

VOL II OF II

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Berkeley County

Deadra L. Jefferson, Circuit Court Judge

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MAR 16 2015

S.C. Supreme Court

JERMAINE T. MCKELVEY

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001743

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- 1 A. No.
- 2 Q. Okay. And you didn't offer any medical testimony
3 on his behalf from anybody?
- 4 A. No.
- 5 Q. Okay. And isn't it true that you also agreed
6 without objection to allow the E-M-S person as an expert
7 to testify as to whether she was -- whether Mr. Phoenix,
8 the victim, was shot in the head. I can show you in the
9 transcript if you want me to.
- 10 A. As -- okay.
- 11 Q. Right. So you agree that you did not object to the
12 qualification of the E-M-S person as an expert to testify
13 as to whether the victim was shot in the head.
- 14 A. I honestly don't know. I don't recall.
- 15 Q. And -- but do you agree that you did not challenge
16 the expertise?
- 17 A. I did not challenge the expertise ---
- 18 Q. --- and you did not object to the expertise?
- 19 A. I did not.
- 20 Q. You did not ask her whether she was qualified to
21 testify.
- 22 A. As an expert, no.
- 23 Q. And you just testified as far as the gunshot wound,
24 the most important people to testify would be the medical
25 people, right?

1 A. Right.

2 Q. And that's -- you're not talking about an E-M-S
3 person as being a medical person?

4 A. Right.

5 Q. When they're first responders, right?

6 A. Right.

7 Q. Okay. Now would you agree with me also that you
8 left the SLED -- Your Honor may I have a minute with my
9 co-counsel?

10 THE COURT: Uh Huh.

11 [Whereupon, Mr. Rhoad confers with Ms. Rhoad]

12 Q. [Mr. Rhoad] Let me ask you this. The bullet
13 fragment is critical to the -- one of the main issues as
14 you testified was whether the guy -- whether my client
15 shot the victim, correct?

16 A. The bullet fragment that was found outside the --
17 I'm sorry ---

18 Q. --- in other words ---

19 A. --- which bullet fragment ---

20 Q. --- you got to have a bullet to have a good -- you
21 got to have a bullet to have ---

22 MS. WILSON: --- objection Your Honor.

23 THE COURT: Basis?

24 MS. WILSON: Can he please let the witness finish
25 answering the question.

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May 19, 2014

1 MR. RHOAD: I'm sorry.
2 THE COURT: Please complete your answer, Mr.
3 Shelton.
4 A. The bullet fragment that was found outside -- that
5 was found outside the club...
6 Q. [Mr. Rhoad] That's what I was referring to. I can
7 withdraw it and break it down ---
8 A. --- yeah, please.
9 Q. Is that okay, Your Honor? I'll withdraw all that
10 and start over. And this seems obvious, but for there to
11 be a gunshot wound there's got to be a bullet, right?
12 A. Right.
13 Q. And there was a bullet fragment offered as evidence
14 in this case, correct?
15 A. Right, yes.
16 Q. And the SLED agent testified that they could not --
17 the SLED ballistics expert testified that they could not
18 match that bullet fragment with the gun, correct?
19 A. Correct.
20 Q. But yet you let that bullet fragment come in as
21 evidence, correct?
22 A. Yes.
23 Q. Without objection.
24 A. Yes.
25 Q. And you agreed with me you can't have a gunshot

1 wound without a bullet right?

2 A. Correct.

3 Q. And if the forensic expert from SLED says you can't
4 match the bullet fragment found at the scene ---

5 MS. WILSON: --- objection Your Honor, leading.

6 THE COURT: Sustained. Leading. Rephrase.

7 MR. RHOAD: Thank you, Your Honor.

8 THE COURT: You're welcome.

9 Q. [Mr. Rhoad] Do you agree with me that the SLED agent
10 that testified at my client's trial, testified that the
11 bullet fragment and the gun supposedly used could not be
12 matched?

13 A. Yes.

14 Q. So, you got a bullet fragment and you got a gun,
15 correct?

16 A. Yes.

17 Q. You got an expert from SLED on ballistics, correct?

18 A. Yes.

19 Q. The expert says the bullet can't be matched to the
20 gun that was entered into evidence, correct?

21 A. Yes.

22 Q. Don't you think that you should have objected to the
23 introduction of the bullet fragment if the State's expert
24 says it can't be matched?

25 A. Well, the -- my reasoning for allowing it and not

1 objecting was that it was found on the scene and so it
2 was introduced as evidence for something that was found
3 on the scene. So -- and I planned on pointing that out
4 to the jury that it was something that couldn't be
5 matched to the gun.

6 Q. Did you do so?

7 A. I don't recall. I might not have.

8 MR. RHOAD: Co-counsel, could you check and see on
9 that? I don't recall that.

10 A. I might not have in closing.

11 Q. [Mr. Rhoad] Okay. But you would argue that a
12 better strategy on the fact of the gunshot wound would be
13 to allow the bullet fragment to come in even though SLED
14 says it doesn't match?

15 And to argue that just because it was found on the
16 scene doesn't mean it came from this gun. That's a
17 better strategy than objecting to its introduction?

18 A. I think there could have been maybe a couple
19 different interpretations as far as who had a gun, who
20 fired a gun out there that night in addition to --
21 because Mr. McKelvey never said he fired a gun. So --
22 but there was a bullet fragment.

23 So, I think there could have been different
24 reasonings for a bullet that doesn't match that gun that
25 they're saying was Mr. McKelvey's, that there was another

1 gun that was fired.

2 Q. Okay. Let me ask you this. Do you recall allowing
3 testimony from various police officers about blood
4 splatter?

5 A. Yes.

6 Q. Okay. Did you seek to determine whether they were
7 qualified to offer such testimony?

8 A. I did not.

9 THE COURT: I'm sorry; I didn't hear your answer.

10 A. I did not.

11 Q. [Mr. Rhoad] Okay. You agree with me that the case
12 that at least part of it is essential as to whether a
13 gunshot wound occurred that that's evidence of blood
14 splatter could convince a jury one way or the other. You
15 would agree to that?

16 A. I would agree, yeah.

17 Q. And I don't know this for sure because I haven't
18 done a lot of criminal work but isn't blood splatter and
19 patterns isn't that an area of expertise?

20 A. I don't know how the Judge ruled -- would have ruled
21 on that because I didn't object to it. But I -- reading
22 back ---

23 Q. --- think maybe you should have?

24 A. I probably should have objected to the blood
25 splatter part of it from that officer.

1 Q. I mean, there were like two or three police officers
2 who testified about blood splatter, right?

3 A. I recall the one officer testifying about the
4 direction of it and then introducing --

5 THE COURT REPORTER: I'm sorry; I didn't hear the
6 last part.

7 A. Saying it was blood splatter; I'm sorry.

8 Q. That's fine. Let me ask you this. Regardless of
9 how many police officers, law enforcement who testified
10 about blood splatter whether it was one, two, or three
11 whatever the record is that will show, you agree with me
12 in hindsight that without there being some expertise that
13 you shouldn't have allowed that or you should have at
14 least objected to that testimony?

15 A. Yes, I agree.

16 MS. WILSON: Your Honor just for the record, can you
17 say which officer you're talking about and where it's
18 written in the record?

19 THE COURT: Yes, it would help because there were
20 many witnesses and the record needs to be clear as to
21 what witnesses you're referring to.

22 MR. RHOAD: We know officer -- officer Edwards ---

23 MS. WILSON: --- Officer Edwards, I never ---

24 MR. RHOAD: --- testified about blood splatter and I
25 believe if I'm not mistaken Detective Roache [phonetic]

1 may have, but you need to confirm that. We know for sure
2 it was police Officer Edwards and if you'll allow me to
3 continue if she finds other police officers she'll let
4 the court know. But we know at least Officer Edwards was
5 allowed to testify about splatter.

6 Q. [Mr. Rhoad] Okay. Now, when you were representing
7 Mr. McKelvey did he ever waiver from his statement to you
8 that he did not shoot Mr. Phoenix?

9 A. He never wavered.

10 Q. And I guess I've already covered this, but if I
11 haven't in pursuing this strategy that Mr. Phoenix and
12 you agreed to, I believe you testified that you didn't
13 attempt to speak to any medical experts with regard to
14 the gunshot wound.

15 A. Not any medical experts, no.

16 Q. Did you speak with any experts?

17 A. I did not speak with any experts, no.

18 Q. In fact, the main emergency room doctor who -- well,
19 let me ask you this, the main emergency room doctor
20 wasn't present to testify, correct?

21 A. Correct.

22 Q. He was on vacation, correct?

23 A. Yes.

24 Q. And you were given an opportunity, I think by the
25 Judge, to ask for a continuance which you declined,

1 correct?

2 A. Right, yes.

3 Q. And if your testimony here at this P-C-R hearing is
4 that it would be critical to speak to medical experts on
5 whether it was a gunshot wound or not, in hindsight do
6 you think you should have at least spoken to the
7 emergency room doctor if you didn't do so?

8 A. I didn't do so, but based off his reports I didn't
9 think that it would help us.

10 Q. Okay. But his reports weren't introduced into
11 evidence, right?

12 A. No.

13 Q. Okay. Now, the police testified, this is on page
14 122 of the transcript, exhibit 21 -- this is just to
15 clear the record up, Your Honor. And you did not object
16 to the testimony concerning the bullet or bullet itself
17 as evidence, correct?

18 A. Could I refer to the transcript?

19 Q. Sure, exhibit 21 of our return and page 122 of the
20 transcript.

21 A. I did not object.

22 Q. And you did not object to testimony concerning the
23 bullet or the bullet itself as evidence, did you?

24 A. I did not.

25 Q. And Officer Edwards testified that he saw a bullet

1 jacket that he picked up and put it in his shirt pocket.

2 Do you remember that part of his testimony?

3 A. Yes.

4 Q. And do you remember later that SLED testified that
5 they tested the jacket fragment and determined they could
6 not tell if it matched the gun found at the scene or not,
7 is that correct?

8 A. Yes.

9 Q. You already answered the next question, let's see.
10 Do you believe that had the evidence of the bullet
11 fragment not been allowed, had that evidence not come in
12 to the trial that that could have made a difference in
13 front of the jury, especially in terms of the gunshot
14 wound itself?

15 A. I don't know.

16 Q. Okay. Did you speak to anyone with SLED prior to
17 the trial to determine if the fragment had any blood on
18 it?

19 A. No, I did not.

20 Q. Okay. And since you didn't speak with anybody who
21 were medical experts with regard to whether this was a
22 gunshot wound and whether or not they would have found
23 blood on a bullet fragment or not, you don't know whether
24 that would have made a difference or not do you?

25 A. I believe I brought it out that they did not test

1 that for blood.

2 Q. Okay. But my point is, did you know as the trial
3 attorney going in enough about gunshot wounds to know
4 whether the blood -- whether there was blood on the
5 bullet or not would have been relevant to whether this
6 victim was shot in the head and suffered a gunshot wound?

7 A. I think if there was blood, that would have been
8 helpful if it was his or not. But as far as ---

9 Q. --- whose blood?

10 A. The victim's, obviously if it was the victim's.

11 Q. It could hurt Mr. Phoenix.

12 A. Right.

13 Q. But if there was no blood ---

14 A. --- if there was no blood I think that would be
15 helpful.

16 Q. All right. But you didn't make a determination one
17 way or the other.

18 A. I don't think anybody did. So, I believe I brought
19 that out, but ---

20 Q. --- right, but do you know ---

21 A. --- the plan was ---

22 Q. --- I'm sorry.

23 A. The plan was to bring that out at trial that there
24 was not blood that was found on the bullet fragment.

25 Q. Okay. But if you had no expert medical testimony

1 to draw a conclusion from that, how would that have
2 helped Mr. McKelvey?

3 A. I guess the inverse. There was no evidence to show
4 that there was blood on there, so ---

5 Q. --- right. I guess what I'm saying is if you talked
6 to a medical expert who said there would have been, then
7 that certainly could have helped Mr. McKelvey's case,
8 right? In other words there would have been blood ---

9 MS. WILSON: --- objection Your Honor, he's asking
10 the witness to speculate.

11 MR. RHOAD: I can back that up ---

12 THE COURT: --- Speculation. Lack of foundation.

13 MR. RHOAD: I withdraw.

14 Q. [Mr. Rhoad] Prior to the trial of Mr. McKelvey's
15 case, did you review the prior records of testifying
16 witnesses to determine if any of those witnesses had any
17 prior arrests and could be used to impeach them?

18 A. Prior to the trial?

19 Q. Yes.

20 A. Mr. Phoenix.

21 Q. What was his criminal record, do you recall?

22 A. I did a SLED -- I don't recall. I did do a SLED
23 check where we obtained his record, in addition there was
24 a pending warrant that was out that I know that we
25 contacted the Magistrate court to find out the result of

1 that pending or that warrant. I don't -- I'm sorry I
2 don't remember ---

3 MR. RHOAD: Judge, like I said I don't do too many
4 of these P-C-R's I don't know if it's appropriate for me
5 to offer a copy of his Mr. Phoenix, the victim's arrest
6 record to Mr. Shelton at this time or not or -- we
7 submitted it, didn't we Sally?

8 MS. RHOAD: No, we did not.

9 MR. RHOAD: Oh we did not? I don't know you'll
10 have to help me Judge.

11 MS. WILSON: Your Honor, I would object to it being
12 admitted if I'm not mistaken Mr. Shelton has a copy he
13 can probably review from his file.

14 THE COURT: He doesn't contest that he had a record
15 or what he's done to research it.

16 MR. RHOAD: I'm sorry?

17 THE COURT: I said he doesn't contest that he was
18 aware of the record or what he did to investigate it to
19 determine whether ---

20 Q. [By Mr. Rhoad] --- you've got you've got it now.

21 A. I do, I'm sorry.

22 Q. My question is this then; do you see a charge on
23 there for I think it's a conviction for breach of trust
24 with fraudulent intent?

25 [Whereupon, Mr. Shelton reviews documents]

1 A. I don't see a conviction; I see one that was pending
2 for breach of trust with fraudulent intent at the time of
3 ---

4 Q. --- one that was pending ---

5 A. --- at the time of trial, yes.

6 Q. Okay. How about the witness Sharon Vance
7 [phonetic], do you remember the State's witness Sharon
8 Vance?

9 A. Yes.

10 Q. She was the -- I think the lady that was in there
11 that -- and she testified that she saw Mr. McKelvey with
12 a gun I believe and him and the victim arguing. Am I
13 remembering correctly?

14 A. Yes.

15 Q. All right. Did you have her record at the time of
16 trial?

17 A. At the time of trial I did not ---

18 THE COURT: --- let me interrupt one second. If
19 anybody has a cell phone on, it needs to be turned off
20 because I hear someone's phone vibrating and there are
21 not supposed to be any electronic devices on at all. If
22 I hear it vibrate it again, I'm going to find out who has
23 it and it's going to be confiscated and you're not
24 getting it back.

25 MR. RHOAD: Mine is in my car, Your Honor.

1 A. At the time of trial ---

2 THE COURT: --- you may continue ---

3 A. At the time of trial I did not -- I did ask the
4 Assistant Solicitor at the time, Ms. Viajonte [phonetic]
5 for her record. I was provided that right as she was
6 walking up to testify at trial.

7 Q. Okay. So -- and I think that's confirmed in a
8 letter that you wrote to Mr. McKelvey dated October 18,
9 2011. It says I understand that the solicitor provided
10 you with a copy of the State's witness, Vance's rap sheet
11 as she was walking to the stand to do the direct
12 examination of Ms. Vance?

13 A. Yes.

14 Q. Okay. Did you have time to review Ms. Vance's rap
15 sheet?

16 A. I did a quick review of it.

17 Q. Okay, did you see in there that she had been
18 convicted of a forgery as one of the crimes?

19 A. If I did, I didn't see that it was within the time
20 period. There was something that I saw after that she
21 had an active bench warrant, but I saw that after her
22 testimony.

23 Q. Okay. Did you ask for the court to recess to give
24 you a chance to make sure of that Mr. Shelton are you
25 sure of that today?

1 A. I did not.

2 Q. Are you sure what you're testifying to today that
3 this was something that was pending or was not within the
4 time frame?

5 A. There was a pending forgery out of North Charleston
6 which I caught after she had testified during a break.
7 She had an active bench warrant.

8 Q. But there was no conviction.

9 A. There was -- not that I recall.

10 Q. Okay. Let me ask you this. Did you cross examine
11 Ms. Vance?

12 A. I did.

13 Q. Did she testify in her -- and I think you might have
14 shown a written statement to her that she arrived at the
15 club at 2:20 a.m.?

16 A. Yes.

17 Q. You see that?

18 A. Yes.

19 Q. And she testified that she saw Mr. McKelvey and Mr.
20 Phoenix arguing and Mr. McKelvey had a gun, correct?

21 A. Right, yes.

22 Q. And do you recall the testimony from the police
23 officer who testified last that he arrived on the scene
24 at 1:15 a.m. and the victim and Mr. McKelvey had already
25 left the scene?

1 A. Yes.

2 Q. Okay. Did you question Ms. Vance on the difference
3 between how could she be there at 2:20 or arrive at 2:20
4 a.m. and see something that happened at 1:15 a.m.? Did
5 you cross-examine her on that?

6 A. I tried to get out of her some of the timeframe
7 issues, but she didn't seem like she knew a lot of what
8 was going on.

9 Q. But you had her written statement saying she got
10 there at 2:20 a.m., right?

11 A. Right, yes.

12 Q. And you agree from your testimony from the police
13 officers that this happened sometime around 1 o'clock?

14 A. Right, yes.

15 Q. So, that's an hour and a half later.

16 A. Right.

17 Q. But you didn't ask her how can you see something and
18 you testify to something that happened -- that could have
19 happened an hour and a half earlier?

20 A. Right, no I did not.

21 Q. Well, do you think that would have made a difference
22 in the jury's mind as to whether she should have been
23 believed or not believed?

24 A. It would have definitely went to her believability
25 and credibility, yes.

1 MR. RHOAD: I think I'm about finished, Your Honor.

2 Q. [Mr. Rhoad] I asked you about not interviewing any
3 medical experts; I covered that. Did you interview Nurse
4 Fuda [phonetic] prior to her testimony?

5 A. I did not.

6 Q. Did you interview the SLED agent prior to her
7 testimony?

8 A. I did not.

9 Q. Did you interview the E-M-S person prior to her
10 testimony?

11 A. I did not.

12 Q. So you really didn't know what they were going to
13 testify to?

14 A. I had their reports, so just based off their
15 reports.

16 Q. Are you supposed to be read your Miranda rights --
17 do you know because you do this stuff all the time and I
18 don't, Mr. Shelton. Are you supposed to be read your
19 Miranda rights before you are given a gunshot residue
20 test?

21 A. I haven't done the research on that lately...

22 THE COURT: I'm sorry, I can't hear you.

23 A. I haven't -- don't know if I've done the research on
24 the gunshot residue test ---

25 THE COURT: --- the court will take judicial notice

1 that you don't need a search warrant or Mirandized to get
2 G-S-R. Typically it's taken at the scene of everyone who
3 is present.

4 MR. RHOAD: Thank you.

5 THE COURT: Go ahead.

6 MR. RHOAD: I apologize.

7 THE COURT: And it's used to exclude folk, usually.
8 That's why it doesn't require...

9 MR. RHOAD: Okay, very good.

10 THE COURT: At least in my recollection. If I'm
11 wrong I will stand corrected but ---

12 MR. RHOAD: --- that's fine, now ---

13 THE COURT: --- that generally is not done.

14 MR. RHOAD: Thank you, Your Honor.

15 Q. [Mr. Rhoad] Mr. Shelton, just a few more things.

16 Now are you familiar with the case of State v Belcher?

17 A. Yes, sir.

18 Q. Okay. And you'd agree with me that that's a 2009
19 Supreme Court Case which says that's it's not proper for
20 a Judge to instruct a jury that they can imply malice
21 which means he planned to do it, intended to do it, just
22 because a weapon is involved.

23 A. Right, yes.

24 Q. And do you agree that that was the law in 2009 was
25 the law at the time of this man's trial?

1 A. Yes.

2 Q. And you agree that you did not object to the Judge
3 giving that instruction to the jury?

4 A. Yes, I did not object.

5 Q. Okay. And you would agree that since one of the
6 main purposes of this or theories of this trial was a
7 gunshot wound, that certainly that was important. You
8 would agree with that?

9 A. Yes.

10 Q. That was a critical charge?

11 A. And the Solicitor specifically said that in her
12 closing.

13 Q. Correct. And the Solicitor -- speaking of the
14 Solicitor's closing, she must have said that Mr. McKelvey
15 shot Mr. Phoenix in the head 10 or 12 or 15 times in her
16 opening, right?

17 A. She said it a lot, yes.

18 Q. So, obviously the gun and the gunshot was critical,
19 correct?

20 A. Yes.

21 Q. And knowing that and knowing that that 2009 Supreme
22 Court case specifically said that's an improper
23 instruction to the jury, never the less ---

24 THE COURT: --- I need you to clarify Belcher is
25 only applicable in murder cases not applicable as far as

1 I understand it. It's the implied malice instruction in
2 murder cases ---

3 MS. RHOAD: --- Judge, I believe I've got a copy of
4 it ---
5 ---

6 THE COURT: --- or is it ABWIK as well? I can't
7 remember ---

8 MS. RHOAD: --- it is. I've got a copy of it if you
9 need it.

10 THE COURT: No, I just want to make sure my
11 recollect -- my brains are gone. I locked myself out, I
12 forgot to change my password and now my secretary is
13 trying to figure out how to get me back in my computer
14 but I want to make sure my recollection ---

15 MR. RHOAD: --- would you like a copy?

16 THE COURT: No, I'll have one in a minute. You may
17 continue.

18 MR. RHOAD: Thank you, Your Honor.

19 Q. [Mr. Rhoad] But nevertheless you let him instruct
20 the jury?

21 A. Yes.

22 Q. And on the appeal, this man has already had an
23 appeal you know, correct?

24 A. Right.

25 Q. I think one of the grounds of Supreme Court's denial

1 was that that objection wasn't preserved.

2 A. Right.

3 Q. You're aware of that?

4 A. Yes.

5 Q. And do you believe, you tried the case you defended
6 Mr. McKelvey. Do you believe had you properly objected
7 to that instruction given the testimony about the gunshot
8 wound and how important that was that that would have
9 made a difference?

10 A. I just -- I don't know. It could have, yes. I
11 missed it just to be honest with you.

12 Q. And I guess -- and I promise you Mr. Shelton I'm not
13 trying to beat you up. You got a bunch of these trials
14 and people go back afterward and they look at them and
15 they pick them apart.

16 And one thing necessarily may not have resulted in a
17 reasonable probability of a different outcome. But
18 wouldn't you agree with me that if you stack a bunch of
19 stuff together that it certainly could with a reasonable
20 degree of probability result in a different outcome?

21 A. It could ---

22 MS. WILSON: Your Honor, I object to this. Errors
23 in P-C-R can't be stacked together and have a cumulative
24 effect, Your Honor.

25 THE COURT: I'm sorry; repeat that I didn't hear

1 you.

2 MS. WILSON: I said Your Honor I object to this line
3 of questioning because the case law states that in a
4 P-C-R you can't look at errors cumulatively, you would
5 have to look at their individual effect on the outcome of
6 the proceedings.

7 THE COURT: I'm going to give him a little
8 latitude, but you need to go beyond speculation about
9 what could or would or may have happened.

10 MR. RHOAD: Okay, I ---

11 MS. RHOAD: --- I was just going to say for the
12 record that I disagree with her statement of the law
13 about cumulative testimony citing the case of Sanchez v
14 State [phonetic] a 2012 case.

15 THE COURT: You may continue.

16 MR. RHOAD: Thank you, Your Honor.

17 Q. [Mr. Rhoad] Okay, so let's try to summarize Mr.
18 Shelton. You didn't talk to any medical personnel?

19 A. Right, no.

20 Q. And you agree that the medical personnel would be
21 the best people to testify as to whether there was a
22 gunshot wound?

23 A. Yes.

24 Q. And you agree with me that you let people that
25 obviously are not qualified, for example, Nurse Fuda ..

1 [phonetic] and the E-M-S person to testify as an expert
2 that it was a gunshot wound?

3 MS. WILSON: Objection, Your Honor, speculation.

4 THE COURT: I'm sorry, I didn't hear the question
5 frankly. Could you repeat it? And there's a little hum
6 going on in the court room conversations I'd like y'all
7 to keep them to a minimum please ---

8 MR. RHOAD: --- I'll repeat the question ---

9 THE COURT: --- go ahead.

10 Q. [Mr. Rhoad] Do you agree with me that you allowed
11 Judge -- excuse me Nurse Fuda [phonetic] to be qualified
12 as an expert without objection?

13 A. Yes.

14 Q. And do you agree that she testified at this man's
15 trial that Mr. Phoenix suffered from a gunshot wound?

16 A. Yes.

17 Q. And would you agree with me in hindsight now that
18 she did not have the expertise nor did you do any inquiry
19 to determine whether she had the expertise to so testify?

20 A. I would agree, yes.

21 Q. Okay. And do you agree with me the same questions
22 with the E-M-S person?

23 A. Yes.

24 Q. You allowed her to without objection be an expert,
25 you allowed her to testify not having the expertise that

1 my client shot Mr. Phoenix?

2 A. Yes.

3 Q. Okay.

4 THE COURT: You need to clarify that question.

5 They didn't testify that he shot him; they testified that
6 it was a gunshot wound?

7 MR. RHOAD: Did he -- I'm sorry, I'll rephrase it
8 ---

9 THE COURT: --- nobody unless they were an
10 eyewitness could testify ---

11 MR. RHOAD: --- no, I misspoke Your Honor, that he
12 suffered a gunshot wound is what I meant to say.

13 A. My memory might be off, but I believe they said it
14 appeared to be a gunshot wound.

15 Q. [Mr. Rhoad] Okay. I mean ---

16 A. --- Yeah ---

17 Q. --- appeared to be a gunshot ---

18 A. --- yeah, they testified to ---

19 Q. --- that's pretty close to being a gunshot wound.

20 A. Yeah.

21 Q. All right. And you agree with me, I guess the
22 fifth thing since my learned counsel says I can do this
23 under Sanchez, this is the fifth thing cumulative that
24 you let the bullet fragment come in even though -- and I
25 understand your strategy, but even though the SLED people

1 said that they couldn't match the bullet fragment with
2 the gun, correct?

3 A. Yes.

4 Q. And you did not do anything with the evidence that
5 was in about there being no blood on the bullet fragment,
6 correct?

7 A. Correct.

8 Q. And did you -- there was testimony in the record
9 too, I think from Officer Edwards that he saw blood on
10 the gun and blood on Mr. McKelvey, correct?

11 A. Yes.

12 Q. Okay. Did you challenge -- do you recall whether
13 you challenged them as to whether there had been a blood
14 sample done and whether or not the blood on the gun
15 belonged to Mr. Phoenix or belonged to my client?

16 A. As far as argument wise, I did, yes.

17 Q. But they had no evidence, and I think their evidence
18 in the record was that they had no evidence of whose
19 blood it was, correct?

20 A. Correct.

21 Q. All right. Well did you ever consider objecting to
22 that evidence coming in at all to begin with?

23 A. I just saw it as their observations, so I did not,
24 no.

25 Q. Okay. I mean in hindsight, do you think it would be

1 a fair point to think okay, if they've got no evidence as
2 to whose blood it is, maybe I should at least try the
3 argument that it should not be admitted because the jury
4 is going to assume that it's Mr. McKelvey's or Mr.
5 Phoenix's blood, correct?

6 A. Correct.

7 Q. Whose else could they assume, right?

8 A. Right, correct.

9 Q. So, in hindsight you'd agree with me that might have
10 been worth trying?

11 A. Yeah.

12 Q. Okay. So I think that's six or seven points that
13 I'm trying to make. You already -- I guess I asked you
14 this, but this would be the eighth point or whatever you
15 didn't talk to any medical people at all?

16 A. No.

17 Q. Didn't try to call them, write them, or email them?

18 A. No.

19 Q. Okay. Let me ask you this. I remember in the
20 trial transcript, do you remember that you did not get
21 the entire police report prior to trial, did you? Do you
22 remember that?

23 A. Yeah, I do remember that.

24 Q. And do you remember that once you got -- I think
25 Judge Dennis got pretty I won't say nasty, but he got

1 pretty stern with the Solicitor's office and law
2 enforcement for you not having that full police report,
3 correct?

4 A. Correct.

5 Q. Do you recall he even alluded in the transcript that
6 there's going to come a day before too long when
7 discovery in a criminal case which is cumulative does not
8 take place that cases will be thrown out, right?

9 A. Yes.

10 Q. Do you remember him saying that?

11 A. Yes.

12 Q. Okay. And why is it important to have the whole
13 police report before the trial?

14 A. So you know what people are going to be testifying
15 to.

16 Q. Same reason maybe it's important to talk to the SLED
17 people before they testify, right?

18 A. Right and have their reports and have medical
19 reports and all that, yes.

20 Q. And in that police report, there were two different
21 police officers that were present during the gun residue
22 test, correct?

23 A. Correct, yeah.

24 Q. And they offered two quite different statements
25 while both being present as to what Mr. McKelvey

1 allegedly said during that, correct?

2 A. Correct.

3 Q. And one of them pretty much amounts to ---

4 MS. WILSON: --- objection Your Honor, he's leading
5 the witness.

6 THE COURT: Sustained. Leading.

7 Q. [Mr. Rhoad] Do you remember what the police officers
8 said in their statement?

9 A. Mr. Edwards...

10 [Whereupon, the witness reviews documents]

11 Q. I think I can help you find it if you can't find it.

12 A. --- Mr. Edwards said that Mr. McKelvey said oh I
13 remember I shot somebody. I believe that's what he said
14 or was that the other officer that said that?

15 Q. Let me ask you this...

16 MS. RHOAD: It was Officer Willingham [phonetic] I
17 believe was his name.

18 [Whereupon, the witness reviews documents]

19 Q. [Mr. Rhoad] Was it Willingham?

20 A. --- yes, Willingham [phonetic] ---

21 Q. --- Willingham that said that McKelvey said that he
22 shot somebody, correct?

23 A. Yes, what are y'all doing to my hands? Gunshot
24 residue test, McKelvey replied I already shot somebody,
25 oh I remember.

1 Q. And what did the other police officer who was in the
2 cell at the same time, what was his statement? Well, let
3 me ask you. Would you agree that his statement was
4 entirely inconsistent with that statement?

5 A. It was different, yes.

6 Q. You mean substantively different?

7 A. Yes.

8 Q. Okay. So one of them says that McKelvey admitted
9 that he shot somebody and the other police officer's
10 statement was substantively different than that
11 statement?

12 A. He said y'all must think I shot somebody.

13 Q. Y'all must think I shot somebody versus oh, I shot
14 somebody.

15 A. Right, yes.

16 Q. You would agree those are significantly and
17 substantially different statements?

18 A. Yes, I agree that is different.

19 Q. I mean one's a self admission, right?

20 A. Yes.

21 Q. One is -- one is just a statement, right?

22 A. Yes.

23 Q. Now this is the question. In hindsight, when
24 you've got a case of this significance and you've got a
25 police officer dressed in his police uniform saying he

1 said he shot somebody and one who says something entirely
2 different who was present at the same time. In
3 hindsight don't you think it would have been a good idea
4 to ask for either a continuance or a new trial which I
5 think the Judge may have even offered you the chance to
6 do and find out why these two guys in the same cell at
7 the same time had two different statements totally
8 inconsistent?

9 A. It probably would have been helpful to have a
10 continuance to read more into the report and have more of
11 a chance to actually digest that report, yes that would
12 have helped.

13 Q. Right, and perhaps even have come up with some legal
14 creative way to at least make an argument that they
15 should be excluded.

16 A. Yes. And it could have led to possibly seeking
17 subpoenas for trying to find other reports if they're
18 there.

19 Q. Right. Because what you knew is that -- you didn't
20 have the whole police report until the middle of the
21 trial, right?

22 A. Until the Jackson v Denno hearing yes.

23 Q. Right and you don't even know if you got the summary
24 or the complete report ---

25 A. --- right ---

1 Q. --- because that's in the transcript, correct?

2 A. Right, yes.

3 Q. So in hindsight you agree that probably would have
4 been a good idea to say hold on just a minute or let's
5 have a continuance or let's ask for a new trial so I can
6 get to the bottom of this?

7 A. Yes.

8 Q. Okay. Because I mean you'd agree with me that a
9 statement by a police officer that comes into evidence
10 that you didn't know about until the trial had already
11 started that amounts to an admission that I shot somebody
12 is critical to this man's defense?

13 A. Yes. There were some differences in that report.

14 Q. Right.

15 A. Yeah.

16 Q. But some significant differences, correct?

17 A. Two important differences ---

18 Q. --- Not just 2 o'clock versus 2:02, but I shot
19 somebody or y'all must think I shot somebody.

20 A. Yeah.

21 Q. Those are significantly, substantially different,
22 right?

23 A. Yes as far as the statement, yes.

24 Q. Let's see, we covered that.

25 MR. RHOAD: Your Honor, I think that's all, but if

1 I might have 30 seconds to confer with my senior partner,
2 I think I'm done.

3 [Whereupon, Mr. Rhoad and Ms. Rhoad confer]

4 MR. RHOAD: Just a few more, Your Honor.

5 Q. [Mr. Rhoad] Mr. Shelton is it true that Mr.
6 McKelvey filed a grievance against you prior to trial ---

7 MS. WILSON: --- objection Your Honor ---

8 THE COURT: --- Basis ---

9 MS. WILSON: --- relevance.

10 THE COURT: Why is this relevant?

11 MR. RHOAD: I beg your pardon?

12 THE COURT: Why is it relevant? What does it make
13 more or less probably?

14 MR. RHOAD: Well, I think it's relevant, Your Honor
15 because if the grievance had to do with the
16 dissatisfaction of the trial strategy that was agreed
17 upon and the job that Mr. Shelton had done it's
18 reasonably probably could have affected the outcome.

19 THE COURT: Was it filed after or before?

20 MR. RHOAD: Before.

21 THE COURT: And what happened with it? Was it
22 dismissed?

23 MR. RHOAD: It was heard by Judge Dennis, Judge
24 Dennis dismissed it.

25 THE COURT: Judge Dennis doesn't hear grievances;

1 grievances have to be heard by ---

2 MR. RHOAD: --- oh, I'm sorry.

3 THE COURT: Did you use the right terminology?

4 MR. RHOAD: I don't know what happened.

5 THE WITNESS: The grievance was dismissed.

6 MR. RHOAD: What was it?

7 WITNESS: It was dismissed.

8 MR. RHOAD: It was dismissed, okay.

9 THE COURT: Grievances are filed for a myriad of
10 reasons. I've found that most of them have nothing to do
11 with the person's proceeding with the case it's usually
12 some personality conflict or otherwise.

13 MR. RHOAD: Oh, I'm sorry Your Honor, my co-counsel
14 is ---

15 THE COURT: --- was it a motion to relieve?

16 MR. RHOAD: The motion to have him relieved as
17 counsel was heard by Judge Dennis.

18 THE COURT: Okay.

19 MR. RHOAD: Okay, it was denied.

20 THE COURT: Okay.

21 MR. RHOAD: I think the basis for the motion was
22 that Mr. ---

23 THE COURT: --- well I understand that, but I need
24 to know how that's relevant because he doesn't have any
25 control over how Judge Dennis rules. The issue is

1 whether he brought it to the Judge's attention or not and
2 it appears that he did if it was heard.

3 MR. RHOAD: Right.

4 THE COURT: So, I guess I need to know why the
5 question is relevant.

6 MR. RHOAD: And then Judge Dennis was the trial
7 Judge.

8 THE COURT: So, again I need to know the relevance.

9 [Whereupon, Mr. Rhoad and Ms. Rhoad confer]

10 MR. RHOAD: Your Honor, I'm told that it is
11 relevant because it was something Chad told Mr. McKelvey
12 was that Judge Dennis didn't care whether he got time or
13 not. Now, whether that's relevant to these proceedings
14 or not. We're ---

15 THE COURT: --- I'm at a loss as to why that's
16 relevant to anything ---

17 MR. RHOAD: --- that's fine. We are mainly civil
18 attorneys. If it's not relevant we will withdraw it.

19 THE COURT: No I mean relevance is relevance
20 whether it's in a criminal or civil context. I just need
21 to know how it's relevant and if it connects to and how
22 it makes more or less probably whether Mr. Shelton met
23 his professional obligation under prevailing norms or
24 not.

25 MR. RHOAD: Well let me at least try this on for

1 size, Your Honor. Maybe it became relevant because Mr.
2 Shelton has testified to eight or nine or ten or eleven
3 different things that in hindsight he should have done.

4 THE COURT: Well hindsight is 20-20 and that's not
5 the court's barometer.

6 MR. RHOAD: It could have made a difference maybe
7 because ---

8 THE COURT: --- could of is not did. It has to
9 undermine the court's confidence in the outcome of the
10 trial. So, we're in the process of testimony I still
11 need to know how it's -- because out of those six or
12 seven I may find that none of them have any merit so I
13 need to know what is the relevance to this line of
14 questioning.

