Thank you. Please state your full
25 name for the record.

1 THE WITNESS: Gerald Brown.

2 THE CLERK: Thank you. You may be seated.

3 GERALD BROWN,

4 HAVING BEEN DULY SWORN, TESTIFIED AS FOLLOWS:

5 DIRECT EXAMINATION

6 BY MR. CRAIG:

7 Q. Mr. Brown, tell the court, in general, what were
8 the charges against you for which you were convicted?

9 A. Ah ...

10 Q. Not the specific charges. His Honor has already
11 read those specific charges. But in general the
12 circumstances and what was the government's theory, the
13 state's theory, about what you did that night?

14 A. Oh, their theory was that I went to this house,
15 George Howard's house, alone and robbed him. That was
16 it.

17 Q. Okay. As part of the government's case, was it
18 important about what you were wearing that night?

19 A. Yes. I mean, it was extremely important, because
20 they were saying that the perpetrator had on a
21 bulletproof vest and he had on a shirt that had police
22 on it. And when I got arrested, you know, I had on a
23 white t-shirt. So yeah, it was extremely important, the
24 clothing.

25 Q. Okay. During the course of the trial, were there

1 a number of witnesses that testified that you had a blue
2 t-shirt, sort of like a polo shirt like Mr. Terry was
3 wearing, that you had a blue t-shirt on like that and it
4 had police written across it?

5 A. Yes, sir.

6 Q. Okay. Were there a number of witnesses and a
7 police officer who testified that you had a bulletproof
8 vest on?

9 A. Yes, sir.

10 Q. Over top of that blue shirt?

11 A. Yes, sir.

12 Q. Or under it; one or the other?

13 A. Yeah. I mean, that was one of the things about
14 the trial. They were saying that it was a -- they saw a
15 bulletproof vest and they saw the t-shirt. And the
16 whole thing was, if the vest was on top of the t-shirt,
17 then you couldn't see the vest. And if the t-shirt was
18 on top of the vest -- either vice versa, if the vest was
19 on top, you couldn't see the word police actually on the
20 t-shirt, because the vest, when they showed it, it's a
21 wrap-around vest, so you couldn't see the word police.
22 And if the shirt was on top and the vest was beneath,
23 then you couldn't see the vest. That was ---

24 Q. And so there's inconsistency in that testimony?

25 A. Right.

1 Q. Now, there was also testimony about that this
2 perpetrator, and they were saying it's you, was wearing
3 a paint ball mask?

4 A. Yes, sir.

5 Q. And they're saying because of that they could not
6 tell whether -- they couldn't identify who was wearing
7 the paint ball mask?

8 A. That's right.

9 Q. And I believe, as the testimony went, the police
10 arrived and they say -- at Mr. Howard's house, and they
11 looked through the windows and they could see somebody
12 wearing a paint ball mask, as you've described, with a
13 bulletproof vest, either above or under, a t-shirt, but
14 they couldn't recognize who it was. Is that correct?

15 A. Correct.

16 Q. Now, later that person ran out of the house into a
17 patch of woods; is that correct?

18 A. Right.

19 Q. Okay. And even at that point they couldn't
20 recognize who it was?

21 A. Right.

22 Q. Was there also testimony that that person had a
23 pistol?

24 A. Yes, there was.

25 Q. And a taser?

1 A. Yes.

2 Q. And that that person ran into a patch of woods and
3 later they found you in that same patch of woods; is
4 that correct?

5 A. Correct.

6 Q. Now, tell the court how it came to pass that you
7 were in that patch of woods?

8 A. Well, I initially went to Mr. Howard's house to
9 conduct a drug deal. He and I had ---

10 Q. Let's stop right there. You went to Mr. Howard's
11 house for what purpose?

12 A. To buy some drugs.

13 Q. To buy some drugs from whom?

14 A. Mr. Howard.

15 Q. From Mr. Howard. All right. Let's stop right
16 there for a moment. Did you know Mr. Howard?

17 A. Yes, sir.

18 Q. You heard Mr. Terry testify a moment ago that you
19 grew up together in the same neighborhood?

20 A. Yes, we did.

21 Q. Went to school together?

22 A. We didn't go to school together. I think he is
23 maybe a year and a half, two -- he's maybe a year and
24 half, something like that, older than I am. When we
25 lived -- see, we lived in the same area my whole life.

1 We stayed in the Oakview, which is the apartment
2 complex. And then we stayed in another area that's
3 close by there. He and I didn't -- we played around and
4 stuff, but we didn't go to the same school, not to my
5 recollection. If we did, it was elementary school, and
6 I only went to like Taylor Elementary for maybe half a
7 semester or something like that.

8 Q. You're speculating how long you went to school
9 together. But you had known Mr. Howard for most of your
10 life?

11 A. Yes. His whole family.

12 Q. And as Mr. Terry testified, the three of y'all
13 played together as you were growing up?

14 A. Yes, sir.

15 Q. Okay. And had you continued to maintain the
16 contact with Mr. Howard after you got out of school?

17 A. Yes, sir.

18 Q. And what was that relationship with Mr. Howard?

19 A. You know, basically just illegal drug
20 transactions.

21 Q. So you would buy drugs from Mr. Howard?

22 A. Yes, sir.

23 Q. Small or large or what sort of quantities?

24 A. It would usually be a number of ounces.

25 Q. And had you bought drugs from Mr. Howard on

1 numerous occasions or how many occasions?

2 A. Yeah. Quite a few occasions. One of the last
3 times I had actually purchased some drugs from Mr.
4 Howard, we had a problem, and that's why, you know, I
5 used Mr. Terry's name as -- basically as a voucher on
6 this particular deal right here.

7 Q. Well, let's stick to the question I asked you
8 right now, which is, you conducted a number of drug
9 deals with Mr. Howard?

10 A. Yes, sir.

11 Q. And on this particular night, you were going to
12 his residence to buy drugs from him?

13 A. Right.

14 Q. Did you have the cash with you to buy the drugs?

15 A. Yes, sir.

16 Q. How much cash did you have?

17 A. It was twenty-three thousand dollars.

18 Q. Why twenty-three thousand?

19 A. That was the amount that I was going to pay for
20 the drugs that I was going to get. Actually I was going
21 to owe him a little bit more money, but the twenty-three
22 thousand dollars, I was going to get like fifty
23 something ounces.

24 Q. Okay. And did Mr. Howard know you were coming?

25 A. Yes, sir.

1 Q. Did he know about the approximate time you were
2 coming?

3 A. Yes, sir.

4 Q. How was the cash wrapped? How was it bundled?

5 A. It was just in bundles, what they call stacks, a
6 thousand dollars in each little bundle.

7 Q. Did you show that cash to Mr. Terry?

8 A. Yeah. I showed it to him.

9 Q. Why did you do that?

10 A. Probably just bragging, I guess, trying to ...

11 Q. Did you tell Mr. Terry why you were going to Mr.
12 Howard's house?

13 A. No. I mean, I didn't really have to tell him.

14 You know, it's -- he knows -- everybody knows who does
15 or what, you know. So we didn't really discuss that
16 issue.

17 Q. Was Mr. Howard a known drug distributor?

18 A. Yes, sir.

19 Q. Known by you?

20 A. Yes, sir.

21 Q. Known by others?

22 A. Yes, sir. He has a record.

23 Q. He has a record? And had he been convicted as a
24 drug distribution in the past?

25 A. Yes, sir.

1 Q. What do you know about that record? What was he
2 convicted of and when?

3 A. I have -- I know one because he pled guilty to one
4 drug charge in 2005. It was actually in my trial
5 transcript where Mr. Chambers gives a mention to that
6 2005 conviction. He has a number of different drug
7 offenses. But I don't know -- I know that one
8 specifically he was, he was convicted for it. Matter of
9 fact, he's waiting to go to trial for another one right
10 now.

11 Q. Okay. Now, do you recall -- maybe this is a
12 little bit out of order, but do you recall after the
13 police arrested you and brought you back around to face
14 Mr. Howard at his residence, and Mr. Howard saying he
15 never saw you before?

16 A. That's what he said.

17 Q. Why did he say that?

18 A. I mean, I assume he didn't want to let the -- have
19 the authorities know that, you know, what was really
20 going on.

21 Q. Okay. But in fact, you did know him and he knew
22 you?

23 A. Yes.

24 Q. So Mr. Howard was lying when he said that?

25 A. Yes, sir.

1 Q. So when you got to Mr. Howard's residence, did you
2 have a bulletproof vest with you?

3 A. No, sir.

4 Q. Did you have a blue t-shirt with police on it?

5 A. No, sir.

6 Q. Did you have a pistol?

7 A. No, sir.

8 Q. Did you have a taser?

9 A. No, sir.

10 Q. Did you have a bag of cash?

11 A. Yes, sir.

12 Q. When you got to Mr. Howard's residence, what did
13 you do? What did you observe? What did you see
14 happening?

15 A. Well, when I got there and he's got a little --
16 nice little walkway. I walked up to the door and the
17 door was already slightly cracked. And I looked inside
18 and see that somebody was tied up. And I didn't know --
19 it was -- one of his sons was in there, I know now, but
20 at the time I didn't know who it was. I could see, you
21 know, one or two individuals laying on the floor tied
22 up. And once I observed that, I left.

23 Q. Where did you go?

24 A. To a wooded area behind the -- it's like a little
25 path that cuts through the back.

1 Q. How far away from the house itself was the patch
2 of woods, would you say?

3 A. You cut through the backyard, there's a backyard
4 and then the woods are like directly almost part of the
5 backyard. The backyard probably is maybe the size of
6 the courtroom and then the woods.

7 Q. And what did you do when you got to the woods?

8 A. I got on the telephone and made a call.

9 Q. To whom?

10 A. I called Andrell. I didn't get an answer, but
11 that's who I called.

12 Q. Why did you call him? To come pick you up?

13 A. He had to come pick me up, because the original
14 plan was Howard was actually going to take me back to my
15 mother's house.

16 Q. But obviously that wasn't going to happen, so you
17 were just trying to get out of there; right?

18 A. Right.

19 Q. And so you stayed hidden in the woods for
20 sometime?

21 A. Yeah. Yeah. I stayed in the woods for a little
22 while.

23 Q. Okay. And you made a call on your cell phone to
24 Mr. Taylor -- excuse me -- Mr. Terry?

25 A. Right.

1 Q. Would your cell phone records at the time have
2 confirmed that telephone call having been made?

3 A. Yes, sir.

4 Q. Okay. Were those cell phone records introduced
5 into the trial?

6 A. No, sir.

7 Q. Did you tell your attorney about those cell phone
8 records ---

9 A. Yes. I mean, he ---

10 Q. --- could verify what you were saying?

11 A. Yeah. He was aware of the telephone calls.

12 Q. But there was no mention of the cell phone records
13 in the trial itself; was there?

14 A. No, sir.

15 Q. And they were not introduced into evidence?

16 A. No, sir.

17 Q. Now, I'm assuming it was a short time after you
18 got to the woods that the police arrived on the scene;
19 was it not?

20 A. It may have been thirty minutes; twenty, thirty
21 minutes. It seemed like it was probably longer than
22 that, but I'm thinking, if I can remember correctly,
23 maybe twenty or thirty minutes.

24 Q. Okay. Why didn't you just leave the scene?

25 A. Well, the area -- there's really nowhere to go.

1 It's in the middle of a white neighborhood, you know,
2 basically. And like I had said before, I didn't want to
3 be walking through there, you know, with twenty-three
4 thousand dollars, you know.

5 Q. So you were afraid you might get just picked up
6 and then they would have the cash?

7 A. Yes.

8 Q. Did you call 911 about what you had just seen in
9 Mr. Howard's house?

10 A. No, sir. I didn't.

11 Q. Why didn't you do that?

12 A. Again, I had twenty-three thousand dollars on me.
13 And you know, I really didn't know what was going on. I
14 was trying to get away from that immediate area.

15 Q. And what happened next when you were waiting in
16 the woods and you couldn't get Mr. Terry?

17 A. I seen a lot of lights and stuff, started
18 flashing, and a lot of screaming. I started running.
19 Ran into a police officer. I didn't know it was a
20 police officer at first, but, you know, we got to
21 tussling, whatever, in the woods.

22 Q. Was it dark then?

23 A. Yeah. I mean, there was no lights or anything.
24 It was completely black dark.

25 Q. Pitch black dark, I think was the testimony of the

1 police officers at the time?

2 A. Yes, sir.

3 Q. And so you actually ran into a police officer?

4 When you were running and trying to get away, you

5 actually ran into a police officer?

6 A. Yes, sir.

7 Q. Okay. And I understand there was a K-9 dog

8 involved in the -- at the time, as well; is that

9 correct?

10 A. Yes, sir. The dog actually attacked me and one of

11 the officers.

12 Q. Okay. And how many officers eventually tried to

13 arrest you or subdue you; do you know?

14 A. Right at that immediately time, it was probably

15 like maybe four or five of them, or something like that.

16 It was more that came later, but I think right at that

17 specific time it was only -- it was one and then two

18 with the dog, and then probably two or three more came.

