

VOLUME TWO OF TWO

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

\_\_\_\_\_  
Appeal from Sumter County

George C. James, Jr., Circuit Court Judge  
\_\_\_\_\_

RECEIVED

MAR 25 2015

S.C. Supreme Court

MARK MCCOY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO.2014-001253

\_\_\_\_\_  
APPENDIX  
\_\_\_\_\_

TIFFANY L. BUTLER  
Appellate Defender

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

ATTORNEY FOR PETITIONER

ALAN WILSON  
Attorney General

DANIEL GOURLEY  
Assistant Attorney General  
P. O. Box 11549  
Columbia, SC 29211

ATTORNEYS FOR RESPONDENT

INDEX

INDEX .....i

TRIAL TRANSCRIPT (SEPTEMBER 24 – 25, 2008) ..... 1

APPLICATION FOR POST-CONVICTION RELIEF (FILED JUNE 5, 2012).....231

RETURN .....368

AMENDED APPLICATION FOR POST-CONVICTION RELIEF  
(FILED FEBRUARY 11, 2013).....374

AMENDMENT TO POST-CONVICTION RELIEF APPLICATION  
(FILED SEPTEMBER 24, 2013).....396

AMENDMENT TO POST-CONVICTION RELIEF APPLICATION  
(FILED OCTOBER 2, 2013) .....430

AMENDMENT TO POST-CONVICTION RELIEF APPLICATION  
(FILED FEBRUARY 21, 2014).....453

POST-CONVICTION RELIEF HEARING TRANSCRIPT (FEBRUARY 27, 2014) .....454

ORDER OF DISMISSAL .....587

INDICTMENT .....604

Mark McCoy-Direct by Brooks

1 had the list of 40 people, at this time, he had  
2 not spoke to anyone that was involved in the case.  
3 And this is -- he hadn't spoke to none of the  
4 police officers. He haven't spoken to none of the  
5 people that were on this witness list.

6 And we didn't know what anyone that was  
7 testifying except for Joe Sumter, because  
8 Solicitor Fant gave us one of the witnesses. He  
9 is -- Joe Sumter was one of the guys that we had  
10 his information and that we knew what he was  
11 testifying to, but as far as all the other  
12 witnesses, we didn't know. And what happened  
13 while we were sitting there, Mr. Johnson, because  
14 the trial is on, Mr. Johnson had -- the list was  
15 there. And Mr. Johnson is saying to me, who is  
16 this person here. And I'm saying, I don't know  
17 who that people is. What is that person going to  
18 testify right there. I'm saying, I don't know  
19 what that person is testify. And because like I  
20 said, the names, I was unfamiliar with the names,  
21 and I didn't know.

22 So during the trial Mr. Johnson got an  
23 opportunity to talk to, I think, maybe 2 or 3  
24 witnesses. And one of the things what really  
25 affected us is dealing with the witnesses and when

Mark McCoy-Direct by Brooks

1 Mr. Johnson was. Kimberly had came up on the  
2 stand. And when Kimberly came up on the stand,  
3 she was crying. And Mr. Johnson was saying to me,  
4 yo, what she is doing up there. And I'm saying,  
5 Mr. Johnson, I don't know. Because her and  
6 Mr. Johnson, you know, were in communication with  
7 each other at the time. And I'm saying, Mr.  
8 Johnson, I don't know what she is doing up there.

9 So instead of asking the judge could he  
10 take the time to speak to Ms. Delay, what he did  
11 was, he asked Catherine Fant, while she was  
12 sitting across the table. I mean, at the  
13 prosecutor's table. And when Mr. Johnson said to  
14 Ms. Fant, is it possible that I speak to  
15 Ms. Delay. And Ms. Fant said, no, you don't know  
16 see her up there crying. No, you can't speak to  
17 her. And what they did was is, they rushed.  
18 Before Kim testified, they rushed Kim out of the  
19 courtroom.