15 MR. RHOAD: And my point, Your Honor, was the
16 relevance may be that if Mr. Shelton and Mr. McKelvey did
17 not get along to the extent that Mr. McKelvey felt he
18 needed to file a motion to have him relieved as counsel,
19 that could go to ---

20 THE COURT: --- I'll give you some latitude, but
21 nine out of ten criminal defendants ask for their lawyers
22 to be relieved because they don't like what they're
23 telling them and then they ask for the next three or four
24 to be relieved because they don't like what they're
25 telling them ---

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1 MR. RHOAD: --- All right, Your Honor, I'll tell
2 you what ---

3 THE COURT: --- often times lawyers have to give
4 their clients bitter news ---

5 MR. RHOAD: --- sure ---

6 THE COURT: --- and a bitter pill is always hard to
7 swallow whoever it's coming from. So that isn't a basis
8 I mean probably I would say 98 percent of the criminal
9 cases I hear, somebody asks for their lawyer to be
10 relieved so.

11 MR. RHOAD: Well, Your Honor I'm going to withdraw
12 from that then and I'm going to ask Mr. Shelton ---

13 THE COURT: --- Unless of course you think it bears
14 on his representation and if you feel the need to explore
15 that line of questioning, feel free to do so.

16 MR. RHOAD: Thank you, Your Honor.

17 THE COURT: You're welcome.

18 MR. RHOAD: I think I'm going to move on to more
19 relevant matters.

20 Q. MR. RHOAD: And I'm going to finish I think by
21 asking you this, Chad, I mean Mr. Shelton. We've covered
22 a number of things, okay, that from the instruction of
23 the Judge to the not interviewing any medical or
24 presenting any medical evidence about gunshot wounds to
25 letting experts who are not experts in the area testify,

1 everything I've asked you about. Now, sitting here today
2 a cumulative effect, not just one isolated thing, but a
3 cumulative effect, don't you agree with me that all of
4 those things could have had a reasonable probability of a
5 different outcome in this trial?

6 A. It could --

7 Q. I beg your pardon?

8 A. It could have, I guess. It could have.

9 Q. Thank you. Thank you, Your Honor.

10 THE COURT: You're welcome, Ms. Wilson, you may
11 proceed.

12 MS. WILSON: Thank you.

13 THE COURT: You're welcome.
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1 CROSS-EXAMINATION

2 BY MS. WILSON:

3 Q. Good afternoon, Mr. Shelton.

4 A. Good afternoon.

5 Q. Do you recall around when you were retained to
6 represent Mr. McKelvey?

7 A. My first meeting with Mr. McKelvey was February 3rd
8 of 2009.

9 Q. And that was approximately a year before trial?

10 A. Yes.

11 Q. Let me just step back for the record. Can you tell
12 us about your background and your experience as a lawyer?

13 A. I've now been with the public defender's office
14 since August of 2007 and that was right after law school.

15 Q. Okay, so the majority of your experience has been in
16 criminal law?

17 A. Yes.

18 Q. Did you get to interact frequently with Mr. McKelvey
19 about this case?

20 A. I did, yes.

21 Q. Did you used to go visit him at the jail or
22 correspond by mail or that type of thing?

23 A. Most of it was visiting through -- at the jail.

24 Q. What type of investigation did you have to do in
25 this case?

1 A. So I -- there were some things that Mr. McKelvey
2 wanted us to do as far as talking to potential witnesses,
3 so we did hire an investigator. That investigator went
4 out and tried to talk to some of the witnesses, however
5 they did not have any information that was helpful for
6 us.

7 And I did -- I thought that the gunshot wound was
8 also not a gunshot wound, but my basis of that was the
9 caliber of the handgun that was used and the close
10 proximity that the victim testified to.

11 So, I did look into possibly finding someone that
12 knew about firearms. I was not able to find anybody that
13 would have been helpful for us.

14 Q. So you were aware that Mr. McKelvey alleged that he
15 didn't shoot the defendant so you -- is that correct?

16 A. Yes.

17 Q. Okay. And so based on that you did consider making
18 an argument and presenting some type of expert witness
19 about whether or not the victim was shot with a gun, is
20 that correct?

21 A. Yes.

22 Q. Did you file Brady and Rule 5 Motions on Mr.
23 McKelvey's behalf?

24 A. I did, yes.

25 Q. Okay and did you review the material that you

1 received with him?

2 A. Yes.

3 Q. And can you just outline for the court the type of
4 materials you received within the Brady packet from the
5 state?

6 A. I reviewed -- I received the original police
7 reports, the medical records from Mr. Phoenix the victim,
8 SLED analysis that was done, SLED chain of custody,
9 statements that were provided from witnesses in the club,
10 statements from people that were outside, the rap sheet
11 from Mr. McKelvey, evidence log from the Moncks Corner
12 police department.

13 There was also a possession of cocaine charge, and
14 there was some SLED from the cocaine, SLED from the
15 gunshot residue, SLED from the bullets and the firearms,
16 and the medical records. A lot -- there was a lot of
17 medical records close to 200 pages or so maybe more.

18 Q. And after you reviewed the evidence with Mr.
19 McKelvey were you able to develop a defense to present on
20 his behalf?

21 A. Yes.

22 Q. What was it?

23 A. That the as far as the armed robbery he, Mr.
24 McKelvey, had money that was on him and there really was
25 no reason for him to have taken money from Mr. Phoenix.

1 There was also some hint that maybe Mr. Phoenix
2 [phonetic] owed Mr. McKelvey money so he couldn't have
3 taken his own money as far as the armed robbery is
4 concerned.

5 THE COURT: I'm sorry, repeat that again. I didn't
6 hear you.

7 A. He owed Mr. McKelvey ---

8 THE COURT: --- Who is he that you're referring to?

9 A. Mr. Phoenix, I'm sorry. So Mr. Phoenix, the victim,
10 owed Mr. McKelvey money and so it was money that was owed
11 to him as far as the -- that's the money that was taken.
12 So, as far as the armed robbery that he didn't take any
13 money was the main issue with that.

14 The Assault and Battery with Intent to Kill rested
15 on my challenging as far as the medical reports that they
16 received the medical people received all their
17 information from Mr. Phoenix and Mr. Phoenix is not
18 someone to have been trusted and that -- my theory is
19 that he was lying and exaggerating and so he's the only
20 person that actually said that Mr. McKelvey shot him.

21 And so that is where the police got all their
22 information so it all rested on Mr. Phoenix. If there
23 was no Assault and Battery with Intent to Kill as far as
24 the gunshot that Mr. McKelvey possibly beat up Mr.
25 Phoenix without the use of the firearm. I think we were

1 able to get Assault and Battery of a High and Aggravated
2 Nature charge from the Judge and so if there wasn't
3 Assault and Battery with Intent to Kill then there wasn't
4 the Possession of a Firearm during the Commission of a
5 Violent Crime.

6 And I attempted to get the attempted armed robbery
7 charge that was not -- the Judge -- I believe the Judge
8 did not allow that charge.

9 Q. Okay. And prior to trial did you talk to -- did
10 the State make any plea offers to Mr. McKelvey?

11 A. Yes. The State made an offer of a range of 12 to 18
12 years.

13 Q. And did Mr. McKelvey choose to reject that offer?

14 A. He did.

15 Q. Did you discuss with Mr. McKelvey prior to trial the
16 potential sentence he was facing and any constitutional
17 rights he had and would exercise at trial?

18 A. Absolutely, yes.

19 Q. And ultimately Mr. McKelvey obviously decided to go
20 to trial and when the case was called for trial were you
21 ready to go forward?

22 A. Yes, I think so, yes.

23 Q. And did you discuss calling any witnesses with Mr.
24 McKelvey before trial?

25 A. I tried to find witnesses. If I had any witnesses,

1 I didn't have any before trial so at that point in time
2 the discussions that I had were about last argument and
3 trying to preserve last argument by not producing any
4 evidence.

5 Q. And can you kind of articulate what your strategy
6 was as far as presenting a defense for Mr. McKelvey? Did
7 you discuss that with him prior to trial?

8 A. I'm not 100 percent sure. Mr. McKelvey and I
9 leading up to trial did not communicate very well. Mr.
10 McKelvey I'm not sure wanted to go to trial at that point
11 and time.

12 Q. Could you briefly characterize what evidence the
13 State presented against Mr. McKelvey at trial? If it can
14 be done briefly.

15 A. I mean it rested mainly on Mr. Phoenix and his
16 testimony that they were in the club, Mr. McKelvey and
17 Mr. Phoenix were in the club together, there was an
18 argument that started in the club. The manager of the
19 club kicked them out of the club.

20 There was one gunshot that was heard. Mr. Phoenix
21 indicated that there were two gunshots, but only one
22 gunshot was heard. The police were very close on scene,
23 right down the street, so they were right in the area.
24 They came right away; saw Mr. McKelvey in Mr. Dash
25 [phonetic], Scarry Dash's [phonetic] car. They saw Mr.

1 Phoenix laying on the ground with blood around him and
2 Mr. McKelvey was taken into custody. They found a gun in
3 the car. There was a discrepancy as to where. The
4 police testified it was underneath the passenger seat;
5 however there were police reports that put it in the
6 glove box.

7 They then arrested Mr. McKelvey. They took Mr.
8 Phoenix by E-M-S to the hospital. Mr. Phoenix indicated
9 that it was Mr. McKelvey that shot him and they tested
10 Mr. McKelvey's hands for gunshot residue.

11 Some gunshot residue was found on the back of his
12 hands and Mr. McKelvey a couple days -- or Mr. Phoenix a
13 couple days later said that Mr. McKelvey took some money
14 from him and that's what the argument was about.

15 Q. And going into trial had you reviewed the statements
16 of the State's witnesses?

17 A. Yes.

18 Q. And based off of their testimony, did you feel like
19 you were adequately able to cross-examine the witnesses
20 based on their testimony -- I mean their statements and
21 their testimony at trial?

22 A. Yes.

23 Q. And you testified a little bit about reviewing the
24 prior criminal record of the State's witness -- witnesses
25 based on your background on the witnesses' background,

1 did you feel the need to impeach the witnesses based on
2 their criminal record?

3 A. Regarding who?

4 Q. Regarding Ms. Vance and the defendant Mr. Phoenix?

5 A. As to Mr. Phoenix I didn't feel that there was
6 anything that was within the timeframe that could --
7 should be allowed in as far as his honesty, his record
8 wise. Ms. Vance, I honestly missed that she had a bench
9 warrant pending.

10 THE COURT: How would that have been admissible? I
11 don't mean to interject.

12 A. She testified at trial that she was scared and I
13 believe the Solicitor was trying to point -- say that she
14 was scared because of Mr. McKelvey and maybe some of the
15 people that ---

16 THE COURT: --- Did he actually ask that question?

17 A. She did -- between break what were you threatened
18 type of thing. She did ask that question. I believe if
19 -- I believe she tried to portray Ms. Vance as being
20 scared because of that reason other than there being a
21 bench warrant could have been ---

22 THE COURT: --- did you have any information that
23 Ms. Vance actually knew she had a bench warrant pending?

24 A. No, I did not.

25 THE COURT: So, tell me how that would have been

1 admissible to impeach her if she -- if you couldn't
2 establish you knew she had a bench warrant pending.

3 A. It might not have been -- I guess it would have been
4 up to the trial Judge.

5 THE COURT: Okay, you may continue.

6 MS. WILSON: Thank you, Your Honor.

7 Q. [Ms. Wilson] Now, when preparing for trial did you
8 talk to Mr. McKelvey about the possibility of calling any
9 expert witnesses?

10 A. I did talk about the -- someone for the gunshot,
11 yes. For the gun ---

12 Q. --- what conclusion did you reach after speaking to
13 him about that?

14 A. We just couldn't find anybody. We didn't have
15 anybody that we -- that I knew of. I didn't know
16 anybody.

17 Q. And did you review all the victim's medical records
18 that you received from the State?

19 A. Yes.

20 Q. And based on your view of that, did you feel the
21 need to speak to any of the doctors or nurses or
22 radiologists about what their testimony would have been?

23 A. I did not. I believed that they were going to
24 testify that there was a gunshot wound based off
25 information that they received from Mr. Phoenix and the

1 police officers who also received the information from
2 Mr. Phoenix. My strategy at the time was to try to show
3 that Mr. Phoenix doesn't have as much credibility as far
4 as his alcohol use and him being under the influence and
5 so that's kind of what I tried to get out from the
6 medical experts.

7 Q. Okay. Let me make sure I got this right. So,
8 basically your strategy at trial was to challenge Mr.
9 Phoenix's credibility based on the fact that he was the
10 person who said he was shot and that the medical
11 professionals relied on that as a basis for their
12 findings?

13 A. Right, yes.

14 Q. How important was preserving last argument in your
15 decision about calling expert witnesses or even looking
16 for other medical witnesses?

17 A. Well, I didn't have anybody so that -- it was very
18 important since I didn't have anyone to testify on his
19 behalf.

20 Q. Okay. And did you think that -- did you think that
21 testimony from medical experts would have had any effect
22 on Mr. McKelvey's armed robbery conviction the State
23 presented -- and the evidence the State presented on
24 that?

25 A. It wouldn't have gone towards the Armed Robbery; it

1 would have gone to the Assault and Battery with Intent to
2 Kill. It could have gone to credibility as a whole, but
3 it wouldn't have gone to the armed robbery.

4 Q. And you're saying the credibility of the victim?

5 A. Yes.

6 Q. Okay. Based on your review of their reports, did
7 you feel like you were able to adequately cross-examine
8 the medical professionals without calling any expert
9 witnesses?

10 A. Yes. I had all their reports. I had it tabbed to
11 the things that I believed helped us ---

12 Q. --- okay ---

13 A. --- and so I was prepared to go through the reports
14 from the stuff that helped us.

15 Q. And do you recall what type of line of questioning
16 you pursued with Ms. Fuda at trial, the nurse?

17 A. I'm sorry I don't recall. Review ---

18 Q. --- I could point you to her testimony in the record
19 just briefly.

20 MS. WILSON: Beg the court's indulgence.

21 Q. [Ms. Wilson] Ms. Fuda's testimony for the record
22 starts on page 317 and your cross-examination starts on
23 page 325.

24 [Whereupon, the witness reviews documents]

25 A. Okay.

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1 Q. Can you just briefly recall for the court what the
2 substance of your cross-examination was and what you were
3 trying to elicit from her?

4 MR. RHOAD: I'm sorry, Your Honor, I couldn't hear
5 that question.

6 Q. [Ms. Wilson] I'm sorry. I was asking him after his
7 review of his cross-examination of Ms. Fuda at trial,
8 what type of testimony he was trying to elicit from her
9 based off his line of questioning.

10 A. That Mr. Phoenix was intoxicated, that they relied
11 on the patient to give the history, the medical history,
12 of what occurred.

13 Q. Okay. Mr. Shelton, you would agree that a gunshot
14 is not absolutely required for a person to be convicted
15 of ABWIK, is that correct?

16 A. That's correct.

17 Q. Do you also recall Mr. Phoenix testifying that he
18 was hit in the head by the defendant?

19 A. Yes.

20 Q. And I guess the transition from talking about Ms.
21 Fuda's testimony, did you consider moving for a
22 continuance based on the absence of the victim's treating
23 doctor at trial?

24 I think the record reflects that he was out of the
25 country. Did you consider requesting a continuance for

1 that? Is that not something you wanted to do?

2 A. Not for the doctor, no.

3 Q. Did you think that his absence could have been
4 beneficial to Mr. McKelvey at trial?

5 A. Yes, absolutely. I didn't want a doctor to come
6 there and say that it was a gunshot wound.

7 Q. Did you think that Mr. -- that his doctor would have
8 been able to say with a little more certainty than Ms.
9 Fuda?

10 A. I think it would have come across with more
11 certainty, yeah.

12 Q. And because this treating physician wasn't present,
13 you were able to cross-examine Ms. Fuda about the basis
14 of her knowledge for Mr. Phoenix's injuries, is that
15 correct?

16 A. That's correct.

17 Q. Do you also recall eliciting testimony from Ms. Fuda
18 about the level of alcohol in the victim's blood?

19 A. I believe so, yes.

20 Q. Did you also consider objecting to the testimony
21 from the emergency medical worker, Ms. Michelle Moritzky
22 [phonetic]?

23 A. Could you point that out?

24 Q. Sure, sorry. She starts on page 251 of the record
25 and goes to about 260.

1 [Whereupon, the witness reviews document]
2 A. What was your question again, I'm sorry.
3 Q. No problem, the question was did you consider
4 objecting to her testimony?
5 A. Not her testimony as to observations that were
6 happening that night.
7 Q. Do you recall eliciting testimony from Ms. Moritzky
8 on cross-examination that her recollection or her report
9 of what happened was based on being dispatched to a
10 gunshot wound, to a scene where a gunshot wound occurred?
11 A. Yes.
12 Q. Did you see any basis to challenge her being
13 qualified by the court as an emergency medical services
14 expert?
15 A. I don't think she was qualified.
16 Q. I think you're right.
17 A. The Judge wouldn't qualify her as an expert.
18 Q. Moving on to Officer Edwards' testimony, do you
19 recall challenging or presenting to the court -- do you
20 recall challenging Officer Edwards' testimony about a
21 bullet jacket found at the scene?
22 A. Yes.
23 Q. And did you think you had basis at the time to
24 object to the fragment being entered into evidence since
25 it was found at the scene?

1 A. No.

2 Q. Did you see any basis to remove her recusal to Judge
3 Dennis prior to trial?

4 A. No, I did actually do a motion to recuse a Judge in
5 this case, but it was not Judge Dennis.

6 Q. Okay. Do you want to expound on that?

7 A. Well, Judge Harrington was at one point in time the
8 trial Judge. I did move to recuse Judge Harrington
9 because she had formerly prosecuted Mr. McKelvey on I
10 believe at least three prior times.

11 So for that reason I thought there was actual bias
12 and so I moved to recuse Judge Harrington which she did
13 recuse herself from hearing the case. But I didn't have
14 any prejudice or I didn't know of any prejudice with
15 Judge Dennis.

16 Q. You talked a little bit earlier about being given I
17 guess an additional report from the State, a police
18 report. Can you kind of expound on what were the
19 differences between the report that you received and the
20 report that you -- the report that you received before
21 trial and the report you received after trial?

22 A. I'm sorry I don't have a copy of the report that was
23 -- that they had.

24 Q. Okay. Well just based off of your recollection
25 were the differences substantial?

1 A. Well, I do think that there were some important
2 differences that the -- from my recollection the original
3 report that I received was I think a page and a half if
4 that.

5 And then, but the report that the officer had was
6 three pages, so there was obviously some substantial
7 information in that and reviewing the case the Jackson v
8 Denno I know that in the report that I received it did
9 say that Mr. McKelvey was under the influence and
10 however, the officer that testified his report did not
11 say that he was under the -- that Mr. McKelvey was under
12 the influence.

13 So, there are some differences in the report. I do
14 believe that there were some substantial differences in
15 the report.

16 Q. Okay. Now did you feel like you had anything to
17 further substantiate Mr. McKelvey being under the
18 influence that you could have, I guess, expounded based
19 off of that additional...

20 A. Other than what Mr. McKelvey told me.

21 Q. Were you given some time by the court to review the
22 document?

23 A. I was given some time, yes, over a lunch break I
24 believe.

25 Q. Were you able to still cross-examine those police

1 officers after your review?

2 A. I was, yes.

3 Q. One where I ascertained was a difference in the
4 statements highlighted by Mr. McKelvey's counsel today
5 was that there was a statement -- a variation in the
6 statement or maybe this is a different thing, but you can
7 clarify for me.

8 There was some variation in statements by police
9 officers, there was some variations about Mr. McKelvey's
10 statements prior to being tested for gunshot residue, is
11 that correct?

12 A. Yes, that's correct.

13 Q. And that's a separate issue from being contained in
14 the two separate incident reports, is that correct?

15 A. No, the first -- the original incident report did
16 not have that statement in there and so the one that we
17 received at trial did have what statement Mr. McKelvey
18 made to the officer.

19 Q. Okay. But you were aware of Mr. McKelvey's
20 statement to police before he was gunshot -- he was
21 tested for gunshot residue before you got that initial
22 report, is that correct?

23 A. One of the statements, not the second one.

24 Q. Okay. And did you think that would have been
25 helpful to the defense to the highlight his statement to

1 the jury with regard to that?

2 A. Yes.

3 Q. An issue today is about whether or not you talked
4 further with the SLED agent in this case who I guess was
5 a firearms expert and testified about the bullet, the
6 condition of the bullet and the gun in this case. After
7 you received reports from SLED agents, do you usually
8 call and speak to them?

9 A. Only if I have a question. Their report kind of
10 speaks for themselves.

11 Q. Okay. You didn't feel the need to speak to the
12 SLED agent in this case?

13 A. Not in this case. I thought some of that evidence
14 actually helped us.

15 MS. WILSON: Beg the court's indulgence.

16 Q. [Ms. Wilson] When you were preparing for trial at
17 the time did you just correct me -- correct me if it's
18 not your testimony -- but you testified that you didn't
19 think that you needed to talk to any medical doctors or
20 radiologists in preparing for trial because you had their
21 reports, is that correct?

22 A. That's correct.

23 Q. There was some questioning earlier about Ms. Vance's
24 testimony and differences in her testimony and in her
25 statement she gave at the scene and her testimony at

1 trial. Have you had the chance to review Ms. Vance's
2 testimony and were there substantial differences in her
3 statement that you did bring out at trial? I can be more
4 specific with that.

5 A. Yeah, please.

6 Q. Now, Mr. -- counsel for Mr. McKelvey indicated that
7 there were some discrepancies with Ms. Vance's testimony
8 about when exactly she arrived at the club and I think
9 maybe possibly when the altercation took place. Did you
10 bring out that discrepancy to the jury on cross-
11 examination of Ms. Vance?

12 A. I did, yes.

13 Q. That if you -- just for the record, your cross-
14 examination of her with regard to that issue is on page
15 192 and it starts on line 24 and it goes to 193, it's on
16 line 13.

17 [Whereupon, the court reviews documents]

18 Q. [Ms. Wilson] And did you present any evidence in
19 this case on self defense?

20 A. No.

21 Q. With Ms. Fuda's testimony -- and I'm sorry if I'm
22 being redundant, Your Honor -- but you brought out the
23 fact through Ms. Fuda's testimony that it was based on
24 the defendant's medical records, is that correct?

25 A. Yes.

1 Q. And in Ms. Moritzky's testimony you brought up the
2 fact at trial that her testimony was based on the nature
3 of the call received for response by the E-M-S, is that
4 correct?

5 A. That's correct.

6 Q. Did you have any basis for objecting to the gun
7 coming into evidence?

8 A. No.

9 Q. You recall that the gun was found at the scene?

10 A. Right, yes.

11 MS. WILSON: Nothing further from the State, Your
12 Honor.

13 THE COURT: Any redirect of the witness?

14 MR. RHOAD: Briefly, Your Honor.

15 THE COURT: You may proceed.

16 MR. RHOAD: Thank you, Your Honor.

17 THE COURT: You're welcome.

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REDIRECT EXAMINATION

BY MR. RHOAD:

Q. Mr. Shelton, have you ever seen the movie Cool Hand Luke?

A. No, I don't think I have.

Q. A famous line in there is what we have here is a failure to communicate.

A. Right.

Q. You've never seen that movie?

A. I've heard that line, yes.

Q. Now let me ask you this, your testimony to the State right there was that you and Mr. McKelvey didn't communicate very well. Do you remember that?

A. Right, yes.

Q. How can you provide effective assistance of counsel if you can't communicate with your client?

A. The communication broke down later on. At first it was, we worked well together and I got a lot of information from him that I felt was necessary.

We didn't have any other witnesses, didn't have any other information and so it rested on whether the State -- I believed the State could prove their case beyond a reasonable doubt and that was the defense that I chose to go.

Q. I'm going to push you a little bit more. When

1 exactly did the communication break down? Did it break
2 down before trial?

3 A. Yes, it broke down before trial.

4 Q. Okay. Now, is communication before the trial more
5 important than communication at the trial? Let me
6 rephrase that question, I withdraw that.

7 Isn't it important that you be able to communicate
8 with him properly throughout the entire process, not just
9 early on?

10 A. Communication is definitely important with the
11 client to give them what their rights are and to tell
12 them what the evidence is and to give them an idea of
13 whether to plea, go to trial and make that informed
14 decision.

15 But once it goes to trial, which is what Mr.
16 McKelvey wanted from the beginning, it's kind of in my
17 hands and I have to communicate to him what his rights
18 are and he has the ability he can testify, he doesn't
19 have to testify in trial. But at that point in time it's
20 up to me for the defense.

21 Q. Whenever you determined that y'all didn't
22 communicate very well, I'm going to ask that question
23 again. When did you -- when did that come into your mind
24 that I can't communicate with my client?

25 A. It happened very shortly after his, if my memory is

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May 19, 2014

1 correct, very shortly after there was a bond reduction
2 hearing and the Judge denied his bond reduction.

3 Q. That was before the trial.

4 A. That was before the trial, yeah.

5 Q. So y'all began not communicating very well after the
6 bond reduction before the trial?

7 A. Yes.

8 Q. How can you properly prepare a defense and try a
9 case when you can't communicate very well ---

10 MS. WILSON: objection, Your Honor. Asked and
11 answered.

12 MR. RHOAD: It hasn't been answered, Your Honor.

13 THE COURT: I'll give him a little latitude, but...

14 MR. RHOAD: I can rephrase the question ---

15 THE COURT: --- yeah, I think you need to because
16 it's getting a little ---

17 MR. RHOAD: --- I'll rephrase the question ---

18 THE COURT: --- complex and I don't know that he
19 can ---

20 MR. RHOAD: --- thank you, Your Honor. I'll
21 withdraw and rephrase.

22 Q. [Mr. Rhoad] Would you agree with me that the essence
23 of effective assistance in our judicial system requires
24 an ability to communicate with the person you're
25 representing?

1 A. Yes.

2 Q. And you weren't able to communicate well with your
3 client?

4 A. I was able to communicate with my client. I was
5 able to provide him and -- I was able to provide him all
6 the information that he -- necessary. He got all copies
7 of all the evidence they had, but he didn't like what the
8 State was presenting.

9 He didn't think that I was doing my job and so he
10 didn't want to hear what I was doing, he didn't want to
11 hear -- he didn't want to hear any of it because it was
12 not exactly what he thought was taking place. And so I
13 don't think he thought I was doing anything and I
14 disagreed with that and that's where the communication
15 broke down.

16 I think I was doing -- and I had no problem
17 representing him because I had no problem taking the case
18 and separating my -- his and my communication and not
19 being able to communicate and taking the case and looking
20 at the evidence and what I believed that the State could
21 prove and not prove.

22 Q. Okay. But is your testimony still what you
23 testified to Ms. -- to the Attorney General's questions
24 is that you did not communicate very well with your
25 client from the time of the bond reduction denial until.

1 the end of the process.

2 A. It was around that time of the bond reduction
3 denial, but I even still at that point in time filed a
4 motion to have Judge Harrington recused. So, I still
5 defended and looked out for his best interest even though
6 we couldn't communicate.

7 Q. Okay. All right. So your testimony is that you
8 provided effective assistance of counsel for your client
9 even though y'all couldn't communicate?

10 A. Based off communication, I still believe that yes I
11 communicated with him everything that he ---

12 Q. --- okay. Did you tell him that you tried to get
13 in touch with an expert?

14 A. I talked about -- and with him, yes on the gun. The
15 gunsmith and I believe I even talked with the girlfriend
16 at the time about a possible person that she had talked
17 with on guns and whether a 30 -- 380 would be able to --
18 would cause more damage than what was seen on scene and
19 so, but I wasn't able to get a hold of anybody.

20 Q. Okay. So, no medical people, but just a gun
21 expert?

22 A. Right, yes.

23 Q. Okay. And you actually had a gun expert that was
24 going to testify or at least the State did, right? Not a
25 gun expert, but a forensics expert, right?

- 1 A. Right, yeah.
- 2 Q. Through SLED?
- 3 A. Right.
- 4 Q. And they testified that the bullet fragment in the
- 5 gun didn't match?
- 6 A. Right.
- 7 Q. Now, how were you able to effectively cross-examine
- 8 I believe your testimony was two police officers who gave
- 9 substantially different statements if you didn't have the
- 10 entire police report until spontaneously at the moment of
- 11 cross-examination?
- 12 A. I was able to prepare for cross-examination from
- 13 what I had.
- 14 Q. Okay. And you made a statement that you didn't
- 15 want to call the doctor in if he says -- if he's going to
- 16 say it was a gunshot wound, right?
- 17 A. Right.
- 18 Q. But what if he said it wasn't?
- 19 A. I've found that ---
- 20 Q. --- you don't want to call them in?
- 21 A. Yeah, absolutely. I've found that doctors when they
- 22 have their reports tend to not want to go away from their
- 23 own reports.
- 24 Q. I understand. But you agree with me that the doctor
- 25 and not just the emergency room doctor, I mean you got

1 radiologists and the doctors and all ---

2 A. --- yeah ---

3 Q. --- and I mean have you seen the affidavits that
4 they've ---

5 A. --- I have not ---

6 Q. --- submitted. They have not been provided to you?
7 Okay, the only other thing is when you got the full
8 report from the police or from the Solicitor's office you
9 said it was three pages and the one you had was one and a
10 half?

11 A. It's from memory, I'm sorry.

12 Q. Okay. And were you able to compare the incident
13 reports, did you have time since you got it at trial to
14 compare the completed police report with the supplemental
15 statement from the victim?

16 A. I don't remember doing that.

17 Q. Okay. And would you think that that would be
18 important to see whether they were consistencies between
19 or inconsistencies ---

20 A. --- absolutely ---

21 Q. --- between the police report that was given to you
22 in the middle of the trial and the supplemental statement
23 made by the victim?

24 A. Absolutely, yes.

25 Q. You didn't have an opportunity to do that?

1 A. Not that I recall.

2 MR. RHOAD: Thank you, Your Honor.

3 THE COURT: You're welcome. You may step down. Do
4 you have something?

5 MS. WILSON: I did, Your Honor.

6 THE COURT: I'm sorry.

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1 RECCROSS-EXAMINATION

2 BY MS. WILSON:

3 Q. Just briefly, Mr. Shelton, there's no question that
4 the victim was injured in this case is that correct?

5 A. That's correct.

6 THE COURT: I'm sorry, repeat that question, I
7 couldn't hear you.

8 Q. I'm sorry Your Honor. There's no question in this
9 case that the victim was injured?

10 A. That's correct.

11 Q. And this breakdown in communication that you
12 testified about did it in any way affect your trial
13 strategy and how you chose to attack the State's evidence
14 at trial?

15 A. No.

16 Q. Did you think that the testimony from the SLED
17 expert on ballistics was in some way beneficial to Mr.
18 McKelvey?

19 A. I thought it was.

20 Q. And it's also your testimony today that it's been
21 your experience that medical doctors basically testify as
22 to what they included in their written reports, is that
23 correct?

24 MR. RHOAD: Objection Your Honor. Speculation.

25 THE COURT: You asked the question, you elicited

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1 the answer, she can rehabilitate the witness. You may
2 proceed.

3 A. That's been my experience.

4 Q. [Ms. Wilson] Okay. And you testified today about
5 comparing the victim's supplemental statement with the
6 testimony with the incident report additional, I guess,
7 expanded incident report you received during trial and
8 you are aware of the substance of Mr. Phoenix's testimony
9 prior to trial, is that correct?

10 A. Yeah, I had researched it or I had, yes.

11 Q. So you had that in your mind when you reviewed that
12 additional report, is that correct?

13 A. Yes, I would have had it in my mind.

14 Q. Thank you.

15 THE COURT: Anything further?

16 MR. RHOAD: Nothing, Your Honor.

17 THE COURT: Sir, you may step down.

18 [Whereupon, the witness is excused and exits the
19 witness stand]

20 THE COURT: Call your next witness.

21 MS. RHOAD: At this time we would call Suzanne
22 Cromer.

23 [Whereupon, Ms. Cromer comes forward]

24 [Whereupon, the witness is duly sworn by the Clerk
25 of Court]

1 THE COURT: Once seated if you could please state
2 your first and last name and then spell your last for the
3 record.

4 WITNESS: My name is Suzanne Cromer, C-R-O-M-E-R.

5 THE COURT: You may proceed.
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1 SUZANNE CROMER,
2 Having been first duly sworn,
3 Was examined and testified as follows:
4 DIRECT EXAMINATION
5 BY MS. RHOAD:
6 Q. Ms. Cromer, where are you presently employed?
7 A. I'm employed at the South Carolina Law Enforcement
8 Division commonly referred to as SLED.
9 Q. And I believe you testified at Mr. McKelvey's trial?
10 A. Yes ma'am.
11 Q. And I won't go through all of your qualifications
12 because they're in the record from the first transcript,
13 but you were qualified as an expert in the field of
14 firearms identification and testing during that trial,
15 didn't you?
16 A. Yes, ma'am.
17 Q. And you testified to the examination of the bullet
18 fragment, the pistol, the magazine, and the bullet that
19 were found at the scene, correct?
20 A. And the unfired cartridges, yes, ma'am.
21 Q. And what was your conclusion as to the bullet
22 fragment as far as the gun that you were given?
23 A. It was inconclusive -- I'm sorry, it was I found
24 that that bullet fragment was unsuitable for
25 identification. It did not have enough of the markings

1 on it that I needed to compare it to a specific firearm.
2 So, it could have been fired by what was the firearm in
3 this case or any other firearm.

4 Q. And I believe at trial that fragment was introduced
5 into evidence through you, wasn't it?

6 A. I believe so, but let me check my record.

7 [Whereupon, the witness reviews documents]

8 A. I believe it was actually entered or marked as a
9 State's exhibit before I testified about it.

10 Q. Okay. And in your examination of the bullets and
11 fragment, did you observe any blood on any of those
12 items?

13 A. Of the fragment?

14 Q. On the fragment, was there any blood?

15 A. No. When I receive fired evidence, I first look at
16 it and do a visual inspection to see if there's any trace
17 material, blood, fibers. If there is I would collect
18 them but I did not see any in this case?

19 Q. Were you asked that at the trial of Mr. McKelvey?

20 A. Not that I recall.

21 Q. When the gun that found at the scene, a .9mm Makarov
22 -- am I saying that right?

23 A. Yes, ma'am.

24 Q. When that gun fires, should there be both a bullet
25 and a casing?

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May 19, 2014

- 1 A. When a semi-automatic pistol fires it will eject a
2 cartridge case out of the ejection port and it expels the
3 bullet down the barrel of the gun out the muzzle.
- 4 Q. So, casing is not the correct term?
- 5 A. It's a cartridge case.
- 6 Q. Cartridge case, okay. Were you given a cartridge
7 case to examine in this case?
- 8 A. No ma'am, I was not.
- 9 Q. And typically when a person fires the gun that you
10 were looking at in this case, would you expect the casing
11 to be in the general area of where the gun was fired?
- 12 A. Depending on the factors of where it's being fired,
13 you would expect a fired bullet and a fired cartridge
14 case after a cartridge has being fired.
- 15 Q. And you would expect it to be in the general area?
- 16 A. Yes. This particular firearm is designed to eject
17 out the ejection port which is on the right side of the
18 firearm.
- 19 Q. And you were not given a cartridge casing to examine
20 here?
- 21 A. No, ma'am I was not.
- 22 Q. Were you asked about that at the trial of Mr.
23 McKelvey?
- 24 A. I believe, but let me check my records.
- 25 [Whereupon, the witness reviews documents]

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Suzanne Cromer-Direct Examination by Ms. Rhoad
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1 Q. I believe on page 290 you were asked if you were
2 given a casing.

3 A. Yes I was.

4 Q. Okay. But you weren't asked where you would -- if a
5 casing would be expected to be found in the general area?

6 A. That's correct.

7 Q. That's all I have, thank you.

8 THE COURT: Any questions for the witness?

9 MS. WILSON: Beg the court's indulgence.

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1 CROSS-EXAMINATION

2 BY MS. WILSON:

3 Q. Good afternoon, Ms. Cromer. Just briefly, are you
4 always given a casing to test when you're given a bullet
5 fragment?

6 A. No I'm not.

7 Q. Would you also agree that it's possible for a casing
8 to be removed for a scene -- from a scene and not -- or
9 not just not collected?

10 A. That is correct.

11 Q. Thank you.

12 THE COURT: I have a question if there's no, well
13 is there any redirect?

14 MS. RHOAD: I have nothing further.

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1 CROSS-EXAMINATION

2 BY THE COURT:

3 Q. Ms. Cromer, would it be unusual for blood to be on
4 the fragment?

5 A. I have seen it -- no, it's not unusual for some
6 blood to be on a fragment, but then it's also not unusual
7 to not find blood on a fragment.

8 Q. So sometimes there is, sometimes there isn't?

9 A. That's correct.

10 Q. And what accounts for that differential?

11 A. It could be if it went through a body, it could be
12 if it had to go back through clothing and it was wiped
13 off on the clothing. It could be, I believe if it --
14 where it ended up, if it ended up in a door frame it
15 could have come off on that.

16 It could also be that this bullet is going at a high
17 rate of speed so it's very hot from being expelled from
18 the burning gases so it could dissipate it. There are
19 many factors why there is or isn't blood on a particular
20 projectile.

21 Q. Do you know within your experience with SLED a
22 percentage of the time generally that you have blood on a
23 fragment and the percentage you don't? Is it more likely
24 than not that you have it or don't have it or is it like
25 50/50?