19 Q. So to start out with, it was the one that you ran

20 into and it became -- it was more on the scene, and

21 others ---

22 A. Yeah. It was probably ---

23 Q. As well as the dog?

24 A. Yes, sir.

25 Q. What were you wearing at that time?

- 1 A. Jeans and a white t-shirt.
- 2 Q. Did you have on a bulletproof vest?
- 3 A. No, sir.
- 4 Q. Did you have a blue t-shirt?
- 5 A. No, sir.
- 6 Q. Paint ball mask?
- 7 A. No, sir.
- 8 Q. Pistol?
- 9 A. No, sir.
- 10 Q. Taser?
- 11 A. No, sir.
- 12 Q. Okay. What about the cash, where was it at this
- 13 point?
- 14 A. Spreaded everywhere. When the dog started
- 15 attacking me, he bit me on the leg a couple of times
- 16 first, and I was trying to hit the dog and the cash just
- 17 spread out across the -- close to the backyard and the
- 18 wooded area right there where the woods and the backyard
- 19 kind of meet.
- 20 Q. Okay. As a result of the dog attacking you, were
- 21 you injured?
- 22 A. Yes, sir.
- 23 Q. Describe in general your injuries?
- 24 A. I have lifelong injuries. I mean, I have teeth
- 25 marks all over my upper shoulders and torso, my arms and

1 ... They look pretty bad. They had to put some
2 stitches in some of them. Some of them they didn't put
3 stitches in, but they needed to because I have like
4 knots, keloids, I guess is what you call it.
5 Q. Did you bleed from those injuries?
6 A. Yeah, a pretty good bit.
7 Q. Okay. What about your white t-shirt, what
8 happened to it?
9 A. It was messed up. Blood all over it, soaked.
10 Q. Was it torn or ripped from the dog?
11 A. Yeah. It was, it was torn some. Yeah, ripped and
12 torn.
13 Q. What about your jeans, did they have blood on
14 them, as well?
15 A. Yeah. The jeans had -- they were cut up pretty
16 good, too, because I got -- like I said, he bit me on my
17 legs, as well.
18 Q. And what happened to that white t-shirt?
19 A. I really have no idea. I mean, I don't know what
20 happened to it. I know when the evidence or whatever
21 was collected, they got it. They have it in evidence or
22 whatever.
23 Q. Well, okay, they don't know what happened or where
24 it is now, but at the time it was confiscated as
25 evidence by the police department?

1 A. Right. Yeah, right.

2 Q. They also had evidence that they collected of a
3 bulletproof vest and blue t-shirt, as well?

4 A. Right.

5 Q. Okay. And after the police arrested you, did you
6 have any t-shirt on at all then?

7 A. They -- the paramedics, if I'm remembering
8 correctly, I think they cut the shirt. They cut the
9 shirt off of me, I think.

10 Q. Okay. And could you describe in general just how
11 much blood was on that t-shirt, white t-shirt?

12 A. I mean, it was saturated with blood. I mean, like
13 I said, I could pull my sleeve up and show you -- the
14 scars are, you know, very, very bad, permanent scars. I
15 mean, you could look at the scars and you would know
16 there was a lot of blood involved.

17 Q. If you had gone to Mr. Howard's residence to rob
18 him, would you have taken cash with you?

19 A. No, sir.

20 Q. Did you go there to rob him?

21 A. No, sir.

22 Q. Did you commit this home invasion for which you've
23 been convicted?

24 A. No, sir.

25 Q. Okay. Now, the things you've just told the court

1 today, did you tell your attorney, Mr. Chambers?

2 A. Yes, sir.

3 Q. Okay. Well, let's back up a little bit. When did
4 you first meet Mr. Chambers? How did that occur?

5 A. Mr. Chambers came to see me and a group of guys,
6 maybe eight, nine guys. He talked to us as a group and
7 then he talked to each individual for about five
8 minutes. He told me that we would probably go to trial,
9 probably within a year or a year and a half. But I was
10 telling him that I was going to actually get a -- hire
11 an attorney. He came back maybe a month or two later,
12 I'm not exactly certain how long it was, but he came
13 back on a Wednesday and told me that we would be going
14 to trial the following Monday, five days later. And so
15 he came that Wednesday, and I think maybe that Saturday
16 and Sunday, and we talked a little bit. He brought a
17 laptop to show -- he attempted to show me the 911 -- to
18 listen to the 911 footage that was involved with the ---

19 Q. Let's stop there for a minute. It was introduced
20 at trial, the 911 tape; was it not?

21 A. Yes, sir.

22 Q. It's an audiotape?

23 A. Yes, sir.

24 Q. And that tape was played in its entirety at the
25 trial; was it not?

1 A. Yes, sir.

2 Q. How long was that tape?

3 A. Probably about thirty minutes. I'm guessing it
4 was thirty or thirty-five minutes, somewhere along in
5 there.

6 Q. And that was a 911 call from whom to 911?

7 A. It was a 911 tape from a guy -- another friend of
8 Howard, Thompson. He was on the telephone talking to
9 Howard when the home invasion situation happened, so he
10 called 911 and he was just on the phone during that
11 time.

12 Q. So as it turned out, just by pure happenstance,
13 Mr. Howard was on the phone, he dropped the phone and
14 the phone line stayed open through Mr. Thompson, so Mr.
15 Thompson could hear what was going on?

16 A. Right, right.

17 Q. And that 911 tape took about thirty-five minutes?

18 A. Yeah. Somewhere around there.

19 Q. Okay. And in the process, that how the police
20 knew a home invasion was taking place, and that's how
21 they got there?

22 A. Right, right.

23 Q. And that time period took about thirty or thirty-
24 five minutes?

25 A. Yes, sir.

1 Q. Okay. And that's about the time you were out
2 there in the woods hiding?

3 A. Yes, sir.

4 Q. Okay. Now, going back to your meeting Mr.
5 Chambers. To help you refresh your memory, in the
6 transcript on page fourteen, there was some discussions
7 prior to your trial starting where you had asked the
8 judge for an attorney. You did not want Mr. Chambers to
9 represent you; is that correct?

10 A. Yes. I was trying to fire Mr. Chambers because,
11 you know, I had spoke with him and I told him it was
12 impossible for us to go to trial because we haven't even
13 really discussed the case. I didn't even get an
14 opportunity to listen to that 911 tape except for about
15 five minutes of it because the laptop he brought, the
16 battery went dead. And there was a number of issues
17 that I had with Mr. Chambers. Initially when I went to
18 court, I wouldn't even dress out. I wouldn't even p ut
19 ---

20 Q. Well, let's -- I'm going to try to take it in
21 order. We'll come back to that. The record shows that
22 you went to trial April the 14th, 19 ---

23 A. Yes, sir.

24 Q. Excuse me. 2009. April 14th, 2009; that was a
25 Monday?

1 A. Yes, sir.

2 Q. Okay. The record also reflects that Mr. Chambers
3 testified, on page fourteen of the transcript, said he
4 was appointed to represent you around the first of the
5 year. So that would have been around three to three and
6 a half months before you went to trial. And you said
7 the first meeting you had with him was with the group
8 meeting. Where was that?

9 A. At Greenville County Detention Center.

10 Q. And you were incarcerated?

11 A. Yes, sir.

12 Q. Had you stayed incarcerated from the time you were
13 arrested at the scene until the trial?

14 A. Yes, sir.

15 Q. Okay. And so during that first meeting that you
16 had sometime around the first of 2009, did you discuss
17 the facts of your case with him at all?

18 A. I mean, we talked on those couple of occasions,
19 like I say, those five days before the trial that ---

20 Q. No, no. I'm talking about -- I'm trying to focus
21 your attention now. When you first met Mr. Chambers and
22 you talked to him the first of the year when he came
23 with the group meeting and y'all separated and you said
24 you talked to him about five minutes about your case?

25 A. Oh, no, sir, we really didn't have time -- I mean,

1 like I said, it was only five minutes. And he was just
2 basically introducing himself as my attorney who will be
3 representing me or whatever. But, no, we didn't -- I
4 don't, I don't even know if he had the discovery at that
5 time. I'm not certain.

6 Q. So the next -- when is the next time you saw him?
7 You said it was Wednesday before the trial?

8 A. Right, Wednesday before the trial, which would be
9 that coming Monday.

10 Q. Okay. So the trial was on Monday, April the 14th,
11 and you saw him Wednesday before that. And that's the
12 first time you really discussed your case with him; was
13 it not?

14 A. Right.

15 Q. And did you tell him your theory of the defense as
16 you explained it here in the court today?

17 A. Yes. We went back and forth on some of the
18 things. The little time that I got to actually talk to
19 him, you know, he wanted -- he was the lawyer, you know,
20 but I was telling him, look, you know, this has to be
21 done, that has to be done, and it wasn't no -- we
22 couldn't -- wouldn't -- we couldn't agree on what was
23 supposed to be done. That's why I tried to fire him.

24 Q. So you were dissatisfied with Mr. Chambers even
25 before your trial started?

1 A. Yes, sir.

2 Q. Did you tell Mr. Chambers that?

3 A. Yes, sir.

4 Q. What did he say in response to that?

5 A. Well, when I went to court -- actually, when I
6 tried to fire him in front of the judge and the judge
7 wouldn't let me, you know, get rid of him, basically,
8 and it was like, you know, you're just stuck with him
9 and what not. It just, it just wasn't ---

10 Q. What was the primary reason why you were
11 dissatisfied with Mr. Chambers at that point before the
12 trial started?

13 A. I mean, there were a number of reasons. He hadn't
14 -- like I said, we didn't get to listen to the 911 tape.
15 You know, he hadn't tried to talk to me about locating
16 -- you know, the issue with Mr. Terry only came up the
17 weekend before the trial, I mean, because that was the
18 only time I really got to talk to him that Wednesday --
19 I mean, that Saturday and Sunday. So even if we wanted
20 to have him subpoenaed, it wasn't enough time.

21 Q. To refresh your memory, on page 15 of the
22 transcript, Mr. Chambers talks about that he had, he had
23 another case he had to try. That's why he couldn't come
24 to see you. He had another case he had to try. He
25 said, I had an assault and battery with intent to kill

1 case I had to try last week. That was the week before
2 your trial. It says, after that I went to the jail and
3 met with him for about an hour. Is that about right,
4 about an hour?

5 A. That's that Wednesday? That's that Wednesday he's
6 talking about?

7 Q. Yeah.

8 A. Okay. That's probably right about.

9 Q. And then says he went back to see you over the
10 weekend before the Monday of the trial?

11 A. Right.

12 Q. Okay. So really the only quality time you had to
13 spend with him to talk about the case was the weekend
14 before the trial started on Monday?

15 A. Saturday and Sunday.

16 Q. Right. And did you tell him about Mr. Terry and
17 wanting to have him come testify?

18 A. Yes. We discussed Mr. Terry -- it's even in the
19 trial transcript where Mr. Chambers gives reference to
20 trying to locate Mr. Terry but being unsuccessful in
21 locating him.

22 Q. Tell me about that?

23 A. I mean, like I said, I don't see how you could,
24 you know, a couple of days before the trial you're
25 trying to locate somebody. I don't know how the

1 subpoena thing works, but I'm quite sure, you know, it
2 takes more than a day or two to subpoena somebody and
3 have them show up for court or whatever.

4 Q. Did you talk to Mr. Chambers about the fact that
5 Mr. Howard had made statements that y'all didn't -- he
6 didn't know you?

7 A. Yes, sir.

8 Q. What did you tell Mr. Chambers about that?

9 A. Well, I told him that when I was sitting on the
10 porch or whatever he said that he didn't -- he never --
11 I think he said, I never saw this guy before or
12 something like that. Even in the -- at trial he said
13 that he didn't know me.

14 Q. And were there witnesses that could have disputed
15 that fact?

16 A. Yes, sir.

17 Q. Mr. Terry for one?

18 A. Yes, sir.

19 Q. But I suppose other witnesses, as well, could have
20 been brought to court to testify about that?

21 A. Yes, sir. I have -- I had some affidavits and
22 stuff from my mother, from my sister that used to date
23 Howard. My youngest sister, you know, saying that, you
24 know, we basically grew up in the Oakview Apartments or
25 whatever together.

1 Q. So there were witnesses that could easily have
2 been brought to court to dispute Mr. Howard's statement
3 that he didn't know you?

4 A. Yes, sir.

5 Q. But that didn't happen?

6 A. No, sir.

7 Q. What about Mr. Howard's prior record and being
8 known as a drug distributor in that area; did you
9 discuss that with Mr. Chambers?

10 A. Yes. We briefly discussed it. And I was -- in
11 the trial transcript, Mr. Chambers, he said that he was
12 going to talk about or get into the issue of Mr. Howard
13 being a drug dealer or what not. I mean, he was aware
14 of this 2005 conviction, as well as some other
15 convictions, drug convictions that Mr. Howard had. But
16 he said that he thought that one of the convictions was
17 -- it was too old or whatever, to have Mr. Howard
18 impeached or whatever. He was basically saying that he
19 couldn't use the old conviction. But the 2005
20 conviction could have been used, but it was never even
21 brought up. The only thing about -- the only question
22 that was asked, was asked Howard did he ever conduct any
23 drug deals with Terry. But he didn't ask him about the
24 conviction or any other drug deals outside of dealing
25 with Terry.

- 1 Q. And never asked Mr. Howard about drug dealings
2 with you?
- 3 A. No, sir.
- 4 Q. Okay. The 2005 conviction wasn't that old back
5 then; was it?
- 6 A. No. It was like four years.
- 7 Q. And only one before ---
- 8 A. Yeah, from the actual incident. Yeah.
- 9 Q. Did you talk to Mr. Chambers about the white t-
10 shirt having so much blood on it?
- 11 A. Yes. I mean ---
- 12 Q. Why was that important?
- 13 A. I mean, because the white t-shirt was loaded with
14 blood. And if I would have had on a bulletproof vest
15 and the blue t-shirt, they would have had some blood on
16 them, as well. I mean, if you see -- if you could see
17 the white t-shirt, it wasn't a white t-shirt anymore.
18 It was a red t-shirt. And it would have -- the vest and
19 the blue shirt, you couldn't have, you couldn't have got
20 around not having blood all over, I mean, with the
21 amount of blood I had lost from the dog bites.
- 22 Q. Now, the testimony of the police officers, I think
23 they said that when they picked you up that the
24 bulletproof vest was lying under you?
- 25 A. On the ground, right.