20 Q So basically what you are saying is,  
21 Mr. Johnson should have made some type of motion  
22 dealing with that issue. A motion for mistrial or  
23 motion for a continuance. Is that the---

24 A Absolutely, and this way that could have  
25 prepared. I mean, we never put up a defense. And

Mark McCoy-Direct by Brooks

1 when we didn't put up a defense, I was thinking  
2 that we wasn't putting up a defense. It was  
3 obvious we wasn't putting up a defense, because we  
4 didn't know anything. And again, if Mr. Johnson  
5 would have been able to take the time to be able  
6 to speak to these witnesses and talk to these  
7 witnesses, like I said, there's a chance that the  
8 outcome of the trial would have been different.  
9 And by him not doing this, and not speaking and  
10 timing the take to investigate; for instance,  
11 getting a chance to speak with Mr. Pleasant, these  
12 actions also prejudiced me.

13 And it denied a right to a fair trial,  
14 because if we would had the opportunity to speak  
15 to him, like I said, if you look inside with  
16 inside the statements, the guy says, Mr. Pleasant  
17 is telling the height of the guy. And he is  
18 saying that the guy is 5-foot 4. The shooter was  
19 5 foot 4. He's saying that it is a silver gun.  
20 Other people were testifying it was a black gun.

21 Now, and the main thing about that is in  
22 Mr. Pleasant's statement, he said my co-defendant  
23 and allegedly, me. But at this time, he's saying  
24 that they was coming -- they came from a complete  
25 different direction, the two, my co-defendant and

Mark McCoy-Direct by Brooks

1 allegedly me, came from a completely different  
2 direction from where Lattimore Holmes testified.

3 And what Solicitor Fant did was, by not  
4 giving us this in time, the State was able to  
5 change the story around. And the State was able  
6 to change the story around. And they made the  
7 shooter, separated the shooter from my  
8 co-defendant. And he came -- they said that --  
9 well Lattimore Holmes is testifying he came from a  
10 different direction. And what I wanted to show,  
11 see I didn't get the opportunity to show the judge  
12 that Lattimore Holmes' testimony was completely, a  
13 lot of things was inconsistent with what he had  
14 testified at trial from---

15 Q Then what he said in the statement.

16 A Absolutely. I didn't get the opportunity  
17 to show Your Honor this. And I mean just for  
18 instance, just for instance, when Mr. Holmes was  
19 asked about was there a fight. Did he allegedly  
20 see me hit this guy. And he said no during the  
21 trial. But 8 months prior to the trial, he was  
22 saying, he said to the investigators in the report  
23 of investigation that there was a fight. And  
24 there was a, you understand what I am saying? But  
25 also in that, in that---

Mark McCoy-Direct by Brooks

1 Q Follow me, Mark.

2 A Yes, sir.

3 Q We got the issue about what you are saying  
4 Mr. Johnson did wrong.

5 A Yes.

6 Q As it relates to Mr. Pleasant.

7 A Uh-huh. (Affirmative.)

8 Q Anything else that you're raising  
9 ineffective assistance about Mr. Johnson's  
10 representation? Any other issue?

11 A Yes. There is another issue that I would  
12 like to bring to the court's attention. That,  
13 okay, two more issues.

14 Q In dealing with Mr. Johnson.

15 A Yeah, in dealing with Mr. Johnson. But  
16 one of the issues was that during the trial when  
17 the judge, the judge had said he was reading his  
18 the charge to the jury. And while he was reading  
19 the charge to the jury, what he did was, the judge  
20 told the jury to find me guilty no matter what. I  
21 know that sound. He said, the judge said, well  
22 the judge said -- it's in the transcripts. The  
23 judge said if you have enough evidence find the  
24 defendant guilty. If you don't have evidence,  
25 find the defendant guilty.

## Mark McCoy-Direct by Brooks

1           And at that time, I turned to Mr. Johnson.  
2       Instead of Mr. Johnson objecting to this, he  
3       didn't get the opportunity to object to it. He  
4       told the judge, and he said to the judge, Your  
5       Honor, you said that they should found Mr. McCoy  
6       guilty no matter what. And the judge said, well,  
7       no, I did not say that. So Mr. Johnson said well  
8       could you play back the tape and look. So when  
9       they played back the tape to look, to find out did  
10      he say that, the judge realized that he did say  
11      that. Now to tell them to find me guilty no  
12      matter what. And with that, if Mr. Johnson would  
13      have objected to that, just that one little  
14      scenario right there, what happened is, the  
15      appellate court, I mean yeah, the appellate court  
16      would have gotten an opportunity to look at that  
17      information to see why would the judge. Because  
18      like I said, the judge is leading.