1 A. It's a 50/50 case.

2 THE COURT: Are there any questions as a result of
3 the court's questions from the applicant?

4 MS. RHOAD: I don't have any questions.

5 THE COURT: From the State?

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

7 THE COURT: Any objection to the witness being
8 excused from the State?

9 MS. WILSON: No objection, Your Honor.

10 THE COURT: From the applicant?

11 MS. RHOAD: No, Judge.

12 THE COURT: Thank you Ms. Cromer, you're excused.
13 [Whereupon, the witness is excused and exits the
14 witness stand]

15 THE COURT: You can call your next witness.

16 MS. RHOAD: At this time we would call Cynthia
17 Fuda.

18 [Whereupon, Ms. Fuda comes forward]

19 [Whereupon, the witness is duly sworn by the Clerk
20 of Court]

21 CLERK OF COURT: Once seated could you please state
22 your first and last name and then spell your last for the
23 record.

24 WITNESS: My name is Cynthia Fuda, F-U-D-A.

25 THE COURT: You may proceed.

1 CYNTHIA FUDA,
2 Having been first duly sworn,
3 Was examined and testified as follows:
4 DIRECT EXAMINATION
5 BY MS. RHOAD:
6 Q. And Ms. Fuda you testified as a witness in Mr.
7 McKelvey's trial?
8 A. Yes, ma'am.
9 Q. Can you tell the court the position that you
10 currently hold where you work?
11 A. I'm a registered nurse at the Medical University of
12 South Carolina in the surgical trauma intensive care
13 unit.
14 Q. And did you hold that position during or prior to
15 Mr. McKelvey's trial?
16 A. Yes, ma'am. I've been there 21 years.
17 Q. And I won't go through your qualifications again,
18 but you qualified as an expert in the area of intensive
19 care nursing at your trial -- at Mr. McKelvey's trial,
20 correct?
21 A. Yes, ma'am.
22 Q. And you treated Mr. Phoenix when he was brought into
23 MUSC?
24 A. Yes, ma'am.
25 Q. I know you've had a lot of training in treating

- 1 wounds, correct?
- 2 A. Correct.
- 3 Q. Have you had any training in treating gunshot
- 4 wounds?
- 5 A. Yes, ma'am.
- 6 Q. Have you had any training in determining whether a
- 7 wound is a gunshot wound or some other kind of wound?
- 8 A. No, ma'am. That would fall under diagnosis and
- 9 nurses don't diagnose.
- 10 Q. Would you consider yourself to be an expert in
- 11 determining if a wound is a gunshot wound?
- 12 A. No, ma'am.
- 13 Q. And at Mr. McKelvey's trial were you allowed to
- 14 testify that the wound that was suffered by Mr. Phoenix
- 15 was a gunshot wound?
- 16 A. I don't recall the exact word ---
- 17 Q. --- did you use ---
- 18 A. --- wording ---
- 19 Q. --- the term gunshot wound when referring to Mr.
- 20 Phoenix's wounds?
- 21 A. I believe I probably did because that was his
- 22 admitting diagnosis.
- 23 Q. Okay. And I won't ask any other questions right
- 24 now, thank you though.
- 25 THE COURT: Any questions for the witness?

1 CROSS-EXAMINATION

2 BY MS. WILSON:

3 Q. Ms. Fuda?

4 A. Fuda.

5 Q. Fuda. Thank you. You assumed care of Mr. Phoenix

6 after he'd been admitted to MUSC, is that correct?

7 A. Yes, ma'am.

8 Q. And your testimony at trial was based on Mr. Fuda's

9 [sic] records and your experience as an I-C-U nurse, is

10 that correct?

11 A. Yes.

12 Q. Prior to your testimony at trial did you review Mr.

13 Phoenix's medical records?

14 A. Yes, ma'am.

15 Q. Do you recall telling the court that Mr. Phoenix's

16 history that was referenced in his records was based on

17 what the medical experts, I guess the doctor and maybe

18 the admitting nurse had been told by others including Mr.

19 Phoenix?

20 A. I think so.

21 Q. Maybe I could have asked that a little more

22 artfully. But you told the court that his history was

23 based on what you or the doctor had been told, is that

24 correct?

25 A. Correct.

1 Q. So your testimony at trial, it wasn't based on you
2 reviewing the wound and seeing it as a gunshot wound, is
3 that correct?

4 A. Correct.

5 Q. Thank you.

6 THE COURT: You may proceed.

7 MS. RHOAD: Thank you.

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Jermaine McKelvey v State of S.C.
Cynthia Fuda-Redirect Examination by Ms. Rhoad
May 19, 2014

1 REDIRECT EXAMINATION

2 BY MS. RHOAD:

3 Q. Ms. Fuda, where would the -- where do you think that
4 the admitting doctor would have gotten the diagnosis of
5 gunshot wound?

6 A. Probably from the police or E-M-S when they brought
7 the patient into the E-R.

8 Q. Okay. So he relies on that history that he's been
9 given?

10 A. I would think so.

11 Q. Thank you.

12 THE COURT: Any further questions for the witness?

13 MS. RHOAD: I don't have any further questions.

14 THE COURT: Anything further from the State?

15 MS. WILSON: Nothing further from the State?

16 THE COURT: Any objections to the witness being
17 excused from the State?

18 MS. WILSON: No objection from the State, Your
19 Honor.

20 THE COURT: From the applicant? From the
21 applicant?

22 MS. RHOAD: No objection.

23 THE COURT: Ma'am, you're excused.

24 [Whereupon, the witness is excused and exits the
25 witness stand]

1 THE COURT: You can call your next witness.

2 MS. RHOAD: Judge at this time we would call

3 Michelle Moritzky.

4 [Whereupon, Ms. Moritzky comes forward]

5 [Whereupon, the witness is duly sworn by the Clerk
6 of Court]

7 CLERK OF COURT: Once seated ma'am, if you could
8 please state your first and last name and then spell your
9 last for the record.

10 THE WITNESS: Michelle Moritzky, M-O-R-I-T-Z-K-Y

11 THE COURT: You may proceed.

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1 MICHELLE MORITZKY,
2 Having been first duly sworn,
3 Was examined and testified as follows:
4 DIRECT EXAMINATION
5 BY MS. RHOAD:
6 Q. Ms. Moritzky, what is your current position?
7 A. I'm a paramedic with Berkeley County.
8 Q. And did you hold that position during the trial of
9 Mr. McKelvey?
10 A. Yes, ma'am.
11 Q. Did you treat Mr. Bernard Phoenix?
12 A. Yes, ma'am.
13 Q. At the trial of Mr. McKelvey did you testify that
14 Mr. Phoenix suffered a gunshot wound?
15 A. Right. We were called to the scene of a gunshot
16 wound. We found him with a penetrating type injury to
17 his head.
18 Q. And over -- so the dispatcher told you it was a
19 gunshot wound?
20 A. Right.
21 Q. And I know you've had a lot of training in medical
22 treatment, have you had training in medical treatment of
23 gunshot wounds?
24 A. Yes, ma'am.
25 Q. Have you had any training in the diagnosis of a

1- gunshot wound versus some other type of wound?

2 A. No. We treat the injury and the symptoms of the
3 injury. Diagnosing it as a gunshot wound would take like
4 a CT, x-ray, gunshot residue; we just treat the injury
5 and the symptoms of the injury.

6 Q. Would you consider yourself to be an expert in
7 diagnosing whether a wound is a gunshot wound or some
8 other type of wound?

9 A. No, not an expert on diagnosing it as a gunshot
10 wound or any other kind of wound. I'm just a -- I treat
11 the injury itself.

12 Q. Okay. Thank you, no other questions.

13 THE COURT: Any questions for the witness?

14 MS. WILSON: Yes, Your Honor.

15 THE COURT: You may proceed.

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Jermaine McKelvey v State of S.C.
Michelle Moritzky-Cross-Examination by Ms. Wilson
May 19, 2014

CROSS-EXAMINATION

BY MS. WILSON:

Q. Ms. Moritzky the first time you came into contact with the victim was at the scene, is that correct?

A. Yes, ma'am.

Q. And now after you came into contact with the victim or any time leading up to trial you never diagnosed Mr. Phoenix [phonetic] as having a gunshot wound, is that correct?

A. No. It's documented that we were called to the scene of a gunshot wound, that he had what appeared to be a gunshot wound to his head.

MS. RHOAD: I'm going to object to her testifying to what appeared to be a gunshot wound.

THE WITNESS: That's just what my report says.

THE COURT: There's no basis to object to that in this P-C-R hearing.

MS. RHOAD: Thank you.

THE COURT: It's -- you questioned on direct and she's entitled to inquire as to the exact scope of her testimony. You may continue.

MS. WILSON: Thank you, Your Honor.

THE COURT: You're welcome.

Q. [Ms. Wilson] So at trial you testified that Mr. Phoenix his wound seemed to indicate a gunshot wound to

1 the head, is that correct?

2 A. Yes, ma'am.

3 Q. And is the basis of that testimony your experience
4 as an emergency medical service professional?

5 A. Yes, the type of injury that it was the amount of
6 blood, also the casing that was found and secured by the
7 police.

8 Q. Have you responded to scenes where victims have
9 suffered gunshot wounds before?

10 A. Yes, ma'am.

11 Q. Is that something that you see frequently?

12 A. I wouldn't say frequently, but I've been doing this
13 over 10 years so I've seen some.

14 Q. It's safe to say it wasn't your first time seeing
15 what was alleged to be a gunshot wound?

16 A. Correct.

17 Q. Okay. Thank you.

18 THE COURT: Any redirect?

19 MS. RHOAD: Nothing further, thank you.

20 THE COURT: Any objection to this witness being
21 excused?

22 MS. WILSON: No objection, Your Honor.

23 THE COURT: From the applicant any objection to the
24 witness being excused?

25 MS. RHOAD: No objection.

1 THE COURT: Ma'am, you're excused.

2 [Whereupon, the witness is excused and exits the
3 witness stand]

4 THE COURT: You may proceed. You may call your
5 next witness.

6 MR. RHOAD: Your Honor, I'd like to call Mr.
7 McKelvey, but before we do that did the court receive and
8 accept the affidavits of ---

9 THE COURT: --- I'd have had to have that without
10 objection from the state because they're entitled to
11 cross-examine the witnesses. You don't generally take
12 affidavits in lieu of live testimony.

13 MS. RHOAD: Well judge, I believe the rules in
14 P-C-R's allow affidavits to be admitted in lieu of live
15 testimony.

16 MS. WILSON: She's just saying with my permission
17 so just give me one second.

18 THE COURT: I need her consent. I'm trying to
19 determine if she objects or not ---

20 MS. RHOAD: --- oh, okay. I didn't ---

21 MS. WILSON: --- thank you, Your Honor. Beg the
22 court's indulgence.

23 THE COURT: Well the rules don't say that but I
24 think black letter precedent I need to determine what the
25 position of the opposing party is to the admissibility of

1 the documents.

2 MS. RHOAD: Okay.

3 [Whereupon, Ms. Wilson reviews documents]

4 MS. WILSON: Your Honor, no objection to the

5 affidavits being entered.

6 THE COURT: Okay, they'll be marked and admitted

7 whatever the next exhibits will be in line.

8 MS. RHOAD: I'm sorry, Judge I didn't hear ---

9 THE COURT: --- they'll be marked and admitted by

10 the court reporter whatever the next numbers are in line

11 by the court reporter.

12 MR. RHOAD: Without objection?

13 THE COURT: Without objection.

14 MR. RHOAD: Okay, thank you.

15 [Whereupon, plaintiff's exhibit numbers 1 and 2 are

16 marked by the court reporter]

17 [Whereupon, plaintiff's exhibit numbers 1 and 2 are

18 entered into evidence by the court]

19 THE COURT: Proceed.

20 MS. RHOAD: So at this time we'd like to ---

21 THE COURT: --- I've already admitted the

22 documents. I need you to call your next witness, time is

23 at a premium.

24 MR. RHOAD: Mr. McKelvey, Your Honor.

25 THE COURT: Sir, please stand please and raise your

1 right hand to be sworn.

2 [Whereupon, the witness is duly sworn by the court]

3 THE COURT: Will you have a seat for me sir and
4 state your full name for the record spelling your last
5 name for the court reporter.

6 MR. RHOAD: He can stay right here, Your Honor.

7 THE COURT: Yes, it's easier for us.

8 THE WITNESS: Jermaine McKelvey, M-C-K-E-L-V-E-Y.

9 THE COURT: Thank you, sir. You may proceed.

10 MR. RHOAD: Thank you, Your Honor. If I may have
11 just a moment, please?

12 [Whereupon, Mr. Rhoad reviews documents]

1 JERMAINE MCKELVEY,
2 Having been first duly sworn,
3 Was examined and testified as follows:
4 DIRECT EXAMINATION
5 BY MR. RHOAD:
6 Q. Mr. McKelvey, you've been in court all day today.
7 A. Yes, sir.
8 Q. And you heard your attorney at the trial, Mr.
9 Shelton, say I believe his exact words were we did not
10 communicate very well.
11 A. Yes, sir.
12 Q. Did you hear that?
13 A. Yes, sir.
14 Q. Do you agree with that?
15 A. No, sir. Yes, sir.
16 Q. You agree with you and your lawyer did not
17 communicate ---
18 A. --- yes, sir ---
19 Q. --- very well.
20 A. Yes, sir.
21 Q. Okay. Do you think that affected his ability to
22 represent you at trial?
23 A. Yes, sir.
24 Q. Do you feel like he explained to you fully his trial
25 strategy?

1 A. No, sir. I believe he abandoned me during the
2 proceeding of trial.

3 Q. Okay. And did you discuss with him from the
4 beginning that -- and tell him from the beginning that
5 you did not shoot Mr. Phoenix?

6 A. Yes, sir.

7 Q. Okay. And did he ever tell you that he tried to
8 find any witnesses to substantiate that? When I say
9 witnesses, I mean medical expert witnesses.

10 A. No, sir.

11 Q. Okay. Did he ever tell you that he tried to
12 contact some firearms expert?

13 A. No, sir.

14 Q. He did not tell you that either?

15 A. No, sir.

16 Q. Okay. And did he communicate with you before trial
17 that he wasn't going to present any witnesses?

18 A. No, sir. I believe he spoke to the Judge about
19 that.

20 Q. Well I'm asking -- I don't want to know what he said
21 to the Judge ----

22 A. --- no, sir ---

23 Q. --- I want to focus on what he said to you. Did he
24 tell you that he was not going to present any witnesses?

25 A. No, sir.

- 1 Q. Okay. Did you discuss with him that how are you
2 going to prove to a jury that I didn't shoot this man if
3 you're not going to call any witnesses?
- 4 A. Yes, sir.
- 5 Q. What was his response to that?
- 6 A. He told me he was ready to go to trial.
- 7 Q. He was ready and prepared for trial?
- 8 A. Yes, sir.
- 9 Q. Okay. Do you believe he was ready and prepared for
10 trial?
- 11 A. No, sir. I believe he was highly ineffective.
- 12 Q. Okay. Those are some catch words, but let's
13 discuss those catch words, okay? Do you agree Mr.
14 Shelton understood that his trial strategy was that you
15 didn't shoot Mr. Phoenix?
- 16 Do you believe he understood that, not whether he
17 did a good job of trying to prove it, but did he
18 understand it?
- 19 A. No.
- 20 Q. No? Okay. Why do you say that?
- 21 A. Basically counsel was ineffective during the
22 proceeding of trial and prior and highly incompetent.
- 23 Q. Okay. Well now, I understand what you're saying
24 and I know you've obviously been doing some reading, but
25 we got to try to show the court why you concluded that

1 okay. Did he allow the experts that weren't qualified as
2 experts to testify that the man was shot?

3 A. Yes, sir.

4 Q. Did he allow that?

5 A. Yes, sir.

6 Q. Do you think that was effective?

7 A. No, sir.

8 Q. Okay. Did he have the full police report prior to
9 trial?

10 A. No, sir.

11 Q. Okay. Do you think he should have asked for a
12 continuance or a new trial so that he could've prepared
13 better testimony of Officer Willingham and Officer
14 Edwards?

15 A. Yes, sir.

16 Q. Okay. Do you think that he should have allowed the
17 bullet fragment to come in when the SLED says it could
18 have come from that gun or any other gun?

19 A. No, sir.

20 Q. Did you discuss with him did he communicate with you
21 whether he thought that evidence coming in helped your
22 case?

23 A. I don't understand that question.

24 Q. All right. You heard Mr. Shelton testify that he
25 thought allowing that evidence of the bullet fragment to

1 come in to evidence helped your case. Did you ever --
2 did he ever communicate that to you?
3 A. No, sir.
4 Q. Did he ever tell you why he thought that helped your
5 case?
6 A. No, sir.
7 Q. Okay. Did you ever communicate with him about the
8 E-M-S person being able to testify ---
9 A. --- no, sir ---
10 Q. --- that it was a gunshot wound?
11 A. No, sir.
12 Q. Prior to trial did you discuss with him whether the
13 doctor was going to testify?
14 A. Yes, sir.
15 Q. All right. What did he tell you?
16 A. He told me he was ready and prepared for trial.
17 Q. Let's go back specifically, did he tell you whether
18 the doctor that actually treated Mr. Phoenix was going to
19 testify?
20 A. No, sir.
21 Q. One way or the other?
22 A. No, sir.
23 Q. Okay. So when you first found that fact out when
24 you were at trial?
25 MS. WILSON: Objection. Your Honor. Leading.

- 1 THE COURT: Sustained. Leading.
- 2 Q. [Mr. Rhoad] Okay. When did you first find that out?
- 3 A. What's the question again?
- 4 Q. At some point you found out that the doctor that
- 5 treated Mr. Phoenix was not going to testify at trial,
- 6 correct?
- 7 A. During the proceeding of trial.
- 8 Q. So when did you find that out?
- 9 A. During the proceeding of trial.
- 10 Q. Okay. Did you communicate with Mr. Shelton on what
- 11 effect, if any, that might have on the defense of your
- 12 case?
- 13 A. No, sir.
- 14 Q. Okay. Let me ask you this, did you and Mr. Shelton
- 15 communicate at all during the trial?
- 16 A. No, sir.
- 17 Q. Did he tell you why he was letting this person
- 18 testify as an expert?
- 19 A. No, sir.
- 20 Q. Or that person testify as an expert ---
- 21 A. --- no, sir.
- 22 Q. Did he tell you why he didn't think he needed more
- 23 time to fully review the entire police report?
- 24 A. No, sir.
- 25 Q. You heard him testify that it had some substantial

1 differences in it ---
2 A. --- yes, sir ---
3 Q. --- correct?
4 A. Yes, sir.
5 Q. But yet he didn't ask for time to review it or
6 additional time to think about those substantial
7 differences, did he communicate that with you?
8 A. No, sir.
9 Q. Did he communicate with you about Ms. Vance who I
10 think testified that she saw you with the gun at the
11 Pleasure Lounge [phonetic]? Did he communicate with you
12 as to why he was going to or how he was going to handle
13 her testimony?
14 A. No, sir. He just I think he just gave me a rap
15 sheet of Ms. Vance before she took the stand.
16 Q. Okay. You were at the trial though, right?
17 A. Yes, sir.
18 Q. And do you remember him questioning Ms. Vance about
19 the -- where she was and when she was and what she saw?
20 A. No ---
21 Q. --- do you remember any of that? I know it's been a
22 long time, but I believe on page 194 of the transcript
23 Mr. Shelton's questioning Ms. Vance basically asks her
24 what time she got there, do you remember that?
25 A. Somewhat, sir. Yes, sir.

1 Q. Okay. And I believe she said she got there at what
2 time? Page 193, line 12 of the transcript what time did
3 she say she got there?

4 A. 2 o'clock --

5 THE COURT REPORTER: I'm sorry?

6 A. 2 o'clock a.m.

7 Q. [Mr. Rhoad] All right, 2 o'clock am. And did you
8 hear Mr. Shelton ask Ms. Vance how she could have seen
9 what she later testifies to at 2 o'clock am when you and
10 Mr. Phoenix the victim, had already left the scene by
11 1:15 a.m.?

12 A. Yes, sir.

13 Q. Did he ask her that? Show me in here if you
14 remember that he asked her that. He just asked her what
15 time she got there, right?

16 A. Correct.

17 Q. He didn't ask her anything else, did he?

18 A. Correct.

19 Q. Okay. So do you think it was effective for him to
20 have that information in front of the jury that this key
21 witness got there at 2 a.m. when the incident and you and
22 Mr. Phoenix had already left according to the testimony
23 of a police officer by 1:15 a.m.?

24 A. Yes, sir.

25 Q. And how could she have seen what she said she saw 45

Jermaine McKelvey v State of S.C.
Jermaine McKelvey-Direct Examination by Mr. Rhoad
May 19, 2014

- 1 minutes later if she wasn't there when this incident
2 occurred?
- 3 A. There's no way she could have seen.
- 4 Q. Was that -- do you think that was effective
5 assistance of counsel?
- 6 A. No, sir.
- 7 Q. Okay. You've had a lot of time to do some research
8 and I know you're not a lawyer, but you know about this
9 case that I mentioned earlier about malice and you can
10 imply malice if a firearm is used during an incident,
11 correct?
- 12 A. Yes, sir.
- 13 Q. Okay. But you know that that was not correct,
14 correct?
- 15 A. Yes, sir.
- 16 Q. Now did Mr. Shelton object at trial to that?
- 17 A. No, sir.
- 18 Q. Do you think that was an effective assistance of
19 counsel?
- 20 A. No, sir.
- 21 Q. Do you agree with me that if you can't communicate
22 with your lawyer, then he can't effectively represent
23 you?
- 24 A. Correct, sir.
- 25 Q. Were you able to communicate with Mr. Shelton?

- 1 A. No, sir.
- 2 Q. Did you like Mr. Shelton?
- 3 A. No, sir.
- 4 Q. Did Mr. Shelton like you?
- 5 A. I really don't know sir, but I would believe not.
- 6 Q. Okay. All right and you think he knew you didn't
- 7 like him?
- 8 A. It's a possibility.
- 9 Q. That make it difficult to communicate, too?
- 10 A. Correct.
- 11 Q. Okay. Anything else that you think that Mr.
- 12 Shelton didn't communicate with you that was important?
- 13 Can you think of anything else while I look at my
- 14 questions?
- 15 A. On the communication of not subpoenaing no witness
- 16 at all.
- 17 Q. Okay. Let me ask you that. Did he tell you that
- 18 he was not going to; prior to trial did he tell you that
- 19 he was not going to subpoena any witnesses?
- 20 A. No, sir.
- 21 Q. Okay. Had he told you that -- I'll strike that,
- 22 let's move on. Did he discuss with you, well I guess I
- 23 already asked that question -- he didn't get the police
- 24 report the full police report until the middle of the
- 25 trial, correct?

- 1 A. Yes, sir.
- 2 Q. Did he discuss with you during the trial or at any
3 time before moving forward the using his own words the
4 substantial differences between what they gave him before
5 trial and what they gave him at trial?
- 6 A. No, sir.
- 7 Q. Did he discuss that with you?
- 8 A. No, sir.
- 9 Q. Did he ask the court to take a break?
- 10 A. No, sir.
- 11 Q. Sit down with you and say okay Mr. McKelvey there's
12 some significant differences here, I think maybe we
13 should ask for a break to do something, did he
14 communicate anything ---
- 15 A. --- no, sir, none.
- 16 Q. Just went forward?
- 17 A. Yes, sir.
- 18 Q. Said he was prepared for trial?
- 19 A. Yes, sir.
- 20 Q. Even though he didn't have the full police report?
- 21 A. Yes, sir.
- 22 Q. So you would agree with me then that -- let me back
23 up -- you would agree with me that you communicated with
24 Mr. Shelton from the start that you did not shoot Mr.
25 Phoenix, is that correct?

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Jermaine McKelvey-Direct Examination by Mr. Rhoad
May 19, 2014

1 A. Yes, sir.

2 Q. Okay. And do you believe that he did anything
3 affirmatively and what I mean by that is his steps to try
4 to prove that theory?

5 A. No, sir.

6 Q. Okay and do you believe by him not doing anything to
7 try to prove that theory was effective?

8 A. No, sir.

9 Q. And you got convicted?

10 A. Yes, sir.

11 Q. And everybody who had no expertise to testify that
12 it was a gunshot wound was allowed to be qualified as
13 experts without objection and allowed to testify,
14 correct?

15 A. Yes, sir.

16 Q. And you believe that was effective assistance of
17 counsel?

18 A. No, sir.

19 Q. Have you seen the affidavits that have been filed
20 with the court without objection from the State of South
21 Carolina? Did they provide you a copy of affidavits from
22 the radiologist who read the C-T scan?

23 A. Yes, sir.

24 Q. And you agree with me that that radiologist
25 concluded that at least from one of the scans that it was

- 1 not a gunshot wound, correct?
- 2 A. Correct, sir.
- 3 Q. And the expert, Dr. Schabel says in his affidavit
4 that he's never seen in all his years a gunshot wound
5 where there wasn't metallic fragments showing up on a C-T
6 scan, correct?
- 7 A. Yes, sir.
- 8 Q. And his affidavit says there wasn't any metallic
9 fragments?
- 10 A. Yes, sir.
- 11 Q. Now, did Mr. Shelton and we've already heard his
12 testimony but did he discuss with you maybe we ought to
13 get somebody to look at the CAT scans or the x-rays?
- 14 A. No, sir.
- 15 Q. Okay. You heard him testify he didn't try to call
16 anybody but a ballistics expert, right?
- 17 A. Yes, sir.
- 18 Q. Okay. We already had a ballistics expert from SLED
19 right?
- 20 A. Yes, sir.
- 21 Q. That says we couldn't match the bullet with the gun
22 or the fragment with the gun, right?
- 23 A. Yes, sir.
- 24 Q. But yet he let the bullet fragment into evidence ---
25 MS. WILSON: Objection, Your Honor. He's leading

1 the witness.

2 THE COURT: Leading

3 MR. RHOAD: I am, I'm sorry.

4 THE COURT: Okay.

5 MR. RHOAD: I get to going, that's how I read
6 sometimes.

7 THE COURT: It's okay. You may rephrase.

8 MR. RHOAD: I'll rephrase.

9 Q. [Mr. Rhoad] Did you -- you went to trial, right?

10 A. Yes, sir.

11 Q. Did the bullet fragment come in as evidence at your
12 trial?

13 A. Yes, sir.

14 Q. Did your lawyer discuss with you why or why he
15 thought it was a good idea for it to come in?

16 A. No, sir.

17 Q. So he didn't communicate with you on that either?

18 A. No, sir.

19 Q. Okay. So basically when this trial got going it
20 just went on down the road and what happened is what
21 happened?

22 A. Yes, sir.

23 Q. And he called no witnesses on your behalf?

24 A. No, sir.

25 Q. Let me ask you this. I think the state provided you

1 with a plea bargain agreement or an offer ---
2 A. --- yes, sir ---
3 Q. --- prior to your trial, correct?
4 A. Yes, sir.
5 Q. I think it was a maximum of 12 and minimum of 18
6 [sic], correct?
7 A. Yes, sir.
8 Q. And you turned that down?
9 A. Yes, sir.
10 Q. Okay. That was before the trial, right?
11 A. Yes, sir.
12 Q. Now, would it have made any difference in your mind
13 if you had known at the time that you turned down the
14 plea that your lawyer was not going to call any witnesses
15 as he indicated to you I think you said he was?
16 A. No sir, because my victim never was shot.
17 Q. Okay. So it wouldn't have made a difference?
18 A. No.
19 Q. Okay. That's all Your Honor, thank you.
20 THE COURT: Any questions for the witness?
21 MS. WILSON: Yes, Your Honor briefly.
22 THE COURT: You may proceed.
23
24
25

1 CROSS-EXAMINATION

2 BY MS. WILSON:

3 Q. Mr. McKelvey, today you testified as to what you

4 didn't ---

5 A. --- I can't hear you.

6 Q. What did you say?

7 MR. RHOAD: He can't hear you.

8 Q. [Ms. Wilson] Oh, I'm sorry. I can get louder. Mr.

9 McKelvey, you testified today that you didn't discuss

10 with Mr. Shelton a lot of things, is that correct?

11 A. Yes, ma'am.

12 Q. What did you discuss with Mr. McKelvey [sic]?

13 A. Mr. who?

14 Q. I mean I'm sorry, Mr. Shelton.

15 A. That I didn't want to go to trial, that I'm

16 innocent, my victim never was shot nor did I rob him.

17 Q. So you declared your innocence and what else did you

18 talk to him about?

19 A. Subpoenaing witnesses, something he never did.

20 Q. How frequently did y'all meet?

21 A. I got it down here somewhere. I don't know

22 precisely.

23 Q. You can give me a guesstimate.

24 A. Probably about four to five times.

25 Q. And so -- how long were these meetings with him?

1 A. Not very long.

2 Q. And so after meeting with him for four to five times
3 you're saying today that all you talked to him about was
4 how you didn't want to go to trial and that you were
5 innocent. That's the only thing you told him?

6 A. Yes, ma'am that's the truth.

7 Q. Okay. And so you testified that you didn't
8 communicate with Mr. Shelton during trial, is that
9 correct?

10 A. That's correct.

11 Q. And you agree that you don't have any legal training
12 or background is that correct?

13 A. No, ma'am, I'm lame to the --

14 THE COURT REPORTER: I'm sorry I can't hear you.

15 A. No ma'am, I'm lame to the law.

16 Q. [Ms. Wilson] And so today you testified -- okay well
17 first, did you review the affidavits created by the
18 radiologists on behalf of your P-C-R attorney?

19 A. Yes, ma'am.

20 Q. Okay. You reviewed that. And you would agree that
21 that affidavit doesn't say that the victim didn't suffer
22 a gunshot wound, is that correct?

23 A. Yes, ma'am.

24 Q. You talked about your problems communicating with
25 Mr. Shelton. Had he communicated better to your liking

1 I guess, how would your trial have been different? How
2 would your -- how would the outcome of your trial been
3 different?

4 A. It wouldn't have been different because I'm still
5 innocent.

6 Q. Okay. So you're saying you would have had the same
7 outcome even if you communicated with Mr. Shelton?

8 A. Uh Huh.

9 Q. Thank you.

10 THE COURT: Any redirect?

11 MR. RHOAD: The only redirect is -- Your Honor.

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REDIRECT EXAMINATION

BY MR. RHOAD:

Q. The affidavits that we submitted don't say that it wasn't a gunshot wound, but they don't say it was a gunshot wound either, correct?

A. Correct.

Q. And if they testified to that effect in front of the jury, okay, not that it was a gunshot wound or was not a gunshot wound but they couldn't tell one way or the other, you don't believe that that would have made a difference as far as the jury is concerned ---

A. --- oh, yes, yes.

Q. And if the jury had been convinced by that evidence and the exclusion of all the other evidence that we've talked about that shouldn't have come in, do you believe that the jury could have found you not guilty?

A. Yes, sir.

Q. Okay. And that would have made a difference, correct?

A. Yes, right.

Q. So she asked you if it would have made a difference, you're just saying, I believe, that you innocent?

A. Yes, sir.

Q. Okay. And you've maintained that from the beginning?

1 A. Yes, sir.

2 Q. But the question that I'm asking you and I think the
3 question the court is more concerned with the answer to
4 is if all of these things that we've pointed out that we
5 believe had not been done, the jury charge, allowing
6 people to testify as experts who weren't qualified to
7 testify as experts, and then these affidavits do you
8 believe in your mind as a whole the jury could have very
9 well reached a different conclusion than guilty?

10 A. Yes, sir.

11 Q. Okay. And you didn't get that chance?

12 A. No, sir.

13 Q. And believe that you didn't get that chance because
14 your attorney was not effective in representing you?

15 A. Yes, sir.

16 Q. And the State said you didn't communicate with Mr.
17 Shelton. I'm asking you did he communicate with you?

18 A. No, sir.

19 Q. Okay. So it's not just a one way street, it's a
20 two way street, y'all weren't communicating?

21 A. Yes, sir.

22 Q. And how can you -- you agree with me it's hard to
23 get effective assistance of counsel without
24 communication?

25 A. Correct.

1 Q. That's all I've got.

2 THE COURT: Have anything further -- I'm sorry; you
3 wanted to ask him something?

4 MS. WILSON: One question, Your Honor.

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RECROSS-EXAMINATION

BY MS. WILSON:

Q. Mr. McKelvey, did you ever communicate with Mr. Shelton by writing -- in writing?

A. Yes, ma'am.

Q. Okay. Thank you.

THE COURT: Any further witnesses from the applicant?

MR. RHOAD: I don't get to ask him one more question?

THE COURT: Oh yeah, I'm sorry -- I apologize.

1 REDIRECT EXAMINATION
2 BY MR. RHOAD:
3 Q. Did Mr. Shelton ever communicate with you in
4 writing?
5 A. No, ma'am.
6 Q. No, ma'am?
7 A. No, sir, no, sir.
8 Q. All right.
9 THE COURT: You may call your next witness ---
10 MR. RHOAD: --- I know what you're going to say.
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RECROSS-EXAMINATION

BY MS. WILSON:

Q. Did you ever receive any letters from Mr. Shelton?

A. Yes, ma'am.

Q. Thank you.

THE COURT: Last shot? So you're done?

REDIRECT EXAMINATION

1
2 BY MR. RHOAD:

3 Q. Let me ask you this ---

4 A. --- letters and writing is different ---

5 Q. --- hold on. Let me ask you this. Did you ever
6 receive any effective communication from Mr. Shelton?

7 A. No, sir.

8 THE COURT: That's a leading question and that's
9 for the court to determine.

10 MR. RHOAD: Okay. Thank you.

11 THE COURT: That's a catch phrase; you going to
12 have to be more specific than that. All right. Do you
13 have any further witnesses?

14 MR. RHOAD: No, Your Honor. I think that that is
15 our entire case?

16 THE COURT: Okay. Does the State have any
17 witnesses?

18 MS. WILSON: Nothing from the state, Your Honor.

19 THE COURT: I'll be glad to hear any argument.

20 MR. RHOAD: Would we be first?

21 THE COURT: Yes.

22 MR. RHOAD: Thank you, Your Honor.

CLOSING ARGUMENT

BY MR. RHOAD:

Your Honor, I really believe that the basis of our P-C-R we covered a lot of specific facts. The basis of our P-C-R is really in three areas. One is the failure to object to certain evidence at trial. I believe that it is clear from the record and clear from Mr. Shelton's testimony that he allowed non-experts to testify on the ---

THE COURT: --- only one person was qualified as an expert, correct? The E-M-T was not qualified as an expert was she? Or did I miss something?

MR. RHOAD: The E-M-T was, Your Honor, on page...

THE COURT: Somebody else I was looking at that was not qualified.

MR. RHOAD: The two people that we called, Your Honor, Nurse Fuda and ---

THE COURT: --- yes, Nurse Fuda was qualified as an expert in intensive care nursing, but that was the extent of her qualifications.

MS. RHOAD: And Ms. Moritzky was qualified too --

MS. WILSON: She was not qualified on page 253.

THE COURT: Yeah, I thought I made a note of it. The Judge made a finding that under Rule 702 that being qualified as an expert was not necessary because she was

1 testifying based on her rational perception of what she
2 was treating the patient for. Yeah, page 251.

3 MS. RHOAD: Well, I thought ---

4 THE COURT: --- she moved for it, but it wasn't
5 given.

6 MS. RHOAD: But I thought that meant -- I took it
7 that he did qualify her as an expert ---

8 THE COURT: --- if you qualify somebody as an
9 expert, you say they're an expert.

10 MS. RHOAD: Okay. I'm sorry Judge, I misread
11 that. I took it to mean that he qualified her but only
12 could give opinions under certain things.

13 THE COURT: No, you can give ---

14 MS. RHOAD: --- in her expertise ---

15 THE COURT: --- opinions based on your rational
16 perception. That's the rule he's referring to.

17 MS. RHOAD: I took that to mean her expertise was
18 going to be limited to emergency medical response and not
19 diagnosis.

20 THE COURT: You can -- there are certain categories
21 of folks that can render and label opinions based on
22 their rational perception and she's one of them. So,
23 when he says on page 253 is you care to examine her as to
24 her qualifications -- I'm starting on line 5 -- I'll
25 allow it I don't know to the extent that you're going to

1 ask an opinion Solicitor, I don't know that she needs to
2 be under rule 701. She certainly can give opinions under
3 certain things. You proceed with your questions, rule
4 701 deals with rational -- with lay opinions.

5 MS. RHOAD: Okay, I would ---

6 THE COURT: --- not expert opinions.

7 MS. RHOAD: I guess then that we would say that he
8 should have objected to her testimony that it was a
9 gunshot wound because that would be ---

10 THE COURT: --- that wasn't her testimony ---

11 MS. RHOAD: --- that would have required an expert
12 opinion.

13 THE COURT: That wasn't actually what her testimony
14 was. She testified as her rational perception of what
15 she saw and what she was treating and what was reported
16 to her, which is admissible under the Rule the exception
17 on hearsay as to diagnosis and treatment. But she never
18 said this is a gunshot wound in my expertise or in my
19 opinion as an E-M-T.