1 Q. And their testimony was that you had had the
2 bulletproof vest on and it somehow got ripped off?

3 A. Ripped off.

4 Q. But the blue t-shirt wasn't ripped off; was it?

5 A. No, sir.

6 Q. It was supposedly still on you?

7 A. One of them said -- one of the officers said that
8 the shirt was still on me. And then another one of the
9 officers, you know, kind of changed the story up a
10 little bit. So yeah, if it would have been still on me
11 like -- I don't know which one of the officers exactly
12 said, but if the blue t-shirt would have been on me or
13 the vest, any one of them, they would have been soaked
14 in blood.

15 Q. Soaked in blood. And have bite marks through the
16 ---

17 A. The shirt and vest and everything.

18 Q. Okay. But the vest had no bite marks on it, no
19 blood?

20 A. (Negative nod.)

21 Q. The t-shirt had no blood or bite marks?

22 A. (Negative nod.)

23 Q. You're shaking your head no. You need ---

24 A. Oh, no. No, sir, it didn't.

25 Q. Okay. And that's no to both of those questions?

1 A. Yes, sir.

2 Q. Okay. Now, the white t-shirt was completely
3 soaked in blood to the point it was almost all red?

4 A. Yes, sir.

5 Q. And did you ask your attorney, Mr. Chambers, to
6 have that introduced into evidence to prove the
7 inconsistencies we were just talking about?

8 A. Yes, sir. That, and a couple of other things,
9 like I say, dealing with the vest and -- he made mention
10 about the inconsistency as far as being able to see the
11 word police. You know, the shirt -- if the vest was on
12 top of the shirt or being able to see the vest, if, you
13 know, vice versa. But not about the bloody t-shirt. I
14 don't remember him saying anything about it.

15 Q. When the trial first started, Mr. Chambers had a
16 chance to make an opening statement to the jury; did he
17 not?

18 A. Yes, sir.

19 Q. At that point did he mention any of these things
20 you've talked about, about what your defense was and
21 those kind of things? Did he talk about that?

22 A. No, sir.

23 Q. Okay. So what did he talk about during the
24 opening statement?

25 A. From what I remember, basically just refuting what

1 the solicitor had said.

2 Q. Things like burden of proof and ---

3 A. Yeah. I have a lot of this stuff written down
4 here if I could reflect to it.

5 Q. So if Mr. Chambers were to ask a question of an
6 officer or somebody else, it wouldn't make sense to the
7 jury if they didn't know where he was going with that;
8 would it, because he never made any admission of that in
9 his opening statement; is that correct?

10 A. Right.

11 Q. Now, tell me about you asking the judge for
12 another attorney before your trial started. Did you ask
13 for another attorney?

14 A. Yes, sir. I -- it was, it was a pretty touch
15 ordeal. I mean, I attempted to ask the judge and
16 explain to him why I didn't want to have Mr. Chambers as
17 my attorney. But the judge kept cutting me off. He
18 wouldn't let me give him any of the reasons why I wanted
19 to have Mr. Chambers not as my attorney. The only thing
20 the judge basically said was that I had a paid attorney
21 before and I had fired the paid attorney. And he was
22 like, you know, -- you know, I know this guy, he's a
23 fine attorney. And he wouldn't -- from my understanding
24 of the law, he was supposed to do an inquiry to see if
25 Mr. Chambers and I had irreconcilable differences. He

1 didn't do this inquiry. He didn't even, like I say, he
2 didn't even let me tell him why I didn't want Mr.
3 Chambers as my attorney.

4 Q. The only choice he gave you was either you keep
5 Mr. Chambers or you represent yourself?

6 A. Represent myself. Right.

7 Q. Either way, you're going to trial today?

8 A. Yes, sir.

9 Q. Now, do you recall after the case went to the
10 jury, when the jury was deliberating and the jury had
11 some questions for the court?

12 A. Yes, sir. I remember, but I don't know
13 specifically what those questions were.

14 Q. Let me refresh your memory and tell you that on
15 page 445 of the transcript, the jury foreman came back
16 and she said, quote -- there's some questions I'm going
17 to preface before the quote. There's some questions the
18 jury had for the court and they wanted to replay all the
19 testimony of the police officers.

20 A. Right.

21 Q. Remember that?

22 A. Yes, sir.

23 Q. And the judge basically said, that's way too much
24 testimony to do all that. Can you be more specific?

25 A. Right.

1 Q. And at that point, the forelady of the jury said,
2 quote, specifically the testimony from each officer
3 about the blue police shirt back in the woods, end
4 quote.

5 A. Yes, sir.

6 Q. So doesn't that indicate to you that that was what
7 the jury was focusing on, the big inconsistency about --
8 it could have been -- about this blue t-shirt and the
9 bloody white t-shirt?

10 A. Yes, sir.

11 Q. But the bloody white t-shirt never got into
12 evidence; did it?

13 A. Yeah. It never got into evidence.

14 Q. So they didn't have the ability to look at the two
15 shirts and compare them side-by-side; did they?

16 A. No, sir.

17 Q. Okay. Could they have done that if Mr. Chambers
18 had introduced it?

19 A. Yes, if he would have introduced it into evidence.

20 Q. And the state had that t-shirt in their
21 possession?

22 A. Yes, sir.

23 Q. Okay. What are you asking this court to do for
24 you today?

25 A. I'm asking the court to set aside my convictions.

1 I feel like I was wrongly convicted. And I want to have
2 the case overturned at least and ---

3 Q. And a new trial?

4 A. Yes. So I can have a new trial. I mean, a ---

5 Q. And if you were to have a new trial, would you
6 have Mr. Terry testify?

7 A. Yes, sir.

8 Q. Would you have the t-shirt introduced?

9 A. Yes, sir.

10 Q. Would you have other witnesses to testify about
11 your knowing Mr. Howard?

12 A. Yes, sir.

13 Q. And so you would have a number of witnesses and
14 physical evidence that could disprove things that were
15 testified to at the trial?

16 A. Yes, sir.

17 Q. And as well as disprove, create inconsistencies
18 between what the government -- excuse me -- the state
19 said happened and what you said happened; there would be
20 an inconsistency?

21 A. Yes, sir.

22 Q. Some things are sort of unresolvable; like why do
23 you take cash to a robbery? You don't take cash to a
24 robbery; right?

25 A. Right.

1 Q. We've gone over a lot of things. Is there
2 anything -- I've looked at my notes -- anything I've
3 left out that we've talked about?

4 A. Yes. I mean, there are quite a few things that I
5 would like to, I would like to read or whatever to the
6 court, I mean, if I may. They all deal with what's in
7 the post conviction application or whatever. Because
8 there are a few points ---

9 Q. Well, if you would, Judge Welmaker will have a
10 copy of that before him when he takes this under
11 advisement, for use. So rather than actually read it to
12 him, if you could just point to references, the pages of
13 where it is, he'll have a chance to read it. Or maybe
14 summarize it for us, as well.

15 A. Yeah. I mean, a couple of these things,
16 especially dealing with the failure to investigate
17 Howard's criminal past and dealing with the appellate
18 counsel, the appellate counsel's failure to instruct the
19 -- well, to give a brief to the appellate court about
20 the faulty hand-of-one/hand-of-all jury instructions. I
21 definitely want to express, you know, ---

22 Q. I did leave that out. Let's talk about that for a
23 minute. I think Judge Miller, at the end of your trial,
24 gave instructions to the jury, he gave an instruction
25 about the hand-of-one is the hand-of-all.

1 A. Yes, sir.

2 Q. And that would have to do in situations where
3 there's multiple -- more than one defendant; would it
4 not be?

5 A. Yeah, two or more people.

6 Q. Yeah. But all the testimony in your case was
7 there was just one person; you?

8 A. Right.

9 Q. So that was a complete inconsistency and could be
10 confusing to the jury to have the hand-of-one/hand-of-
11 all being changed to the jury?

12 A. Yes. I mean, it was completely inconsistent.
13 Because the prosecution's whole case was that one
14 individual, me, went to the place -- to this guy's house
15 and robbed him. That was the whole prosecution's
16 theory. But, you know, actually they kind of put a
17 phantom accomplice there, either me or the other guy who
18 was the phantom, because no evidence at all was
19 introduced as far as more than one person being involved
20 in the crime.

21 Q. The only evidence that there was somebody else
22 involved was your testimony about arriving there and
23 seeing people already tied up?

24 A. Yeah, but that, you know, just with the crime
25 itself, no evidence period.

1 Q. None from the state whatsoever?

2 A. None whatsoever. Like I said, the state's whole
3 argument was that I went there alone and did this --
4 committed this crime.

5 Q. And when you testified about seeing people tied
6 up, they discounted that like that never happened?

7 A. Yes, sir.

8 Q. So the hand-of-all -- hand-of-one/hand-of-all just
9 didn't apply in your case; did it?

10 A. No, sir. Matter of fact, I think I really need to
11 read this because, you know, as we know, you only get,
12 you know, they say one bite at the apple.

13 Q. This is your first PCR?

14 A. Yes, sir. And I want to make sure that, you know,
15 just in case, you know, the PCR is not successful, I
16 want to make sure I have all of my issues covered
17 because I've got a life -- you know, five life
18 sentences. And, you know, I have some stuff here that I
19 would really like to read because it's proof from the
20 transcript itself, proof from the transcript itself that
21 the appellate counsel was ineffective and proof from the
22 transcript -- further proof from the transcript itself
23 that Mr. Chambers was ineffective.

24 Q. Go ahead then.

25 A. This is dealing with the appellate counsel. It

1 says the appellate counsel was ineffective for not
2 arguing the only preserved claim on direct appeal. I
3 was prejudiced by the appellate counsel's performance
4 because I was the only person arrested, charged or
5 indicted in the case. Thus, the appellate counsel
6 should have briefed the court on the improper jury
7 instructions that the judge gave of the hand-of-one/
8 hand-of-all ---

9 MS. RATIGAN: Your Honor, I'm going to object.
10 I don't ---

11 THE COURT: Where are you reading? What part
12 of your application is that from?

13 THE DEFENDANT: This particular part of the
14 application is ---

15 THE COURT: What page?

16 MS. RATIGAN: It appears to be pages 11
17 through 15. Your Honor, we would object to this being
18 read into the record. It's clearly made a part of his
19 application. Mr. Brown is not qualified to be making
20 legal arguments to this court in any event.

21 THE COURT: Is that what you want to read to
22 me, what's already ---

23 THE DEFENDANT: No, sir. See, some of this
24 stuff is not part of the memorandum of law. It is, it
25 is because they didn't go into the transcript and give

1 -- and point out the specifics. It's just a legal
2 argument, but not the specifics of what is in the
3 transcript that will show that the appellate counsel was
4 ineffective and Mr. Chambers was ineffective, as well.

5 THE COURT: Well, how many pages do you have
6 of those?

7 THE DEFENDANT: It's only a couple of pages
8 for the one and probably about three pages for the
9 other.

10 MR. CRAIG: Your Honor, might I suggest we
11 make a xerox copy and just introduce them.

12 THE COURT: Well, there's no reason -- when
13 you read to me, I can't remember it as well as if I can
14 read it. And I know the state may object to you
15 submitting something late. But rather than hearing your
16 testimony, I'll -- if they do object, I'll allow you to
17 submit that. But rather than you reading it to me, I'd
18 rather read it, so that when I review the entire
19 transcript, I'll have that with me. So you've got about
20 five pages?

21 THE DEFENDANT: Well, actually those two
22 issues that I was talking about was five pages. But
23 it's nine pages in all. And they basically, like I
24 said, they're the things that I point out from the
25 transcript ---

1 THE COURT: But your lawyer hasn't pointed
2 those out to me already?

3 THE DEFENDANT: No, not some of these, he
4 hasn't. Because I ---

5 THE COURT: But he's representing you.

6 THE DEFENDANT: Yes, sir. And I've done some
7 additional research on my own and ---

8 THE COURT: You can't have but one lawyer, you
9 know, representing you.

10 THE DEFENDANT: If need be, this needs to be
11 -- definitely needs to be done. If need be, I will
12 represent myself and allow my attorney to -- I will ---

13 THE COURT: I'll allow you to submit those and
14 we'll make copies of them before we leave today. Okay?
15 I don't need you reading to me, though, sir. I can read
16 it. That will be much better. I can digest it better
17 when I read it rather than hearing you, trying to listen
18 and make notes.

19 THE DEFENDANT: Okay. I just want to make
20 sure that it'll be an official part of the record.

21 THE COURT: Yes. It'll be part of the record.

22 THE DEFENDANT: All right. Thanks.

23 THE COURT: I'll allow that in over objection
24 of the state, I presume. All right. If you've got
25 those we'll make copies of them. Do you have any other

1 questions?