19           Q     Okay. Let me help you out. What you are  
20      saying is that Mr. Johnson should have objected.  
21      Maybe asked for a mistrial---

22           A     Uh-huh. (Affirmative.)

23           Q     ---in regards to a problem with the  
24      judge's instructions---

25           A     Right.

Mark McCoy-Direct by Brooks

1 Q ---to the jury. Is that correct?

2 A Yes. Also too there was another situation  
3 should have objected to as dealing with the  
4 judge's instructions.

5 THE COURT: Is he referring to a page in  
6 the transcript? I'm sorry.

7 A This is dealing with the transcript---

8 THE COURT: Okay.

9 A ---when the judge was speaking to them.  
10 And it was -- I'm alleging like -- I would be  
11 alleging that my 6th Amendment was violated when  
12 it was like the trial court erroneous jury  
13 instruction on reasonable doubt.

14 Q Okay. Let me ask you this.

15 A Yes.

16 Q Basically what you are saying is that when  
17 the judge said that---

18 A Uh-huh. (Affirmative.)

19 Q ---your lawyer, and when you say uh-huh,  
20 you mean yes.

21 A Yes.

22 Q When your lawyer, when the judge said  
23 that, what you are saying is your lawyer should  
24 have objected and asked for a mistrial. As a  
25 result of that.

## Mark McCoy-Direct by Brooks

1 A Yeah, absolutely.

2 Q And he didn't do that.

3 A No.

4 THE COURT: Where in the transcript is the  
5 charge where he said if there is no evidence, find  
6 him guilty. If there is evidence, fine him  
7 guilty. Where is that? Do you all have a page  
8 number?

9 A I can tell you are right now. Excuse me,  
10 Your Honor.

11 MR. GOURLEY: 520, Your Honor.

12 THE COURT: 520?

13 MR. GOURLEY: Yes, Your Honor.

14 THE COURT: 520 of the record on appeal,  
15 or the 520 of the transcript?

16 MR. GOURLEY: 520 on the record on appeal.

17 THE COURT: What line number?

18 MR. GOURLEY: I believe it is line 10.

19 But I may be mistaken.

20 THE COURT: Page 520 line 10, says proof  
21 beyond a reasonable doubt is proof that leaves  
22 firmly convinced of the defendant's guilt. If  
23 you have a doubt for which you can give or  
24 assign a reason as to the guilt of the  
25 defendant, then he is entitled to a verdict of

## Mark McCoy-Direct by Brooks

1 not guilty. If and on page 521, if you have a  
2 reasonable doubt as to the guilt or the  
3 innocence of the defendant, he is entitled to  
4 that reasonable doubt, and would be entitled to  
5 an acquittal and a verdict of not guilty. On  
6 the other hand if you find the State has proven  
7 its case, it's your duty to convict the  
8 defendant and find him guilty. So if there is  
9 anything different that I am missing, somebody  
10 can point it out to me.

11 MR. BROOKS: Okay.

12 THE COURT: And if there was, that's fine.  
13 I just need to see it.

14 MR. GOURLEY: Your Honor, we don't dispute  
15 that Judge King did say, you must find the  
16 defendant guilty both ways. And then  
17 Mr. Johnson objected to it. And judge King did  
18 recharge the jury based off of his error.

19 THE COURT: Is that right, Mr. Brooks?

20 MR. BROOKS: If he's stipulated to it so.

21 MR. GOURLEY: It's in the record, Your  
22 Honor.

23 MR. BROOKS: I'm not going to disagree  
24 when the AG is stipulating to something we are  
25 talking about.

Mark McCoy-Direct by Brooks

1 THE COURT: Well now he's not stipulating  
2 it the way you -- your client says. He's just  
3 saying the judge misspoke. Brought the jury  
4 back out at Mr. Johnson's request and clarified  
5 it. So I guess I will just read the  
6 transcript. Okay.

7 Q Now, Mark, I think we've covered the  
8 issues about PCR, ineffective assistance of  
9 counsel and Mr. Johnson, is that correct?