20 And actually her actual testimony was that's what
21 the wound seemed to indicate, entrance type wound and
22 exit type wound. I relied on what we see his injuries
23 are and what the injuries indicate happened, but she
24 never said it was a gunshot wound. She said this is what
25 we treated, this is what it appeared to be. And the

1 nurse basically said the same thing based on the records.
2 So, none of them ever said in their expert opinion that
3 this was a gunshot wound the way a doctor would.

4 MR. RHOAD: Your Honor, the nurse was qualified as
5 an expert witness ---

6 THE COURT: --- she was qualified as an expert, but
7 she only testified as to what was in the record which she
8 can do as an expert as to what the doctors reported what
9 his underlying symptoms were, diagnosis, and treatment.
10 But she never said -- she said what was in the records
11 which as an expert she's allowed to do and there's no
12 basis in the record for her not to be qualified as an
13 expert in intensive care medicine -- as an intensive care
14 nurse basically is what she was qualified to do.

15 And basically what they did because the doctor was
16 in Tanzania they called her to testify that he presented
17 at the ER like this, he treated him for this, is this
18 what the doctor said basically was his diagnosis what you
19 were treating him for and that's the extent of what she
20 testified to.

21 MR. RHOAD: Okay.

22 THE COURT: She didn't say in my expert opinion
23 this is a gunshot wound.

24 MR. RHOAD: Okay well my response, Your Honor, to
25 that would be I respectfully disagree with your

1 characterization ---

2 THE COURT: --- I don't a characterization. This
3 is the full record. I'm reading it; it says what it
4 says. I've tried many of these cases,

5 MR. RHOAD: My ---

6 THE COURT: --- I know Judge Dennis is as
7 meticulous as I am probably to a fault, he probably may
8 be even more meticulous than I am. And I know, I'm just
9 reading what the nurse actually said. The court is not
10 advocate; I don't have a position. But it is my job to
11 make sure objectively that the record is represented as
12 to what it actually says.

13 MR. RHOAD: Sure and I meant no disrespect. I
14 should have said interpretation, but Your Honor ---

15 THE COURT: --- no, I don't have an interpretation
16 either. It just says what it says. At page 330 and
17 331 she said it was a puncture wound explored whether a
18 gunshot and exact nature of the injury and her actual
19 testimony was and I may be referring to the -- yeah,
20 Nurse Fuda, wait one second for me -- she was qualified
21 as an expert in intensive care nursing, which she was
22 more than qualified in that area. Mr. Shelton would have
23 had no basis to object to her being qualified as an
24 intensive care nurse. She would have been trained -- and
25 actually she could have testified because she has

1 training in gunshot wounds and she lists actually
2 everything that she has training in -- she was qualified
3 as an expert in the area of intensive care nursing and
4 that's at page 19 lines 11-13.

5 The court asked counsel if he wanted to examine her
6 regarding her expertise in that area and Mr. Shelton said
7 no sir, and then he allowed her to permit and render
8 opinions in that area, which would have been limited to
9 intensive care nursing, which basically deals with how he
10 presented to her at the time at the hospital and what she
11 treated him for.

12 And her testimony today bears out that that was the
13 scope of her testimony as well. She talks about Dr.
14 Menchel [phonetic] treating him, but that he was out of
15 the country that he was flown in, in very critical --
16 when he was flown in he was very critical, his pressure
17 was low, trying to warm him up he was intubated, which
18 all she would have been able to testify to.

19 They asked what he was admitted for. She said he
20 had a gunshot wound to the left side of his head, which
21 caused the skull fracture. Tell us approximately where
22 the entrance was and whether or not there was an exit
23 wound. It went in the front forehead right here and came
24 out back here indicating on the left. But in any event,
25 she was testifying as to what his admitting diagnosis

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Closing Argument by Mr. Rhoad
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1 was, not that as an expert in my opinion this was a
2 gunshot wound. So basically what they called her for was
3 to basically make the record permissible as to diagnosis
4 and treatment -- actually what he was being treated for
5 when he was admitted to the hospital. So I just need the
6 record to be clear in that regard.

7 MR. RHOAD: Sure and this one point I think in that
8 effect essentially it magnifies the importance of the net
9 effect of what Your Honor just said. It magnifies and
10 accentuates the importance of the lack of any expert
11 testimony on behalf of my client at trial which was the
12 trial strategy from the beginning.

13 And while the affidavits that have been submitted to
14 the court I'll concede don't say it was not a gunshot
15 wound they certainly can be read to suggest that there
16 would have been a reasonable doubt raised as to whether
17 it was a gunshot wound and the expertise of whether it
18 was a gunshot wound could have been further explored.
19 But what ---

20 THE COURT: --- well I haven't read the affidavits
21 yet, but here's based on what -- and I'm going to read
22 them fully -- but what you're saying is your expert
23 doesn't say in those affidavits that it wasn't a gunshot
24 wound?

25 MR. RHOAD: Or that it was.

1 THE COURT: Yeah, that's ---
2 MR. RHOAD: --- but please read the affidavits.
3 THE COURT: I plan to.
4 MR. RHOAD: Okay.
5 THE COURT: But that's still -- I can tell you in
6 my experience that's iffy ---
7 MR. RHOAD: --- Right ---
8 THE COURT: --- if you've got a doctor on the stand
9 that's not going to tell you what it is and what it
10 isn't, it sort of all comes out in the wash.
11 MR. RHOAD: Well, I think he's going to testify
12 well ---
13 THE COURT: --- I'm going to read it.
14 MR. RHOAD: Okay. And Your Honor just so you know
15 that once and this really isn't I guess I don't know if
16 we have a way to add something, but we've always said I
17 mean we've always maintained ineffective assistance of
18 counsel. I mean Mr. Shelton testified from the stand
19 today that he and his client couldn't communicate.
20 I think it's pretty good evidence of ineffective
21 assistance of counsel if you can't communicate with your
22 client or vice versa. And then finally Your Honor the
23 legal argument, which I think is the strongest legal
24 argument we've got is that the jury charge was improper.
25 The jury charge that Judge Dennis let in was improper.

1 It's been determined by the Supreme Court that it was
2 improper. The jury was allowed to imply malice because
3 of the use of a firearm. Mr. Shelton did not object to
4 it. As a result of his not objecting to it, it wasn't
5 preserved on appeal.

6 And we believe that jury charge in addition to the
7 fact that no evidence was presented to bolster the theory
8 that Mr. Phoenix did not suffer from a gunshot wound, I
9 don't see how that can be effective assistance of counsel
10 if counsel agrees that that's the strategy of trial and
11 you present no evidence to that effect. How can that be
12 an effective assistance of counsel?

13 I think those things cumulatively added up and I
14 believe Your Honor, I urge that you grant -- this P-C-R
15 relief is granted based on those -- based on evidence
16 that we've presented and those theories. And I'll be
17 glad to answer any questions.

18 THE COURT: I don't have any other than what I've
19 already asked.

20 MR. RHOAD: Thank you.

21 THE COURT: Ms. Wilson would you like to respond?
22 You're welcome.

23 MS. WILSON: Yes, Your Honor.
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CLOSING ARGUMENT

BY MS. WILSON:

Your Honor, the State would just ask that you deny and dismiss this application for post conviction relief on prejudice. With regard to the issue of Mr. Shelton not objecting to Ms. Fuda's testimony, I think the record reflects that Mr. Shelton made it pretty clear that well he tried to make it pretty clear to the jury that Ms. Fuda's testimony was basically based off of the victim's medical records and what was in the victim's medical record was partly based on what was conveyed to the medical professionals by Mr. Phoenix.

Mr. Shelton also gave testimony that he thought it was beneficial not to have the treating physician there because he thought for certain that he would testify in line with his report that the victim suffered a gunshot wound and that the jury would find a doctor's testimony about a victim being shot with a gunshot -- being shot or being shot with a gun, I guess more credible than a nurse testifying as to records to reflect what a doctor testified -- a doctor concluded.

With regard to Ms. Moritzky's testimony, Your Honor, Ms. Moritzky's testified today that her testimony was based on her experience and the record reflects that. Ms. Moritzky did not diagnose the victim as suffering

1 from a gunshot wound. And Mr. Shelton elicited at trial
2 testimony based that Ms. Moritzky's testimony was based
3 on what was conveyed during the 9-1-1 call and that her
4 basis of identifying the gunshot wound was from what she
5 saw and what she perceived and therefore what treatment
6 followed as a result.

7 With regard to failure to call an expert witness to
8 testify about whether or not Mr. Phoenix suffered from a
9 gunshot wound, the affidavit presented by the experts in
10 this case didn't show or can't say that Mr. Phoenix
11 didn't suffer a gunshot wound and indeed Mr. I think Dr.
12 Schabel's affidavit says he may have been hit with
13 something which also could be grounds for Mr. -- which
14 also could have been evidence of Mr. McKelvey, against
15 Mr. McKelvey which would have been sufficient to him
16 being convicted of ABWIK as well.

17 Also, Your Honor, Mr. McKelvey testified that he was
18 able to cross-examine the medical professionals
19 effectively without having an expert testimony. And he
20 also, I guess, at trial particularly through Ms. Fuda's
21 testimony, he challenged the victim's medical records as
22 being -- as a result of things that the medical
23 professionals were told by the victim. He also gave a
24 credible trial strategy -- credible strategy to attack
25 the victim's credibility and that Mr. McKelvey hasn't

1 provided any basis for a challenge to Ms. Fuda's
2 qualification as an expert or Ms. Moritzky's testimony.
3 Also, Your Honor, this expert testimony that was
4 presented by affidavit today doesn't provide anything to
5 attack Mr. McKelvey's armed robbery conviction.

6 With regard to the allegation that Mr. Shelton
7 should have objected to the jury instruction on malice,
8 the case referenced by Mr. McKelvey through his counsel
9 is Belcher and in Belcher the Supreme Court held that if
10 there's a jury question about self defense it's an error
11 for the trial court to charge a jury that it could have
12 inferred malice for the use of a deadly weapon, Your
13 Honor.

14 And in this case we don't have any evidence
15 presented with regard to self defense and specifically
16 Mr. McKelvey said that he denied shooting the defendant
17 so there is no evidence to reduce, mitigate, or excuse
18 the killing which would warrant -- which would have made
19 the instruction improper.

20 With regard to the criminal backgrounds of Ms. Vance
21 and Mr. Phoenix and just their testimony overall, Mr.
22 Shelton testified that he pointed out the inconsistencies
23 in Ms. Vance's tape, Ms. Vance's statement specifically
24 with regard to her testimony about being unsure about the
25 time frame which she arrived at the club. Mr. Shelton

1 elicited testimony and basically brought out her
2 uncertainty and highlighted it for the jury in the record
3 on pages 192 and 193.

4 Also Your Honor, with regard to the allegation about
5 him not having or with regard to him receiving an
6 extended, I guess, incident report from one of the police
7 officers. He testified that he had time to review the
8 report prior to trial and it's the State's position that
9 Mr. McKelvey hasn't proven what additional information or
10 additional line of questioning would have been elicited
11 had Mr. -- had the matter been continued and Mr. Shelton
12 given additional time to review the report.

13 It's the State's position that Mr. Shelton provided
14 effective assistance of counsel. He was able to
15 adequately cross-examine the State's witnesses based on
16 strategy that he thought was best to proceed at trial.
17 Also, Your Honor it's the State's position that Mr.
18 McKelvey wasn't prejudiced by any actions from Mr.
19 Shelton because he doesn't make any challenges to counsel
20 performing with regards to his armed robbery for which he
21 received a higher sentence.

22 And also, Your Honor, Strickland v Washington I
23 think a lot of this a lot of Mr. Shelton's performance --
24 in the, I guess reflecting back in hindsight. In
25 Strickland v Washington explicitly prohibits this court

1 from basing any claims of ineffective -- or I guess
2 accepting any claims of ineffective assistance of counsel
3 based on hindsight. And the case law says that we have
4 to look at what Mr. Shelton did at the time of trial and
5 prior to trial and based on his observations and
6 decisions then and not after the fact. Also Your Honor,
7 with regard lastly, sorry ---

8 THE COURT: --- it's okay, go on ---

9 MS. WILSON: --- with regard to counsel's argument
10 that we should consider all of these alleged errors
11 cumulatively, there's no South Carolina case law to say
12 that this court should consider the effect of each error
13 cumulatively to reach its conclusion that counsel's
14 ineffective. And we just ask that you deny and dismiss
15 this application with prejudice. Thank you.

16 THE COURT: You're welcome. Anything further?
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REPLY-CLOSING ARGUMENT

BY MS. RHOAD:

MS. RHOAD: Just to point out that the State v Belcher case, I don't believe that that really was limited to ---

THE COURT: --- it is limited ---

MS. RHOAD: --- to self defense.

THE COURT: It is limited to circumstances where there's mitigation. We still charge in the express and inferred malice where there's no self defense. It is limited to self defense or where there is some defense that mitigates, reduces, or limits the liability of the defendant. It doesn't say that you can't charge it anymore; it just says under the circumstances that you can't instruct it anymore.

MS. RHOAD: Well we would take the position that if counsel would have presented evidence to reduce or mitigate ---

THE COURT: --- there wasn't -- I haven't heard any testimony that there was any evidence that it would have reduced, mitigated, excused or justified. The only one you have available is self defense. That's the only one our case law really has contemplated. That's the only one that could be to reduce, mitigate, or justify. That's the only justified killing in South Carolina is

1 self defense or defense of others or defense of your land
2 or defense of your hand under the castle doctrine. But
3 that's -- it's limited to that.

4 MS. RHOAD: Well we would also just ask the court
5 to consider that the injury to Mr. Phoenix that he didn't
6 even stay the night in the hospital so perhaps that could
7 have been testimony that would have reduced -- I know it
8 wasn't ---

9 THE COURT: --- that's not what the Supreme Court
10 contemplates. I can tell you from experience based since
11 Belcher has come out that we still instruct, on express
12 an inferred malice and it is appropriate and where there
13 is no evidence of self defense. Where there is evidence
14 of self defense, you don't instruct inferred malice
15 anymore.

16 MS. RHOAD: Thank you, Judge.

17 THE COURT: You're welcome. Give me a moment
18 because I need to look at these affidavits.

19 [Whereupon the court reviews documents]

20 THE COURT: Have you all explained to your client
21 that the only remedy in this case would be a new trial
22 which could potentially subject him to a greater penalty
23 than that which he is already serving?

24 MR. RHOAD: Have we considered that?

25 THE COURT: Have you explained that to him?

1 MR. RHOAD: Yes, Your Honor.

2 THE COURT: Okay. I just wanted -- I meant to ask
3 that earlier and I forgot.

4 MR. RHOAD: Yes.

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1 THE COURT: I'm going to try to keep this short due
2 to the hour and I'm going to allow Ms. Wilson to make any
3 further findings of facts and conclusions of law
4 consistent with the record.

5 The applicant has the burden of proof in
6 establishing that Mr. Shelton was ineffective in his
7 assistance. In other words that this court -- that his
8 performance fell below an objective standard such that
9 the outcome of the trial, the result of the trial was
10 undermined. I have reviewed the record in this case and
11 I probably will review it again subject to actually
12 issuing a final order, but at this moment I am of the
13 opinion that the burden of proof has not been
14 established. And I'll start preliminarily and I may skip
15 around a little and I apologize if I do.

16 There's been a great deal made about the
17 admissibility of a bullet fragment. I can discern no
18 basis in the record for Mr. Shelton to have objected to
19 the admissibility of the bullet fragment. It was part of
20 the scene of the incident and even over his objection; I
21 can discern from the record no basis from which it would
22 have been excluded as a part of the crime scene. Any
23 objection would have gone to weight, not admissibility.
24 And whether the SLED personnel that -- and that being Ms.
25 Cromer's testimony as the firearms and tool marks expert,

1 her testimony was and was today and was at the time of
2 trial that the bullet fragment was unsuitable for
3 identification, that it could have been fired by the gun
4 or any other firearm.

5 In my estimation that testimony enured to the
6 benefit of the applicant, in fact it was exculpatory in
7 nature because it allowed Mr. Shelton the ability to
8 argue many things. One of which was the sufficiency of
9 the police's investigation of the scene as well as
10 identifying other potential culprits of this incident as
11 well as exculpating his client.

12 In other words, there was a gun found at the scene
13 and there was a bullet fragment found at the scene but
14 neither of them matched, so the State has failed to
15 establish their burden of proof by beyond a reasonable
16 doubt. So I cannot discern any prejudice to him in the
17 admissibility of the bullet fragment, nor does it
18 undermine the outcome of the trial.

19 Now jumping to the Belcher case, the Belcher holding
20 is correct, we no longer instruct actual implied malice
21 that being the use of a deadly weapon where there is
22 evidence that would reduce, mitigate, excuse, or justify
23 the killing or the alleged assault and battery with
24 intent to kill. And the type of reduction, mitigation,
25 or excuse that our Supreme Court contemplates is self

1 defense as that is the only complete defense to a killing
2 in South Carolina. I'm not aware of any other evidence
3 that could have been produced that would have reduced,
4 mitigated, or excused or justified the killing and the
5 record is void of any evidence of self defense. There is
6 no testimony that he ever acted in self defense or in
7 defense of others.

8 The testimony in this record is that he always
9 maintained his innocence so in order for him to have been
10 able to get an instruction like that, he would have had
11 to admitted that he shot Mr. Phoenix or that he injured
12 Mr. Phoenix in some way in self defense which would have
13 been the type evidence that would have reduced,
14 mitigated, or excused or justified the killing or the
15 assault and battery with the intent to kill. And there's
16 simply no evidence of that in the record.

17 So there is no error in the Judge instructing
18 expressed and inferred malice, nor would there have been
19 any basis. Well, Mr. Shelton could have asked for it,
20 but the Judge still would have instructed it in that
21 there was no evidence of self defense in this case.
22 There would have been no basis for, nor was it error for
23 Mr. Shelton not to request a continuance. There's no
24 guarantee one would have been granted. In all
25 likelihood the court would have -- although there's some

1 indication that if he wanted one he could have received
2 one. But, Mr. Shelton indicated he didn't need one that
3 he was ready for trial, that he had additional time to
4 review those items that had not been presented to him.
5 And there's no indication in the record that anything
6 further would have been discovered or developed as a
7 result of a continuance in this matter.

8 Now as it regards the objection, the allegation that
9 Mr. Shelton was ineffective for failing to object to
10 testimony of Nurse Fuda, again, I can discern no
11 prejudice to him. I'm inclined to agree with him that it
12 was fortuitous that the doctor was away in Tanzania. It
13 allowed him some great flexibility in arguing exactly
14 what the nature of this injury was and also the absence
15 of the witness.

16 But in any event, Nurse Fuda was clearly qualified
17 as an expert in the area as a nurse in intensive care
18 nursing. She did not evaluate or diagnose the nature of
19 Mr. Phoenix's condition. She merely reported from the
20 records what his diagnosis was, what his treatment was,
21 and what her rational perception was as she treated him
22 based on that material that was reported in his medical
23 records. And she testified here today and I find it
24 credible as consistent with her testimony at the time of
25 trial that that was his admitting diagnosis and that her

1 testimony was not her assessment that it was a gunshot
2 wound. It was merely what she received in terms of
3 information to treat Mr. Phoenix and that which the
4 doctor received from the E-M-S and police.

5 Ms. Moritzky, who is employed with Dorchester -- I
6 mean Berkeley County E-M-S was not qualified as an
7 expert. She testified as her rational perception of the
8 injury and her treatment of Mr. Phoenix until such time
9 that he was transported to the Medical University of
10 South Carolina. And she said it was a penetrating type
11 injury to his head, that she never diagnosed it as a
12 gunshot wound, that she only testified as what it seemed
13 to indicate because of the amount of blood and the other
14 information that had been transmitted to her for purposes
15 of treating him.

16 And that based on the record her testimony was
17 completely appropriate. She was not qualified as an
18 expert. It was not necessary; the Judge made it clear
19 regarding that and so there really would have not been
20 any basis for Mr. Shelton to have objected to the
21 admissibility of her testimony, nor do I think it would
22 have been successful. She certainly could testify based
23 on her years of experience as to what she saw from Mr.
24 Phoenix and how as a result of what she saw how she
25 treated him or any life saving measures that she

1 administered to him prior to him being evacuated from the
2 area. It is a valid strategy on Mr. Shelton's part to
3 focus on maintaining last argument. That is a valid
4 strategy that is often employed by defense counsel with
5 the State having the burden of proof it provides them
6 with the -- the defendant, or the applicant in this
7 instance, with the opportunity to hear the State's full
8 argument and then to rebut it basically and have the last
9 word or the last say so, so to speak before the jury and
10 that is a valid strategic assessment on his part and I
11 will not second guess it.

12 Now jumping to -- there's been a great deal of
13 testimony about whether, in fact, Mr. Phoenix was shot or
14 not. I don't know that it is dispositive on the issue; I
15 really don't know that it particularly matters in this
16 case and I will tell you why. In order to establish
17 assault and battery with intent to kill, the State does
18 not have to prove that Mr. Phoenix was shot. They only
19 have to prove that the defendant had the present ability
20 to 1) commit and -- let me back up a little bit.

21 The State has to prove that the defendant with
22 malice aforethought unlawfully attempted or offered to
23 commit a violent injury upon another person who had the
24 present ability to complete the attempted injury. And we
25 all know what an assault is. Assault is the intentional

1 creation of a reasonable fear of immediate bodily harm.
2 It is not necessary that the intent to injury or harm
3 actually take place. And that is what we typically know
4 when someone goes up to someone and says I'm going to hit
5 you and they draw their arm back.

6 Malice is defined as ill-will or hostility towards
7 another person. It is the intentional doing of a
8 wrongful act without just cause or excuse. And with an
9 intent to inflict an injury or under circumstances that
10 the law will infer an evil intent, malice aforethought
11 does not have to require that the malice exists for any
12 particular time before the act is committed, but it must
13 exist in the mind of the defendant just before and at the
14 time the act is committed.

15 Therefore, there must be a combination of the
16 previous evil intent and the act. And as I've already
17 ruled under these circumstances malice without any
18 allegation of self defense or in a position of the
19 defense of self defense would be appropriate, it can be
20 expressed or inferred.

21 Skipping ahead; it does not have to be a gun. Under
22 our law, ordinary objects can become deadly weapons
23 depending on how they are used. And so there's
24 testimony from Mr. Phoenix that the applicant actually
25 struck him. But, going a little further ahead and

1 looking at the affidavits of the doctors that were
2 presented by the applicant in this case, I give them some
3 weight, but not extensive weight as they were not
4 treating physicians, they are not emergency room
5 physicians they are radiologists who reviewed a cat scan.

6 But what I see as most telling is that of -- I'm
7 referring to that Donna Roberts, Doctor Donna Roberts,
8 she said based on her training and experience he has a
9 depressed skull fracture which is consistent with the
10 record that he presented with a history of dizziness,
11 falling, and confusion. That she reviewed the CT scan
12 and her basic impression is that there were no metallic
13 fragments that were present at the time of the CT scan
14 which would indicate basically a through-and-through
15 injury; it was entrance wound and an exit wound; my
16 extrapolation based on experience and having heard many
17 of these cases not the affidavit provided by the
18 radiologist.

19 But, she does not say whether -- let me make sure I
20 get the right language she used -- based on my medical
21 training and experience no metallic ballistic fragment is
22 present on the CT scan of the head, nor on the CT scan of
23 the head dated December 16 of 2008. So she doesn't say,
24 she simply says there's no metallic ballistic fragment
25 which is sometimes present, sometimes not present but she

1 simply says in this instance it's not present. We then
2 move to the affidavit of Doctor Stephen Schabel and I
3 hope I pronounced that correctly, it's S-C-H-A-B-E-L.
4 What I find most persuasive in his affidavit is that he
5 apparently has done he says he has an academic interest
6 in the effect of guns and bullets on the human body.

7 As a part of this interest I pursued a study of
8 articles in medical journals concerning this issue that's
9 in paragraph 11. Paragraph 12, based on my medical
10 training and experience I have an opinion to a reasonable
11 degree of medical certainty that the depression shown on
12 the CT scan of Mr. Phoenix's head may have been caused by
13 a strike from the barrel of a gun, from a barrel of a gun
14 or some other linear object and not by a firing of a
15 bullet from a gun. This opinion is based on the shape of
16 the depression.

17 Based on my medical training and experience I have
18 an opinion to a reasonable degree of medical certainty
19 that almost all non-jacketed bullet gunshot wounds,
20 striking bone, leave metallic fragments after striking
21 the bone. I have never seen a fully jacketed bullet
22 produce an injury such as the one seen on Mr. Phoenix's
23 CT, that's at paragraph 14 and 13 respectively, which
24 supports, in my mind, Mr. Shelton's testimony that he
25 investigated talking to a doctor, but he could not find

1 one that would have said anything beneficial to Mr.
2 McKelvey's case. The State does not have prove that he
3 shot the gun, the State can prove an ABWIK by him having
4 struck him with the butt of the gun. They could have
5 proven it by him using his hand which is a deadly weapon
6 under South Carolina law depending on how it is used.

7 So, in my estimation, this supports what Mr. Shelton
8 said which is I don't see how any of this would have been
9 beneficial to Mr. McKelvey. Basically you would have had
10 a radiologist testify that we have no indication of a
11 through-and-through wound, however, we do have an
12 indication based on the shape of this depressed skull
13 fracture that he was struck by, basically the butt of a
14 gun or something consistent with the butt of a gun.

15 I don't know that a hand -- well, I don't know I've
16 seen people used hands and inflict a lot of injury so I
17 don't want to speculate. I can't think of a case right
18 off the top of my head where somebody's hand fractured
19 someone's skull, but it is possible. So I don't want to
20 rule it out of the realm of possibility.

21 But, the bottom line is there is no testimony that
22 is exculpatory that Mr. Shelton could have presented that
23 said he didn't inflict this injury, so the State doesn't
24 have to prove that the gun was shot. They don't have to
25 prove that it was a through-and-through injury. There

1 are often times where skull fractures are produced
2 especially in small caliber weapons where it bounces off
3 the skull and creates a fracture based on the caliber of
4 the weapon, but I don't know that we need to speculate or
5 even go into that line of or analogy or interpretation
6 because basically these affidavits bear out what the
7 record shows which is that some injury was inflicted.

8 It was either inflicted from a gun being shot, or
9 the butt of a gun being used to hit someone and there is
10 testimony in the record from Mr. Phoenix that he was
11 struck by the applicant. So, I don't know that any of
12 this amounts to Mr. Shelton having been ineffective when
13 he testified I investigated this, I didn't find anything
14 that would have been beneficial to my client to testify.
15 And I agree with him that it would not have been
16 beneficial to have -- actually the ER doctor would have
17 provided a whole lot more information and probably this
18 entire line of questioning would have been developed had
19 he been present and I don't see any of that inuring to
20 the applicant's benefit in this case.

21 In other words, in undermining the outcome of this
22 trial or making it more likely that he would have been
23 found not guilty as a result of this testimony. And
24 based on my review of the record, it appears that Mr.
25 Shelton very effectively cross-examined the weight of the

Jermaine McKelvey v State of S.C.
Ruling by the Court
May 19, 2014

1 testimony of each of these witnesses. There has been
2 some discussion as to whether he should have impeached
3 Ms. Vance with testimony regarding an outstanding bench
4 warrant.

5 You know I can't stand in the shoes of the Judge
6 that tried this case, but unless there could have been
7 some really strong connection regarding that, it is
8 unlikely that would have ever come in to the record.
9 And, Mr. -- upon questioning, Mr. Shelton could not even
10 establish whether she knew she had an outstanding bench
11 warrant or that that was the source of her having
12 trepidation about testifying. Really it all sort of
13 rises the level of speculation, people come to court
14 scared all time for a myriad of reasons. Some because
15 they just have never been in a court room and sometimes
16 they're just shy and it's just the entire process is
17 daunting to them.

18 While there may have been some implication that she
19 was afraid of the applicant, I don't know that that would
20 have been nullified by a bench warrant. And quite
21 frankly without there being concrete knowledge that she
22 was aware of it and she knew about it, it could very well
23 have backfired. She said no, I didn't know I had a bench
24 warrant outstanding and then it could have even more
25 solidified whatever she felt regarding the applicant but

1 I don't want to speculate. The bottom line is there is
2 no indication she even knew she had a bench warrant,
3 outstanding or that it actually would have been admitted
4 into the record or that it would have made any
5 substantial in impeaching her credibility is again based
6 on my reading of the record it appears Mr. Shelton did a
7 thorough job in cross-examining each of the witnesses.
8 And that Mr. Shelton employed a valid strategy, that
9 being attacking the credibility of Mr. Phoenix based on
10 how he presented and his previous history.

11 Again in the interest of time, I'm sure there's
12 something I'm missing but, when Ms. Wilson provides the
13 court with a proposed order I'll cover anything that I
14 may have excluded due to the interest of time or any
15 other grounds that were argued, but I think those were
16 our main objections. And I've reviewed the officer's
17 testimony regarding blood splatter, but I will look at
18 that again to make sure -- to see whether that may have
19 made any appreciable difference in the outcome of this
20 trial.

21 If you could provide the court with a proposed order
22 within 15 days, Ms. Wilson, I'd be very appreciative.
23 And I'm sure that you will send that to counsel by the
24 same format and if you all have anything that you want to
25 add to the order, let Ms. Wilson know and she can then

1 incorporate anything you've requested.

2 MR. RHOAD: Thank you.

3 MS. RHOAD: Thank you, Your Honor.

4 MS. WILSON: Thank you.

5 THE COURT: You're welcome and y'all have a good
6 weekend.

7 [Whereupon court adjourns at 5:25 p.m.]

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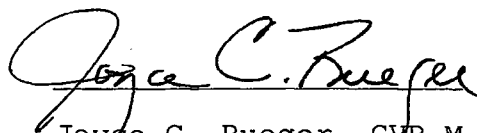
Jermaine McKelvey v State of S.C.
Certificate of the Court Reporter
May 19, 2014

C E R T I F I C A T E

I, the undersigned, Joyce C. Rueger, Official
Circuit Court Reporter for the Ninth Judicial Circuit of
the State of South Carolina, do hereby certify that the
foregoing is a true, accurate, and complete Transcript of
Record of the proceedings had and evidence introduced in
the trial of the captioned case, relative to appeal, in
the Court of Common Pleas for Charleston County, South
Carolina on the 19th day of May, 2014.

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

October 14, 2014


Joyce C. Rueger, CVR-M
Court Reporter

STATE OF SOUTH CAROLINA)
)
 COUNTY OF BERKELEY)
)
 JERMAINE T. MCKELVEY, 280590)
 POST)
)
 V.)
)
 STATE OF SOUTH CAROLINA)
 _____)

IN THE COURT OF COMMON PLEAS
 CASE NO.: 2012-CP-08-1235

AFFIDAVIT OF DR. DONNA R. ROBERTS

2014 MAY 13 PM 1:41
 DONNA R. ROBERTS
 CLERK OF COURT
 BERKELEY COUNTY, SC

FILED

PERSONALLY APPEARED BEFORE ME, DR. DONNA R. ROBERTS, having
 been duly sworn testifies as follows:

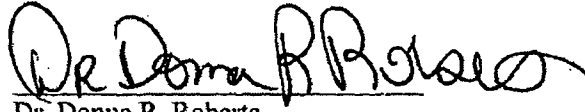
1. I am a person over the age of eighteen (18) years of age and I have person knowledge of the facts stated herein.
2. I graduated from medical school at the Medical University of South Carolina (hereinafter "MUSC") in 1999 and completed a Diagnostic Radiology residency at MUSC in 2004. I completed a Neuroradiology fellowship from the University of California, San Francisco in 2006. A current Curriculum Vitae is attached to this affidavit as Exhibit A.
3. I am licensed to practice medicine in the State of South Carolina and am certified by the American Board of Radiology. I also hold a certificate of Added Qualifications in Neuroradiology.
4. I currently serve as an assistant professor in radiology at MUSC and I have held this position since 2006. I also am an assistant professor in neurosciences at MUSC and I have held this position since 2011.
5. In my role at MUSC I view CT and MRI scans of patients of MUSC and provide my findings to other physicians to assist in the care of patients.

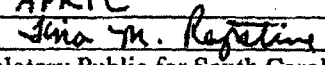
DW

152

6. I was the radiologist who interpreted the CT scan of the head and brain taken of Bernard Phoenix on December 16, 2008. Mr. Phocnix presented with a history of dizziness, falling and confusion per the requesting physician. I reviewed Mr. Phoenix's earlier CT scan taken on November 27, 2008.
7. Mr. Phoenix's CT scan showed a depressed skull fracture. I have attached a 3D image of Mr. Phoenix's skull on November 27, 2008. (Exhibit B) This image was created on my computer using scientifically and clinically accepted software using the data from Mr. Phoenix's CT scan.
8. Based on my medical training and experience, no metallic ballistic fragment is present on the CT scan of the head dated November 27, 2008 nor on the CT scan of the head dated December 16, 2008.

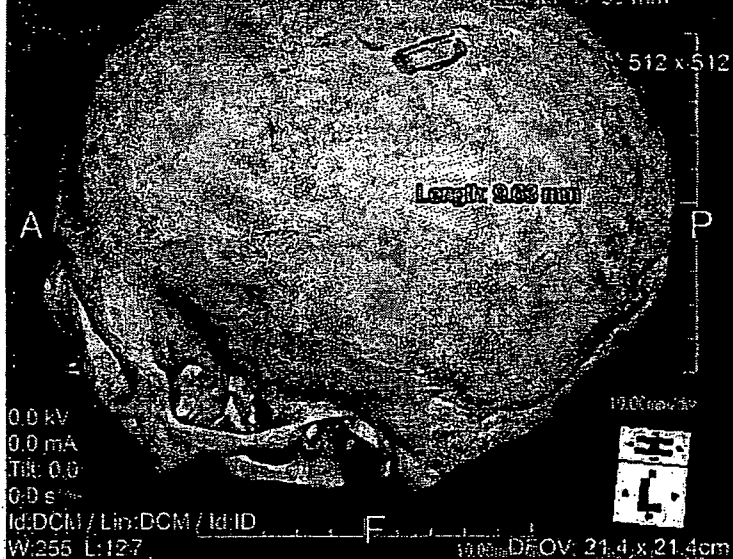
FURTHER AFFIANT SAYETH NOT!


Dr. Donna R. Roberts

SWORN to before me this 25 day of
APRIL, 2014.

Notary Public for South Carolina

TINA M. RAPSTINE
Notary Public
State of South Carolina
Commission Expires Sept. 29, 2016

MUSC
EX: 3901640
1961 Jan 23 M 43979
Se: 243/8
Im: 1/7
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MUSC
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1961 Jan 23 M 43979
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Se: 243/8

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MUSC

PHOENIX BERNARD L

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Int: 5/7

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PHOENIX BERNARD L

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Acc: 5445676

2008 Nov 27

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DOV: 21.4 x 21.4 cm

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DOV: 21.4 x 21.4 cm

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Se: 243/8

Int: 7/7

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MUSC

PHOENIX BERNARD L

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Acc: 5445676

2008 Nov 27

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Id: DCM / Lin: DCM / Id: ID

W: 255 L: 127

DOV: 21.4 x 21.4 cm

CURRICULUM VITAE

Name: Donna R. Roberts

Office Address: 96 Jonathan Lucas Street MSC 323
Suite 210 CSB
Charleston, SC 29425

Office: 843-792-2396
Fax: 843-792-1767

Education:

Clemson University 1982 – 1986 Computer Engineering, B.S., December 1986
Clemson, South Carolina

University of Colorado 1988 – 1990 Electrical Engineering, M.S., May 1990
Boulder, Colorado

Medical University of South Carolina 1995 – 1999 M.D., May 1999
Charleston, South Carolina

Residencies:

Medical University of South Carolina June 1999 – June 2004
Charleston, South Carolina
Resident, Radiology

University of California July 2004 – June 2006
San Francisco, California
Fellow, Neuroradiology

Specialty/Board Certification/ Licensure:

South Carolina State Medical Physician License
American Board of Radiology Certificate
Certificate of Added Qualifications in Neuroradiology
ACLS
PALS

Faculty Appointments:

2004 – 2005	Adjunct Assistant Professor	University of Texas Medical Branch	Prev. Medicine
2004 – 2006	Adjunct Assistant Professor	Medical University of South Carolina	Radiology
2010 – 2011	Assistant Professor	St. Jude Children's Research Hospital	Radiology
2006 – Pres.	Assistant Professor	Medical University of South Carolina	Radiology
2011 – Pres.	Assistant Professor	Medical University of South Carolina	Neurosciences

Hospital Appointments/Privileges:

2006 – 2008		Franklin and Seidelmann Teleradiology - Cleveland, Ohio
2008 – 2011		St. Jude Children's Research Hospital - Memphis, Tennessee
2006 – Present	Active	Medical University of South Carolina - Charleston, South Carolina

Other Experience:

1987 – 1988	Electrical Engineer	Texas Instruments - Dallas, Texas
1988 – 1989	Electrical Engineer	University of Colorado Health Science Center - Denver, Colorado
1990 – 1993	Project Engineer	Lockheed Engineering & Sciences Company at NASA Headquarters - Washington, D.C.