2 MR. CRAIG: I don't, Your Honor. Thank you.

3 THE COURT: Any cross-examination?

4 MS. RATIGAN: Yes, Your Honor.

5 CROSS EXAMINATION

6 BY MS. RATIGAN:

7 Q. So when you met with Mr. Chambers, did you discuss
8 the state's evidence against you?

9 A. Yes, on the weekend before the trial.

10 Q. And you told him your version of what happened
11 that night?

12 A. Yes, ma'am.

13 Q. And you told him that you brought your own money,
14 that twenty-three thousand dollars?

15 A. Yes, ma'am.

16 Q. Well, why did you testify at trial that Mr. Terry
17 gave you that money?

18 A. That's what I was talking about a while ago, I was
19 going to explain it, and he told me to hold up.

20 Q. Well, explain it to me, why you're saying today it
21 was your money but you told the jury that it was Mr.
22 Terry's money?

23 A. Yes. I did. I did do that. And the reason why I
24 did it was because initially Mr. Howard and I had -- the
25 last deal that we had didn't go too good. And so I used

1 Mr. Terry's name and face as -- basically as a voucher.

2 And so, you know, that's what Mr. Howard was aware of.

3 And so when I went to trial, I just said the same thing.

4 Q. So you lied to the jury when you told them that

5 Mr. Terry gave you that money?

6 A. Yes.

7 Q. And you told Mr. Chambers that Mr. Terry had

8 dropped you off that night?

9 A. Yes, I did.

10 Q. And you gave him an address or phone number in

11 which to contact your cousin?

12 A. Yes, I did.

13 Q. And was that during the first meeting or was that

14 during the weekend before trial?

15 A. It was the weekend before trial. Because the
16 first meeting, we didn't discuss the case. He just
17 introduced himself basically as my attorney after the
18 other guys he talked to, nine or ten of us, and we spoke
19 for probably five minutes.

20 Q. Well, once you met Mr. Chambers and knew he was
21 your lawyer, did you ask Mr. Terry to contact him?

22 A. I didn't have an opportunity to talk to Mr. Terry.

23 Q. You couldn't write him a letter?

24 A. Yeah, I mean, I probably could have wrote him a
25 letter. But basically it was at the last minute. When

1 Mr. Chambers showed up, I mean, it was ---

2 Q. Now, I'm talking about that very first meeting
3 when Mr. Chambers showed up and said, you know, I'm
4 Randy Chambers, I'm your lawyer. At that point you knew
5 he was your attorney. Why didn't you ask your cousin to
6 contact your attorney and give him this information?

7 A. Well, first of all, I wasn't planning on going to
8 trial with Mr. Chambers, who was a public defender. I
9 was planning on hiring another attorney. What I was
10 going to do, the first attorney that I had was Mr. Chip
11 Price. And we didn't -- we wasn't seeing things eye-to-
12 eye, so I fired him. Like I said, he was a paid
13 attorney. And I was going to hire another attorney.
14 And the reason why I didn't at the time before, because
15 Mr. Chambers said it would be a year or a year and a
16 half, at least, before we go to trial.

17 Q. Okay. And when Mr. Chambers came to talk to you
18 the Wednesday before your trial, you didn't try and
19 contact Mr. Terry at that point?

20 A. No, I didn't.

21 Q. Why?

22 A. He tried to -- I gave him the telephone number and
23 address and what-have-you, what not. And he said that
24 he would try and contact Mr. Terry. I was in the county
25 jail. I mean, you know, I didn't really have a direct

1 way to locate or to get in contact. See, I knew what
2 his address was. I could have written him a letter, but
3 you're talking about the weekend basically before the
4 trial.

5 Q. Okay. And some of the officers testified when
6 they arrested you out in the woods, you had that blue
7 police shirt on you?

8 A. Yes. I think one of them.

9 Q. And that you were on top of the bulletproof vest?

10 A. Yes.

11 Q. And when you were out in the woods that night, did
12 you see anybody else other than those police officers?

13 A. I don't think so. I know when the lights and
14 stuff were flashing, I didn't even know that they were
15 police officers. Somebody could have ran past me or
16 through the woods, and I wouldn't have been able to see
17 them, because I didn't know that they were police
18 officers until they were, you know, pretty much on top
19 of me and, you know, hollering police or whatever.

20 Q. Well, did you hear anybody running by you aside
21 from the officers?

22 A. Like I said, I can't say if -- who it was because
23 it was too dark. It was a lot of running, a lot of
24 movement, a lot of yelling and everything that took
25 place.

1 Q. Okay. And you testified in the trial that you had
2 known Mr. Howard for years?

3 A. Yeah, pretty much since we were kids.

4 Q. And you testified at trial that you called Mr.
5 Terry and he's the one who told you to go into the
6 woods?

7 A. Yes.

8 Q. And you admitted at the trial that you fought with
9 the officers and you choked the police dog?

10 A. Well, no, I didn't directly admit that I choked
11 the police dog. One of the officers said that I slung
12 the police dog around, what have you, what not. But
13 like I said, if you look at the scars and stuff that I
14 have, then you will see that the dog did all the damage.
15 The only thing that happened to the dog was that he
16 chipped one of his teeth probably when he bit the
17 officer, because the officers, you know, have radios and
18 gun and everything else on them. So this was pretty
19 much a -- this a trained attack dog. And from my
20 understanding after the trial, whatever is in front of
21 him that's what he attacks. So like I said, he got me
22 and one of the officers.

23 Q. So at the trial you said, quote, you can probably
24 say I choked him. So you did admit to choking the
25 police dog?

1 A. Yeah, trying to keep him from killing me.

2 Q. Okay.

3 MS. RATIGAN: That's all I have, Your Honor.

4 THE COURT: Any redirect?

5 MR. CRAIG: No, Your Honor.

6 THE COURT: Thank you, sir. You may step
7 down. If you could, just leave -- if you could leave
8 those documents you want us to copy with the officer
9 there, we'll get Ms. White to ---

10 MS. RATIGAN: Your Honor, is that going to be
11 a court exhibit or is that going to be an applicant's
12 exhibit?

13 THE COURT: That'll be a court exhibit.
14 Anyway, it'll be applicable for the appeal.

15 MS. RATIGAN: And I would just put my formal
16 objection on the record, Your Honor.

17 THE COURT: Your objection is noted.

18 (WHEREUPON, Court Exhibit Number 1 was marked for
19 identification.)

20 THE COURT: You may call your next witness.

21 MR. CRAIG: We would rest, Your Honor.

22 THE COURT: All right. Anything from the
23 state?

24 MS. RATIGAN: Yes, Your Honor, I would briefly
25 call Mr. Chambers.

1 THE CLERK: Mr. Chambers, if you would place

2 ...

3 You do solemnly swear or affirm that the testimony
4 you're about to give in this case will be the truth, the
5 whole truth and nothing but the truth, so help you God?

6 THE WITNESS: I do.

7 THE CLERK: Thank you. You may be seated.

8 RANDALL L. CHAMBERS,

9 HAVING BEEN DULY SWORN, TESTIFIED AS FOLLOWS:

10 DIRECT EXAMINATION

11 BY MS. RATIGAN:

12 Q. Mr. Chambers, do you recall representing Mr. Brown
13 on these charges?

14 A. I do.

15 Q. And were you, in fact, appointed?

16 A. I was.

17 Q. Do you recall whether you were the first attorney
18 on this case?

19 A. I was not the first attorney.

20 Q. And do you recall who that first attorney was?

21 A. The first attorney was Chip Price.

22 Q. And did you file discovery motions or did you
23 receive materials from Mr. Price?

24 A. I believe Chip had already done all that. So we
25 had all that from before. We probably -- you know what,

1 we probably did it, as well, just to be sure, because in
2 a matter of course we always submit it. But I know that
3 Chip had already done it.

4 Q. Did you have a chance to review those materials?

5 A. I did.

6 Q. Did you review them with Mr. Brown?

7 A. I did.

8 Q. When Mr. Brown stated you were appointed early in,
9 I guess, it's 2009, does that sound accurate?

10 A. I think that's right, yeah. My recollection was
11 that -- and I don't know how long Chip had been involved
12 in the case, but that he was relieved at Mr. Brown's
13 request, I want to say around November. And then there
14 was apparently some delay of a couple of months and then
15 I was appointed, I believe, in January sometime.

16 Q. Okay. And when you were appointed, was the case
17 on the trial docket; do you know?

18 A. No, it was not.

19 Q. Did it come to trial -- come up for trial pretty
20 quickly?

21 A. Apparently, yeah.

22 Q. When you met with Mr. Brown, did he give you his
23 version of what had happened that night?

24 A. No.

25 Q. What did he tell you? I mean, did he give you

1 anything to go on or ---

2 A. Let's see, I met with him probably twice before
3 the Wednesday that he's talking about. There was the
4 initial meeting, which he fairly accurately described.
5 I mean, we talked for longer than five minutes. But I
6 had gotten what we refer to as our new jails. I had
7 about ten of them. Some of them were in the new jail.
8 Some of them were in the old jail. I believe that Mr.
9 Brown was in the old jail. And typically what I do is
10 when I have several people together like that, is I go
11 over some of the basics with all of them as a group. In
12 other words, you know, things about bond and discovery
13 and all those sorts of things. And then I sit down and
14 I speak briefly with each one of my clients. In his
15 particular case, there wasn't an issue as to bond,
16 because bond had already been set in his case and there
17 wasn't any change of circumstance or anything to ask for
18 another bond. And we just talked briefly at that point.
19 But I don't -- he didn't give me any details, really,
20 about his case. In fact, most of what he talked about
21 was he intended to hire another lawyer.

22 Q. Now, when you did eventually end up talking to him
23 about the case, did he tell you about his cousin,
24 Andrell Terry?

25 A. Well, let me say, I did go see him one other time

1 ---

2 Q. Okay.

3 A. --- after that. And that was a couple of months
4 before the trial. And again, that was a brief meeting.
5 And I was going over there to talk about possible plea
6 negotiations, if there was anything we could do. But
7 again, he indicated even then that he probably was going
8 to hire another lawyer, that he just hadn't gotten the
9 money together, whatever. And that was pretty much the
10 end of it. Now, the next time, and I want to go ahead
11 and say, because I'm sure his lawyer is going to ask me
12 about it, and it's in the transcript, it is completely
13 accurate that I next spoke to him the Wednesday prior to
14 this case going to trial. The reason for that is I was,
15 frankly, surprised by the solicitor's office when they
16 put this case on the docket. I did not say, by the way,
17 there was going to be another year to year and a half,
18 because I really had no idea how long it was going to
19 be. This case was several months old at that point.
20 But the dockets for those two weeks came in fairly close
21 succession, and I had a very serious case the week
22 before that was an assault and battery with intent to
23 kill case, that also took up a lot of time. I finished
24 that case. And then I went the Wednesday of that week
25 prior to when he was going to be going to trial. So

1 that part is accurate. Now, as to your specific
2 question, did he tell me about Andrell Terry? He did.
3 He told me that they had been in -- that they were going
4 over there together to buy drugs and indicated to me, if
5 I remember correctly, that Andrell Terry was basically
6 the moving force behind the whole thing, but that they
7 were in that together. So he did give me a phone
8 number. And I then had Tracy Burkett, who is my
9 investigator in the public defender's office, to try and
10 locate him based on the phone number we had. She told
11 me that number didn't work. And then she made
12 independent efforts to try and find him and was not able
13 to do that. So it may very well be that he lived at the
14 same address and had the same phone number, but Ms.
15 Burkett was not able to find him. And she has always
16 done a very thorough job and was not able to find him.
17 And that's what I indicated to Judge Miller, is that we
18 weren't able to find him.

19 Q. And did Mr. Terry ever attempt to contact you to
20 your knowledge?

21 A. No.

22 Q. Did Mr. Brown discuss with you that he had
23 actually known the victim for years?

24 A. He told me that, yeah. And I believe that he was
25 telling the truth.

1 Q. Did you discuss with him whether or not it would
2 be worth calling witnesses to try and corroborate that
3 statement?

4 A. My personal opinion was that given the
5 circumstances of the case, it didn't really matter how
6 long they knew each other.

7 Q. And did Mr. Brown bring up with you the fact that
8 the victim, George Howard, had a prior drug record?

9 A. We talked about that. And you know, it was clear
10 to me that this guy was a drug dealer anyway and I
11 believe that I argued that to the jury and as much as
12 possible through cross-examination or otherwise, tried
13 to point that out. I mean, you know, you -- it is
14 unusual for someone to be the subject of a home invasion
15 unless somebody believes you have something. And it's
16 not uncommon for drug dealers' homes to be invaded by
17 those who are trying to take cash from them. So ...
18 And also -- I mean, we talked about a lot of this stuff.
19 But also I will tell you that during these meetings, I
20 made it clear to him on that Wednesday that I was going
21 to spend as much time as necessary to get ready. And we
22 spent probably six or seven, maybe eight hours together,
23 over that time. But a lot of -- most of that time was
24 taken up by him telling me that he didn't want me to
25 represent him. And there was a lot of hostility. So,

1 you know, there was a limit to what we could do. And he
2 is right, we tried to listen to the 911 tape at one
3 point and my computer, the battery died, and we weren't
4 able to finish listening to it. But, you know, I went
5 over it with him, or basically what the gist of it was.

6 Q. So your defense at trial, would it be fair to say,
7 was that it was just the wrong place, wrong time?

8 A. The defense sort of developed as we went along. I
9 mean, as he indicated to you, he didn't want me to
10 represent him. And I told the judge that. And I
11 frankly think the judge should not have made him go to
12 trial under those circumstances. You know, I tried to
13 make that clear to Judge Miller. I mean, we talked some
14 off the record with the prosecutor and then there were
15 those statements that were made on the record. But, you
16 know, I don't think Judge Miller should have put him in
17 the position that he was in where he had to either go
18 pro se or have me represent him. He didn't want me to
19 represent him. He had made that clear every time that I
20 had talked to him, that he didn't want me to represent
21 him. But there were a lot of things that he testified
22 to that I heard for the first time when he testified to
23 them. Because he was not forthcoming with those things
24 with me. He had shared with me about Mr. Terry. And so
25 I knew those things. But yeah, it sort of developed

1 over time. You know, he didn't even dress out the first
2 day. And when he was introduced to the jury, you know,
3 he even said to the jury, made a statement to them, this
4 is not my lawyer. Now, as the trial started, he
5 apparently gained some confidence in my abilities and
6 thought I was doing a good job. He even made the
7 statement to me, I should have paid you twenty-five
8 thousand dollars to begin with instead of Chip Price.
9 At that point he started to share more details with me
10 and then things evolved over time. But that was kind of
11 the situation that I was in.

12 Q. Did he ever share with you that Mr. Terry had
13 given the money or that it was his money, or do you
14 recall?

15 A. You know, I don't really remember that. I know he
16 testified that Mr. Terry gave him the money. My
17 recollection was that they had gone over there together
18 to make this purchase of drugs and that Terry was going
19 to be out in the car.

20 Q. Okay. Now, about this white t-shirt, do you
21 recall -- well, first of all, do you recall there being
22 kind of a bloodied up kind of white t-shirt?

23 A. I remember testimony to that effect, yeah.

24 Q. And Mr. Brown has argued today that you should
25 have moved that shirt into evidence. Is that something

1 you can speak to, why you did or did not think that was
2 a good idea?

3 A. You know, I don't remember. Maybe I should have.

4 I remember that there was a lot of cross-examination
5 about -- first of all, nobody actually ever saw him in
6 the house. Nobody was able to testify that Gerald Brown
7 was in that house, not any of the victims that were
8 there, not any of the police. They saw a figure, they
9 said, running through the yard, I believe one of the
10 police officers testified to. They weren't able to say
11 that that was Gerald Brown. There were real

12 inconsistencies in their testimony about what shirt he
13 was wearing. One officer, I think I pretty effectively
14 showed, was just flat-out wrong, probably lying about
15 the shirt at one point. And he wasn't wearing any of
16 the stuff -- I mean, he didn't have a helmet, you know,
17 any of that stuff on when he was found out there in the
18 woods. And so, you know, the way things played out
19 seemed to be consistent with what he testified to, I
20 thought.

21 Q. And the basic testimony from the cops was that a
22 masked man ran out from the house and into the woods?

23 A. More or less. There wasn't any one officer that
24 said all those things. It was different people, ---

25 Q. Right.

1 A. --- you know, saying different things. Yeah.

2 Q. And then your client was the one they caught out
3 in the woods?

4 A. That's the one the dog got a hold of. Yeah.

5 Q. Was there ever any indication from reports or
6 statements that they ever ran across anybody else in the
7 woods or was it just Mr. Brown?

8 A. No. No indication at all.

9 MS. RATIGAN: That's all I have, Your Honor.

10 THE COURT: You may cross-examine the witness.

11 MR. CRAIG: Thank you, Your Honor.

12 **CROSS EXAMINATION**

13 **BY MR. CRAIG:**

14 Q. Mr. Chambers, I'm Jim Craig. We haven't met
15 before.

16 A. Good to meet you.

17 Q. And Judge Miller stated in the trial about Mr.
18 Brown wanting another attorney, that he knew you as a
19 fine attorney. There's no reason to doubt that
20 whatsoever, by the way. My point is, though, is the
21 level of time you had to prepare for this case. You met
22 Mr. Brown initially when you were appointed to represent
23 him in January of -- before the trial, in January of
24 2009; is that correct?

25 A. That is correct.

1 Q. By the way, have you had a chance to review your
2 file on this case before you came today?

3 A. I did.

4 Q. Okay. So you were appointed in January of 2009
5 and I believe your testimony is consistent with the
6 record and Mr. Brown's, that you came to see him, along
7 with other folks that you were appointed to represent, I
8 assume, around that time frame?

9 A. That's correct.

10 Q. And you talked to all of them in general and then
11 you talked to Mr. Brown, and I guess the others, as
12 well, ---

13 A. I did.

14 Q. --- on an individual basis? And that was more or
15 less an introduction meeting?

16 A. Exactly right.

17 Q. And talked to each of your clients in sort of
18 broad general terms about what their case was about?

19 A. Exactly.

20 Q. And I assume at that point you did not go over
21 discovery or other kinds of facts in those ---

22 A. I didn't. I hadn't even looked at any of that at
23 that point, because I had just gotten the case. And we
24 try -- I don't always get it done the way that I should
25 for various reasons, but I try very hard to get over to

1 see people within seventy-two hours of being appointed.

2 So ...

3 Q. And you were not anticipating this case to be
4 called for trial in April either; were you?

5 A. I was not. I mean, I was surprised by it.

6 Q. And the record is clear that you told the court
7 that you had been involved, as you just testified, in
8 another case where there was an assault and battery or
9 some sort of case that you were deeply involved in and
10 took a lot of your time?

11 A. Exactly.

12 Q. And as soon as that case was over with, you came
13 and met with Mr. Brown about his case, which was on
14 Wednesday before trial?

15 A. That's exactly right.

16 Q. And I think you said you met with him for about an
17 hour on that occasion?

18 A. I did.

19 Q. And so there's only so much substance you can get
20 done in an hour; is that a fair statement?

21 A. Yeah. I mean, I hadn't thoroughly reviewed all
22 the discovery and things at that point. And we had met
23 one other time, but it wasn't anything substantive,
24 because like I said, I mean, every time I talked to him
25 he told me he was going to hire another lawyer. And so

1 I anticipated that he was going to do that. But then
2 once he was on the trial docket, I went over there and I
3 talked to him. We did talk some about the case. But
4 there was also -- I mean, he wasn't happy. And I mean,
5 I'm not saying that I blame him in that situation, to be
6 quite honest with you. You know, I felt like from what
7 -- from the discovery standpoint that I was pretty well
8 prepared. But it is certainly not the same as if you
9 have a client who is actively involved in assisting you
10 in getting ready for trial. He was not of that mindset.
11 And again, I can't say that I blame him under the
12 circumstances.

13 Q. Fair enough. So both you and he were sort of
14 under the assumption that it would not be you going to
15 trial with him?

16 A. Yeah.

17 Q. And so when you went to see Mr. Brown on that
18 Wednesday before the trial actually started, that was
19 the first time you had actually told Mr. Brown, or he
20 knew, that he was going to trial the following Monday?

21 A. I believe that's true.

22 Q. Was he surprised?

23 A. He was.

24 Q. And how long had you known, at that point, that
25 you were going to trial the following Monday?

1 A. Not very long. I had probably known it for about
2 a week or so before that. And I thought that my
3 investigator had contacted him to let him know that.
4 But apparently, according to him, that didn't take
5 place. And I believe that that's true, because he did
6 seem genuinely surprised on Wednesday when I told him
7 that we were going to trial.

8 Q. Okay. So you spent about an hour with him then
9 and then you came back that weekend?

10 A. Well, I don't really remember. I told him that I
11 would spend every day with him getting ready for trial,
12 if we could. And I don't remember the next time -- I
13 think that I -- I think that it was before that weekend,
14 I do. We spent -- I mean, we ended up spending
15 probably, you know, eight hours or so together. But a
16 lot of our time, he described it pretty accurately, was
17 just a back and forth. I mean, he was upset and he was
18 dead-set on trying to get another lawyer. Now, we did
19 manage to talk about the evidence and talk about the
20 case some. But I mean, there was a lot of back and
21 forth, and he was not very happy.

22 Q. Actually I think you may be correct. To your
23 recollection at that time is probably more clear than it
24 is now, but you said you went to see him on Wednesday
25 for about an hour and then you went to see him again the

1 night after that, so that would have probably been on

2 Thursday or Friday?

3 A. Yeah.

4 Q. And then after that you said you saw him on a

5 Sunday?

6 A. Yeah.

7 Q. Which would have been the day before the trial?

8 A. Yeah. If that's what I said, then that's correct.

9 Q. And so frankly, you didn't have much time to get
10 prepared yourself for this trial; did you?

11 A. Not preparation with him. You know, I spent a
12 good bit of time with the discovery and going through
13 and, you know, getting ready to -- you know, what I
14 typically do is I go through and any witnesses that are
15 going to be called, I go through the discovery material
16 and anything that applies to that witness, I'll
17 segregate it out and put -- I use like a file system,
18 and I put them in the files. I did all of that stuff.
19 But, no, I didn't have as many -- I didn't have the
20 quality discussions with him that I would like to have
21 had. Now, as far as quantity goes, with clients, from
22 their standpoint, especially when they're facing
23 something serious, there's never enough time to talk
24 about the case. And I understand that. I mean, listen,
25 he was facing life without parole. But, yeah, I mean,

1 given the situation that we were in, I don't think that
2 I had enough time to prepare with him -- or I didn't
3 have as much time as I would have liked, the quality
4 time, to have prepared with him as I would have liked
5 going into trial. I think had he been fully cooperative
6 with me and had been of the mindset that, hey, you know,
7 let's go do this, that it would have been enough and we
8 would have had plenty of time between now and then to
9 get ready. Because the only witness he ever made me
10 aware of was Mr. Terry. And we were not able to locate
11 him. Now, again, given more time maybe we could have.
12 If he had mentioned Mr. Terry to me earlier in the
13 process, then maybe we would have found him. And I did
14 -- I had no indication that he had ever mentioned to
15 Chip Price about Mr. Terry, because there was nothing in
16 the stuff that was provided by Chip that would have
17 indicated anything about Mr. Terry. I heard Mr. Terry's
18 name for the first time on, I believe, the Wednesday
19 before trial when I talked to Gerald Brown.

20 Q. Did you issue a subpoena for Mr. Terry?

21 A. We didn't, because we didn't know where to issue
22 it to.

23 Q. You had -- you said you only had a phone number
24 for him?

25 A. That's what I recollect, yeah.

1 Q. Did Mr. Brown tell you about the inconsistency in
2 the statements made by Mr. Howard having to do with
3 saying he never saw him before, never met this man
4 before?

5 A. Well, the inconsistency was apparent, because he
6 told me that he had known this guy all of his life and
7 Howard said that he never knew him.

8 Q. Let me back up. One thing you said on direct
9 examination that I think is very important. There was
10 never any identification of Mr. Brown as the perpetrator
11 of this crime, being inside the house; was there?

12 A. No.

13 Q. None whatsoever?

14 A. None at all.

15 Q. None in discovery, none at trial?

16 A. No.

17 Q. It's only the proximity of Mr. Brown in the woods
18 being attacked by the dog and the connection with him
19 with the bulletproof vest and the shirt and those kind
20 of things?

21 A. That's exactly right.

22 Q. Okay. So ... And then Mr. Howard sort of
23 postulating this as a crime against him, that he had
24 been robbed, as opposed to some drug deal had gone bad?

25 A. Well, he did. But, you know, the one thing that

1 was sort of a problem was, I mean, they were tied up
2 there in the house. Somebody tied those people up.

3 Q. Somebody did, that's right.

4 A. Yeah. Nobody identified it was him. But it
5 wasn't necessarily -- I mean, it wasn't necessarily a
6 drug deal gone bad. He -- they were tied up.

7 Q. It was a home invasion, but the question is, who
8 did it?

9 A. That's exactly right.

10 Q. And it didn't make sense that Mr. Brown would have
11 gone to rob somebody and bring the cash to the robbery?
12 That doesn't make sense; does it?

13 A. It does not make sense.

14 Q. And it doesn't make sense -- well, let me put it
15 this way. It would be a big inconsistency if the jury
16 had been able to know the fact that Mr. Brown and Mr.
17 Howard knew each other, that they had grown up together?

18 A. Well, Gerald testified to that, but you know, ---

19 Q. Wouldn't it be fair to say -- I'm sorry, I don't
20 want to cut you off. Wouldn't it be fair to say the
21 jury believes third-party testimony a lot more than a
22 defendant saying something that may be self-serving?

23 A. That may be. But as I said, a lot of this stuff I
24 didn't really find out till we started into the trial
25 and Gerald started to gain some confidence in me and

1 started to be more forthcoming with things. I don't
2 even remember if we talked about that prior to the
3 trial.

4 Q. Did -- another major inconsistency would have been
5 how he would have a t-shirt completely soaked in blood
6 that he's supposedly wearing, along with this blue t-
7 shirt, that's got no blood on it?

8 A. Yeah. I mean, I thought, you know, on cross-
9 examination, I got into the inconsistencies about what
10 he was wearing or what was found and all those sorts of
11 things. But, no, I didn't put the shirt into evidence,
12 and maybe I should have.

13 Q. In fact, you actually argued to some extent in
14 closing about there's no blood on the blue t-shirt?

15 A. Yeah.

16 Q. And wouldn't you agree now that it would have been
17 a lot more effective to argue that if the bloody t-shirt
18 had been in evidence?

19 A. It may be. If I recollect, I mean, there was
20 testimony that his t-shirt was very bloody. But, yeah,
21 it certainly might have been more effective for them to
22 have seen it and perhaps I probably should have done
23 that, in retrospect.

24 Q. Why was there no mention in your opening statement
25 about Mr. Brown's theory of events as opposed to just

1 the standard ---

2 A. I didn't know Brown's -- I didn't know most of
3 Brown's theory until he got ready to testify.

4 Q. So what ---

5 A. And I don't like to -- as a habit I don't like to
6 stand up in opening argument and talk about things that
7 I'm going to put up into evidence for fear, one, that I
8 may end up, for whatever reason, not putting up a case.
9 And two, in this situation, I didn't know a lot of it.