Extramural Grants/award amount (current and past):**Principal Investigator/Site Principal Investigator:**

1. **Sponsoring Agency:** NASA
Project Title: Human Cerebral Vascular Autoregulation and Venous Outflow In Response to Microgravity-Induced Cephalad Fluid Redistribution
Period of Support: 10/1/12 – 09/30/2015
Total Costs: to be determined
2. **Sponsoring Agency:** Guerbet
Project Title: Safety and Efficacy Evaluation of Dotarem® in Magnetic Resonance Imaging (MRI) in patients with Central Nervous Systems (CNS) Lesions (SENTIO) Study
Period of Support: 06/09/2011 – 06/08/2012
Total Costs: \$92,047
3. **Sponsoring Agency:** Department of Radiology & Radiological Science Pilot Grant Program
Project Title: Interleaved TMS and fMRI for Mapping of Language Networks
Period of Support: 07/01/2011 – 06/30/2012
Total Costs: \$5,000
4. **Sponsoring Agency:** NASA (NNJ04HF70G)
Project Title: Human Cerebral Cortex Plasticity in Response to Long-term Bedrest as an Analog to Microgravity
Period of Support: 07/2004 – 08/2007
Total Costs: \$525,278
5. **Sponsoring Agency:** Radiological Society of North America (HPSD 0106)
Project Title: Human Cerebral Cortex Plasticity in Response to Lower Limb Immobilization
Period of Support: 06/2002 – 05/2003
Total Costs: \$30,000
6. **Sponsoring Agency:** NASA EPSCoR
Project Title: 3D Computed Axial Tomographic Analysis of Deep Water Microbrites from Lake Joyce, Antarctica as an Analog for Life on Mars
Period of Support: 03/2002 – 02/2003
Total Costs: \$8,000
7. **Sponsoring Agency:** Radiological Society of North America
Project Title: Reproducibility of fMRI BOLD Activation Correlated with Cortical Excitability
Period of Support: 07/2001 – 06/2002
Total Costs: \$35,000

Radiology Consultant:

1. **Sponsoring Agency:** U.S. Army Medical Research and Materiel Command
Project Title: The Injury and Traumatic Stress (INTRuST) Consortium Neuroimaging Acquisition and Archival
Period of Support: 11/01/11 – 10/31/14
Total Costs: \$100 per MRI scan

2. **Sponsoring Agency:** NIH
Project Title: TCD With Transfusions Changing to Hydroxyurea (TWITCH): A Phase III Randomized Clinical Trial to Compare Standard Therapy (Erythrocyte Transfusions) With Alternative Therapy (Hydroxyurea) for the Maintenance of Lowered TCD Velocities in Pediatric Subjects
Period of Support: 11/11 – 10/14
Total Costs: \$18,985 per year

Awards, Honors, Membership in Honorary Societies:

Radiological Society of North America's Roentgen Resident/ Fellow Research Award: 2003
 Radiological Society of North America's Roentgen Resident/ Fellow Research Award: 2002
 American Board of Radiology Leonard B. Holman Residency: 2001
 South Carolina Medical Association Academic Merit Scholarship: 1997
 South Carolina Medical Association Research Scholarship: 1997
 Medical Student of the Year Award: 1997
 South Carolina College of Emergency Physicians: 1996
 Stanley Foundation Scholarship: 1996
 NIH Summer Research Scholarship: 1996
 Luther G. Bell Scholarship: 1996
 1st place Student Research Day: 1996

Academic Committee Activities:

Medical University of South Carolina Senate - Alternate	2012 - Present
Medical University of South Carolina Ethics Committee	2011 - Present
Medical University of South Carolina Suspected Child Abuse and Neglect (SCAN) team	2006 - Present
Neurosurgery Case and Topic Committee	2006 - Present
Medical University of South Carolina Pediatric Tumor Board Committee	2006 - Present
Medical University of South Carolina Head and Neck Tumor Board Committee	2006 - Present
Medical University of South Carolina Brain and Spine Tumor Board Committee	2006 - Present

Major Teaching Responsibilities (Current):

Neuroradiology monthly conferences for Radiology Residents	2006 - Present
Medical University of South Carolina, Charleston, SC	

Brain & Spine Tumor Board weekly conferences Medical University of South Carolina, Charleston, SC	2006 - Present
Head & Neck Tumor Board weekly conferences Medical University of South Carolina, Charleston, SC	2006 - Present
Pediatric Tumor Board weekly conferences Medical University of South Carolina, Charleston, SC	2006 - Present
Imaging of Head and Neck Cancer – lecture for ENT residents Medical University of South Carolina, Charleston, SC, February 15, 2008	2006 - Present
Introduction to Neuroradiology – lecture for Neurology Residents Medical University of South Carolina, Charleston, SC	2006 - Present

Major Clinical Interests and Responsibilities:

Neuroradiology

Students Mentored:

Christian Hicks
Erick Funke
Patricia Ramsey
J. Scott Carroll
Wayne Kelley

Invited Lectures:

Invited Presentation - College of Charleston, Neurosciences Core, 12/1/2009, "Principles of Neurobiology: Imaging Neuropathology"

Invited Presentation - 8th Annual Pediatric Neuroscience Update, 3/20/09, "Pediatric Neuroimaging – What's New?"

Invited Presentation - MUSC Epilepsy Ground Rounds, 12/1/08, "Functional Brain Mapping with Transcranial Magnetic Stimulation"

Invited Presentation - South Carolina Spine Society Annual Meeting, 10/04/08, "Diffusion-weighted MR Imaging of the Spine"

Invited Presentation - American Society of Functional Neuroradiology Annual Meeting, 2/29/08, "Functional Brain Mapping with Transcranial Magnetic Stimulation"

Invited Presentation - South Carolina Professional Society on the Abuse of Children, 4/16/2008, "Neuroradiology of Abusive Head Trauma"

The MUSC Southeastern Predoctoral Training in Clinical Research (SPTCR), 7/17/2007, "Advances in Neuroimaging Techniques".

Presentations:

Roberts DR, Ramsey D, Johnson K, Studholme C, Dillon W. "Structural Brain Changes Following Long-term Bedrest": Human Brain Mapping, Florence, Italy. June 2006.

Johnson KA, Koola J, Roberts DR, Ramsey D, Epstein CM, George MS. "Mapping Cortical Plasticity in the Bedrest Analogue of Space Flight Using TMS and fMRI": Human Brain Mapping, Florence, Italy. June 2006.

Roberts DR, Kelley W, Carroll SJ, Horner, MD, George MS. "BOLD Functional MRI Activation Correlates with Cortical Excitability Measured by Transcranial Magnetic Stimulation": Radiology Society of North America Annual Meeting, Chicago, IL. November, 2003.

Bohning DE, Vera C, Vincent DJ, Shastri A, Roberts DR, Patel SJ, George MS. Time Course of Bold-fMRI Sensorimotor Response to Median Nerve Stimulation: 5th International Conference on Functional Mapping of the Human Brain, Dusseldorf, Germany. June 23-26, 1999.

Vincent DJ, Bryant AE, Worthington WC, Chandler VM, Roberts DR, Vera CL, Patel SJ, Bohning DE, George MS. When can fMRI replace Wada for Language Lateralization? Two years' experience: 4th International Conference on Functional Mapping of the Human Brain, Montreal, Quebec CANADA. Neuroimage 1998; 7.4:5146. June 6-12, 1998.

Mark S. George, Ananda Shastri, Kathleen A. McConnell, Ziad Nahas, Jeffrey P. Lorberbaum, Donna R. Roberts, Charlotte Teneback, Diana J. Vincent, Lucy McGavin, Daryl E. Bohning. A Combined TMS/fMRI Study of Intensity - Dependent over Motor Cortex: American College of Neuropsychopharmacology (ACNP) Panel of Posters and Abstracts, Las Croabas, PR. Dec 1998.

Worthington WC, Vincent DJ, Bryant AE, Roberts DR, Vera CL, George MS. A Comparison of Functional Magnetic Resonance Imaging for Language Localization and Intracarotid speech Amytal Testing in Presurgical Evaluation for Intractable Epilepsy: Preliminary Results: 12th Meeting of the World Society for Stereotactic and Functional Neurosurgery, Lyon, France. July 1-4, 1997.

George MS, Wassermann EM, Speer AM, Kimbrell T, Stallings L, Vincent DJ, Roberts DR, Epstein C. "Beyond Functional Imaging: Combining Functional Imaging (SPECT, PET fMRI) with Transcranial Magnetic Stimulation (TMS) to Actively Probe Brain-Behavior Relationships." Annual Meeting American Psychiatric Association, San Diego, CA. May 17-22, 1997.

George MS, Speer AM, Stallings LE, Bohning DE, Roberts DR, Vincent DJ, Epstein CM, Wassermann EM, Kimbrell TA. Beyond Functional Imaging: Combining Functional Imaging (SPECT, PET, fMRI) with Transcranial Magnetic Stimulation (TMS) to Actively Probe Brain-Behavior Relationships: Third International Conference on Functional Mapping of the Human Brain, Copenhagen, Denmark. Neuroimage 1997; 5.4:S519. May 20-23, 1997.

Vincent DJ, Roberts DR, Speer AM, Bohning DE, George MS, Merging Methodologies: Mapping Motor Cortex with Echoplanar BOLD fMRI and Transcranial Magnetic Stimulation: International Society for Magnetic Resonance in Medicine Fifth Scientific Meeting, Vancouver, Canada. April 12-18, 1997.

Publications:

Peer Reviewed Journal Articles:

1. Van Poppel K, Patay Z, Roberts DR, Clarke DF, McGregor A, Perkins FF, Wheless JW. "Mesial Temporal Sclerosis in a Cohort of Children with SCN1A Gene Mutation." *Journal of Child Neurology*, 2012 Jul 27(7):893-7.
2. Bonilha L, Elm JJ, Edwards JC, Morgan PS, Hicks C, Lozar C, Rumboldt Z, Roberts DR, Rorden C, Eckert MA. "How common is brain atrophy in patients with medial temporal lobe epilepsy?" *Epilepsia*. 2010 Sep;51(9):1774-9.
3. Bonilha L, Edwards JC, Kinsman SL, Morgan PS, Fridriksson J, Rorden C, Rumboldt Z, Roberts DR, Eckert MA, Halford JJ. "Extrahippocampal gray matter loss and hippocampal deafferentation in patients with temporal lobe epilepsy." *Epilepsia*. 2010 Apr;51(4):519-28.
4. Eckert MA, Keren NI, Roberts DR, Calhoun VD, Harris KC. "Age-related Changes in Processing Speed: Unique Contributions of Cerebellar and Prefrontal Cortex." *Frontiers in Neuroscience*, 2010 Mar 8;4:10.
5. Roberts DR, Ramsey D, Johnson K, Koola J, Ricci R, Hicks C, Borckardt JJ, Bloomberg JJ, Epstein C, George MS. "Human Cerebral Cortex Plasticity in Response to Long-term Bedrest as an Analog to Microgravity." *Aviation, Space, and Environmental Medicine*, 2010 Jan; 81(1):30-40.
6. Bonilha L, Halford JJ, Rorden C, Roberts DR, Rumboldt Z, Eckert MA. "Automated MRI analysis for identification of hippocampal atrophy in temporal lobe epilepsy." *Epilepsia*. 2009 Feb;50(2):228-33.
7. Ricci R, Ramsey D, Johnson K, Borckardt JJ, Vallejo M, Roberts DR, George MS. "A pilot feasibility study of daily rTMS to modify corticospinal excitability during lower limb immobilization." *Ther Clin Risk Manag*. 2008 Oct;4(5):1127-34.
8. Roberts DR, Ricci R, Funke FW, Ramsey P, Kelley W, Carroll JS, Ramsey D, Borckardt JJ, Johnson K, George MS. "Lower limb immobilization is associated with increased corticospinal excitability." *Exp Brain Res*. 2007 Mar 15.
9. Green AJ, Roberts DR, Swanson RA. "Post-traumatic epidermoid cyst presenting with headache." *Neurology* 4(9):1657, May, 10, 2005.
10. Roberts DR, Carroll SJ, Kelley W, Haines, SJ, George MS, "Reproducibility of Functional MRI Activation in Clinical Practice." *Applied Radiology*, pp36-38, Jan, 2003.
11. Nahas Z, Lomarev MP, Roberts DR, Shastri A, Lorberbaum JP, Teneback C, McConnell KA, Vincent DJ, Li X, George MS, Bohning DE. Unilateral left prefrontal Transcranial Magnetic Stimulation (TMS) produces intensity-dependent bilateral effects as measured by Interleaved BOLD fMRI. *Biological Psychiatry* 50(9):712-20, 2001.
12. Bohning DE, Shastri A, McGavin L, McConnell KA, Nahas Z, Lorberbaum JP, Roberts DR, George MS. Motor cortex brain activity induced by 1-Hz transcranial magnetic stimulation is

- similar in location and level to that for volitional movement." *Investigative Radiology*. 35(11): 676-83, 11, 2000.
13. Bohning DE, Shastri A, McConnell KA, Nahas Z, Lorberbaum JP, Roberts DR, Teneback C, Vincent DJ, George MS. "A combined TMS/fMRI study of intensity-dependent TMS over motor cortex." *Biological Psychiatry* 45(4): 385-94. 1999.
 14. Roberts DR, Vincent DJ, Speer A, Bohning DE, Cure J, Young J, George MS. "Multi-modality mapping of motor cortex: comparing echoplanar BOLD fMRI and transcranial magnetic stimulation." *Journal of Neural Transmission* 104: 833-843. 1997.
 15. Worthington C, Vincent DJ, Bryant AE, Roberts DR, Vera CL, Ross DA, George MS. "Comparison of functional magnetic resonance imaging for language localization and intracarotid speech amytal testing in presurgical evaluation for intractable epilepsy. Preliminary results." *Stereotactic & Functional Neurosurgery* 69(1-4 Pt 2): 197-201, 1997.
 16. George MS, Speer AM, Stallings LE, Bohning DE, Roberts DR, Vincent DJ, et al. Beyond functional imaging: Combining functional imaging (SPECT, PET, fMRI) with transcranial magnetic stimulation (TMS) to actively probe brain-behavior relationships. *NeuroImage*, 5(4 PART II), 1997, Pages S519, 1997.
 17. Roberts DR, Koutsougeras C, Nudo RJ, Cusick CG. Modeling sensory representations in brain: new methods for studying functional architecture reveal unique spatial patterns. *IEEE* 1995, 19-27.
 18. Lear JL, Pratt J, Roberts DR, Johnson T, Feyerabend A. "Gamma Camera Image Acquisition, Display and Processing with the Personal Microcomputer." *Radiology* 175(1): 241-245. April 1990.
 19. Lear JL, Pratt J, Roberts DR. "Macintosh II-Based Nuclear Medicine Image Acquisition and Processing System." *European Journal of Nuclear Medicine*, October 1989.

Non- Peer Reviewed:

1. George MS, Vincent DJ, Roberts DR, Bohning DE, Patel S, Vera C, Cure J, Horton J, Young J. "Presurgical Mapping of Regional Brain Activity using Echo Planar BOLD fMRI." *Advances in Clinical Research*, Picker International, Inc. 1997.
2. Roberts DR, Andersen DT, McKay CP, Wharton Jr RA, Rummel JD. "Antarctic Analogs as a Testbed for Regenerative Life Support Technologies." 42nd International Astronautical Federation, October 10, 1991.
3. Roberts DR, edited by Shelly Pumphrey. "Gardens in Space." *Station Break*, January 1991.

Chapters in Scholarly Books and Monographs

1. Roberts DR. "CNS Radiology of Child Abuse". In: Roger W. Byard, Kim A. Collins (Eds.), *Forensic Pathology of Infancy and Childhood*, In press.

2. Roberts DR. Multiple sections. In: Rumboldt Z, Castillo M, Huang B, Rossi A, Brain Imaging with CT and MRI: An Image Pattern Approach, 2012.
3. Roberts DR and Castillo M. "Chapter 11: Spine". In: PopeT editor, Aunt Minnie's Atlas and Imaging-Specific Diagnosis, 2003.
4. George MS, Nahas Z, Bohning DE, Shastria A, Teneback C, Roberts DR, Speer AM, Lorberbaum J, Vincent DJ, Owens SD, Kozal A, Molloy M, Risch C. A Transcranial Magnetic Stimulation and Neuroimaging. In: George MS and Belmaker RH, eds TMS in Neuropsychiatry, 2000.

Rev: 09/2012

STATE OF SOUTH CAROLINA)
COUNTY OF BERKELEY)
JERMAINE T. MCKELVEY, 280590)

IN THE COURT OF COMMON PLEAS
CASE NO.: 2012-CP-08-1235

AFFIDAVIT OF DR. STEPHEN SCHABEL

V.)

STATE OF SOUTH CAROLINA)

2014 MAY 14 PM 1:11
MARY P. BROOKIN
CLERK OF COURT
BERKELEY COUNTY, SC

FILED

PERSONALLY APPEARED BEFORE ME, DR. STEPHEN SCHABEL, having been

duly sworn testifies as follows:

1. I am a person over the age of eighteen (18) years of age and I have personal knowledge of the facts stated herein.
2. I graduated from medical school at the University of Chicago in 1972 and completed a Diagnostic Radiology residency at Strong Memorial Hospital, University of Rochester in 1976. A current Curriculum Vitae is attached to this affidavit as Exhibit A.
3. I am licensed to practice medicine in the State of South Carolina and am certified by the American Board of Radiology.
4. I currently serve as a professor in radiology at MUSC and I have held this position since 1985.
5. I have qualified as an expert in the field of radiology in the courts of the State of South Carolina on prior occasions.
6. In my role at MUSC I view CT and MRI scans of patients of MUSC and provide my findings to other physicians to assist in the care of patients.

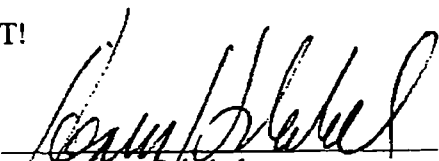
DW

7. I have reviewed the CT scans of the head and brain taken of Bernard Phoenix on November 27, 2008, and December 16, 2008.
8. I was asked to provide an expert opinion as to whether Bernard Phoenix sustained a gunshot wound to the head. In addition to a review of the CT scans taken at MUSC, I also reviewed the SLED ballistics report concerning the gun and bullets in evidence in Mr. McKelvey's trial. (Exhibit B)
9. It is my opinion to a reasonable degree of medical certainty that Mr. Phoenix's CT scan showed a depressed skull fracture. I have attached a 3D image of Mr. Phoenix's skull on November 27, 2008. (Exhibit C) This image was created by Dr. Donna Roberts and is part of the MUSC records for Mr. Phoenix. I reviewed the 3D image to assist me in developing my opinion regarding Mr. Phoenix's injury.
10. Based on my medical training and experience, no metallic ballistic fragment is present on the CT scan of Mr. Phoenix's head dated November 27, 2008, nor on the CT scan of the head dated December 16, 2008.
11. I have an academic interest in the effects of guns and bullets on the human body. As part of this interest I have pursued a study of articles and medical journals concerning this issue.
12. Based on my medical training and experience, I have an opinion to a reasonable degree of medical certainty that the depression shown on the CT scans of Mr. Phoenix's head may have been caused by a strike from a

barrel of a gun or some other linear object and not by a firing of a bullet from a gun. This opinion is based on the shape of the depression.

13. Based on my medical training and experience, I have an opinion to a reasonable degree of medical certainty that almost all non jacketed bullet gunshot wounds striking bone leave metallic fragments after striking the bone.
14. I have never seen a fully jacket bullet produce an injury such as the one seen on Mr. Phoenix's CT.
15. To my knowledge no attorney or his or her agent has attempted to contact me to provide testimony concerning Mr. Phoenix's injury prior to the time I was contacted by the law firm of Rhoad and Rhoad.

FURTHER AFFIANT SAYETH NOT!


Dr. Stephen Schabel

SWORN to before me this 14 day of

MAY, 2014.

Jana Marie Ragsdale
Notary Public for South Carolina

EXR 09/29/2016

CURRICULUM VITAE – updated 5/2012**PERSONAL**

NAME: Stephen Irwin Schabel

TELEPHONE: Home: (843) 795-7969
Office: (843) 792-7649
Weekends: (843) 869-1632
Cell Phone: (843) 259-1864
Beeper: (843) 792-4270

CITIZENSHIP: U. S. A.

EDUCATION AND TRAINING

1964 - 1968 Washington University, St. Louis, MO - B.A.

6/64 - 9/64 National Cancer Society Summer Student, University of Alabama, Birmingham Medical Center (gastroenterology)

6/65 - 9/65 Research Assistant, Division of Gastroenterology, University of Alabama, Birmingham Medical Center - Dr. B.I. Hirschowitz

1968 - 1972 University of Chicago, Chicago, IL - M.D.

6/68 - 9/68 Summer Research Fellow, Department of Microbiology, University of Chicago - Dr. William Martin

6/69 - 9/69 Summer Exchange Student, M.D. Anderson Hospital and Tumor Institute, Houston, TX - Drs. E.J. Freireich & E. Frei

6/71 - 10/71 Summer Exchange Student (Radiation Therapy) Royal Marsden Hospitals, London and Sutton, England - Dr. H.E.M. Kay

1972 - 1973 Internship in Radiology - University of Rochester, Rochester, NY

1973 - 1976 Residency - University of Rochester, Rochester, NY

CERTIFICATION

May, 1985	International Labor Office - OSHA, Certified as "B" Reader Pneumoconiosis Radiographs Recertified "B" Reader 4/20/89 to 4/20/93 Recertified "B" Reader 2/8/93 to 2/8/97 Recertified "B" Reader 7/1/97 to 6/30/01 Recertified "B" Reader 07/21/01 to 07/2005 Recertified "B" Reader 07/2005 to 07/2009 Recertified "B" Reader 08/2009 to 7/2013 Recertified "B" Reader 02/2013 to 2017
1973	National Board of Medical Examiners - Diplomat
June, 1976	American Board of Radiology (Diagnostic)
1988	Special Purpose Exam (SPEX)
1991	Federal Licensing Exam (FLEX)
1994	US Medical Licensing Exam (USMLE) – Steps I, II and III

FACULTY POSITIONS HELD

6/1/76 - 7/1/80	Assistant Professor of Radiology, MUSC, 169 Ashley Avenue, Charleston, SC 29425
7/1/80 - 6/30/85	Associate Professor of Radiology, MUSC, 169 Ashley Avenue, Charleston, SC 29425
7/1/80 - 7/30/83	Director of Diagnostic Ultrasound, Department of Radiology, MUSC, 169 Ashley Avenue, Charleston, SC 29425
1/1/85 - 01/92	Director, Diagnostic Radiology, Department of Radiology, MUSC, 169 Ashley Avenue, Charleston, SC 29425
7/1/85 - Present	Professor, Department of Radiology, MUSC, 169 Ashley Avenue, Charleston, SC 29425
7/1/88 – 12/20/88	Acting Chairman, Department of Radiology, MUSC, 169 Ashley Avenue, Charleston, SC 29425
02/99 – 08/04	Vice-Chairman for Education, Department of Radiology, MUSC, 169 Ashley Avenue, Charleston, SC 29425

MEDICAL LICENSURE**South Carolina State Board of Medical Examiners**

Elected member (1st Congressional District)
 Received Licensure (January) 1976 - Present
 4 year term 1988 - 1991
 4 year term 1992 - 1995
 Vice President 1991
 President 1992 - 1995
 Investigative Review Committee 1995 - 2000

Schabel SI. Medical Licensure: A Board Member's Perspective. Presented at the Eastern Regional Conference, Charleston, SC, March 15, 1989

Schabel SI. Medical Licensure in the United States. Presented at the Ministry of Health, Peoples Republic of China, Beijing, April 9 - 11, 2001

Federation of State Medical Boards

Fellow	1988 - 1999
FSMB Board of Directors	1994 - 1999
Federation Exam Review Committee - Appointed	1988 - 1991
Federation Exam Board (FLEX Board) - Elected	1990 - 1993, 1993-1996
ECFMG Board of Trustees - Appointed Trustee	Jan 1, 1998 - Dec 31, 2001
Reappointed to 2 nd 3 year term	Jan 1, 2002 - Dec 31, 2005
ECFMG - Personal Practice Committee	2000 - 2004
ECFMG - Research & Publications Committee	2000 - 2004
Chair-Research & Publications Committee	Feb 2001 - 2004
ECFMG - Executive Committee	2000 - 2004
Treasurer	2001 - Jan 1, 2003
Finance Committee	2001 - 2004
Chair, Finance Committee	2002 - 2004
Test Committee	2002 - 2005
ECFMG - Anniversary Planning Committee	2005
FAIMER Board of Directors	2002 - 2005
(Foundation Advancement International Medical Education and Research)	
Research & Publications Committee	2003 - 2004
Medical Education Credentials Committee	2005
FSMB Special Committee for Maintenance of Licensure	2003-2008 (chair)

National Board of Medical Examiners

Member (4 year term)	1994 - 1997
Reappointed (4 years)	1997 - 2000
Test Con Rep	2004 - 2005
Member-at-Large, Executive Board	2005 - 2007, 2007-2009 term ends 3/09
USMLE Composite Committee - Appointed	1992 - 1995, 1995 - 1998
USMLE Composite Committee - Chairman	1996 - 1997

USMLE Committee on Irregular Behavior	1992 - 1998
USMLE Committee on Irregular Behavior, Chairman	1992 - 1998
USMLE By-laws Committee	1993
USMLE Ad Hoc Committee for Quality Assurance	1993 - 1995
USMLE Step I Committee Member	2002 - 2008
USMLE Step II Standard Setting	1992
USMLE Step III Committee Member	1992 - 1999
USMLE Step III Chairman, Reappointed	1999 - 2002
USMLE Step III IRC Member	1999 - present
USMLE Step III IRC Item Review Committee	2010 - 2012
PEPL Committee (visual exam material)	1993 - 1999
Assessment Center Advisory Committee (Joint with FSMB)	1996 - 1997
Nominating Committee	1997, 2001
Representative, Test Committees	August, 2004 - 2005
CEO Evaluation Committee	2006 - 2009
Hubbard Award Committee	June 2005 - 2008
Common Medical Licensing Examination System (NBME governance representative)	June 2005
NBME- ECFMG Joint Working Committee Member	2007 - present
NBME Alumni Committee	2009 - present
NBME/NBME Committee Member	2009 - present
NBME Ad Hoc Task Force for 2015 Centennial	2010 - present
NBME Alumni Committee (Planning for NBME's Centennial in 2015)	2010 - present

American Board of Medical Specialties (ABMS)

Member, ABMS Maintenance of Licensure Task Force 2005 - present

HONORS AND AWARDS

1966	Sophomore Honors (Washington University)
1975	Alpha Omega Alpha - University of Chicago of Illinois
1981, 1984, 1988	American Medical Association Physician Recognition Award
1983, 1990, 1999	Winner, Golden Apple Award, American Medical Student Association, MUSC
1986	American Board of Radiology - Examiner for Oral Board Examination
1986	Certificate for Excellence in Teaching, Medical Student Council, MUSC
1986 - 1990	Certificate for Excellence in Teaching - MUSC Student Council
1988, 1992	Elected member South Carolina State Board of Medical Examiners
1988	LCME Faculty Fellow for the AMA Site Visitor University of South Dakota
1990	Fellow, American College of Chest Physicians
1990, 1994	Best Hospital Consultant - by Family Medicine Staff
1991 - 2001, 2007	Hippocratic Oath Ceremony - Chosen by senior students
1994	Fellow, American College of Radiology

1995, 2000	Health Sciences Foundation Teaching Excellence Award Nominee
1995, 2004, 2006,	Nominated for the Golden Apple Award, American Medical Student
2009	Association
1996	Health Sciences Foundation Teaching Excellence Award - Educator-Mentor Medal
2001	Certificate of Appreciation - Nominee for Health Sciences Foundation
2001	Teaching Excellence Award (August 2001)
2003	FSMB Distinguished Service Award (April 2003)
2005	Faculty Excellence Award (April 21, 2005)
2010	Medical Jeopardy - Winner (March 24, 2010)
2011	Medical Jeopardy - Winner (April 4, 2011)
2012	Medical Jeopardy - Winner (April 19, 2012)

SOCIETY MEMBERSHIPS

Charleston County Medical Society

Executive Committee/Board of Censors 2004
 President Elect 2010-2011
 President 2011-2012
 Executive Board 2011-Present
 Foundation Board 2011-Present
 Finance Committee 2011-Present

South Carolina Medical Association

Alternate Delegate, 1989
 Delegate, 1991
 Association of University Radiologists
 South Carolina Radiological Society - President, 1991
 American College of Radiology - Fellow
 Radiological Society of North America
 Low Country Ultrasound Society - President, 1980 - 1984
 American Roentgen Ray Society
 American College of Nuclear Medicine
 American College of Chest Physicians - Fellow
 Waring Medical History Society -President Elect 2006- President 2007
 Society of 1824

MUSC-COMMITTEES

Faculty Senate

Elected four terms - 1982-1984, 1984-1986, 1987-1989, 1989-1991
 University Affairs Committee
 Governance Committee
 Committee for Incentives for Excellence in Teaching
 Search Committee for Vice President for Academic Affairs
 Honorary Degree Committee Member - 1984
 Honorary Degree Committee Chairman - 1992

Legal Affairs Committee - 1989

Faculty Grievance Hearing Committee -1990

Credentials Committee - December 4, 2002 – Present

Vice Chair – 2011–Present

Medical Credentials Committee – Medical Executive Committee – 2011-Present

Quarterly Medical Staff Meetings

College of Medicine

Strategic Planning - Undergraduate Medical Education Committee - 1995

Education Manpower Needs - Subgroup - 1995

Faculty Development Committee - 1993-1994

LCME Self Study Clinical Sciences Taskforce Committee - 1995

Institutional Review Board for Human Research (IRB) – 1995 - 1996

Inquiry Committee – November 1995

Curriculum Committee:

Member - 1981-1984

Chairman, Fourth Year Subcommittee - 1994-1997

Executive Committee – 1994 - 1997

Vice Chair for the Second Year Curriculum

Curriculum Coordinating Committee, 1998

Clinical Year Committee Member

Chairman, Ad Hoc Task Force for the Fourth Year Medical Education, 1980

Ad Hoc Committee-Clinical Education in Pre-Clinical Medical School Years, 1980

Appointments, Promotion and Tenure Committee - June 1, 2001 – June 1, 2004.

Ad Hoc Committee to help develop a UMA faculty contract – July 2001

AOA Awards Committee – Presented the Hiram Curry Award – May 2009

AOA Scholarship Committee – 2011-Present

Admissions Committee

Member, 1991-1994

Interview medical school applicants, 1991-2001

Committee on Early Admissions Program

Member, 1991-1992

Hospital Committees – MUSC

Ad Hoc Biliary Lithotripsy Committee - Dr. Max Rittenbury

Ad Hoc Clinical Committee - MUH - 1987-1988

Adult Tumor Board - 1981-Present

Radiology Department Quality Assurance Committee – 1985 -1990

Search Committee - Chairman Department of Medicine - MUSC

Search Committee - Chairman Department of Dermatology - MUSC

Dean's Task Force - MUSC - Restructuring - 1995

Surgery Department Review Committee - Chairman

Waring Library Board – Executive Board

Waring Library Board – Board of Directors

Department Committees – MUSC
PQI Meeting 2011-2012

OTHER STATE ACTIVITIES

South Carolina State Tumor Registry Committee
Member, 1992 - 1996

South Carolina Radiological Society
President, 1991-1992
Nominating Committee, 1991-1995
Committee on Education and Accreditation, 1988
Professional and Public Relations, 1984, 1986, 1989
Peer Review, 1990

REVIEWER

Book Review - Journal of Radiology
Manuscript Reviewer for AJR

CONSULTATIONS

Advisory Board of Advance Magazine, 1992 - 1993
Sea Island Health Center of Franklin C. Fetter Clinics, 1981-1984
Psychiatric Examinations for Charleston County Probate Court
Consultant radiologist for Dr. Charles Banov, Charleston, SC
Radiology Consultant - Educational Testing Service, Princeton, NJ - Sigi Plus

VISITING PROFESSOR

University of Rochester, Rochester, NY, March 1983
University of Michigan, Ann Arbor, MI, April 19, 1989
Oregon Health Sciences Center, Portland, OR, April 19, 1989
University of Southern Alabama, Mobile, AL, February 12, 1990
University of Virginia, Charlottesville, VA, 1990
University of Virginia, Charlottesville, VA, January 30 – February 2, 2003
UMDNJ – Robert Wood Johnson Medical School, New Brunswick, NJ – February 4, 2004
University of Vermont, Fletcher Allen Healthcare, Burlington, VT – April 14 & 15, 2005
University of Nebraska, Lincoln, NE – November 16, 2011
Defense Council Seminar, Hilton Head, SC – May 17, 2012

PUBLICATIONS

1. Foote GA, **Schabel SI**, Hodges M. Pulmonary complications of the flow-directed balloon-tipped catheter. Presented as a scientific exhibit at the Annual Meeting of the Radiological Society of North America, November, 1974. *N Engl J of Med.* 1974 Apr; 290:927-931.
2. **Schabel SI**. Letter: Graft-versus-host atherosclerosis. *Lancet.* 1975 Feb 15;1(7903):396.
3. Burgener FA, **Schabel SI**. Letter: Indirect liver lymphography. *Lancet.* 1975 Aug 9; 2(7928):281-282.
4. **Schabel SI**, Burgener FA, Reynolds J, Gephardt G. Radiographic manifestations of malignant mixed uterine tumors. *J Can Assoc Radiol.* 1975 Sep; 26(3):176-183.
5. **Schabel SI**, Burgener FA. Osteitis pubis in renal failure simulating chondrosarcoma. *Br J Radiol.* 1975 Dec; 48(576):1027-1028.
6. Burgener FA, **Schabel SI**. The radiographic size of renal transplants. *Radiology.* 1975 Dec; 117(3 Pt 1):547-550. Abstracted in Urology Digest. Included in Atlas of Roentgenographic Measurement. Lusted LB and Keats TE. 4th Edition Year Book Medical Publishers, 1978
7. Katzberg RW, **Schabel SI**. Bilateral small kidneys in shock. *JAMA.* 1976 May; 235:2213-2214.
8. Burgener FA, Fischer HW, Adams JT, **Schabel SI**, Plume SK. Pharmacocholangiography with anticholinergic drugs in the dog. *Br J Radiol.* 1976 Sep; 49(585):769-775.
9. **Schabel SI**. Diffuse arterial calcification of the uterus: An unusual radiographic appearance. *Br J Radiol.* 1976 Sep; 49(585):797-798.
10. **Schabel SI**, Skucas J. Esophageal obstruction following administration of "aged" barium sulfate tablets -- A warning. *Radiology.* 1977 Mar; 122(3):835-836.
11. **Schabel SI**, Katzberg RW, Burgener FA. Acute inflammation of epiglottis and supraglottic structures in adults. *Radiology.* 1977 Mar; 122(3):601-604. Abstracted in *Emerg Med.* 1977 Aug; 9:174-175.
12. **Schabel SI**, Rogers CI, Rittenberg GM. Duodeno-duodenal fistula-- A manifestation of carcinoma of the colon. *Gastrointest Radiol.* 1978 Apr 15; 3(1):15-17.
13. Rittenberg GM, **Schabel SI**, Vujic I, Meredith HC. The vascular sunburst appearance of osteosarcoma -- A new angiographic finding. *Skeletal Radiol.* 1978; 2:243-244.

14. **Schabel SI, Rogers CI.** Opaque artifacts in a health food faddist simulating ovarian neoplasm. *AJR*. 1978 Apr; 130(4):789-780.
Abstracted in *Medical World News*, Jul 10, 1978.
Abstracted in *OB-Gyn News*, Jul 1, 1978.
Abstracted in *Keats Normal Variants*, 1988.
15. **Rittenberg GM, Schabel SI, Nelson RP.** Bilateral spontaneous urinary extravasation in ureteral obstruction. *Radiology*. 1978 Jun; 127(3):648.
16. **Schabel SI, Korn JH, Rittenberg GM, Leaman RB.** Bone infarction in gout. *Skeletal Radiol*. 1978; 3:42-47.
17. **Schabel SI, Rogers CI, Rittenberg GM, Bubanj R.** Extramedullary plasmacytoma. *Radiology*. 1978 Sep; 128(3):625-628.
Abstracted in *Practical Reviews in Roentgenology*, Nov 4-11, 1978
Abstracted in *Modern Medicine of Canada*, Apr, 1979
Included in *Radiology for Internists – RM Eisenberg*
Clinical Imaging: An Atlas of Differential Diagnosis. RM Eisenberg, Aug 1987
17. **Schabel SI, Anderson RJ.** Basic science catches up with Kartagener. *Lancet*. 1978 Oct 14;2(8094):848-849.
18. **Schabel SI, Rittenberg GM, Johnson EG III.** Carcinoma of the colon demonstrated by ultrasound. *J Clin Ultrasound*. 1978 Dec; 6(6):436-437.
19. **Meredith HC, Vujic I, Schabel SI, O'Brien PH.** Obstructive jaundice caused by cavernous transformation of the portal vein. *Br J Radiol*. 1978 Dec; 51(612):1011-1012.
20. **Schabel SI, Foote GA, McKee K.** Posterior lymphadenopathy in sarcoidosis. Presented as a Scientific Exhibit at the Annual Meeting of the Radiological Society of North America, November, 1978. *Radiology*. 1978 Dec; 129(3):591-593.
21. **Burgener FA, Schabel SI.** The value of various radiological procedures for the investigation of functional disturbances of renal transplants. (German). *Fortschritte auf dem Gebiete der Rontgenstrahlen und der Nuklearmedizin*. 1978 Dec; 129(6):679-685.
22. **Schabel SI.** Radionuclide Scans and Lung Cancer. *JAMA*. 1979;242:2178.
23. **Schabel SI, Warren E, Rittenberg GM.** The pulsatile abdominal mass: an approach to diagnosis. *J SC Med Assoc*. 1979 Mar; 75(3):93-96.
24. **Schabel SI, Rittenberg GM, Bubanj R, Warren E.** Pedunculated gastric leiomyoma: A wandering abdominal mass demonstrated by ultrasound. *J Clin Ultrasound*. 1979 Jun; 7(3):211-212.