10 Q. You said you found out some things for the first
11 time during the trial?

12 A. That's exactly right.

13 Q. Such as?

14 A. Most of what he said about the particular
15 circumstances of just logistically where he was and with
16 Mr. Terry and all that, I didn't hear until he got ready
17 to testify.

18 Q. So you put him on the stand and asked him and he
19 just started talking and that's the first time you heard
20 some of these things?

21 A. Right before he got ready to testify. It was
22 after he listened to the testimony that had been
23 presented by the prosecutor.

24 Q. You did know about Andrell Terry?

25 A. I did know about Andrell Terry.

1 Q. And you did know about the inconsistency in the
2 statement between Mr. Howard saying he didn't know Mr.
3 Brown. You knew that before the trial?

4 A. Well, I mean, again, I knew that my client said
5 that they knew each other for a long time and had had
6 dealings together. And then he told -- on the scene,
7 the victim, Mr. Howard, said didn't know who he was,
8 didn't know him when they brought him around.

9 Q. Yeah. But you were aware of that inconsistency
10 before the trial started?

11 A. I think -- I probably was, yeah.

12 Q. But as stated by Mr. Howard, that took place --
13 that was in the discovery somewhere?

14 A. Yeah.

15 Q. Did you ever offer to withdraw to Judge Miller
16 before the trial started?

17 A. I believe I did, yeah. I mean, I know that in the
18 transcript at some point he said, I'm sorry, Mr.
19 Chambers, you're stuck, I'm not going to let you go.

20 Q. It's not on the record, so maybe it was -- was
21 that possibly off the record, off ---

22 A. I don't remember. I just remember that Miller,
23 Judge Miller said, I'm not going to let you out of this.

24 Q. I did see that.

25 A. Yeah. So the clear indication was -- and listen,

1 this is certainly -- it's not unusual, for various
2 reasons, for somebody to decide they don't want you to
3 represent them. And I made it clear to Judge Miller
4 that my client did not want me to represent him. And I
5 certainly didn't want to go forward with a client who
6 was so vehemently opposed to me representing him. The
7 judge did not let me out of the case. I thought that
8 that was pretty clear that I, you know, wanted to be
9 relieved in the case. It was certainly clear that Mr.
10 Brown wanted me relieved. You know, and the judge
11 declined. I'm fully onboard with you. In my mind, he
12 put Mr. Brown in an untenable situation. You know,
13 you're either going to go to trial with a lawyer you're
14 telling me you absolutely don't want to represent you or
15 you're going to represent yourself, but either way,
16 you're going to trial. Now, I understand that from the
17 judge's standpoint, they don't want to just keep
18 dragging things out and, you know, going on. You know,
19 my personal view is, he's the one sitting in jail. So
20 if anybody's prejudiced by the delay, it's him. But I'm
21 not the judge. You know, the legislature has not
22 elected me to be a judge. And so I just show up and do
23 what they tell me to do.

24 MR. CRAIG: That's all. Thank you, Your
25 Honor.

1 THE COURT: Any redirect?

2 MS. RATIGAN: No redirect. State would rest.

3 THE COURT: Thank you, Mr. Chambers.

4 MS. RATIGAN: We would ask that Mr. Chambers
5 be relieved.

6 THE COURT: You may step down.

7 All right. I'll take this under advisement. I'll
8 issue an order before too long after I've reviewed the
9 transcript.

10 MS. RATIGAN: Thank you, Your Honor.

11 MR. CRAIG: Thank you, Your Honor.

12

13 [END OF REQUESTED TRANSCRIPT OF RECORD]

1 CERTIFICATE OF REPORTER

2 I, the undersigned Danette P. Hanks, Official Court
3 Reporter for the Thirteenth Judicial Circuit of the
4 State of South Carolina, do hereby certify that the
5 foregoing is a true, accurate, and complete transcript
6 of record of all the proceedings had and evidence
7 introduced in the trial/hearing of the captioned case,
8 relative to appeal, in the Court of Common Pleas for
9 Greenville County, South Carolina, on the 19th day of
10 February, 2014.

11 This transcript may contain quoted material. Such
12 material is reproduced as read by the speaker.

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

15 October 13, 2014

16

17

18

19

20



Circuit Court Reporter

Addendum

1

2012CP2307837

I am aware that there is a Two Prong Test that is used when evaluating allegations of ineffective assistance of counsel. First, one must prove that counsel's performance was deficient under prevailing professional norms. *Cherry v. State*, 386 S.E. 2d 625 (quoting *Strickland*, 104 S. Ct. 2065). Second, one must prove that counsel's deficient performance prejudiced the applicant such that " there is a reasonable probability that, but for counsel's unprofessional errors the results of the proceeding would have been different." " A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial."

I hope to prove and satisfy this Two Prong Test with the following evidence of law:

(A) 6th and 14th Amd. Violated, because trial attorney failed to subpoena exculpatory witness.

Prior to trial I informed trial attorney (Randall Chambers) that I had an alibi (exculpatory) witness. However, counsel failed to contact (subpoena) him. This witness (Mr. Andrell Terry) would have testified to dropping me off at the alleged victim's house with the \$ 23,000 that I was alleged to have taken in an armed robbery. I have an affidavit from Mr. Terry to this affect and Mr. Terry is here today to confirm as to what he would have testified to during my trial if he had been called upon. Note: on page 355 and 356 of the trial transcript (on redirect), Mr. Chambers asked me if we had tried to locate Mr. Terry to testify and I acknowledged the fact that we did; however, the reason why we could not locate Mr. Terry, is because Mr. Chambers didn't give us enough time to locate him and/or have him subpoenaed. We couldn't locate Mr. Terry, because we only had the opportunity to discuss the issue of Mr. the weekend before the trial, which started on Monday. We went to trial on Monday June 14, 2009—less than one week after discussing the case with me on only 3 different occasions—all of which when combined was less than 6 hours.

(B) 6th and 14th Amd Violations, because counsel failed to conduct proper pretrial investigation concerning exculpatory evidence.

Counsel failed to investigate exculpatory evidence. The night applicant was arrested for the crimes in question, he was attacked by a k-9 unit; he was viciously and repeatedly bitten—so much so, that he needed stitches in several different places. The white T-shirt that he had on was covered in blood and yet, the blue T-shirt and bullet proof vest that he allegedly had on at the same time had no blood on them.

ENTERED COMPUTER

2012 CP2307837 / Addendum / Exhibit(c)

RECEIVED 2009-06-14 10:00 AM	COURT'S
	EXHIBIT NO. 1
	IDENTIFICATION EVIDENCE
	DKT# 12-7837
	DATE: 2-6-14

Trial counsel failed to have the bloody white T-shirt, as well as the blue T-shirt and bullet proof vest admitted into evidence; although he was quite aware of them. See trial transcript page 380, line 3, page 389 lines 2-25 and page 390 lines 1-8. Admission of such evidence would have established that there was no way that petitioner could have been wearing the blue T-shirt and bullet proof vest of the assailant. Plus, defense counsel could have cross-examined state's witness regarding this inconsistency. Given this exculpatory evidence, it is clear that the evidence in support of my convictions does not rise to the level beyond reasonable doubt. Again, I believe that the law is in support of me and that I satisfy the Two Prong Test of Strickland v. Washington.

(C) Petitioner's 6th and 14 Amd. Rights were violated when counsel failed to investigate Howard's criminal past.

I was prejudiced by my trial attorney (Randall Chambers), because he didn't bring up Howard's criminal history. My entire defense evolved around me being at Howard's residence to conduct a drug deal. Howard is and was a known convicted drug dealer. Trial attorney should have brought up Howard's drug convictions during his cross-examination of Howard, as that particular fact was a critical part of my defense; and in fact, that was essentially my entire defense. Counsel only asked if Howard had been involved with distribution of controlled substances with Andrell Terry. See trial transcript page 116-117. Counsel did not inquire as to whether Howard had engaged in drug distribution outside contact with Mr. Terry; although counsel already knew of at least two prior drug convictions that Howard had. See trial transcript page 46 and 47. In trial transcript page 46 and 47, counsel conceded that some of the convictions of Mr. George Howard (the alleged victim) were too remote to impeach George with under Rule 609 SCRE. But since the entire defense relied on the jury believing George was a drug dealer, these convictions would be directly relevant to the defense presented. Therefore, these convictions were admissible under Rule 405 (b) SCRE as evidence of Howard's character. Obviously trial counsel intended to use it as character evidence. See counsel's statement in trial transcript page 47, lines 1-7 —counsel stated " That goes right to the heart of whether or not the alleged victim in this case was a drug dealer. And it is definitely something that I intend to get into. Not only that, but the victim—or the alleged victim in this case has a fairly substantial record of drug convictions. I intend to ask him about those. We believe that it is relevant." However, for some reason he did not even attempt to admit them. Perhaps he confused the prior con-

victions being admitted as permissible character evidence under Rule 405 (b) SCRE with, prior convictions being admitted to impeach credibility under Rule 609 SCRE. These are two distinct theories which allow for the admission of prior convictions. Also, trial counsel was well aware of a 2005 drug conviction that Howard had. See trial transcript page 47. And yet, he never brought that conviction up either; even though this 2005 conviction was clearly admissible under both rules.

(D) Petitioner's 6th and 14th Amd. Rights were violated because trial counsel failed to do any pretrial investigation, as in regards to Howard's prior contact with the petitioner.

Defense counsel failed to inquire as to why Howard lied when he stated that he did not know the petitioner prior to these events. See trial transcript page 119. Also see trial transcript page 315 where petitioner testified that he had known Howard all his life. Petitioner has several affidavits from family members stating that he and Howard grew up together in a housing project in Taylors called Oakview, and that his younger sister and Howard once dated. The primary purpose of cross-examination is to impeach the credibility of the witness. Unfortunately petitioner was prevented from doing so regarding Howard and at the same time providing support to his defense, by counsel's failure to properly cross-examine Howard. Counsel failed to present Howard's testimony as being incredible. Such clearly rendered counsel's conduct below any objective standard of reasonableness. Counsel put forth a defense, but failed to obtain all necessary evidence in support of said theory. Petitioner was prejudiced by counsel's poor performance, in that he proceeded to trial with an incomplete defense; despite the existence of evidence that would have provided a complete defense. And in fact, counsel basically performed little or no pretrial investigation, as counsel himself admits to spending only 7 or 8 hours preparing for the case. See trial transcript page 15. The language of the court in U.S. v. Tucker, citing the ABA standard for criminal justice says—"An attorney should contact the defendant immediately and 'spend quite a bit of time with the individual at that early stage'." The duty to investigate is part of the defendant's right to reasonable competent counsel. "This principle is so fundamental that the failure to conduct a reasonable pretrial investigation may in itself amount to ineffective assistance of counsel."

(E) Petitioner's 6th and 14th Amd. Rights were violated when counsel failed to present theory of defense during opening statements.

The purpose of opening statements is to permit each party to the case to present a theory of the case. In the instant case, the petitioner's theory of defense was that the petitioner was not the assailant at issue. Counsel did not raise this theory during opening statements, but merely attempted to refute the government's case. Clearly, such failure represents conduct below any objective standard of reasonableness. Counsel failed to present any statement upon which a claim of actual innocence could be grasped by the jury. Petitioner was prejudiced by counsel's poor performance, in that the jury was left without a theory of defense until the presentation of the petitioner's case, thereby causing the jury to be unaware as to how to evaluate evidence in light of such a theory of defense.

STOP

(F) Petitioner's 6th and 14th Amd. Rights were violated by Appellate counsel, when counsel failed to brief the court (argue) that the jury instruction regarding multiple offenders (hand of one, hand of all) was improper.

Appellate counsel was ineffective for not arguing the only preserved claim on direct appeal. Applicant was prejudiced by appellate counsel's performance, because petitioner was the only person arrested/charged/indicted in the case. And thus, appellate counsel should have briefed the court on the improper jury instructions that the judge gave on hand of one, hand of all (accomplice liability); and the judge's general reference to accomplish hand of one, hand of all provisions of statute was insufficient. See *Anders v. California*, 87 S. ct.; *Strickland v. Washington*, 104 S. ct.; *Atkins v. Singletary*, 965 F.2d, etc.

Also see page one of a two page letter (exhibit) from appellate counsel (Mr. Tristan M. Shaffer), dated November 19, 2010. In the third paragraph of this letter, appellate counsel lists his reasons for not briefing the appellate court on the "improper" jury instructions on hand of one, hand of all. Counsel states: " I am not briefing the judge instructing the jury on 'the hand of one, the hand of all' because I feel this issue is without merit. A judge should only refuse a requested jury instruction when there is no evidence which would support that instruction. *State v. Burriss*, 334 S.C. 256, 265, 513 S.E. 2d 104, 109 (1999). In the 911 tape, I believe the caller said he believed multiple people were. Furthermore, Mr. Chambers even argued that it was likely multiple people during his closing argument. I don't think he was ineffective in waiving this issue."

In the above paragraph, appellate counsel (Mr. Tristan M. Shaffer) lists four (4) specific reasons as to why he did not brief the appellate court on the hand of one, hand of all instruction given by the trial judge:

They are " 1) the issue is without merit, because a judge should only refuse a requested jury instruction when there is no evidence to support that instruction. 2) In the 911 tape, I believe the caller said he believed multiple people were. 3) Mr. Chambers argued that it was likely multiple people during his closing argument. 4) I don't think he was ineffective in waiving this issue.