25. Rittenberg GM, Schabel SI, Bubanj R, Allen R, Ross P. Computed tomography of the left gonadal vein. *J Comput Tomogr*. 1979 Jun; 3(2):140-142.
26. Schabel SI, Stanley JH, Rittenberg GM. Bilateral superior sulcus tumors of the lung in asbestosis. *AJR*. 1979 Nov; 133 (5):930-932. Abstracted in *Yearbook of Diagnostic Radiology*, 1980.
27. Tyminski LJ, Schabel SI, Rittenberg GM. Diagnostic ultrasound: its place in the evaluation of renal disease. *SC Med Assoc*. 1979 Aug; 75(8):355-359.
28. Schabel SI, Moore TE, Rittenberg GM, Stanley JH, Javid LH. Vertebral vacuum phenomenon. A radiographic manifestation of metastatic malignancy. Presented as a scientific exhibit at the Annual Meeting of the Radiological Society of North America, Nov, 1979. *Skeletal Radiol*. 1979; 4:154-156.
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ABSTRACTS

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AUDIOVISUAL PRESENTATIONS

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BOOK CHAPTERS

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3. **Schabel SI**. Imaging of aortic aneurysms. South Carolina Radiological Society Annual Meeting, Hilton Head, SC. Oct 1978.
4. **Schabel SI**. Consulting Radiologist. South Carolina Thoracic Society Annual Meeting, Kiawah Island, SC. Nov 16-18, 1979.
5. **Schabel SI**. Radiology of Infection. Infection Control Practitioners, South Carolina Hospital Association Annual Meeting, Columbia, SC. Feb 20, 1980.
6. **Schabel SI**. Unusual Manifestations of Sarcoidosis. Annual meeting of the American College of Radiology, North Carolina Chapter, Charleston, SC. Mar 1982.
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13. **Ross P, Gobien RP, Vujic I, Schabel SI.** Percutaneous catheter management of biloma. Joint Meeting of the European College of Angiography, The European Society of Cardiovascular and Interventional Radiology, and The American Society of Cardiovascular Radiology, Dubrovnik, Yugoslavia. Sep 27-30, 1983.
14. **Gobien RP, Stanley JH, Schabel SI, Curry NS, Gobien BS, Vujic I, Reines HD.** The effect of physical characteristics of drainage tubes on the adequacy of percutaneous abscess drainage. Radiological Society of North America Annual Meeting, Chicago, IL. Nov 13-18, 1983.
15. **Stanley JH, Hungerford GD, Schabel SI, Gobien RP, Frey D, Ross P.** Quantitative analysis of the cervical spine by CT. Radiological Society of North America, Chicago, IL. Nov 13-18, 1983.
16. **Curry NS, Cochran S, Barbaric A, Schabel SI, Pagani JJ, Kangarloo H, Diamant M, Gobien RP, Vujic I.** Interventional radiologic procedures in the renal transplant. Radiological Society of North America Annual Meeting, Chicago, IL, Nov 13-18, 1983.
17. **Kinsella MB, Miller SK, Schabel SI, Smith EA, Leroy CE, Silver RM.** Quantitative Assessment of Pulmonary Status and Bronchoalveolar Lavage in Systemic Sclerosis. American Rheumatism Association Annual Meeting, Houston, TX. May 23, 1988.
18. **Kravitz JN, Bullington WM, Schabel S, Judson MA.** Intracavitary Amphotericin B for Pulmonary Aspergilloma Complicated by Serious Hemoptysis in Fibrocystic Sarcoidosis. Poster presented at the American Thoracic Society International Conference, New Orleans, LA. May 14-19, 2010.

LETTERS TO THE EDITOR

1. Post and Courier – Reduce the risks of air pollution from cruise ships. Spring 2012

CONTINUING EDUCATION PRESENTATIONS GIVEN

1. **Schabel SI.** How to look at a chest x-ray. Continuing Education for Family Physician. Kiawah Island, Charleston, SC. Fall 1977.
2. **Schabel SI.** Computed tomography of the kidneys. Urologic pearls for the family physician. MUSC, Urology Department, Charleston, SC. Spring 1978.
3. **Schabel SI.** South Carolina Thoracic Society - Consulting Radiologist 2nd Consecutive Care Conference. Nov 1978.
4. **Schabel SI.** The chest film as an aid in the management of patients with pulmonary and cardiac problems. Family Practice Refresher Course, Feb 10, 1979.
5. **Schabel SI.** Sonography. Family Practice Review Course, Jun 28, 1979.
6. **Schabel SI.** Radiologic Work-up of Colonic Cancer. Cancer Day, MUSC, Charleston, SC. October 12, 1979.
7. **Schabel SI.** South Carolina Thoracic Society - Consulting Radiologist 3rd Consecutive Care Conference, November 1979.
8. **Schabel SI.** CT Scanning in Infectious Diseases. Infectious Disease Division, MUSC, Charleston, SC. Nov 15, 1979.
9. Seymour EQ, **Schabel SI**, Spicer KM. Recent Advances in Radiological Imaging: Imaging of the Gallbladder. SC Health Communication TV Network, Mar 6, 1980.
10. **Schabel SI.** Ultrasound and CT in Urologic Diagnosis. Postgraduate Course - Urology for Non-Urologists. Mills House, Charleston, SC. May 26, 1980.
11. **Schabel SI.** Radiology Review - American Association of Surgeons Assistants. Mills Hyatt House, Charleston, SC. Mar 17, 1981.
12. **Schabel SI.** Radiological Evaluation and Intervention in the Traumatized Patient. Postgraduate Course in Surgery, Kiawah Island, SC. Apr 13, 1984.
13. **Schabel SI.** Old Grads. MUSC Alumni - New Advances in Radiology, May 17, 1984.
14. **Schabel SI.** Chest X-Ray Interpretation - Update in Cardiology for primary physicians. American College of Cardiology, Charleston, SC. Jun 7, 1984.
15. **Schabel SI.** Errors You Will Make on a Chest X-Ray. Imaging Seminar at Spoleto, Charleston, SC. Jun 4-8, 1984.

16. **Schabel SI.** Pleural Disease - An Approach to Speedy Diagnosis. Imaging Seminar at Spoleto, Charleston, SC. Jun 4-8, 1984.
17. **Schabel SI.** Tissue Characterization of the Liver by Ultrasound. Imaging Seminar at Spoleto, Charleston, SC. Jun 4-8, 1984.
18. **Schabel SI.** Unknown Case Discussion. Imaging Seminar at Spoleto, Charleston, SC. Jun 4-8, 1984.
19. **Schabel SI.** Chest X-Rays in the Critically Ill Patient. MUSC, Department of Anesthesiology, Course on Critical Care, Charleston, SC. Nov 18, 1984.
20. **Schabel SI.** Uses and Misuses of New Imaging Technology. Postgraduate Course on Adult and Pediatric Urology, Department of Urology, MUSC, Charleston, SC. Mar 7, 1985.
21. **Schabel SI.** Current Topics in Gastroenterology. Department of GI, MUSC - GI Imaging, Charleston, SC. April 25, 1985.
22. **Schabel SI.** How to make the best of radiologic imaging. South Carolina Medical Association Annual Meeting. Apr 26, 1985.
23. **Schabel SI.** Cardiology for Primary Physicians. American College of Cardiology, Department of Cardiology, MUSC, Charleston, SC. May 23, 1985 & Jun 7, 1985.
24. **Schabel SI.** (1) Errors on Chest Radiography, (2) Imaging of Pleural Diseases, (3) Tissue Characterization by US. Imaging at Spoleto, Charleston, SC. Jun 6-8, 1985.
25. **Schabel SI.** Film Panel - Unknown Case Moderator. Imaging at Spoleto, Charleston, SC. May 29-Jun 8, 1985.
26. **Schabel SI.** Radiologic Cases. South Carolina Thoracic Society Meeting, Charleston, SC. Mar 6, 1988.
27. **Schabel SI.** Imaging Techniques in Cancer Management. Post Graduate Course in Surgery, MUSC, Charleston, SC. Apr 6-10, 1988.
28. **Schabel SI.** Cross sectional imaging in GI Disease. Current topics in Gastroenterology, Charleston, SC. Apr 7-8, 1988.
29. **Schabel SI.** Medical Licensure: A Board Member's Perspective. Eastern Regional Conference, Charleston, SC. Mar 15, 1989.
30. **Schabel SI.** Ultrasound Refresher Course. Ultrasound of the Liver. (Annual MUSC) Apr 1986, 1987, 1988, 1989.

31. **Schabel SI.** Newer Therapies for Gallstones: An Approach for the Internist & Family Practitioner. Current Topics in Gastroenterology, Charleston, SC. Apr 13, 1990.
32. **Schabel SI.** Clinico-Pathological Aspects of AIDS. AIDS Symposium 1994, MUSC, Basic Science Auditorium, Charleston, SC. November 10-11, 1994.
33. **Schabel SI.** X-Ray Interpretation. South Carolina Emergency Nurses Conference, North Charleston, SC. November 11-12, 1994.
34. **Schabel SI.** Chest Pain: Shortness of Breath. Radiology For The Primary Care Physician, Charleston, SC. March 12-14, 1995.
35. **Schabel SI.** The Solitary Lung Nodule. Radiology for the Primary Care Physician, Charleston, SC. March 12-14, 1995.
36. **Schabel SI.** Clinico-Pathological Aspects of AIDS. AIDS Symposium 1995. MUSC, Basic Science Auditorium, Charleston, SC. November 9-10, 1995.
37. **Schabel SI.** Whistle Blowing - Licensure and Legal Aspects. MUSC, Orthopedic Grand Rounds, Charleston, SC. May 7, 1996.
38. **Schabel SI.** Radiology Workshop for Family Physicians. Annual Meeting of the South Carolina Academy of Family Physicians, Hyatt Regency, Hilton Head Island, SC. November 12, 1999.
39. **Schabel SI.** Family Practice Workshop. Sponsored by Greenville Academic Services, Greenville, SC. March 23, 2001.
40. **Schabel SI.** General Internal Medicine Spring Conference, sponsored by Dr. Freeman. Mills House, Charleston, SC. March 22, 2001.
41. **Schabel SI.** Radiology Update for the Primary Care Physician. CME Sym-paws-ium, Clemson, SC. September 14-15, 2001.
42. **Schabel SI.** Mammography I Interpretive Skills Assessment. Awarded 7 credit hours, Category I, toward the AMA Physician's Recognition Award. March 3, 2003.
43. **Schabel SI.** Reading X-Rays. Emergency Lecture Series for Residency Program, MUSC, Charleston, SC. July 23, 2004.
44. **Schabel SI.** The Construction and Deconstruction of Louis Pasteur. MUSC, 2004 Infection and Immunity Class, Charleston, SC. December 6, 2004.
45. **Schabel SI.** Case Presentations (Moderator). Second Annual Joint Meeting of South and North Carolina Radiological Societies, Charleston, SC. Mar 3-6, 2005.

TEACHING - MEDICAL STUDENTS

1. Radiographic Anatomy (Head and Neck, Upper Extremity, Chest, Abdomen). Freshman Anatomy, Summer, Fall 1977-1994.
2. Introduction to Clinical Medicine I, Medicine and Social Responsibility, Small Group leader, 1983-1992.
3. Introduction to Clinical Medicine, Diagnostic Imaging, Sophomore – 1981-Present.
4. Imaging of Heart, Lungs, Abdomen, Nervous System. Sophomore Physical Diagnosis, 1980-Present.
5. Senior Sub-Specialty Rotation - Course Director for Radiology, 1978-1979.
6. Senior Radiology Clerkship, 1978-Present.
7. Course Director, 1981-Present
8. Faculty Advisor to Senior Students entering Radiology.
9. Underground Curriculum. Thursday evenings: Radiology seminars for medical students. MUSC, Charleston, SC. 1982 –Present.
10. Medical Licensure. Medical Jurisprudence Course, MUSC, Charleston, SC. September, 1990
11. Medical Licensure in South Carolina - medical students interested in Family Medicine - October 30, 1990
12. Medical Licensure. American Medical Student Association - Fall Region 5 Workshop. MUSC, Charleston, SC. Saturday, November 3, 1990
13. Career Night Radiology. Sebring Aimer House, MUSC, Charleston, SC. November 15, 1990
14. Disciplinary Procedures. Medical Jurisprudence Course, MUSC, Charleston, SC. September 5, 1991
15. Pearls Lecture - Senior Medical Students (Taped), May, 1991
16. AOA Medical Jeopardy (Interhospital challenge between students and physicians), 1999-2004
17. MSAC 1st Specialty Seminar. Lecture Topic: "Match and Interview Process". October 14, 2005.

18. Second Year Clinical Visits – MUSC Dean's Office
Second Year Students are taken on short tours of various clinical services in medicine.
March 11, 2005
March 25, 2005
April 8, 2005
19. Pearls Lecture – Senior Medical Students (Taped), May 17, 2005
20. Internship 101: Equipping Tomorrow's Physicians. Fourth Year Medical Students
April 5, 2010
21. Pearls Lecture - Senior Medical Students, May 18, 2010
22. Oath Ceremony – Senior Medical Students, May 20, 2010
23. CPC1-FA10 – Cardiac Arrest Case – Second year students, September 14, 2010
24. Medical Imaging of the Abdomen, First Year Medical Curriculum, January 21, 2011
25. Student Medical History Club/Waring Library, April 6, 2011

TEACHING - POST GRADUATE

1. Radiology Residents MUSC 1976 - Present
2. Surgical House Staff, Introduction to Diagnostic Imaging, Course Director 1980 – Present
3. Family Medicine House Staff, Annual Radiology Review, Course Director 1980 - Present
4. Urology House Staff, Ultrasound and CT Urology, October - December 1980
5. Cardiology Fellows, Radiology of the Heart, 1980, 1981, 1983
6. Surgical House Staff, Diagnostic Evaluation of the Colon, April 14, 1981
7. Medicine House Staff, Emergency Radiology, October, 1981
8. Radiation Therapy House Staff, New Developments in Radiology, January, 1982
9. ENT House Staff, Radiology of ENT Disease, March, 1983
10. Thoracic Surgery House Staff, Radiology of the Heart, August, 1983

11. Orthopedic House Staff, Radiology of Metastatic Bone Disease, July 19, 1984
12. Imaging of the chest wall. Thoracic Surgery, December 22, 1987
13. Radiology of acutely ill patient - Critical Care Resident, June 20, 1988
14. Trauma Rounds, May 10, 1988
15. Radiology Consultant for Multi-trauma Conference at MUSC. Bi-weekly 1990-1991
16. Surgical House Staff, GI Radiology, January 6, 1996
17. Medicine House Staff Emergency Lecture Series, X-rays, August 20, 1996
18. Surgical House Staff, GI Radiology, January 17, 1998
19. Medicine House Staff, Emergency Lecture Series, Reading X-Rays, August 21, 2001
20. Surgery Grand Rounds – Surgery Residents – Abdominal CT in 2010, August 8, 2010

TEACHING - ALLIED HEALTH

1. Radiology for Physicians Assistants, MUSC - PA Students 1977, 1978
2. Radiology for Graduate Pharmacists, MUSC Pharm D students 1980 - Present
3. Imaging of the Common Bile Duct, Surgical Grand Rounds, 1980
4. Radiology of Acute Cholecystitis, MUSC Grand Rounds, March 1982
5. CPC - Paraquat Poisoning, April 6, 1984
6. Basic Concepts in Radiologic Exams, Nursing Practicum Students, September 1982
7. Radiology for Physical Therapist, MUSC, July 1987 & June 1988
8. New Horizons in Medicine, Seabrook Island, SC. May 6, 1988
9. Pulmonary Imaging, Radiology for Physicians' Assistants Lecture Series, MUSC, Jan 2005.
10. Basic Imaging Course for Physical Therapy Students, June – August 2010, weekly

TEACHING - UNDERGRADUATE PRE-MED

1. Alpha Epsilon Delta Pre Med Honor Society - Radiology, September 11, 1984
2. College Pre-Med Advisors - Radiology on the Move, Sponsored/MUSC Registrar's Office. October 18, 1984.

TEACHING - RADIOLOGIC TECHNOLOGISTS

1. Continuing Education Radiographic Technologists, Charleston County Hospital. 1978, 1979
2. Radiographic Pathology - Radiographic Technology, Bachelors Degree Students. 1979
3. Inservice Training, Radiologic Technologists, MUSC, (Sonography). 1979
4. Tri-County Radiologic Technology Society, Computed Tomography. 1979
5. VA Radiologic Technology Inservice Lecture, Cervical Spine Techniques. February 27, 1985
6. Tri-County Society Radiologic Technologist, Radiology of Fractures. April 1985
7. MUSC Radiologic Technology Inservice, Cervical Trauma. July 24 & 26, 1985
8. Tri-County Radiologic Technologist Society, Imaging of Trauma. February 17, 1988
9. Radiology Ultrasound Technology Education Program, 1986 - 1988
10. 20 Years of Radiologic Advance, Tri-County Radiologic Technology Society. May 1989
11. VA Radiologic Technology Inservice Lecture, 1990
12. Wild Life of South Carolina - Road Kills. Annual Fall Meeting of the South Carolina Radiological Technologist Society, Myrtle Beach, SC. October 5, 1990
13. Annual Meeting of the South Carolina Radiological Technologist Society, Sheraton Charleston Hotel, Charleston, SC. March 5, 1998
14. Radiology Update for the Primary Care Physician. presented at the CME Sym-Paws-ium 2001
16. Radiology Update for the Primary Care Physician. September 14, 2001
17. Successfully completed the CITI Human subject research education course. Dec 6, 2001

18. Radiology At Its Best, Embassy Suites Hotel, Radiologic Technology Meeting, Charleston, SC. March 1, 2002
19. Greenville Memorial Hospital 46th Annual Post Graduate Seminar, Greenville, SC. A Primary Care Update. Sponsored by Greenville Academic Services. April 10-12, 2002
20. AIDS Symposium 2002 sponsored by Dr. Virella, CPC, Professor of Immunology and Microbiology
21. AIDS Symposium 2009 sponsored by Dr. Virella, CPC, Professor of Immunology and Microbiology
22. AIDS Symposium 2010 sponsored by Dr. Virella, CPC, Professor of Immunology and Microbiology, November 18, 2010.

GRANT ACTIVITY

1. Oral Cyclophosphamide vs. Oral Placebo in Scleroderma Pulmonary Alveolitis. In conjunction with Richard Silver M.D. and UCLA, PI's Phil Clements and Don Tashkin.
2. Effects of Distortion from Compression on Radiograph. Grant Proposal to National Institute of Health with Ehsan Samei.

SOUTH CAROLINA LAW ENFORCEMENT DIVISION

FORENSIC SERVICES LABORATORY REPORT

MARK SANFORD
Governor



REGINALD I. LLOYD
Director

Lt. Michael Roach
Moncks Corner Police Department
118 Carolina Avenue
Moncks Corner, SC 29461

FIREARMS DEPARTMENT
March 30, 2010
SLED LAB: L08-18357
Your Case No: 082296
Incident Date: 11/27/2008
[S] Jermaine McKelvey
[V] Bernard Phoenix
[S] Askari Dash

This is an official report of the South Carolina Law Enforcement Division Forensic Services Laboratory and is to be used in connection with an official criminal investigation. These examinations were conducted under your assurance that no previous examinations of person(s) or evidence submitted in this case have been or will be conducted by any other laboratory or agency.

Reginald I. Lloyd, Director
South Carolina Law Enforcement Division

ITEMS OF EVIDENCE:

- Item: 4** One Bulgarian Makarov, 9x18mm caliber pistol, serial number AB 19 745, with magazine.
RESULTS:
Item 4 was examined, test fired using the submitted magazine, and found to be in working order.
- Items: 5 - 9** Five unfired 380 Auto caliber cartridges.
RESULTS:
No examination was conducted on Items 5 through 9.
- Please note that Items 5 through 9 were not the proper caliber for use in the Item 4 pistol, however, 380 Auto caliber cartridges can be fired in Item 4.
- Item: 10** One fired bullet jacket fragment. Please note this item was incorrectly listed on intake documents as a "Spent casing".
RESULTS:
This item was unsuitable for identification with a specific firearm.
Item 10 could have been fired by Item 4 or by another firearm.

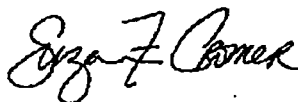


P.O. Box 21398, Columbia, South Carolina 29221-1398 Phone (803) 896-7300 Fax (803) 896-7351

SLED LAB No. L08-18357
March 30, 2010

Page 2 of 2

A test-fired bullet and cartridge case from Item 4 were entered into the Integrated Ballistics Identification System (IBIS). Should any "hits" be developed against these entries, you will be notified. Please retain the Item 4 firearm for a minimum of two years in order to maintain its availability for any future comparisons related to IBIS activity.



Suzann E. Cromer
Forensic Scientist



Ex: 3901640

Se: 243/8
Im: 2/7
0.0

H

MUSC
PHOENIX BERNARD L
1961 Jan 23 M 43979
Acc: 5445676
2008 Nov 27
Acq Tm: 02:48:06 146000

Ex: 3901640

Se: 243/8
Im: 2/7
0.0

H

MUSC
PHOENIX BERNARD L
1961 Jan 23 M 43979
Acc: 5445676
2008 Nov 27
Acq Tm: 02:48:06 146000

A



512 x 512

P

0.0 kV
0.0 mA
Tilt: 0.0
0.0 s
Id: DCM / Lin: DCM / Id: ID
W: 255 L: 127

F

DFOV: 21.4 x 21.4cm

A



512 x 512

P

0.0 kV
0.0 mA
Tilt: 0.0
0.0 s
Id: DCM / Lin: DCM / Id: ID
W: 255 L: 127

F

DFOV: 21.4 x 21.4cm

Ex: 3901640

Se: 243/8
Im: 2/7
0.0

H

MUSC
PHOENIX BERNARD L
1961 Jan 23 M 43979
Acc: 5445676
2008 Nov 27
Acq Tm: 02:48:06 146000

Ex: 3901640

Se: 243/8
Im: 2/7
0.0

H

MUSC
PHOENIX BERNARD L
1961 Jan 23 M 43979
Acc: 5445676
2008 Nov 27
Acq Tm: 02:48:06 146000

R



512 x 512

L

0.0 kV
0.0 mA
Tilt: 0.0
0.0 s
Id: DCM / Lin: DCM / Id: ID
W: 255 L: 127

F

DFOV: 21.4 x 21.4cm

R



512 x 512

L

0.0 kV
0.0 mA
Tilt: 0.0
0.0 s
Id: DCM / Lin: DCM / Id: ID
W: 255 L: 127

F

DFOV: 21.4 x 21.4cm

Ex: 3901640

H

MUSC
PHOENIX BERNARD L
1961 Jan 23 M 43979
Acc: 5445676
2006 Nov 27
Acq Tm: 02:43:03.146000

Ex: 3901640

H

MUSC
PHOENIX BERNARD L
1961 Jan 23 M 43979
Acc: 5445676
2006 Nov 27
Acq Tm: 02:43:03.146000

Se: 243:8
In: 87
0.0

Se: 243:8
In: 87
0.0

512 x 512

512 x 512

P

A

A

P

0.0 kV
0.0 mA
Tm: 0.0
0.0 s
Id:DCM / Lin:DCM / Id:ID
W:255 L:127

0.0 kV
0.0 mA
Tm: 0.0
0.0 s
Id:DCM / Lin:DCM / Id:ID
W:255 L:127

F

F

DFOV: 21.4 x 21.4cm

DFOV: 21.4 x 21.4cm

Ex: 3901640

R

MUSC
PHOENIX BERNARD L
1961 Jan 23 M 43979
Acc: 5445676
2006 Nov 27
Acq Tm: 02:43:06.146000

Se: 243:8
In: 77
0.0

512 x 512

A

P

0.0 kV
0.0 mA
Tm: 0.0
0.0 s
Id:DCM / Lin:DCM / Id:ID
W:255 L:127

DFOV: 21.4 x 21.4cm

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

Jermaine T. McKelvey, #280590,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

2012-CP-08-1235

ORDER OF DISMISSAL

2014 JUL 22 PM 4:48
 FILED
 MARY P. BROWN
 CLERK OF COURT
 BERKELEY COUNTY, SC

Presiding Judge:

Applicant's Attorney:

Respondent's Attorney:

Trial Counsel:

Date of Hearing:

Court Reporter:

Hon. Deadra L. Jefferson

Dennis J. Rhoad, Esquire

Sally Rhoad, Esquire

Ashleigh R. Wilson, Esquire

Chad D. Shelton, Esquire

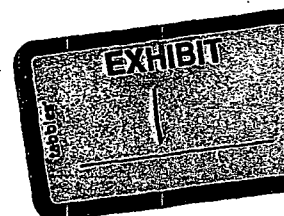
May 19, 2014

Joyce C. Rueger

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed April 23, 2012 and amended on May 28, 2013 and May 9, 2014. The Respondent made its Return on June 28, 2013. An evidentiary hearing on the matter was convened on May 19, 2014 at the Charleston County Courthouse. The Applicant was present at the hearing and represented by Dennis J. Rhoad and Sally Rhoad, Esquires. Ashleigh R. Wilson, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

Also present and testifying was Chad Shelton, Esquire, Suzanne Cromer, Cynthia Fuda, and Michelle Moritzky. The Court had before it the trial transcript, the Berkeley County Clerk of Court records, the Applicant's records from the South Carolina Department of Corrections, the

1-10/14/14
 [Signature]



Applicant's PCR application, the Respondent's Return, the Applicant's appellate records, and exhibits submitted to the Court by the Applicant¹.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Berkeley County Clerk of Court. The Applicant was indicted at the February 2009 term of the Berkeley County Grand Jury for Assault and Battery with Intent to Kill (ABWIK)² (2009-GS-08-0304) and Possession of a Firearm During the Commission of a Violent Crime³ (2009-GS-08-0305). The Applicant was subsequently indicted at the April 2009 term of the Berkeley County Grand Jury for Armed Robbery⁴ (2009-GS-08-0504).⁵ The Applicant was represented by Chad D. Shelton, Esquire and David Schwacke, Esquire.

On April 14, 2010, the Applicant proceeded to trial and was found guilty on all charges. The Applicant was sentenced by Judge Dennis to confinement for a period of twenty-seven (27) years for Armed Robbery, five (5) years for Possession of a Firearm During the Commission of a Violent Crime, and twenty (20) years for ABWIK. The sentences for Armed Robbery and

¹ Applicant's Exhibit 1 is an affidavit with attachments from Dr. Donna R. Roberts. Applicant's Exhibit 2 is an affidavit with attachments from Dr. Stephen Schabel.

² ABWIK is a violent, most serious felony punishable by twenty (20) years' imprisonment; the offender is not eligible for parole until he serves at least seven (7) years of his sentence. See S.C. CODE ANN. § 16-3-620 (2008); S.C. CODE ANN. § 16-1-60 (2008); S.C. CODE ANN. § 17-25-45 (2008).

³ Possession of a Firearm During the Commission of a Violent Crime is a felony punishable by a mandatory minimum five (5) years' imprisonment in addition to the sentence imposed for the principal crime. See S.C. CODE ANN. § 16-23-490 (2008).

⁴ Armed Robbery is a violent, most serious felony punishable by a mandatory minimum ten (10) years' imprisonment and a maximum thirty (30) years' imprisonment, none of which sentence may be suspended, nor probation granted. See S.C. CODE ANN. § 16-11-330(A) (2008); S.C. CODE ANN. § 16-1-60 (2008); S.C. CODE ANN. § 17-25-45 (2008).

⁵ The Applicant was also convicted of Possession of Cocaine Base/Meth (2009-GS-08-2447) and sentenced to one (1) year imprisonment. See S.C. CODE ANN. § 44-53-375(A) (2008) (penalty for misdemeanor Possession of Cocaine Base/Meth-First Offense is a maximum three (3) years' imprisonment and/or a five thousand dollar (\$5,000.00) fine). However, the Applicant does not challenge this conviction in his Application for post-conviction relief.

Possession of a Firearm During the Commission of a Violent Crime are to be served consecutively to each other and concurrent with the remaining sentences.

A timely Notice of Appeal was filed on behalf of the Applicant. Katherine H. Hudgins, Esquire of the South Carolina Office of Appellate Defense perfected the appeal in the form of an Anders brief. See Anders v. California, 386 U.S. 738, 87 S. Ct. 1396 (1967). The South Carolina Court of Appeals affirmed the Applicant's convictions and sentences. The Remittitur was issued on February 26, 2013.

ALLEGATIONS

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

1. Violation of 6th Amendment Right to Effective Assistance of Counsel
 - a. Failure to timely and properly object to jury instruction on malice
 - b. Failure to call expert witness to testify on the Applicant's behalf
 - c. Failure to object to perjured testimony
 - d. Failure to fully investigate the case
 - e. Failure to impeach witnesses with prior convictions
 - f. Failure to attack the character of the victim and the witnesses
 - g. Failure to prepare for trial
 - h. Failure to secure the victim's medical records
 - i. Failure to move for the recusal of the judge
 - j. Failure to subpoena witnesses
 - k. Failure to subpoena the Applicant's investigator
 - l. Failure to challenge the court's guilty verdict
2. Violation of 5th Amendment Right to a Fair Trial
3. Violation of 14th Amendment Right to Due Process and Equal Protection

On May 28, 2013, the Applicant amended his application to allege the following:

1. Ineffective Assistance of Counsel
 - a. Counsel failed to object to the inference of malice charge given by the trial judge.
 - b. Counsel failed to object to the testimony of the MUSC nurse (Cindy Fuda) that the alleged victim Mr. Phoenix sustained a gunshot wound.

30444
3 

- c. Counsel failed to object to the introduction of the bullet jacket found at the scene as evidence.
- d. Counsel failed to impeach witnesses based on their prior convictions.
- e. Counsel failed to inform Applicant that he was not calling any witnesses on his behalf.
- f. Counsel failed to adequately investigate the facts and circumstances surrounding the injury to the victim.
- g. Counsel failed to investigate, develop, and present all available, relevant, and admissible mitigating evidence for sentencing.

On May 9, 2014, the Applicant amended his application a second time to allege the following:

1. Ineffective Assistance of Counsel.

- a. Counsel failed to timely and properly object to the trial judge's improper jury instruction that malice could be inferred from the use of a deadly weapon. See State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009).
 - i. The trial judge's use of an improper jury instruction in Applicant's trial violated Applicant's Fifth Amendment right to a fair and impartial trial.
 - ii. The trial judge's use of an improper jury instruction and the prosecution's announcement that the judge would charge the jury panel that malice could be inferred from the use of a deadly weapon violated Applicants' rights to due process and equal protection in his trial proceedings.
- b. Counsel failed to properly investigate the facts surrounding the Applicant's case including but not limited to the following:
 - i. Prior records of testifying witnesses
 - ii. Medical experts who treated and made diagnosis concerning victim Bernard Phoenix
- c. Counsel failed to call expert witnesses on Applicant's behalf including but not limited to treating and or non-treating physicians and nurses, emergency personnel, forensic experts and police personnel.
- d. Counsel failed to object or move to impeach testimony of testifying witnesses.
- e. Counsel failed to move for or accept the court's offer of a continuance based on the failure of Dr. Todd Mishall to attend the trial.
- f. Counsel failed to investigate or subpoena any medical expert who could testify on the issue of whether the alleged victim Bernard Phoenix did in fact sustain a gunshot wound to the head.

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SPG

- g. Counsel failed to question witnesses and or subpoena medical records showing facts in conflict with the allegation that Bernard Phoenix in fact sustained a gunshot wound to the head.
- h. Counsel failed to investigate and subpoena an expert witness who would testify as to the level of alcohol in alleged victim Bernard Phoenix's blood and its impact on his ability to perceive and observe his surroundings.
- i. Counsel failed to investigate, subpoena, and question an expert on the issue of the significance of the presence or lack of presence of gun powder burns or residue.
- j. Counsel failed to object to emergency personnel and treating nurse's testimony that the alleged victim Bernard Phoenix in fact sustained a gunshot wound when such witnesses lack the expertise to classify a wound as coming from a gunshot.
- k. Counsel failed to investigate and subpoena an expert witness to testify as to whether the CT scan and other medical records indicate the alleged victim Bernard Phoenix sustained a gunshot wound.
- l. Counsel failed to object to or question the alleged victim Bernard Phoenix as to possible perjury in his testimony and failed to impeach his testimony based on prior arrest records of Mr. Phoenix.
- m. Counsel failed to object to and/or question witness Korshanda Baskin as to blood spatter statements made by bar owner, and inconsistencies in her testimony and statement.
- n. Counsel failed to object to and question witness Sharon Vance as to inconsistencies in her testimony and statement. Also, trial counsel failed to impeach witness Vance with the use of her prior convictions.
- o. Counsel failed to further question or investigate Officer James Taylor regarding his testimony as to where the gun was found and as to who performed the booking of Mr. McKelvey.
- p. Counsel failed to object to testimony concerning gunshot residue as said evidence was improperly collected and collected without giving Mr. McKelvey his Miranda rights as required by the State and Federal Constitutions.
- q. Counsel failed to object to the testimony of Officer Tony Edwards concerning a bullet jacket and fragment found at the scene. Trial counsel also failed to object to the introduction of said bullet jacket and fragment into evidence.
- r. Counsel failed to properly investigate or object to Officer Michael Roach's testimony concerning whether Mr. Phoenix was in fact shot and the location of alleged wounds as Officer Roach is not qualified to make such conclusions.
- s. Counsel failed to object to the trial court's jury instruction of malice.
- t. Counsel failed to present any evidence or argue to the jury that there was in fact evidence that malice should not be inferred and there was evidence that the "deed" was not done with a deadly weapon.

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- u. Counsel failed to investigate or question witness Laurie Villalobos as to her criminal record. Further, counsel failed to attempt to impeach Ms. Villalobos concerning her criminal record.
- v. Counsel failed to investigate and attack the victim and witnesses' character.
- w. Counsel failed to have properly qualified medical experts present concerning Mr. Phoenix's x-rays, CT scans, and other medical records. Further, trial counsel failed to obtain such pictures so the jury could view the alleged gunshot wound with the assistance of trained medical personnel.
- x. Counsel failed to move the Court for the trial judge to recuse himself from the case when the trial judge showed resentment and hostility toward the Applicant.
- y. Counsel failed to subpoena witnesses on Applicant's behalf and to be properly prepared to go forward with Applicant's trial.
- z. Counsel failed to further investigate and question witness David Black concerning his testimony that the gun he examined did not have any fingerprints, blood or anything to link the Applicant to the gun.
- aa. Counsel failed to inform the Applicant as to the possible length of sentence he could be given based on the charges Applicant faced in his trial.
- bb. Counsel failed to ask for a continuance when he discovered he had not been provided the most recent police report concerning Applicant's incident.
- cc. Counsel failed to properly object to alleged statement of Applicant. Trial counsel should have objected to the statement on the grounds it was not voluntarily given since Applicant was not mentally and physically capable of knowingly making a statement at the time. Further trial counsel should have objected to the statement on the ground he was not provided a complete copy of the police investigation report prior to trial such that trial counsel could have properly investigated the statement and its circumstances and could have informed his client of the consequence of the introduction of the statement.
- dd. Counsel failed to object to the testimony of the MUSC nurse (Cynthia Fuda) that the alleged victim Mr. Phoenix sustained a gunshot wound.
- ee. Counsel failed to object to the introduction of the bullet jacket found at the scene as evidence. Trial counsel should have objected when officer testified he picked up a jacket of a bullet fragment that he said passed through victim and landed in wall.
- ff. Counsel failed to inform the Applicant that he was not calling any witnesses on Applicant's behalf.
- gg. Counsel failed to adequately investigate the facts and circumstance surrounding the injury to the victim.
- hh. Counsel's performance during the sentencing phase was both unreasonable and prejudicial.
 - i. Counsel failed to investigate, develop, and present all available, relevant, and admissible mitigating evidence.

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FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

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

Summary of the Testimony

Chad Shelton, Esquire, was present and testified he has been a public defender since 2007. He testified he was appointed to represent the Applicant and first met with him on February 3, 2009. Counsel testified he met with the Applicant frequently at the detention center. He testified that the majority of his interaction with the Applicant took place at the detention center. He testified he filed Brady and Rule 5 motions on the Applicant's behalf and reviewed the materials received with the Applicant. Counsel testified he received and reviewed police reports, the victim's medical records, SLED analysis reports from the gunshot residue, drug, bullet, and firearm testing, the SLED chain of custody, witness statements from people inside and outside of the club, the Applicant's criminal record, and the evidence log from the police department, as well as close to two hundred (200) pages of medical records.