The following is proof from the trial transcript that there was absolutely no evidence to support a jury instruction on hand of one, hand of all. All evidence and witness testimony supported " the state's theory " that there was only one(1) individual involved in this crime. The 911 caller (witness) that appellate counsel alludes to clarifies at trial exactly what it was that he said on the phone and exactly what he meant. On page 127, lines 18-25 of the trial transcript, trial attorney addresses the 911 caller, Michael Thompson. Trial attorney asks the 911 witness about his remarks on the 911 tape concerning the "previous break-ins" , about him saying "these are the same guys that broke in before." Trial attorney ask why did the witness say that it was the same guys? The witness says that he just assumed. It is clear that the 911 witness is referencing to the "same guys" from a previous break-in, and there was no evidence that there was more than one perpetrator involved in said crime. On page 130, lines 4-8 of trial transcript, the 911 caller witness explains himself about these "distinct voices" when asked by trial counsel. The 911 witness says " I mean, the only thing that I can tell you is everything was happening so fast and to make a distinction to say okay, this voice from that voice-- I said what I said out of the heat of the moment, but to say if I said I heard three or four, right now, I can't say that I did. Note: The 911 caller was never at the scene of the crime. There were three victims and one perpetrator inside the house—this is a fact from the evidence. There was absolutely no evidence that there was more than one perpetrator inside, outside, or around the house—or even remotely involved in this crime. Also see trial transcript page 130, lines 17-19, wherein 911 witness says " Well, the only reason I used they is because in my mind and this is just an assumption, I didn't think one person would be able to do this."

Again, the prosecution's theory was that there was only one individual involved in this crime. The following is additional testimony from each of the state's witnesses, all of whom said that it was only one person, individual, or guy that they saw: Witness number one, Jarecus Howard, trial transcript page 79, lines 5,16,19,20,21,22; page 80, lines 1,7,12,15,21,22,; page 81, lines 10,11,20,23; page 82, lines 15-17,22; page 83, lines 1,13-15,21,25; and page 86 line 12. The above quoted pages are of the trial transcript wherein witness Jarecus Howard constantly and continuously refers to the perpetrator as "he" ,or "the man" , never once suggesting that there was more than one person involved in crime.

Police officer/witness Dan Acord, trial transcript page 140, line 13 "there was only one person that I saw." Transcript page 141, lines 18 and 23, "the individual", "an individual."

Police officer/witness Chuck Porter, transcript page 168, line 15 "the suspect" ; transcript page 170, lines 14-17, "one individual comes out of the house—just one individual."

Police officer/witness Michael Bryan, transcript page 196, lines 6-9 "just one man, yes sir, just one person."

Police officer/witness Travis Wyatt, transcript page 273, line 25 through page 274 line 1 "the suspect came out of the front door." Transcript page 275, lines 4-10, "the whole house searched—no one else found. The only people in the house were our three victims. No one else seen running out of front door, and immediate entry was made into house."

Police officer/witness Hal Harris, transcript page 288, line 25 through transcript page 289, line 1 "from the time that I saw him come around the corner of the house, I never lost sight of him."

Each and every officer and witness gave testimony that they only saw one individual. The following is even further proof from the trial transcript that the prosecution's whole case/theory was based on a belief that only one person committed said crime. Trial transcript page 358, lines 20-25, trial attorney and solicitor originally refuse jury instructions on hand of one, hand of all, the solicitor states "well, I mean--no, I don't think so. I think it was he was in the house or he wasn't." Transcript page 366, lines 16-25 and page 367, lines 1-11, the prosecutor changes his mind and request for the hand of one, hand of all jury instructions.

Trial transcript page 367, lines 13-25 through page 368, line 1, trial counsel states his objection to the judge's hand of one, hand of all jury instruction. He says the charge would be more misleading than beneficial. Trial transcript page 440, counsel states his objection once more on the charge, after judge reads charge as a whole. Trial transcript page 368, line 12, the judge decides to instruct the jury with the charge. Transcript page 430, lines 5-18, the judge's jury instruction on hand of one, hand of all. Transcript page 435, lines 3-17, the judge's continuous reference to an accomplice, e.g. Accomplice liability.

It is clear that the prosecution's entire case was based on the theory that one person committed said crimes. And even after receiving his requested instruction on the hand of one, hand of all, the prosecutor only argues that it was one person whom committed the crime. With a hand of one, hand of all instruction to the jury, there has to be some evidence that more than one person was involved in the crime—no such evidence exists in this case—even the prosecution states this fact: trial transcript page 420, lines 17-24 and page 421, lines 16-19; the prosecution argues that "well, it's just one voice. It was the defendant. There's no other evidence of another person in this case. The officers never saw anyone else. The only person they ever saw was this defendant wearing these items. That's the only thing they ever saw. Same as the victims."

It is clear that this instruction was confusing, misleading and extremely prejudicial to the defendant. Thus, appellate counsel should have briefed the court on this issue. See Article 5, section 21 and section 17 of the S.C. Constitution; State v. Stone, 330 S.E. 2d 286; State v. Woods, 1 S.E. 2d 190; State v. Hewitt, 31 S.E. 2d 257; State v. Collins, 225 S.E. 2d 189; and State v. Leonard, 355 S.E. 2d 270.

INSTRUCTIONS ARE TO ENLIGHTEN, NOT TO CONFUSE

These instructions were confusing and misleading. Allowing the prosecution to place a "phantom accomplice" at the crime scene—who's acts the petitioner would also be guilty of. And forcing the jury to except this phantom accomplice; when it is absolutely clear that the prosecution's entire case was that one individual committed these crimes. There is no evidence of an accomplice in this crime whatsoever.

The only thing that trial counsel objected to and was ruled on by the court, was his objection to the hand of one, hand of all jury instruction. This was the only unquestionable objection that appellate counsel had to pursue on direct appeal. Appellate counsel's performance was unreasonably deficient. See *Evitt v. Lucey*, 105 S. ct. (holding that fairness of the appellate process requires that a defendant receive more than a nominal representation from counsel) Counsel briefed the court on an issue that was not preserved for review and failed to brief the court on the only preserved issue. Ruling from court of appeals found that the issue was not preserved, and that even if properly, it lacked merit. ●

It is also clear that this instruction gave the jury alternative theories—one saying that the defendant committed these crimes alone, the other saying that he had an accomplice. It has been long settled that when a case is submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the conviction be set aside. See *Stromberg v. California*, 51 S. ct. 532; *Leary v. U.S.*, 89 S. ct. 1545; *Bachellar v. Maryland*, 90 S. ct. 1315; *Ulster*

Appellate counsel also stated in his letter, dated November 19, 2010 that he did not brief the court on the improper hand of one, hand of all jury instruction, because he said that my trial attorney (Mr. Randall Chambers) had argued multiple people during his closing argument. Although that never happened—nowhere in Mr. Chambers' closing argument does he argue that multiple people were involved in this crime; he only argues that I didn't commit it. Please see trial counsel (Randall Chambers') closing argument page 369-408 of trial transcript. Appellate counsel also stated in last line of above quoted letter, that " I don't think he was ineffective in waiving this issue." Trial counsel never "waived" this issue. As a matter of fact, the only thing in the trial record that trial counsel objected to was the hand of one, hand of all instruction. See trial transcript page 367, lines 13-25 through page 368, line 1 and page 440, lines 19-20. Therefore, the only issue that was preserved for appellate review (by way of objection), was the hand of one, hand of all instruction that was given by the trial judge. It is obvious that appellate counsel was ineffective in not briefing the court on this issue. Each of the reasons that appellate counsel pointed out in his letter of November 19, 2010 for not briefing the court on the improper jury instructions are contrary to what the evidence and trial transcript says. ↓F↓ NOTE:

(G) Petitioner's 6th and 14th Amd. Right to counsel of choice were violated by the court not allowing him to obtain new counsel.

Petitioner and trial counsel had irreconcilable differences and trial judge should have done an inquiry into the matter if he was not going to allow petitioner to replace counsel. See Powell v. Alabama, 53 S. ct. 55; Fareta v. California, 95 S. ct. 2525; Bland v. Cali. Dept. of Corr.; U.S. v. Walker, 915 F. 2d 480. Also see trial transcript pages 8-21, wherein petitioner attempts to substitute counsel and where at the judge refused to even let him state and explain his grievances; nor did the judge do an inquiry to determine if in fact my attorney and myself had irreconcilable differences. The Brecht harmless error analysis does not apply when defendant has been denied the right to substitute counsel. U.S.C.A. Amd. 6. Brecht harmless error analysis only applies to trial errors and not to structural defects; because structural defects infects the entire trial process, they defy harmless error analysis and, consequently, require automatic reversal.

F↑ NOTE: The following note should also be pointed out to the court: All of SCDC's telephone records are recorded, and there's an available recording of a conversation that appellate counsel had with me, shortly after he filed his brief to the court. If Mr. Shaffer can recall, he told me that, "in hind-sight (after already filing his brief) that yes he should have briefed the court on the improper instructions. He also stated that he'd tell the court this when I came back."

The court considers three things: Timeliness, Inquiry, and Conflict. In Bland, his attorney had only received file a week before trial (In my case, counsel consulted with me on only three occasions—less than a week before trial; on one of those occasions counsel brought a laptop in order to play the 911 tape that was a major part of the prosecution's case. This 911 tape was at least thirty minutes long, though petitioner got to listen to only 4 or 5 minutes of it, because the battery in counsel's laptop went dead. Thus, petitioner never knew what was on the 911 tape until well into the trial).

The court in Bland says, " because there was no inquiry, we cannot determine the nature and extent of the conflict. There is no way of knowing whether the dispute rose to the level of an irreconcilable conflict resulting in a total lack of communication and depriving Bland of effective assistance of counsel." The court further said " the problem was not in giving the indigent defendant his particular choice of counsel; rather, the problem was the court's failure to make an adequate inquiry to determine whether there was an irreconcilable conflict." The petitioner's trial judge failed to do this inquiry as well.

H) Petitioner's 5th and 14th Due Process Rights were violated when he was sentenced to 5 years consecutive term of incarceration for poss. of a weapon under § 16-23-490, when he received a term of life without parole for the underlying crime.

Pursuant to S.C. Code § 16-23-490(A), the 5 year mandatory consecutive sentence for poss. of a firearm does not apply in cases where death penalty or a life sentence without parole is imposed for the violent crime. Petitioner was sentenced to life without parole for the crimes in question.

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)
)
Gerald Brown,)
S.C.D.C. No. 174505,)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)

IN THE COURT OF COMMON PLEAS
C.A. No. 2012-CP-23-7837

ORDER OF DISMISSAL

ENTERED COMPUTER

FILED CLERK OF COURT
GREENVILLE, S.C.
PAUL B. WICKENHUISER
2014 APR -9 PM 3:09
JW

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed December 14, 2012. The Respondent made its return on May 3, 2013. An evidentiary hearing into the matter was convened on February 19, 2014 at the Greenville County Courthouse. The Applicant was present at the hearing and represented by James P. Craig, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant, Andrell Terry and the Applicant's trial counsel, Randall L. Chambers, Esquire, testified at the PCR hearing. The Court had before it the trial transcript, the Greenville County Clerk of Court records, the Applicant's South Carolina Department of Corrections records, the PCR application, the return, the appellate records, and Court's Exhibit 1.

PROCEDURAL HISTORY

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Applicant was indicted at the September 2007 term of the Greenville County Grand Jury for possession of a weapon during commission of a violent crime (2007-GS-23-7600), assault and battery of a high and

[Handwritten signature]

aggravated nature (ABHAN) (2007-GS-23-7602), impersonating law enforcement (2007-GS-23-7603), malicious injury to a police dog (2007-GS-23-7604), first-degree burglary (2007-GS-23-7605), armed robbery (2007-GS-23-7606), three counts of kidnapping (2007-GS-23-7622, counts 1-3), and resisting arrest (2007-GS-23-7633). He was represented by Randall L. Chambers, Esquire.

After the State brought the case to trial, the Applicant was found guilty. On April 16, 2009, the Honorable Edward W. Miller sentenced the Applicant to concurrent terms of five years for possession of a weapon during commission of a violent crime, ten years for ABHAN, one year for impersonating law enforcement, five years for malicious injury to a police dog, life imprisonment without parole (LWOP) for first-degree burglary, LWOP for armed robbery, LWOP for each count of kidnapping, and one year for resisting arrest.

A notice of appeal was filed at the South Carolina Court of Appeals. Tristan M. Shaffer, Esquire of the South Carolina Office of Appellate Defense perfected the appeal. The Court of Appeals affirmed the Applicant's convictions and sentences. State v. Brown, Op. No. 2012-UP-262 (S.C. Ct. App. filed May 2, 2012).

ALLEGATIONS

In his application and his pro se "Addendum to the Memorandum of Law in Support of Motion for Relief Pursuant to the Uniform Post-Conviction Procedure Act, S.C. Code Ann. 17-27-10, *et seq.*" filed on March 28, 2013, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel:
 - a. Failed to conduct a proper pre-trial investigation.
 - b. Failed to call an exculpatory witness (Andrell Terry).
 - c. Failed "to introduce the blood-stained white tee-shirt worn by the [Applicant] when he was attacked by police dogs, along with a



blue tee-shirt and bullet proof vest taken from the assailant in this matter that showed no signs of blood.”

- d. Failed to cross-examine the victim about his criminal history.
 - e. Failed to cross-examine the victim about his prior contact with the Applicant.
 - f. Failed to present the theory of the defense during opening statement.
2. Ineffective assistance of appellate counsel:
- a. Failed to raise the issue of whether the jury instruction about “hand of one is hand of all” was improper.
3. Violation of Constitutional rights:
- a. Violation of Sixth and Fourteenth Amendments because trial judge did not allow the Applicant to obtain new counsel.
 - b. Violation of Due Process because the Applicant received a consecutive five-year sentence for possession of a weapon during the commission of a violent crime when he received a sentence of life imprisonment without parole for that underlying crime.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe the witnesses who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

Ineffective Assistance of Trial Counsel

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

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel’s ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v.

3


State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). To prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citation omitted).

The Applicant stated he discussed the State's evidence and his version of events with trial counsel. The Applicant stated he went to the victims' house that night with cash in order to buy drugs. The Applicant stated he did not have a police shirt, bulletproof vest, pistol or taser. The Applicant stated he told trial counsel that Terry dropped him off that night and gave counsel Terry's contact information the weekend before trial. The Applicant stated he called Terry when he was hiding in the woods near the victims' house but Terry did not answer his phone. The Applicant stated trial counsel did not obtain his cell phone records. The Applicant stated he "got to tussling" with a police officer in the woods. The Applicant stated he was not wearing a police shirt, bulletproof vest, or mask. The Applicant stated trial counsel should have mentioned his defense in his opening statement. The Applicant stated police collected his white t-shirt and that trial counsel should have introduced this shirt at trial because it was bloody and since the officers stated he was wearing it under the police shirt, the police shirt should have also been bloody. The Applicant stated he had known the adult victim for years, which was contrary to what the victim told police. The Applicant stated trial counsel should have contacted witnesses to refute the victim's testimony on this point. The Applicant stated trial counsel should have asked the victim about prior drug deals.

Andrell Terry, the Applicant's cousin, stated he drove the Applicant to the victims' house

⁴ 

that night but did not realize at the time where the Applicant was going. Terry stated the Applicant was wearing a white t-shirt and jeans and did not have anything else with him except for a shopping bag full of cash. Terry stated the Applicant never called him that night. Terry stated he became aware the Applicant was arrested for the home invasion of the victims' house a few months later. Terry stated he did not contact the Applicant's defense attorney to relay the events of the night. Terry stated he did not give the Applicant the bag full of cash and was surprised the Applicant testified to this at trial.

Trial counsel testified he was the Applicant's second attorney and was appointed in early 2009. Trial counsel testified he received the discovery motions from the first attorney and reviewed those materials both independently and with the Applicant. Trial counsel testified he had two meetings with the Applicant prior to the week before trial. Trial counsel testified the Applicant would not discuss his version of events on the night of the incident and said he wanted to hire another attorney. Trial counsel testified they had more meetings the week before the trial and estimated he spent 8 hours with the Applicant. Trial counsel testified he was well prepared from a discovery standpoint but that the Applicant would not actively assist him. Trial counsel testified the Applicant told him to contact Terry but that his investigator could not locate him. Trial counsel testified Terry never contacted him. Trial counsel testified he did not mention the defense theory in his opening argument both because he does not generally do this and because the Applicant never told him the events of the night. Trial counsel testified the defense developed as the trial progressed and the Applicant gained confidence in him. Trial counsel testified there were inconsistencies in the officers' testimony about the shirt the Applicant was wearing when he was arrested. Trial counsel testified he recalled the white t-shirt issue but did not remember why he did not offer it into evidence at trial. Trial counsel testified the Applicant

5 *DWA/TS*

said he had known the adult victim for years (and even testified to this) but that, under the circumstances, this did not really matter.

This Court finds the Applicant failed to meet his burden of proving trial counsel did not properly meet with him to discuss the case. Trial counsel testified they had numerous meetings before the trial (most of which took place the week beforehand) and that they reviewed the State's evidence in the case. Trial counsel testified he was willing to spend as much time as necessary to meet with the Applicant and prepare the case, but that the Applicant was hostile and would not discuss the case with him. This Court finds trial counsel's testimony is credible. This Court notes trial counsel is a very experienced criminal defense attorney and had to contend with an uncooperative client. Regardless, this Court finds trial counsel adequately conferred with the Applicant, conducted a proper investigation, and was thoroughly competent in his representation. This Court finds the Applicant failed to demonstrate what more trial counsel could have done in order to prepare his case for trial. See Davis v. State, 326 S.C. 283, 486 S.E.2d 747 (1997) (denying relief where applicant failed to present witnesses or specific testimony establishing he would have had a defense with additional time to prepare for trial).¹

This Court finds the Applicant failed to meet his burden of proving trial counsel should have called Andrell Terry as a witness at trial. Terry stated he dropped the Applicant off near the victims' house that night. Terry stated the Applicant had a bag of cash but did not have a police shirt, mask, vest, or weapons. The Applicant corroborated Terry's testimony at the PCR hearing. The Applicant admitted that he testified at trial that Terry gave him the cash in this case and

¹ While the Applicant argued trial counsel should have obtained his cell phone records, this Court cannot speculate upon whether these records were vital to the case, as they were not introduced into evidence at the PCR hearing. See Palacio v. State, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999) (holding that, since the contents of challenged documents were not presented at the PCR hearing, the Applicant could not demonstrate how the failure of counsel to obtain these documents prejudiced the defense).

6


stated this was a lie. The Applicant testified he never spoke to Terry after he was dropped off but admitted he testified differently at trial (that he spoke to Terry, who told him to hide in the woods). The Applicant admitted he never told Terry to contact trial counsel. Trial counsel testified he was unable to locate Terry before trial and that Terry never contacted him. This Court does not find either Terry or the Applicant to be credible witnesses. This Court finds trial counsel's testimony, however, is credible. This Court notes Terry and the Applicant are first cousins and that Terry knew about the Applicant's arrest prior to his trial. Regardless, Terry never contacted trial counsel in order to provide allegedly helpful information about the night in question. This Court finds this improbable. Rather, this Court finds trial counsel made every effort to locate Terry, was unable to do so, and informed the trial judge and jury of this. (Trial transcript, pp.355-56; pp.380-81). This Court finds the Applicant failed to prove trial counsel was deficient. This Court also finds that, based upon the utter lack of credibility of Terry's story, the Applicant also failed to prove any resulting prejudice.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have introduced his white t-shirt into evidence at trial. The Applicant argues this would have been beneficial because the t-shirt was bloody but the police shirt the officers said he was wearing over it was not. Trial counsel testified he did not recall why he did not introduce the t-shirt at trial and stated it may have been helpful. This Court finds the failure to introduce the white t-shirt into evidence was not deficient in light of the fact that the Applicant was hostile with trial counsel during trial preparation and the trial itself. Regardless, the Applicant cannot prove any resulting prejudice. Trial counsel actually made the argument during closing statements at trial that the police shirt should be bloody if the officers' accounts were accurate. (Trial transcript, p.389). And any potential deficiency in not introducing the white t-shirt at trial

[Handwritten signature]

was negated by the State's presentation of overwhelming evidence of the Applicant's guilt. See Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of defendant's trial); Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt).

This Court finds the Applicant failed to meet his burden of proving trial counsel should have contacted witnesses in order to refute the adult victim's contention that he did not know him. Trial counsel testified the Applicant addressed this issue during his trial testimony. Trial counsel also testified that, given the circumstances of this case, this was not a big issue. This Court agrees, based on the State's presentation of overwhelming evidence of the Applicant's guilt. See Franklin, 346 S.C. at 570 n.3, 552 S.E.2d at 722 n.3; Geter, 305 S.C. at 367, 409 S.E.2d at 346. Regardless, as these potential witnesses did not testify at the PCR hearing, this Court cannot speculate as to what they would have testified to at trial. See Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (the South Carolina Supreme Court "has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial.") (emphasis in original). Similarly, while the Applicant argued trial counsel should have asked the adult victim about his prior criminal record, he failed to present any evidence that such a record existed or that it would have been helpful in impeaching the victim's credibility. See Jackson v. State, 329 S.C. 345, 349-50, 495 S.E.2d 768, 770 (1998) (finding applicant failed to prove prejudice from counsel's failure to investigate criminal backgrounds of victims and witnesses when he failed to substantiate at the

8


PCR hearing that the victims and witnesses had criminal records).

This Court finds the Applicant failed to meet his burden of proving trial counsel should have mentioned the defense theory in his opening argument. Trial counsel testified he does not do this in opening statements. Further, trial counsel testified the Applicant had not discussed the events of the night in question with him prior to the trial. This Court finds trial counsel's testimony is credible. This Court finds that, even if he had wanted to articulate a defense strategy to the jury, he could not have done so due to the Applicant's refusal to participate in trial preparation. This Court finds the Applicant failed to demonstrate trial counsel was deficient.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that trial counsel committed either errors or omissions in his representation of the Applicant. This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by trial counsel's performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

Ineffective Assistance of Appellate Counsel

The Applicant stated appellate counsel failed to raise the issue of the "faulty" jury charge for hand of one is the hand of all because there was a "phantom accomplice" in this case.

This Court finds the Applicant has not met his burden of proving appellate counsel was ineffective. A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S. Ct. 830 (1985). In analyzing a claim of ineffective assistance of appellate counsel, the Court applies the Strickland test just as it would when

9


analyzing a claim of ineffective assistance of trial counsel. See Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009); Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999) (noting courts apply the Strickland test to determine if appellate counsel was deficient for failing to raise an issue and whether the defendant was prejudiced from the failure to raise the issue). This Court finds the Applicant has failed to meet his burden of proving appellate counsel was deficient in not making the jury charge argument. This Court has examined the record and does not find this argument would have been successful. “Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.” Smith v. Robbins, 528 U.S. 259, 288, 120 S. Ct. 746, 765 (2000) (quoting Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)). This Court does not find the Applicant has overcome the presumption that his appellate counsel was effective.

Violation of Constitutional Rights

In his PCR application, the Applicant argues his constitutional rights were violated as a result of the trial judge’s actions. This Court notes, however, that these issues should have been raised on direct appeal and not for the first time in a PCR action. These allegations are dismissed. See Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974); see also S.C. Code Ann. § 17-27-20(b) (2003) (noting PCR “is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction”). This Court has expressly held “errors which can be reviewed on direct appeal may not be asserted for the first time . . . in post-conviction proceedings.” Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 519 (1993).

All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this

10 *[Signature]*

matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds the Applicant has abandoned any such allegations.

CONCLUSION

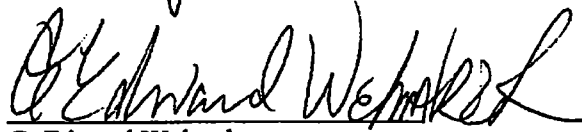
Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient and the Applicant was not prejudiced by counsel's representation. Therefore, this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

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

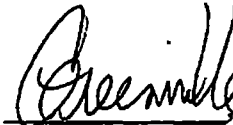
IT IS THEREFORE ORDERED:

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

AND IT IS SO ORDERED this 3 day of April, 2014.



G. Edward Welmaker
Presiding Judge
Thirteenth Judicial Circuit

 Greenville, South Carolina.

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2012CP2307837

Gerald Brown vs. South Carolina State Of

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy: ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; ☐ Statement of Judgment by the Court:
Dated at Greenville, South Carolina, this .

Court Reporter: _____

PRESIDING JUDGE - G Edward Welmaker

This judgment was entered on the , and a copy mailed first class this , to attorneys of record or to parties (when appearing pro se) as follows:

James P. Craig 2001 Assembly Street Ste. 201
Columbia, SC 29201

ATTORNEY(S) FOR THE PLAINTIFF(S)

Karen Christine Ratigan PO Box 11549 Columbia,
SC 29211

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of Court
- Clerk of Court

FILED CLERK OF COURT
STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE
2014 APR 29 PM 2 42

GERALD BROWN,
S.C.D.C. No. 174505

Civil No. 2012-CP-23-7837

Defendant-Petitioner,
v.

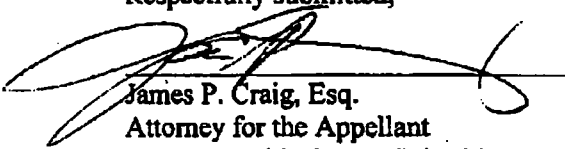
STATE OF SOUTH CAROLINA,
Plaintiff-Respondent.

NOTICE OF APPEAL IN TIME CANCELLED
Date 4-21-14 Init. J

ENTERED COMPUTER

Notice is hereby given that the Gerald Brown, appeals the order of the Honorabel G. Edward Welmaker, Presiding Judge, Thirteenth Judicial Circuit, dated April 9, 2014, which denied Appellant's motion for post-conviction relief pursuant to the South Carolina Uniform Post-conviction Procedure Act. The Appellant received written notice of the entry of this order on April 14, 2014.

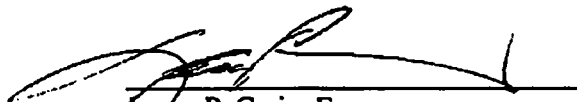
Respectfully submitted,


James P. Craig, Esq.
Attorney for the Appellant
2001 Assembly Street, Suite 201
Columbia, South Carolina 29201
Phone: 803-252-5178
E-mail: jcraig@craiglawfirm.com

Columbia, SC
April 16, 2014

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion has been sent this 16th day of April, 2014, by regular United States Mail with sufficient postage affixed thereto to insure delivery thereof to the Karen Ratigan, Esq., Office of the Attorney General of South Carolina, P.O. Box 11549, Columbia, South Carolina 29211.


James P. Craig, Esq.
Attorney for the Appellant

FILED
APR 16 2014
CLERK OF COURT
SOUTH CAROLINA