Counsel testified he hired an investigator to speak with witnesses given to him by the Applicant. He testified the witnesses he spoke to were not helpful. Counsel testified he discussed calling witnesses at trial with the Applicant, but they did not have any witnesses to present. He testified he also discussed with the Applicant the preservation of last argument and calling a firearms expert because he did not think the gunshot was a gunshot due to the caliber of the

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weapon. He testified he was unable to find a firearms expert that would have been helpful to the Applicant's case to present at trial. He testified, however, that he did thoroughly consider and investigate an expert on the gunshot issues.

Counsel testified the Applicant's defense to the Armed Robbery charge was that the Applicant had money on him at arrest and did not have any reason to take any money from Mr. Phoenix the victim. He testified on the ABWIK charge the Applicant's defense was that the medical reports all relied on the victim's testimony, that the victim was lying about being shot by the Applicant and that the victim owed the Applicant money, so the money the Applicant took from the victim was in fact owed him. Counsel testified he tried to get the court to charge the jury on Attempted Armed Robbery, but was unsuccessful. Counsel testified he is unsure if he discussed his trial strategy with the Applicant prior to trial because communication with the Applicant broke down after the Applicant's hearing denying his bond reduction. He testified this breakdown in communication did not affect his trial strategy or his ability to effectively attack the State's evidence at trial because at the outset of Counsel and the Applicant's relationship, communication was good and Counsel was able to obtain all the information he needed. Counsel testified the Applicant was upset at the State and did not want to hear what Counsel was working on because it was not what the Applicant wanted to hear. However, Counsel testified he felt his representation was effective, even though he and his client were not communicating well. Counsel's articulated strategy was to argue the Applicant beat up the victim without a gun to get money he was owed in order to obtain a jury charge on the lesser included offense of ABWIK—Assault and Battery of a High and Aggravated Nature (ABHAN)⁶—which would eliminate the

⁶ ABHAN is a common law misdemeanor punishable by up to ten years in prison. State v. Fennell, 340 S.C. 266, 274, 531 S.E.2d 512, 516-17 (2000); State v. Hill, 254 S.C. 321, 331, 175 S.E.2d 227, 232 (1970); State v. Prince, 240 S.C. 96, 100, 124 S.E.2d 778, 780 (1962). ABHAN is the unlawful act of violent injury to another accompanied by circumstances of aggravation. State v. Frazier, 302 S.C. 500, 397 S.E.2d 93 (1990); State v. Foxworth, 269 S.C.

possibility of a Possession of a Firearm During the Commission of a Violent Crime conviction altogether.

Counsel testified that prior to trial the State offered the Applicant a guilty plea to a sentence ranging from twelve (12) to eighteen (18) years, which the Applicant rejected. Counsel testified he discussed with the Applicant the sentences he was facing and his constitutional rights. He testified he was prepared to proceed to trial when the Applicant's case was called. Counsel also testified he did not move to recuse Judge Dennis prior to trial. He testified he did, however, have his recusal request of Judge Harrington granted because she prosecuted the Applicant on previous unrelated charges during her time as an assistant solicitor.

Counsel testified the State's evidence against the Applicant included the victim's testimony, which formed the basis of the State's case, the fact that the Applicant was seen trying to leave the club shortly after police heard shots fired at the corner in the area of the incident, and a positive gunshot residue test of the Applicant's hands. The State's evidence also included: the police report that states the gun was found in the glove box closest to the Applicant and the victim's statement to police that the Applicant shot him. The Applicant's version of the facts differed on the number of shots fired and the Applicant and the victim getting into an argument over the victim taking money from the Applicant.

Counsel testified that prior to trial he was given the time to review an additional police report he received during the Applicant's Jackson v. Denno, 378 U.S. 368, 84 S. Ct. 1774 (1964) hearing on statements alleged to have been made by the Applicant prior to the gunshot residue

496, 238 S.E.2d 172 (1977). Circumstances of aggravation include the use of a deadly weapon, the intent to commit a felony, infliction of serious bodily injury, great disparity in the ages or physical conditions of the parties, a difference in gender, the purposeful infliction of shame and disgrace, taking indecent liberties or familiarities with a female, and resistance to lawful authority. Foxworth, 269 S.C. at 498, 238 S.E.2d at 173; State v. Hollman, 245 S.C. 362, 140 S.E.2d 597 (1965); State v. Tyndall, 336 S.C. 8, 21, 518 S.E.2d 278, 285 (Ct. App. 1999).

test. Counsel testified the additional police report included a statement from the Applicant. He testified after review of the report he was able to adequately cross-examine the State's witnesses at trial.

Counsel testified he did not speak with the SLED agents prior to trial. He testified he generally does not speak with the SLED agents unless he has a question about their reports. He testified some of the SLED reports in the Applicant's case were helpful to the defense. Counsel testified he also did not speak with a SLED agent about whether or not blood was found on the bullet jacket. He testified he brought out at trial the fact that the bullet jacket was not tested for blood. He testified if blood was found on the bullet jacket it would have been hurtful to the Applicant, but if blood was not found on the bullet jacket it could have been helpful to the Applicant.

Counsel testified he reviewed all the victim's medical records prior to trial and did not feel the need to speak with medical professionals about the records. Counsel testified it was his experience that when testifying at trial medical professionals rarely stray away from the conclusions reached in their reports. He testified further he felt a medical professional at trial would testify the victim's injuries were a gunshot wound based on the victim's testimony and it was unlikely the treating physician would have changed his opinion. He testified he was able to effectively cross-examine the medical professionals presented by the State without consulting or calling an expert witness. Counsel's strategy was to introduce criminal records, such as witness Sharon Vance's pending bench warrant, even though Counsel did not discover that until later, to impeach witnesses and to ultimately show that the victim was not credible; however, Counsel found nothing to impeach the witnesses. He further testified that he would not have been able to

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establish the witness, Sharon Vance's knowledge of the pending bench warrant at the time of her testimony.

Counsel testified he did not consider moving for a continuance based on the absence of the victim's treating physician at trial. He testified the treating doctor's testimony would not have been helpful. He testified the treating doctor's absence was in fact beneficial to the defense. Counsel testified he did not want the victim's treating doctor present to say for certain the Applicant suffered a gunshot wound. He testified because the physician was absent he was also able to more effectively cross-examine Nurse Fuda. Counsel testified he did not interview Nurse Fuda but knew the substance of her testimony based on the victim's medical reports. He testified Nurse Fuda was not qualified to diagnose the victim's injuries as a gunshot wound. Counsel testified that on cross-examination he got Nurse Fuda to say the victim was intoxicated and that medical professionals relied on the victim's history of the incident to diagnose the victim.

Counsel also testified he did not have an expert witness to testify about the victim's injuries at trial because he did not want a doctor to opine definitively that the victim's wound was from a gunshot and that the absence of a doctor's testimony was beneficial to the Applicant's case. He testified he did not call any witnesses and thought strategically preserving last argument was important. He also testified calling an expert to testify about whether or not the victim suffered from a gunshot wound would have only been a challenge to the victim's credibility on the gunshot wound but not his remaining testimony that he was hit in the head by the Applicant and would not have affected the elements of proof on the Applicant's armed robbery charge. Counsel testified whether the victim sustained a gunshot wound was important, but a gunshot wound is not an absolute requirement for the Applicant to be convicted of assault and battery with intent to kill. Counsel testified he spoke with his client about possibly calling a

gun expert, but that ultimately he was not able to get in touch with any expert who could offer favorable testimony. He testified he was able to prepare for cross-examination and effectively examine the officer with the information he had and was aware of the substance of the victim's testimony prior to trial.

Counsel testified he did not consider objecting to the testimony of Michelle Moritzky, the EMS personnel who responded to the scene of the shooting. He testified he had no basis to challenge her qualifications. He testified on cross-examination of Ms. Moritzky at trial, he elicited testimony from her that she was dispatched to a call of a gunshot wound and the victim's injury seemed to indicate a gunshot wound. He testified he also got Ms. Moritzky to agree that her testimony about the victim's injury was based on the information she received from the police before arriving at the scene.

Counsel testified he did not object to the admissibility of the bullet fragment found by Officer Edwards at the scene. He testified he did not have a basis to object because the fragment was found at the scene and he intended to point out to the jury that the bullet fragment did not match the gun found at the scene to help exculpate his client. Counsel testified he also did not have a basis to object to Officer Edwards' testimony about blood being on the gun. He testified there was no evidence of whose blood was on the gun and he saw Edwards' testimony as a police observation.

Counsel testified he reviewed the victim's prior record before trial. He testified the Applicant had a pending warrant and did not recall the Applicant having a conviction for breach of trust. Counsel testified he reviewed the prior record of Sharon Vance as she took the stand to testify at trial. He testified Vance had an active bench warrant and a pending forgery charge, but her prior convictions were not within the admissible time period. Counsel testified he did not see

any convictions that could be used to impeach the victim or Vance at trial, but that he was effectively able to cross-examine Vance by questioning her on her different, conflicting statements made at the scene of the incident and at trial.

Counsel testified he was aware of State v. Belcher, 385 S.C. 597, 600, 685 S.E.2d 802, 803-804 (2009) (jury may not infer malice in order to prove the element of Murder or ABWIK by use of a deadly weapon where evidence present that would reduce, mitigate, excuse, or justify the homicide or ABWIK) at the time of trial. He testified he did not object to the malice instruction given to the jury using Belcher. He testified the malice charged in the Applicant's case was critical. Counsel testified there was no evidence that would reduce, mitigate, excuse, or justify the ABWIK or of self-defense presented in this case. Counsel testified that the Applicant always maintained his innocence. Likewise, Counsel did not challenge the admissibility of the blood spatter evidence and that he should have objected under Edwards. State v. Edwards, 194 S.C. 410, 10 S.E.2d 587 (1940) (non-expert may identify substance as blood at trial).

Suzanne Cromer also testified at the hearing. Cromer testified she is a SLED agent who testified at the Applicant's trial as a firearms and toolmarks expert. Cromer testified she concluded the bullet fragment found at the scene of the shooting was not suitable for identification. She testified the bullet fragment could have been fired by the firearm found in this case or any other firearm.

Cromer testified she did not observe blood or fiber on the bullet fragment. She testified she was not asked at trial about blood being found on the fragment but that the fragment was admitted at trial. Cromer testified there is a 50/50 chance blood will be found on a bullet fragment. She testified the blood could have been wiped off on clothing or the bullet could have

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been so hot when it was ejected that the blood dissipated. She testified many factors come into play when determining whether blood was on the fragment.

Cromer testified a semi-automatic gun will eject a cartridge case after expelling the bullet. She testified she was not given a cartridge to test. She testified in her experience the fired bullet and the casing are usually dispersed in the same general area, however, it is possible for casings to be removed or collected at the scene. Cromer testified further she does not always receive a casing when given a bullet or fragment to test and did not receive a cartridge case in the Applicant's case. She testified that where a cartridge is found on the scene of a crime "depends"; however, this line of questioning was explored at trial.

Cynthia Fuda also testified at the hearing. She testified she is a registered nurse at MUSC. At the time of trial Nurse Fuda was qualified as an expert in intensive care nursing. Nurse Fuda testified she treated the victim during his time in the surgical trauma unit. She further testified that she has training in treating gunshot wounds. She testified that the victim's medical records reflected "gunshot wound" as his admitting diagnosis. She testified she does not have training or experience in identifying or diagnosing a gunshot wound. She testified further her testimony during the Applicant's trial that the victim suffered a gunshot wound was based on the victim's medical records—the EMS, police, and doctor's reports that the victim was admitted with a gunshot wound—and her experience as an intensive care nurse. She testified prior to testifying at trial, she reviewed the victim's records. She testified her testimony at trial was not based on a conclusion that she reached about the victim's injuries and that her testimony was not her assessment that the victim suffered from a gunshot wound.

Also present to testify was Michelle Moritzky. Ms. Moritzky testified she has been a paramedic in Berkeley County from the time of the Applicant's trial until now. She testified she

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treated the victim after being called to the scene by dispatch. Ms. Moritzky testified she treated the victim for a "penetrating type injury to the head." She testified she never diagnosed the victim's injuries as a gunshot wound, but the victim's injuries appeared to indicate a gunshot type wound to the head. She testified her conclusion was based on the amount of blood and the type of injury, as well as the casing found by the police. She testified that although she has been trained to treat gunshot wounds, she treats symptoms and does not evaluate the injury. She further testified that she had been to this type of scene before and the Applicant's case was not the first time she was seeing what was alleged to be a gunshot type wound.

Lastly, the Applicant took the stand. The Applicant testified he thought his poor communication with counsel shortly before trial affected counsel's performance at trial. He testified he thought counsel abandoned him at trial, never communicated to him in writing, and never communicated his trial strategy to him. He testified counsel never told him he could not find any witnesses and never discussed calling any expert witnesses. The Applicant testified counsel did not present evidence to support his theory that he did not shoot the victim.

The Applicant testified counsel never discussed with him the evidence or the fact that the victim's treating doctor would not testify at trial. He testified counsel also never discussed with him cross-examination of the State's witnesses. The Applicant testified counsel kept telling him he was ready and prepared for trial but that he believes Counsel was highly ineffective. The Applicant testified he thought counsel should have objected to the malice charge given at trial. He testified counsel also never discussed the bullet fragment with him but the Applicant did not clarify whether the victim's injury was or was not a gunshot wound. The Applicant testified if all these things were done, the outcome of his trial would have been different.

Ineffective Assistance of Counsel

I. Standard

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "the burden of proof is on the applicant to prove his allegation by a preponderance of the evidence."

Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 622, 300 S.E.2d 482, 483 (1983)). Where the Applicant alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814 (citing Strickland, 466 U.S. at 686, 104 S. Ct. at 2064).

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

Courts use a two-pronged test to evaluate allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. See id. at 117-18, 386 S.E.2d at 625. Under this prong, attorney performance is measured by its "reasonableness under prevailing professional norms." Id. at 117, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 668, 104 S. Ct. at 2052). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional

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errors, the result of the proceeding would have been different.” Id. at 117–18, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 694, 104 S. Ct. at 2068). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 694, 104 S. Ct. at 2068).

This Court finds Counsel is a trial practitioner who has extensive experience in the trial of serious offenses. This Court finds Counsel’s testimony credible and finds the Applicant’s testimony to be not credible. Counsel conferred with the Applicant on numerous occasions. During conferences with the Applicant, Counsel discussed the pending charges, the range of penalty, the elements of the charges and what the State was required to prove, the Applicant’s constitutional rights, the Applicant’s version of the facts and possible defenses or lack thereof.

Regarding the Applicant’s claims of ineffective assistance of counsel, this Court finds the Applicant has failed to meet his burden of proof. This Court finds that the Applicant’s attorney demonstrated the normal degree of skill, knowledge, professional judgment, and representation expected of an attorney who practices criminal law in South Carolina. State v. Pendergrass, 270 S.C. 1, 5, 239 S.E.2d 750, 752 (1977); Strickland, 466 U.S. at 687–88, 104 S. Ct. 2052, 2064–65; Butler, 286 S.C. at 442, 334 S.E.2d at 814 (citing Strickland, 466 U.S. at 687–88, 104 S. Ct. at 2064–65, Turner v. Bass, 753 F.2d 342, 348 (4th Cir. 1985), *rev’d on other grounds*, Turner v. Murray, 106 S. Ct. 1683 (1986); Marzullo v. Maryland, 561 F.2d 540, 543 (4th Cir. 1977)). This Court finds further Counsel adequately conferred with the Applicant, conducted a proper investigation, and provided thorough representation. This Court finds that Counsel’s representation did not fall below an objective standard of reasonableness.

II. Expert Witness Testimony and Trial Strategy

The Applicant alleges Counsel was ineffective for failing to investigate or subpoena an expert witness to testify at trial about whether the victim suffered a gunshot wound to the head. This Court finds Counsel was not deficient for failing to procure an expert to testify at trial about the victim's injuries. At the evidentiary hearing, Counsel testified he looked into procuring a firearms expert to testify at trial about whether the caliber of gun found in the cases could have caused the type of injury sustained by the victim. Counsel testified he was unable to find an expert witness with favorable testimony and ultimately decided not to call any witnesses at trial because he felt it was important strategically to preserve last argument.

This Court finds Counsel articulated a valid strategic basis for his decision not to call any witnesses at trial. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1996); Underwood v. State, 309 S.C. 560, 562, 425 S.E.2d 20, 22 (1992); Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 778-79 (1992) (finding counsel's decision not to call witnesses reasonable where their testimony would have been of no value to the case and witnesses were not credible). Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992) (citing Goodson v. U.S., 564 F.2d 1071 (4th Cir. 1977)). Counsel stated he decided not to call any witnesses at trial to preserve last argument which he thought was very important. This Court finds Counsel's desire to preserve last argument was a valid strategic basis for not calling any witnesses at trial.

This Court finds the Applicant's assertions that Counsel never discussed with him strategic decisions, such as whether the defense should present a case or obtain last argument is without merit. The trial court specifically questioned the Applicant on whether Counsel explained his strategic decisions, as well as the Applicant's right to testify and present a case, to which the Applicant affirmed Counsel discussed and he understood. (Tr. 337: 14-25, 338:1-25, 339:1-25, 340:1-25, 341:5-10). See Abney v. State, 408 S.C. 41, 51, 757 S.E.2d 544, 549 (Ct. App. 2014) ("While trial counsel should consult with his client, the final decision on strategy belongs to counsel."); More v. State, 399 S.C. 641, 723 S.E.2d 871, 873 (2012) (citing Florida v. Nixon, 543 U.S. 175, 187, 125 S. Ct. 551 (2004) ("Attorneys have a duty to consult with their clients regarding 'important decisions,' including questions of overarching 'defense strategy.' . . . This does not require counsel to obtain the defendant's consent on every strategic decision, but certain decisions regarding the waiver of basic trial rights [to plead guilty, waive a jury, testify on his own behalf, or take an appeal] cannot be made for the defendant by surrogate"). Further, the Applicant presented no evidence at the hearing that Counsel made decisions on fundamental trial strategies without his consent. Therefore, this assertion of error is overruled.

This Court also finds the Applicant was not prejudiced by Counsel's failure to call an expert witness to testify about the victim's injuries at trial. See Dempsey v. State, 363 S.C. 365, 370, 610 S.E.2d 812 (2005) (citing McLaughlin v. State, 352 S.C. 476, 483-84, 575 S.E.2d 844-45 (2003)) (finding defense counsel's decision not to call an expert witness to rebut the State's expert witness was legitimate strategic decision and any resulting prejudice to the Applicant would be merely speculative). This Court finds the testimony of the expert witnesses presented by the Applicant at the evidentiary hearing was not exculpatory and it is unlikely the expert's testimony would have affected the outcome of the Applicant's trial.

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The Applicant presented by affidavit the testimony of Dr. Donna R. Roberts, a radiologist. See Robert's Aff. 1, Apr. 25, 2014. Dr. Roberts, after review of the victim's two CT scans, stated she observed a depressed skull fracture and, based on her medical training and experience, found no metallic ballistic fragments. See Robert's Aff. 2, Apr. 25, 2014. The Applicant also presented by affidavit the testimony of Dr. Stephen Schabel, a radiologist. See Schabel Aff. 1, May 14, 2014. Dr. Schabel also observed a depressed skull fracture after review of the victim's two CT scans. See Schabel Aff. 2, May 14, 2014. Dr. Schabel also opined that based on the shape of the depression and based on his medical training and experience, to a reasonable degree of medical certainty, the victim's skull depression as shown on the victim's CT scan may have been caused by a strike from a barrel of a gun or some other linear object and not by the firing of a bullet from a gun. See Schabel Aff. 2-3, May 14, 2014. Dr. Schabel based his opinion on review of the MUSC CT scan, SLED ballistics report concerning the gun, and the bullets in evidence. See Schabel Aff. 2, May 14, 2014. Dr. Schabel also opined that "almost all non-jacketed bullet gunshot wounds striking bone leave metallic fragments after striking the bone." See Schabel Aff. 3, May 14, 2014.

This Court finds neither expert presented by the Applicant could conclusively say the victim did not suffer from a gunshot wound to the head. This Court finds their testimony, if presented by Counsel at trial, also would not have helped the Applicant defend against the Armed Robbery charge for which he was also on trial. This Court also finds the testimony of both Dr. Schabel and Dr. Roberts that the victim suffered from a skull fracture was consistent with the testimony of the State's witness Nurse Cynthia Fuda. (Tr. 322:3-9).

This Court finds Dr. Schabel's testimony that the victim's skull fracture may have been caused by a strike from a barrel of a gun or some other linear object was not particularly helpful

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to the Applicant. This testimony, if presented by the Applicant at trial, would have corroborated the victim's testimony at trial that before being shot by the Applicant, the Applicant hit him on the head with an object. (Tr. 103:6-9, 15-17).

This Court also finds that whether the victim sustained a gunshot wound is not dispositive or required for the Applicant to be convicted of Assault and Battery with Intent to Kill. ABWIK is an unlawful act of violent injury to the person of another accompanied by circumstances of aggravation. Hill v. State, 350 S.C. 465, 472, 567 S.E.2d 847, 851 (2002) (citing State v. Fennell, 340 S.C. 266, 531 S.C.2d 512 (2000)). ABWIK is an unlawful act of a violent nature to the person of another with malice aforethought, either express or implied. Id. Malice is a formed purpose and design to do a wrongful act under the circumstances that exclude any legal right to do it. Fennell, 340 S.C. at 278, 531 S.E.2d at 518. Intent to kill required to convict of ABWIK need only be a general intent demonstrated by acts and conduct from which a jury may naturally and reasonably infer intent and may be proved with evidence of the character of the means of instrument used. State v. Coleman, 342 S.C. 172, 176, 536 S.E.2d 387, 389 (Ct. App. 2000) (citing State v. Forest, 325 S.C. 12, 14, 479 S.E.2d 50, 51 (1996)). This Court finds that had Counsel presented Dr. Schabel's testimony at trial, his statement that the victim may have been struck in the head by some object would have aided the State in proving an element of Assault and Battery with Intent to Kill: an unlawful act of a violent nature.

This Court finds Counsel was not deficient for failing to present an expert witness to testify about the victim's injuries. This Court further finds that Counsel was able to challenge the testimony of the State's witness on the gunshot and the victim's injuries through the effective cross-examination of Nurse Fuda and Ms. Moritzky and Counsel was able to argue the lack of conclusive testing on the issues of weapon used at the crime scene and exact nature of the

victim's injuries. As to the prejudice prong of the Strickland analysis, Counsel's strategy not to call a doctor as an expert witness bolstered the Applicant's case at trial. Moreover, this Court finds that it was advantageous for Counsel to argue that the State's failure to call a doctor as an expert to testify as to the gunshot issues was a failure of the State to prove an element of the offense and meet their burden of proof. Further, upon review of the affidavits presented by the Applicant, neither expert could conclusively state that the CT scans and other reports presented to them indicate whether the victim suffered a gunshot wound. This Court finds that Counsel's strategy to maintain last argument and attach the credibility of the victim was valid and inured to the Applicant's benefit. Consequently, this Court fails to ascertain any prejudice caused to the Applicant from Counsel's strategic decisions. Counsel articulated a valid strategic reason for not calling witnesses at trial. This Court finds the Applicant was not prejudiced in any way by Counsel's performance since the testimony of the experts presented by the Applicant at the evidentiary hearing would not have been beneficial to the Applicant at trial. This Court finds the Applicant has failed to carry his burden of proving Counsel was ineffective in this regard.

III. Inferred Malice Jury Charge

The Applicant alleges Counsel was ineffective for failing to object to the trial court's instruction to the jury that malice could be inferred from the use of a deadly weapon. This Court finds the Applicant has failed to carry his burden of proving Counsel was ineffective for failing to object to the malice instruction given at trial. The Applicant alleges the malice instruction given was improper pursuant to State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). In Belcher, the Court held that instructing the jury that malice may be inferred from the use of a deadly weapon in Murder or Assault and Battery with Intent to Kill prosecution is no longer proper where evidence is presented that would reduce, mitigate, excuse, or justify the homicide.

Id. at 600, 685 S.E.2d at 803-4. The Court also held that the permissive inference charge concerning the use of a deadly weapon remains a correct statement of the law where the only issue presented to the jury is whether the defendant has committed the Murder or Assault and Battery with Intent to Kill. Id. at 612, 685 S.E.2d at 810.

This Court finds the malice instruction by the Court in the Applicant's trial was proper and Counsel had no basis to object to the jury instruction. This Court finds and the record reflects that, unlike the defendant in Belcher, the Applicant did not claim self-defense and no evidence was presented at trial that would reduce, mitigate, excuse or justify the Applicant shooting the victim. See State v. Price, 400 S.C. 110, 114-15, 732 S.E.2d 652, 654 (Ct. App. 2012) (malice inference instruction proper in ABWIK case where only uncontradicted evidence presented was that an assailant shot a victim at close range as the victim stood with his hands up, causing the victim serious injury and the only issue to determine was whether the defendant committed the crime). This Court also finds the malice instruction given was a correct statement of law since the Applicant maintained his innocence, presented no other defenses, and the only issue presented to the jury was whether the Applicant was in fact the assailant and committed the Assault and Battery with Intent to Kill.

This Court also notes that even if this jury instruction were improper, pursuant to Belcher the Applicant still would not be entitled to post-conviction relief. In Belcher, the Court explicitly held "[o]ur ruling, however, will not apply to convictions challenged on post-conviction relief." Id. at 612-13, 685 S.E.2d at 810. Therefore, this Court finds Counsel's failure to object to the malice jury instruction given at trial did not result in deficient performance and Counsel's performance did not affect the outcome of the Applicant's proceeding.

IV. Impeachment of Witnesses

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A. Bernard Phoenix and Sharon Vance

The Applicant alleges Counsel was ineffective for failing to investigate and use for impeachment the prior records of Bernard Phoenix, the victim, and Sharon Vance, the State's witness. This Court finds the Applicant has failed to carry his burden of proving Counsel was ineffective for failing to investigate and use for impeachment the prior records of the victim and State's witness. Defense counsel ordinarily has a duty to investigate possible methods for impeaching prosecution witnesses. Hoots v. Allsbrook, 785 F.2d 1214, 1221 (4th Cir. 1986).

This Court finds Counsel provided credible testimony that he reviewed the criminal history of both the victim and Vance prior to their testimony at trial. This Court also finds credible Counsel's testimony that he did not find convictions usable for impeachment on the records of either the victim or Vance. This Court finds the Applicant has also failed to present to the Court the criminal history of either the victim or Vance in support of his claim that the records contained convictions that the Applicant could have used for impeachment. Further, had the Applicant established that Counsel knew about Vance's pending bench warrants, the Applicant has not shown that Vance's bench warrant would have been admissible to impeach her at trial. This Court finds the Applicant has failed to show that Counsel's performance was deficient. This Court also finds the Applicant has failed to show that Counsel's failure to impeach the victim and Vance with any prior convictions affected the outcome of his proceeding.

The Applicant alleges Counsel was ineffective for failing to cross-examine Sharon Vance on inconsistencies in her statements. This Court finds and the record reflects Counsel adequately cross-examined Vance at trial and challenged her credibility. On cross-examination, Counsel elicited testimony from Vance about her inability to recall when she arrived at the club the night

of the shooting (Tr. 192:24-25, 193:1-13), how often she had seen the victim as a customer at the bar (Tr. 193:14-23), how she was one of the last witnesses to give her statement (Tr. 194:9-25), and how she was not outside to know what took place between the victim and the Applicant once they left the club (Tr. 195:5-9). This Court finds the Applicant has failed to carry his burden of proving Counsel was ineffective for failing to effectively cross-examine Vance at trial. This Court also finds the Applicant has failed to show how additional cross-examination of Vance by Counsel would have affected the outcome of his trial.

B. Laurie Villalobos

The Applicant alleges Counsel was ineffective for failing to investigate and question witness Laurie Villalobos as to her criminal record. This Court finds the record is void of any witness called by either the State or the defense named Laurie Villalobos. This Court finds the Applicant failed to present Villalobos or her criminal record to the court for review. "[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." Bannister, 333 S.C. at 303, 509 S.E.2d at 809 (1998) (citing Pauling v. State, 331 S.C. 606, 503 S.E.2d 468 (1998); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992)). This Court finds this allegation is wholly without merit and it is unclear to the Court how Villalobos or her criminal record had any relevance to the Applicant's case. This Court finds the Applicant has failed to carry his burden of proving Counsel was deficient and that his failure to investigate and question Villalobos affected the outcome of his proceeding.

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V. Failure to Request a Continuance

The Applicant alleges Counsel was ineffective for failing to request a continuance on two bases: 1) the absence of the victim's treating physician, Dr. Mishall, at trial and 2) Counsel's receipt of an extended version of an officer's report during the Applicant's Jackson v. Denno hearing. This Court finds Counsel articulated a valid strategic reason for not requesting a continuance on the basis that the victim's treating physician was not present. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1996); Underwood v. State, 309 S.C. 560, 562, 425 S.E.2d 20, 22 (1992); Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 778-79 (1992) Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992) (citing Goodson v. U.S., 564 F.2d 1071 (4th Cir. 1977)).

Counsel provided credible testimony that he did not request a continuance based on Dr. Mishall's absence at trial because he expected Dr. Mishall to confirm the findings in his medical reports, which was that the victim suffered from a gunshot wound to the head. State v. Madry, 93 S.C. 412, 76 S.E.2d 977, 977 (1913) (trial court's refusal to grant continuance based on absence of witness not abuser of discretion where testimony would have merely corroborated evidence already presented). This Court finds Counsel's reason for not objecting to the absence of Dr. Mishall at trial was valid and Dr. Mishall's absence was helpful to the defense and allowed a more beneficial cross-examination of Nurse Fuda. This Court also finds Dr. Mishall's absence did not affect the outcome of the Applicant's proceeding.

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This Court finds Counsel was not ineffective for failing to request a continuance based on counsel's receipt of an extended version of a police report during the Applicant's Jackson v. Denno hearing. The record reflects at the conclusion of the Applicant's Jackson v. Denno hearing, Counsel noticed the incident report from the Applicant's case that he had was a page and a half and the copy of the incident report the officer referred to during his testimony was three pages. (Tr. 26:4-25, 27:1-22). The Court provided Counsel with a copy of the extended report and gave him the opportunity to review the report during a break. This Court finds Counsel had ample time to review the extended version of the report and never indicated he needed additional time to review the report. See State v. Lytchfield, 230 S.C. 405, 411, 95 S.E.2d 857, 860-61 (1957) (no abuse of discretion in denial of the motion to continue on the ground of witness absence). Cf. State v. Lunsford, 318 S.C. 241, 243, 456 S.E.2d 918, 920 (1995); State v. Patterson, 290 S.C. 523, 351 S.E.2d 853 (1986) (no dismissal or mistrial when, after receiving discovery material, defense counsel allowed time to review material during break in trial and before examination of witnesses continued). This Court also finds the Applicant has also failed to show what benefit the additional time to review the extended portion of the police report would have yielded. This Court finds Counsel was adequately prepared for trial and the cross-examination of the State's witnesses. This Court finds trial counsel was not ineffective for failing to request a continuance at trial.

VI. Failure to Investigate and Subpoena Witnesses.

Our Courts have 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. Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (citing Pauling v. State, 31 S.C. 606, 503

S.E.2d 468 (1998); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995); Underwood v. State, 309 S.C. 345, 495 S.E.2d 768 (1998)). The Applicant's mere speculation as to what a witness' testimony would have been by itself, cannot satisfy the Applicant's burden of showing prejudice. Id. (citing Glover, 318 S.C. at 498-99, 458 S.E.2d at 540). See Edwards, 392 S.C. at 457, 710 S.E.2d at 65 ("So long as a defendant's attorney conducts a reasonable investigation, including interviewing potential witnesses when it is reasonable to do so, his performance will not be deficient."); Simpson v. Moore, 367 S.C. 587, 597, 627 S.E.2d 701, 706 (2006) (citing Strickland, 466 U.S. at 691, 104 S. Ct. at 2066) ("Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.").

A. The Victim's Blood Alcohol Content

The Applicant alleges Counsel was ineffective for failing to subpoena witnesses to testify about the victim's blood alcohol level. This Court finds the Applicant has failed to produce the testimony of any witness to establish the victim's blood alcohol level.

This Court also finds Counsel elicited testimony about the victim's alcohol use prior to the shooting at trial. The record reflects Counsel elicited testimony from the victim that he drank before going to the club and had one beer while at the club before the shooting. (Tr. 108:15-24). Counsel also elicited testimony from Nurse Fuda that the victim's EMS records said the victim vomited alcohol prior to being intubated. (Tr. 328:25-329:4). This Court finds Counsel presented testimony about the victim's alcohol use to the jury and the Applicant has failed to prove that Counsel's failure to call a witness to testify about the victim's blood alcohol level affected the outcome of his trial.

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B. Gunpowder Burns/Residue

The Applicant alleges Counsel was ineffective for failing to investigate, subpoena, or question an expert on the issue of the significance of the presence or lack of presence of gun powder burns and/or residue. This Court finds the Applicant has failed to produce the testimony of any expert witness to establish what their testimony would have been about gunpowder burns and residue during the Applicant's trial. This Court finds the Applicant has failed to show how Counsel's failure to present expert witness testimony on this issue affected the outcome of the Applicant's trial. This Court will not speculate on the substance of a witnesses testimony and finds the Applicant has failed to carry his burden of proving Counsel was both deficient and that the outcome of his proceeding would have been difference had an expert on this issue been procured by Counsel.

C. Officer James Taylor

The Applicant alleges Counsel was ineffective for failing to question or investigate Officer James Taylor regarding his testimony as to where the gun was found and who performed the booking of Mr. McKelvey. The record reflects Officer Taylor testified at trial he found a gun in the floorboard on the passenger's side of the car halfway under the front seat where the Applicant had been sitting. (Tr. 166:12-22, 167:3-20). The record also reflects Officer Taylor testified he did not recall booking the Applicant and never went to the jailhouse to book the Applicant, and, after he turned the evidence over to his Corporal, he had no other interactions with the gun. (Tr. 176:3-5).

This Court finds the Applicant has failed to show what additional information would have been obtained by Counsel had he further investigated or questioned Officer Taylor about where in the car police located the gun or who booked the Applicant at the jail. This Court finds

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it is unlikely additional investigation into these facts would have yielded any benefit to the Applicant or affected the outcome of the Applicant's proceeding.

D. Officer Michael Roach

The Applicant alleges Counsel was ineffective for failing to investigate and object to Officer Michael Roach's testimony concerning whether the victim in fact was shot and the location of the victim's wounds on the grounds that the officer was not qualified to make such conclusions. This Court finds Counsel's performance was not deficient in this regard. This Court finds Officer Roach's testimony was not objectionable. Officer Roach testified at trial he responded to the scene after receiving a call that there had been a shooting at the Pleasure Lounge behind the middle school and the victim had been shot in the head. (Tr. 226:21-25). Officer Roach testified he took an oral statement from the victim once he regained consciousness. (Tr. 228:2-14). Officer Roach testified the victim told him Jermaine McKelvey (the Applicant) had shot him in the head. (Tr. 228: 15-20).

This Court finds it is clear Officer Roach's testimony about the victim being shot in the head was based on what he learned over the course of his investigation. This Court finds Officer Roach's testimony about the victim's injuries was not based on any medical conclusions and did not require any medical expertise or training. This Court also finds the Applicant has failed to show what benefit further investigation or questioning of Officer Roach by Counsel would have yielded the Applicant. This Court finds it is unlikely any objection to Officer Roach's testimony on the grounds raised by the Applicant would have been successful. This Court finds Counsel was not deficient for failing to object to Officer Roach's testimony and that his performance did not affect the outcome of the Applicant's proceeding.

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E. Agent David Black

The Applicant alleges Counsel was ineffective for failing to investigate and question witness David Black concerning his testimony that the gun he examined did not have any fingerprints, blood, or anything to link the Applicant to the gun. This Court finds Counsel's performance was not deficient. David Black, a latent print examiner at SLED, testified at the Applicant's trial. (Tr. 260:11-20). Agent Black was qualified without objection as an expert in latent fingerprint examination (Tr. 261-264, 264:15-20). He testified on cross-examination that he really did not have any information, such as fingerprint evidence or blood DNA, to help the jury sort out the identity of the suspect. (Tr. 274:13-18, 275:20-24, 276:1-6, 277:12-14, 278:9-13).

This Court finds the Applicant has failed to show what additional testimony Counsel would have been able to elicit had he investigated or further questioned Agent Black. See Bannister, 333 S.C. at 303, 509 S.E.2d at 809. This Court finds Agent Black's testimony at trial was beneficial to the Applicant and it is unlikely further questioning of Agent Black by Counsel on the lack of physical evidence on the gun linking the Applicant to the weapon would have affected the outcome of the Applicant's proceeding.

VII. Failure to Object.

A. Gunshot Residue Collection.

The Applicant alleges Counsel was ineffective for failing to object to testimony regarding gunshot residue evidence that was improperly collected and collected without giving the Applicant his Miranda rights. See Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612 (1966) ("the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural

safeguards effective to secure the privilege against self-incrimination"). This Court finds Counsel was not deficient and he objected to the admissibility of the Applicant's statement to police before the gunshot residue test was administered on this very basis at trial. The record reflects Counsel argued to the Court during the Applicant's Jackson v. Denno hearing that the Applicant's statement to police before the gunshot residue test was performed should be excluded because the Applicant was not given Miranda warning. (Tr. 25:3-9). In response to Counsel's argument, the trial court found the Applicant's statement was not in response to any interrogation by police and Miranda was not required. (Tr. 25:23-26:1). This Court finds Counsel made the argument presented by the Applicant and the lower court ruled on this very issue at trial. At the evidentiary hearing, the Applicant raised the issue that Counsel was ineffective for failing to move to suppress the results of the gunshot residue tests based on the lack of a search warrant. While no South Carolina or United States Supreme Court cases are directly on point, this Court follows the prevailing black-letter precedent and adheres to the view that in this case, a search warrant was not required to swab the Applicant's hands for gunshot residue and, thus, the results of that test were admissible at trial. Therefore, this Court finds Counsel was not ineffective for failing to challenge the admission of the gunshot residue test results. Like many other pre-trial, investigative proceedings, performing a gunshot residue test on a suspect potentially has an exculpatory effect. This Court agrees with other jurisdictions that have applied the prevailing law and concluded that a gunshot residue test and the swabs taken from the suspect are non-testimonial in nature, minimally invasive, are not immediately self-incriminating, occur prior to initiation of the adversarial process and before any "critical stage" in a suspect's case, and are not subject to Miranda, 5th Amendment, or 6th Amendment protections. See Jones v. State, 74 A.3d 483, 494-95 (Md. 2013); Kyger v. Carlton, 146 F.3d

374, 381 n.2 (6th Cir. 1998); Williams v. Schario, 93 F.3d 527, 528 (8th Cir. 1996). Accordingly, this Court finds Counsel was not ineffective for failing to challenge the admission of the results of the Applicant's gunshot residue test. Therefore, this Court finds the Applicant has failed to prove prejudice resulting from this purported failure and his corresponding burden of proof on this assignment of error. This Court finds the Applicant has failed to carry his burden of proving Counsel was both deficient and that his performance affected the outcome of his proceeding.

B. Bullet Fragment Evidence

The Applicant alleges Counsel was ineffective for failing to object to Officer Tony Edwards' testimony about a bullet fragment found at the scene and the introduction of the fragment into evidence. "Defense counsel may decide as a strategic matter not to object because his objection would highlight the erroneous evidence, argument, or charge." State v. Torrence, 305 S.C. 45, 65, 406 S.E.2d 315, 326 (1991). See Fernandez v. State, 306 S.C. 264, 267, 411 S.E.2d 426, 428 (1991) (counsel's failure to object to admission of syringe into evidence not ineffective assistance of counsel where counsel impeached State witness and bolstered the applicant's case by showing that the syringe was not consistent with the State's case against the applicant.). This Court finds Counsel was not deficient for failing to object to testimony about the bullet fragment and the introduction of the fragment into evidence. The record reflects Officer Edwards testified he noticed the bullet jacket lying near the doorway close to the victim and he collected the bullet jacket to put into evidence. (Tr. 120:14-23).

Counsel testified he did not see a basis to object to the admissibility of the bullet fragment since it was found at the crime scene and nothing about the bullet evidence introduced at trial was inculpatory. This Court finds Counsel's conclusion that he did not have a basis to object to the admissibility of the bullet fragment was valid. This Court finds there was no basis to

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exclude the bullet fragment since it was found at the crime scene in close proximity to the victim. This Court finds Counsel was not deficient for failing to object to Officer Edwards' testimony about the fragment. This Court finds the Applicant has presented no evidence to show that Officer Edwards was not qualified to make statements about the bullet fragment at trial. Moreover, the Applicant has presented no argument in favor of excluding the bullet fragment's admission into evidence, as it was part of the crime scene and all questions surrounding the bullet fragment go to weight of the evidence and extent of the investigation—factual issues for the jury to decide—and not admissibility. Further, admission of the bullet fragment allowed Counsel to cross-examine witnesses regarding ancillary issues about the reliability of the evidence inured to the Applicant's benefit. This Court finds the Applicant failed to carry his burden of proving Counsel was deficient and his failure to object to the admissibility of Officer Edwards' testimony and the admissibility of the bullet fragment affected the outcome of his proceeding.

C. The Applicant's Statement

The Applicant alleges Counsel was ineffective for failing to object to the admission of the Applicant's statement. The Applicant claims Counsel should have objected to his statement to police on the grounds that it was not voluntarily given based on the Applicant's mental and physical impairment. The Applicant also claims Counsel should have objected to the statement on the grounds he was not provided a complete copy of the police investigation report prior to trial.

The rules for mandatory disclosure in criminal cases provide:

Upon request by a defendant, the prosecution shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the prosecution, the existence of which is known, or by the exercise of due diligence

may become known, to the attorney for the prosecution; the substance of any oral statement which the prosecution intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a prosecution agent.

Rule 5(a)(1)(A), SCRCrimP. To maintain compliance with the rules, a trial judge has broad discretion in connection with previously undisclosed materials:

If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances.

Rule 5(d)(2), SCRCrimP. See State v. Newell, 303 S.C. 471, 476, 401 S.E.2d 420, 423–24 (Ct. App. 1991) (trial judge has broad discretion in handling material that should have been produced pursuant to an earlier request that is revealed during or just before trial). Upon finding a Rule 5, SCRCrimP violation, a court will only reverse where the defendant suffered prejudice as a result of the violation. State v. Kennerly, 331 S.C. 442, 453–54, 503 S.E.2d 241, 220 (Ct. App. 1998). Accordingly, this Court finds the Applicant suffered no prejudice as a result of the late introduction of the full report; the delay in production certainly had no bearing on the admissibility of the Applicant's statement.

"When considering the voluntariness of a statement, the court and jury should consider 'not only the crucial element of police coercion; the length of the interrogation; its location; its continuity; the defendant's maturity; education; physical condition; and mental health.'" Withrow v. Williams, 507 U.S. 680, 693, 113 S. Ct. 1745 (1993) (citations omitted). "A defendant's mental condition in and of itself does not render a statement involuntary in violation of due process." Colorado v. Connelly, 479 U.S. 157, 164, 107 S. Ct. 515 (1986); State v. Hughes, 336 S.C. 585, 594, 521 S.E.2d 500, 505 (1999).

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This Court finds the Applicant was not deficient for failing to object to the Applicant's statement on the grounds that the Applicant was mentally and physically impaired. This Court finds the Applicant has presented no evidence to support his claim that he was mentally or physically impaired when he made his statement to police. Counsel testified he spoke with the Applicant about being under the influence, but did not have anything to corroborate the Applicant's claim since the officers' testimony and reports did not indicate the Applicant was under the influence.

This Court finds Counsel was not deficient for failing to object to the Applicant's statement on the grounds that he was not provided a complete copy of the police investigation report prior to trial. This Court finds the Applicant has failed to carry his burden of proving Counsel's performance was deficient in this regard. This Court finds Counsel had ample time to review the extended police report received during the Jackson v. Denno hearing. This Court also finds the differences between the two versions of the report as highlighted by Counsel would not have affected the admissibility of the Applicant's statements at trial and it is unlikely the late receipt of the report would have warranted the absolute exclusion of the Applicant's statement. Moreover, this Court reiterates its findings and conclusions propounded in Section V. of this order that, based on the trial transcript, the State, Counsel, and the trial judge all had ample time to review the record prior to the determination of the admissibility of the Applicant's statement and further examination of witnesses. This Court finds the Applicant has failed to carry his burden of proving Counsel was deficient and that his performance affected the outcome of the Applicant's proceeding.

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D. Nurse Fuda's Expert Testimony

The Applicant alleges Counsel was ineffective for failing to object to Cynthia Fuda's testimony at trial about the victim's injuries on the grounds that Nurse Fuda lacked the expertise to make conclusions about the cause of the victim's injuries. This Court finds Counsel's performance was not deficient in this regard. This Court finds Nurse Fuda's testimony was not objectionable. The record reflects Nurse Fuda was qualified at trial without objection as an expert in the area of intensive care nursing. (Tr. 319:11-18). Nurse Fuda testified when the victim arrived at the emergency room he had a gunshot wound to the left side of his head which caused a skull fracture. (Tr. 322:3-15). On cross-examination by Counsel, Nurse Fuda testified the basis of her testimony was the victim's medical records, which she had reviewed and relied on in directly treating the victim upon his arrival in the surgical trauma unit at the hospital. (Tr. 326: 2-13). At the evidentiary hearing, Nurse Fuda testified her testimony at trial was based on her review of the victim's medical records and her experience as an intensive care nurse. She testified further she did not diagnose the victim's injuries but explored the exact nature of the injury and whether the puncture wound was in fact a gunshot wound, on which topics Counsel cross examined her. (Tr. 330: 2-14, 331: 3-5). The record reflects that she did not provide any expert opinions regarding the "diagnosis" of the victim but instead was simply relying on his "admitting diagnosis" in her care and treatment of the victim in the surgical trauma unit.

This Court finds Nurse Fuda was qualified as an expert in intensive care nursing and qualified to testify as to her rational perception of the victim's medical condition while under her care. This Court also finds it is clear from the record that Nurse Fuda did not evaluate or diagnose the victim's injuries and merely reported the victim's admitting diagnosis from his medical records. This Court finds it is unlikely any objection to Nurse Fuda's testimony would

have been successful. Therefore, this Court finds Counsel was not deficient for failing to object to Nurse Fuda's testimony and his performance did not affect the outcome of the Applicant's proceeding.

E. Michelle Moritzky's EMS Testimony

The Applicant alleges Counsel was ineffective for failing to object to Michelle Moritzky's testimony at trial about the victim's injuries on the grounds that Moritzky lacked the expertise to make conclusions about the cause of the victim's injuries. This Court finds Counsel's performance was not deficient in this regard. See Rule 701, SCRE (lay witness testimony); Rule 703, SCRE (opinion on ultimate issue); State v. Mitchell, 399 S.C. 410, 416-17, 731 S.E.2d 889, 893 (2012); State v. Douglas, 380 S.C. 499, 502-503, 671 S.E.2d 606, 608-609 (2009) (witness testified as to her personal observations and experiences, as well as personal interview with victim; thus, witness may offer lay opinion testimony and need not be qualified as an expert). This Court finds Ms. Moritzky need not have been qualified as an expert in order to render her lay opinion based on her rational perceptions while rendering aid to the victim; therefore, her testimony was not objectionable. (Tr. 253: 2-11). Ms. Moritzky, a paramedic for Berkeley County EMS, testified at the Applicant's trial that she was called to the scene of a gunshot wound at the Pleasure Lounge. (Tr. 253:21-25). She testified the victim's wounds "seemed to indicate a gunshot wound" because she saw an "entrance type wound and an exit type wound." (Tr. 258:16-23; 259:1-11). Further, Moritzky testified that at the scene of the incident, in treating the victim, she relied on "what we see his injuries are and what the injuries indicate happened." At the evidentiary hearing Ms. Moritzky testified she did not diagnose the victim and her testimony at trial was based on her observation of the victim's symptoms and the amount of blood at the scene.

This Court finds Ms. Moritzky's testimony as to the cause of the victim's injuries based on her observations and treatment of the victim was appropriate. The record reflects Ms. Moritzky's conclusions were based on her rational perception of the victim's injury for purposes of rendering treatment. This Court finds Ms. Moritzky could testify as to what she saw when treating the victim and it is unlikely an objection to her would have been successful. This Court finds Counsel was not deficient for failing to object to Ms. Moritzky's testimony about the victim's injury and his performance did not affect the outcome of the Applicant's proceeding.

VIII. Failure to Develop Mitigation Evidence

The Applicant alleges Counsel was ineffective for failing to develop admissible mitigation evidence to present to the Court during sentencing. See Simpson, 367 S.C. at 607, 627 S.E.2d at 712 (citing Jones v. State, 332 S.C. 329, 504 S.E.2d 822 (1998) ("Even if the PCR judge correctly found counsel deficient, Simpson failed to show that he was prejudiced during the mitigation case. The jury was aware of Simpson's troubled childhood, traumatic life experiences, and mental condition. Any additional investigation would have merely resulted in a "fancier" mitigation case, having no effect on the outcome of the trial."); see also Butler, 286 S.C. at 442-43, 334 S.E.2d at 814-15 (citing Strickland, 466 U.S. at 686, 104 S. Ct. at 2066) (Applicant alleged counsel was ineffective for failing to research, develop, and present evidence in mitigation during the sentencing phase of trial; however, based on testimony adduced during the PCR hearing, the court was unable to find the applicant had been prejudiced under Strickland). This Court finds the Applicant has failed to show that Counsel's performance was deficient. This Court finds the Applicant has also failed to show what, if any, further mitigation evidence existed. This Court further finds the Applicant has also failed to show what benefit further development of mitigation evidence by Counsel would have yielded. This Court finds the

Applicant failed to carry his burden of proving Counsel performance affected the outcome of the Applicant's proceeding.

IX. Recusal of Judge Dennis

The Applicant alleges Counsel was ineffective for failing to move to recuse Judge Dennis when he showed resentment and hostility toward the Applicant. Pursuant to Canon 3(E)(1)(a) of Rule 501, SCACR, a judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned. State v. Jackson, 353 S.C. 625, 627, 578 S.E.2d 744, 745 (S.C. Ct. App. 2003). It is not enough for a party seeking disqualification to simply allege bias or prejudice. Brailsford v. Brailsford, 380 S.C. 443, 451, 669 S.E. 2d 342, 346 (Ct. App. 2008); State v. Jackson, 353 S.C. 625, 627, 578 S.E. 2d 744, 745 (Ct. App. 2003); Rule 501, SCACR; Rule 501, Canon 3(E)(1)(a), SCACR. The party must show some evidence of that bias or prejudice. The alleged bias or prejudice must stem from an extra-judicial source and result in a decision based on information other than what the judge learned from his or her participation in the case as a judge. Canon 3(E)(1)(a), SCACR. Jackson, 353 S.C. at 627, 578 S.E. at 745. A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to, instances where he has a personal bias or prejudice against a party. Murphy v. Murphy, 319 S.C. 324, 331, 461 S.E. 2d 39, 42 (1995). Such bias must stem from an extrajudicial source and result in decisions based on information other than what the judge learned from his participation in the case. Reading v. Ball, 291 S.C. 492, 494, 354 S.E.2d 397, 398 (Ct. App. 1987). It is not enough for the party seeking disqualification to simply allege bias. Id. The party seeking disqualification must show some evidence of bias or prejudice. If there is no evidence of judicial bias or prejudice, a judge's failure to disqualify himself will not be reversed on appeal. Mallett v. Mallett, 323 S.C. 141,

10/24/14
[Signature]

145–46, 473 S.E. 2d 804, 807–08 (Ct. App. 1996); Roper v. Dynamique Concepts, Inc., 316 S.C. 131, 139, 447 S.E. 2d 218, 222–23 (Ct. App. 1994), Koon v. Fares, 379 S.C. 150, 156, 666 S.E. 2d 230, 234 (2008). A motion to recuse may not be predicated on the judge's rulings in the case before him or on rulings in a related case, nor on his demonstrated tendency to rule in any particular manner, or on a particular judicial leaning or attitude derived from his experience on the bench. Mallett, 323 S.C. at 145–46, 473 S.E. 2d at 807–08 (citing U.S. v. Grinnell Corp., 384 U.S. 563, 86 S. Ct. 1698 (1966); Berger v. U.S., 255 U.S. 22, 31, 41, S. Ct. 230, 232 (1921)). The fact a trial judge ultimately rules against a litigant is not proof of prejudice by the judge, even if it is later held that the judge committed errors in his rulings. Mallett, 323 S.C. at 147, 473 S.E. 2d at 808 (citing Reading, 291 S.C. at 494, 354 S.E.2d at 398).

This Court finds the record is void of any showing of resentment or hostility toward the Applicant by the trial judge. This Court also finds there was no basis for Counsel to move to recuse the trial judge. This Court finds further the Applicant has failed to present any evidence of a bias or prejudice stemming from an extra-judicial source by the trial judge. This Court finds this allegation is wholly without merit and the Applicant has failed to carry his burden of proving Counsel should have moved to recuse the trial judge and that Counsel's failure to do so effected the outcome of his proceeding.

X. Failure to Inform of Potential Sentences

The Applicant alleges Counsel was ineffective for failing to inform the Applicant of the potential sentences he was facing if convicted at trial. This Court finds this allegation is wholly without merit. This Court finds credible Counsel's testimony that he informed the Applicant of the potential sentences he was facing along with his constitutional rights. This Court finds Counsel was not deficient in this regard and his performance did not affect the outcome of the

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for

Applicant's proceeding. See Randall v. State, 356 S.C. 639, 641-42, 591 S.E.2d 608, 609-610 (2004) (citing Jackson v. State, 349 S.C. 62, 562 S.E.2d 475 (2002)) (failure to advise of collateral consequences of parole eligibility before the applicant proceeds to trial not ineffective assistance of counsel).

XI. Overwhelming Evidence of Guilt

Lastly, this Court finds the presence of overwhelming evidence of the Applicant's guilt presented by the State at trial negates any claim that Counsel's performance could have reasonably affected the outcome of the Applicant's trial.⁷ 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 no reasonable probability the result of trial would have been different had counsel's performance not been deficient where there is overwhelming evidence of guilt); cf. Ford v. State, 314 S.C. 245, 248, 442 S.E.2d 604, 606 (1994) (holding respondent failed to prove prejudice from trial counsel's failure to request an alibi charge where there was overwhelming evidence of guilt).

At trial, the State presented the following evidence of the Applicant's guilt: the victim testified the Applicant took money from him and then shot him (Tr. 103:13-25, 104:15-18, 105:18-21, 228:15-25); the Applicant was seen trying to leave the scene shortly after police heard gunshots in the area of the shooting (Tr. 117:7-24); a gun was found on the side of the car where the Applicant was seated (Tr. 123:1-9, 166:12-22); an eyewitness testified she saw the Applicant inside the club with a gun in his hand after hitting the victim (Tr. 188:23-25, 189:1-14); the victim and defendant were seen having a dispute at the club shortly before the shooting

⁷ At the conclusion of the Applicant's trial, the trial judge commented the jury "returned a verdict of guilty, and I think the evidence overwhelmingly supports their decision, both direct and circumstantial evidence as to all charges." (Tr. 434:4-8).

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(Tr. 244:5–25, 245:1–5); a second eyewitness saw the Applicant with a gun in his hand as he was kicked out of the lounge with the victim and heard gunshots shortly after they exited (Tr. 246:4–20); and the Applicant's hands tested positive for gunshot residue shortly after arrest (Tr. 311:2–5). This Court finds the Applicant has failed to carry his burden of proving prejudice resulted from Counsel's performance since there is overwhelming evidence of guilt.

All Other Allegations

As to any and all allegations—specifically whether the Applicant desired to challenge his Armed Robbery conviction and the Applicant's bald assertion that Counsel's cumulative errors constitute ineffective assistance of counsel—that were raised in the application in this matter and not specifically addressed in this Order, this Court finds Applicant failed to present any evidence at the evidentiary hearing regarding such allegations. Accordingly, this Court deems those allegations abandoned by the Applicant. Therefore, they are hereby denied and dismissed.

CONCLUSION

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

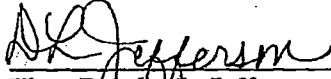
This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate 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 17th day of July, 20 14



Hon. Deadra L. Jefferson

Presiding Judge, 9th Judicial Circuit

Charleston, South Carolina
At Chambers



STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Berkeley County

R. Markley Dennis, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JERMAINE T MCKELVEY,

APPELLANT

FINAL ANDERS BRIEF OF APPELLANT

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

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TABLE OF AUTHORITIES**Cases**

<u>State v. Belcher</u> , 385 S.C. 597, 685 S.E.2d 802 (2009)	5, 6
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STATEMENT OF ISSUE ON APPEAL

Did the trial judge commit reversible error, based on State v. Belcher, when, in charging the jury on the law of assault and battery with intent to kill [ABIK], he instructed the jury that "inferred malice may also arise when the deed is done with a deadly weapon" when evidence was presented that would reduce the ABIK to assault and battery of a high and aggravated nature [ABHAN] and the judge instructed the jury on the law of the lesser included offense of ABHAN?

STATEMENT OF THE CASE

In February of 2009, the Berkeley County Grand Jury indicted McKelvey for assault and battery with intent to kill [ABIK] and possession of a firearm during the commission of a violent crime, indictments #09-GS-08-305, 305. In April of 2009, the Berkeley County Grand Jury indicted McKelvey for armed robbery, indictment #09-GS-08-504. In December of 2009, the Berkeley County Grand Jury indicted McKelvey for possession of cocaine base, indictment #09-GS-08-2447. On April 12, 2010, McKelvey proceeded to jury trial on all four charges before the Honorable R. Markley Dennis, Jr. The jury returned verdicts of guilty on all charges. A timely notice of intent to appeal was filed on April 16, 2010. This appeal follows.

ARGUMENT

The trial judge committed reversible error, based on State v. Belcher, when, in charging the jury on the law of assault and battery with intent to kill [ABIK], he instructed the jury that "inferred malice may also arise when the deed is done with a deadly weapon" when evidence was presented that would reduce the ABIK to assault and battery of a high and aggravated nature [ABHAN] and the judge instructed the jury on the law of the lesser included offense of assault and battery of a high and aggravated nature.

The jury convicted McKelvey of shooting Bernard Phoenix outside of The Pleasure Club in Moncks Corner, following an altercation inside of the club. At the close of the State's case the judge indicated that he would charge the jury with the law on the lesser included offense of ABHAN. (R. p. 334, lines 17 – p. 335, 336, 337, lines 1-10). The State objected to the lesser included offense. (R. p. 347, lines 5-8). The judge overruled the objection based on the altercation inside the club prior to the shooting. (R. p. 347, lines 9 – p. 348, lines 1-14). The judge charged the jury with the law of the lesser included offense of ABHAN. (R. p. 399, lines 7 – p. 400, lines 1-18).

When instructing the jury on the law of ABIK, the judge told the jury that malice aforethought was an element of ABIK. (R. p. 396, lines 13-14). The judge told the jury that malice could be express or inferred. (R. p. 397, lines 3-4). The judge told the jury, "Malice may be inferred, as I told you. Inferred malice may be shown from conduct showing a total disregard for human life. Inferred malice may also arise when the deed is done with a deadly weapon." (R. p. 397, lines 15-19). The judge then defined deadly weapon. (R. p. 397, lines 20 – p. 398, lines 1-2). The judge erred in instructing the jury that malice could be inferred from the use of a deadly weapon.

In State v. Belcher, 385 S.C. 597, 610, 685 S.E.2d 802, 809 (2009), decided in October of 2009, prior to the April 2010 trial date in the present case, the South Carolina

Supreme Court wrote, "Under our policy-making role in the common law, we hold that the "use of a deadly weapon" implied malice instruction has no place in a murder (or assault and battery with intent to kill) prosecution where evidence is presented that would reduce, mitigate, excuse or justify the killing (or the alleged assault and battery with intent to kill)." Evidence was presented that would reduce the ABIK to ABHAN. The judge charged the jury with the law of ABHAN. Pursuant to Belcher, the judge erred in instructing the jury that malice could be inferred from the use of a deadly weapon.

The judge's error in instructing the jury that malice could be inferred from a deadly weapon is not harmless. The State exploited the error in closing arguing:

What is malice? Malice is an ill will, hatred, extreme indifference for human life. Well, how do you know if someone's acting maliciously? We tell that from the circumstances and the surroundings that are happening. Having a deadly weapon, having a gun in an inference of malice. Shooting someone in the head is an inference of malice. You know, it's a hostility toward a person without any justification to do so. And the judge is going to tell you about how malice can be inferred. Again, use your common sense.

(R. p. 369, lines 9-21). The judge committed reversible error in instructing the jury that malice could be inferred from the use of a deadly weapon.

CONCLUSION

Based on the above argument, the conviction and sentence should be reversed and the case remanded for a new trial.

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 28th day of June, 2011.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Berkeley County
R. Markley Dennis, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JERMAINE T MCKELVEY,

APPELLANT

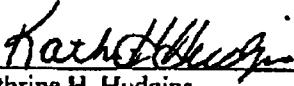
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jermaine T. McKelvey states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. She has reviewed the record of appellant's trial before Judge R. Markley Dennis, Jr., which was held on April 12-14, 2010, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Jermaine T. McKelvey.

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 28th day of June, 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."

June 28, 2011


Kathrine H. Hudgins
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

MMH2008-12-05300

WITNESSES

Roach

Moncks Corner Police Department

DOCKET NO. 2009-GS-08-0304

The State of South Carolina

County of Berkeley

AGENCY CASE NUMBER

082296

COURT OF GENERAL SESSIONS

February Term 2009

ARREST WARRANT NUMBER

H-758317

DATE OF ARREST

November 28, 2008

ACTION OF GRAND JURY

True Bill

THE STATE

vs.

Jermaine T McKevey

DOB:

B/M

Indictment for

ABWIK

J. Roach
Person of Grand Jury
Date: 02-04-09

VERDICT

Forfeiture of Petit Jury

Date:

INDICT

750

FILED - 4 11 23
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STATE OF SOUTH CAROLINA)
COUNTY OF BERKELEY)

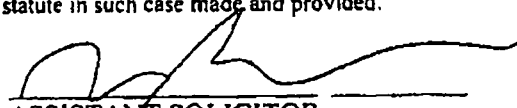
INDICTMENT

At a Court of General Sessions, convened on February 4, 2009 the Grand Jurors of Berkeley County present upon their oath:

ABWIK

That Jermaine T. McKelvey did in Berkeley County, South Carolina, on or about November 27, 2008, with malice aforethought commit an assault and batter upon one Bernard L. Phoenix, while armed with a deadly weapon, with the intent to kill or cause grievous bodily injury to Bernard L. Phoenix, to wit: did shoot the victim in the head with a handgun. This in violation of §16-3-620 of the South Carolina Code of Laws (1976, as amended).

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


ASSISTANT SOLICITOR

STATE OF SOUTH CAROLINA

COUNTY OF Berkeley
 STATE VS.
Jermaine T McKulvey
 AKA:
 Race: B Sex: M Age: 29
 DOB: SS#:
 Address:
 City, State, Zip: Moncks Corner, SC 29461
 DL#: SSID#:

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐
 In disposition of the said indictment comes now the Defendant who was
 (TO: ABWIK/Assault and Battery with Intent to Kill)

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2009-GS-08-0304A/W#: H758317Date of Offense: 11/28/2008S.C. Code §: 16-03-0620CDR Code #: 0014

SENTENCE SHEET

Max: 0-20 yrs

☒ CONVICTED OF or ☐ PLEADSin violation of § 16-03-0620 of the S.C. Code of Laws, bearing CDR Code # 0014

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS (CSC ☐ § 17-25-45
 w/minor 1st or 2nd Act)

The charge is ☒ As Indicted, ☐ Lesser Included Offense. Defendant Waives Presentation to Grand Jury (defendant's initials)
 The plea is ☐ With Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST: Dorie C. Biagiatti 7/6/09 Defendant Attorney for Defendant SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
 for a determinate term of 20 days/months/years or ☐ under the Youthful Offender Act not to exceed years
 and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment
 of \$; plus costs and assessments as applicable*; the balance is suspended with probation for

months-years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
 probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on:

☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 34-13-40 to be calculated and applied
 by the State Department of Corrections. Nov 27, 2008

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

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
 Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered PTUP
 Total: \$ plus 20% fee: \$ days/hours Public Service Employment
 Payment Terms:
☐ Set by SCDPPPS

Recipient:

*Fine: \$
 § 14-1-206 (Assessments 107.5 %)
 § 14-1-211(A)(1) (Conv. Surcharge) \$100 \$ 100.00
 § 14-1-211(A)(2) (DUI Surcharge) \$100 \$
 § 56-5-2995 (DUI Assessment) \$12 \$
 § 56-1-286 (DUI Breath Test) \$25 \$
 § 47-12 (Public Def Prob) \$500 \$
 § 14-1-212 (Law Enforce. Funding) \$25 \$ 25.00
 § 14-1-213 (Drug Court Surcharge) \$100 \$
 § 50-21-114 (BUT Breath Test Fee) \$50 \$
 § 56-5-2942(i) (Vehicle Assessment) \$40/en \$
 § 90-7 (SCCA Surcharge) \$5 \$ 5.00
 3% to County (if paid in installments) \$ 3.90
 TOTAL \$ 133.90

Clerk of Court/ Deputy Clerk

Court Reporter

SCCA 217 (11/2009)

Presiding Judge

Judge Code:

Sentence Date:

☐ Appointed PD or appointed other counsel,
 § 47.12 requires \$500 be paid to Clerk
 during probation.

JAH

WITNESSES

753

Michael Roach
Moncks Corner Police Department

The State of South Carolina
County of Berkeley

AGENCY CASE NUMBER

082296

COURT OF GENERAL SESSIONS

April Term 2009

ARREST WARRANT NUMBER

H-758318

THE STATE

DATE OF ARREST

November 28, 2008

VS.

ACTION OF GRAND JURY

True Bill

Jermaine T McKelvey

DOB:

B/M

VERDICT

Indictment for
Armed Robbery
Date: 04-08-09

Indictment for

Armed Robbery

\$16-11-0330(A)

CDR: 0139

Foreperson of Petit Jury

Date:

INDICT

FILED
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STATE OF SOUTH CAROLINA)
)
COUNTY OF BERKELEY)

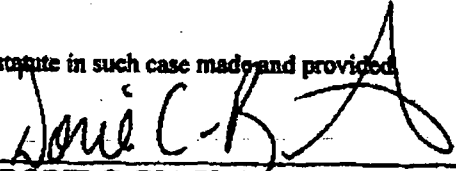
INDICTMENT

At a Court of General Sessions, convened on April 8, 2009 the Grand Jurors of Berkeley County present upon their oath:

Armed Robbery

That Jermaine T McKelvey did in Berkeley County, South Carolina, on or about November 27, 2008, while armed with a deadly weapon, to wit: .380 Markove hand gun, take and carry away personal property of Bernard Louis Phoenix with intent to deprive the victim of possession by use of force, threats or intimidation, in violation of §16-11-0330(A) of the South Carolina Code of Laws, 1976, as amended.

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


DORIE C. BIAGIANNI
ASSISTANT SOLICITOR

STATE OF SOUTH CAROLINA

COUNTY OF
STATE

Berkeley

VS.

Jermaine T McKelvey

AKA:

Race: B Sex: M Age: 29

DOB: SS#:

Address:

City, State, Zip: Moncks Corner, SC 29461

DL#: SID#:

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐In disposition of the said Indictment comes now the Defendant who was
TO: Armed Robberyin violation of § 16-11-0330(A) of the S.C. Code of Laws, bearing CDR Code # 0139
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC ☐ §17-25-45
w/minor 1st or Lewd Act)The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.Arrested by: Det. C. R. A. 71661
Biagiatti, Dorie C. SC Bar# Defendant Attorney for Defendant SC Bar#WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 27 days/months/years or ☐ under the Youthful Offender Act not to exceed years
and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment
of \$; plus costs and assessments as applicable*; the balance is suspended with probation for months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
probation, which are incorporated by reference.☐ CONCURRENT or ☒ CONSECUTIVE to sentence on: 2009 G-5-08-305
☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
by the State Department of Corrections. 7000 27,2008
☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ OrderedTotal: \$ plus 20% fee: \$

Payment Terms:

☐ Set by SCDPPPS

Recipient:

*Fine: \$ § 14-1-206 (Assessments 107.5 %) \$ § 14-1-211(A)(1) (Conv. Surcharge) \$100 \$ 100.00§ 14-1-211(A)(2) (DUI Surcharge) \$100 \$ § 56-5-2995 (DUI Assessment) \$12 \$ § 56-1-286 (DUI Breath Test) \$25 \$ § 47.12 (Public Def/Prob) \$500 \$ § 14-1-212 (Law Enforce. Funding) \$25 \$ 25.00§ 14-1-213 (Drug Court Surcharge) \$100 \$ § 50-21-114(BUI Breath Test Fee) \$50 \$ § 56-5-2942(J) (Vehicle Assessment) \$40/ea \$ § 90.7 (SCCJA Surcharge) \$5 \$ 5.003% to County (if paid in installments) \$ 3.90TOTAL \$ 133.90Clerk of Court/Deputy Clerk Linda J. HallCourt Reporter: Deborah GarrisonIN THE COURT OF GENERAL SESSIONS
2012-CP-08-1235

INDICTMENT/CASE#: 2009-GS-08-0504

A/W#: H758318

Date of Offense: 11/27/2008

S.C. Code § : 16-11-0330(A)

CDR Code #: 0139

SENTENCE SHEET

Max: 10 yrs - 3

☒ CONVICTED OF or ☐ PLEADSPTUP days/hours Public Service EmploymentObtain GED ☐Attend Voc. Rehab. or Job Corp. May serve W/E beginning Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐Fine may be pd. in equal, consecutive weekly/monthly
pmts. of \$ beginning \$ paid to Public Defender FundOther: ☐ Appointed PD or appointed other counsel,
§ 47.12 requires \$500 be paid to Clerk
during probation.Presiding Judge R. J. AndersonJudge Code: 2062Sentence Date: 4-14-10

MH2009-01-05547

WITNESSES

Each

Concks Corner Police Department

AGENCY CASE NUMBER

12296

ARREST WARRANT NUMBER

RECT PRESENTMENT

DATE OF ARREST

November 28, 2008

TION OF GRAND JURY

True Bill

Andrea M. Miller
repetition of Grand Jury
date: 02-04-09

INDICT

repetition of Petit Jury

50
DICT

Date:

DOCKET NO. 2009-GS-08-0305

The State of South Carolina

County of Berkeley

COURT OF GENERAL SESSIONS

February Term 2009

THE STATE

VS.

Jermaine T McKelvey

DOB:

BM

Indictment for

Possession of a Firearm During the
Commission of a Violent Crime

2009 FEB -4 PM 2:25
BERKELEY COUNTY

STATE OF SOUTH CAROLINA)
COUNTY OF BERKELEY)

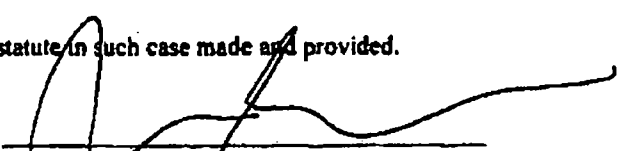
INDICTMENT

At a Court of General Sessions, convened on February 4, 2009 the Grand Jurors of Berkeley County present upon their oath:

Possession of a Firearm During the Commission of a Violent Crime

That Jermaine T. McKelvey did in Berkeley County, South Carolina, on or about November 27, 2008, willfully and unlawfully possess a firearm or visibly display a firearm during the commission of a violent crime, to wit: assault and battery with intent to kill. This in violation of §16-23-490 of the South Carolina Code of Laws, (1976) as amended.

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


ASSISTANT SOLICITOR

758
STATE OF SOUTH CAROLINACOUNTY OF
STATE

Berkeley

VS.

Jermaine T McKelvey

AKA:

Race: B Sex: M Age: 29

DOB: SS#:

Address:

City, State, Zip: Moncks Corner, SC 29461

DL#: SID#:

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐In disposition of the said indictment comes now the Defendant who was
TO: Possession of a Firearm During Commission of a Violent Crime

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE: 2009-GS-08-0305

A/W#: 09GS080305

Date of Offense: 11/27/2008

S.C. Code §: 16-23-0490

CDR Code #: 0549

SENTENCE SHEET

Max: 0-5yr

☒ CONVICTED OF or ☐ PLEADS

in violation of § 16-23-0490 of the S.C. Code of Laws, bearing CDR Code # 0549

☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Biagianti, Doris C.

SC Bar#

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 5 days/months/years or ☐ under the Youthful Offender Act not to exceed years
and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment
of \$; plus costs and assessments as applicable*; the balance is suspended with probation for months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
probation, which are incorporated by reference.☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
by the State Department of Corrections. Nov 27, 2008☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-23-20 or 16-23-65 (Criminal
Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ OrderedTotal: \$ plus 20% fee: \$

Payment Terms:

☐ Set by SCDPPPS

Recipient:

*Fine:

§ 14-1-206 (Assessments 107.5 %)

§ 14-1-211(A)(1) (Conv. Surcharge)

§ 14-1-211(A)(2) (DUI Surcharge)

§ 56-5-2995 (DUI Assessment)

§ 56-1-286 (DUI Breath Test)

§ 47.12 (Public Def Prob)

§ 14-1-212 (Law Enforce. Funding)

§ 14-1-213 (Drug Court Surcharge)

§ 50-21-114(BUI Breath Test Fee)

§ 56-5-2942(J) (Vehicle Assessment)

§ 90.7 (SCCJA Surcharge)

3% to County (if paid in installments)

TOTAL

Clerk of Court/ Deputy Clerk

Court Reporter:

PTUP

 days/hours Public Service EmploymentObtain GED ☐Attend Voc. Rehab. or Job Corp. May serve W/E beginning Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐Fine may be pd. in equal, consecutive weekly/monthly
pmts. of \$ beginning \$ paid to Public Defender FundOther: ☐ Appointed PD or appointed other counsel,
§ 47.12 requires \$500 be paid to Clerk
during probation.

Presiding Judge

Judge Code: 2968Sentence Date: 4/14/10