10 A Do I have any more issues?

11 Q We've covered Kimberly Delay. We've  
12 covered Lattimore Holmes. We've covered  
13 Mr. Johnson and a potential Brady violation on  
14 Mr. Pleasant ineffective assistance dealing with  
15 witness or lack of witness Pleasant in the  
16 statement. And I have dealt with the jury charge.  
17 I think that is that everything dealing with the  
18 issues that we talked about in the case. Let me  
19 say this, you don't have to say these things  
20 again. We've got the witnesses to kind of get  
21 into the issues. I just want to make sure we have  
22 highlighted the issues, you know, for the court.  
23 And we are obviously going to develop more  
24 thoroughly with other witnesses who are here.  
25 Just, that's for information purposes.

## Mark McCoy-Cross by Gourley

1 But is there anything we missed as far as,  
2 what we've highlighted with the testimony here to  
3 Judge James?

4 A No.

5 Q I believe we've got all the issues out  
6 there.

7 A Pretty much, yes.

8 MR. BROOKS: I am going to go ahead and sit  
9 down. And you are going to answer questions of  
10 this fellow here, with the attorney general, okay.

11 MR. GOURLEY: Judge, it was 528 on the  
12 record of appeal. Line 10.

13 THE COURT: Yeah, I've got it.

14 Cross Examination by Mr. Gourley:

15 Q Mr. McCoy, how many times did you meet  
16 with Mr. Johnson prior to your trial?

17 A He came to see me maybe at least 8, 9  
18 times. Maybe even more.

19 Q And you were in prison the entire time?

20 A I was in the county jail, yes, sir.

21 Q Did you all review any discovery material  
22 or evidence that the State was going to present in  
23 your case?

24 A Yes, whatever they had sent him. Whatever  
25 they had sent Mr. Johnson, he bought it to me.

## Mark McCoy-Cross by Gourley

1 And me and him went over it together.

2 Q And did you seem to understand all that,  
3 and have a grasp of what was being presented, and  
4 what was being shown to you?

5 A At the time, yes, sir.

6 Q Did you ever give Mr. Johnson any type of  
7 leads or witnesses to investigate on your behalf?

8 A Yeah.

9 Q And who are they?

10 A I had asked him to speak to an Ivan  
11 Sanders.

12 Q Who is she?

13 A No, that was a he.

14 Q He, sorry.

15 THE COURT: First name?

16 A Ivan Sanders. And that was it. And, sir,  
17 and that was it. And the only reason that it  
18 wasn't, at the time, I didn't him to speak to  
19 anybody, because him, you know, he didn't know  
20 anything about the case.

21 Q Okay.

22 A So it wasn't no one to speak to.

23 Q But you knew what the State had alleged.

24 A Oh, yeah, I mean, yeah.

25 Q You didn't give any type of witness or

## Mark McCoy-Cross by Gourley

1 leads other than Ivan Sanders.

2 A No, I didn't, because we didn't know. At  
3 the time we didn't know anybody.

4 Q Did you all talk about any defenses?

5 A Did we talk about defenses?

6 Q Yeah.

7 A We talked so much. No, I can't recall if  
8 we did or not.

9 Q Okay. Did you talk about any type of  
10 trial strategy or anything?

11 A Well, pretty much, Mr. Johnson was  
12 confident that, before the trial, Mr. Johnson was  
13 very confident that we were going to win.

14 Q Okay.

15 A The reason why and I kind of could  
16 understand it, was because we didn't know any of  
17 the witnesses.

18 Q Right.

19 A So we were under assumption that and we  
20 didn't know who was going to testify, or what  
21 anybody was going to say.

22 Q And you didn't testify during the trial,  
23 did you?

24 A No.

25 Q Do you remember at the end of the trial

## Mark McCoy-Cross by Gourley

1 you apologized to the court?

2 A Apologize to the court?

3 Q Yeah. Do You remember talking to the  
4 court and apologizing to I think the family, for  
5 the loss of their son?

6 A Again, yeah, I didn't apologize to the  
7 court. I apologized to the lady.

8 Q The family, yes.

9 A And what I said to her I think, if I can  
10 recall was, that anytime a person loses a son,  
11 there is a, you know, anytime a person loses a  
12 son, that's, I may not have said these exact  
13 words, but that's messed up. And, you know, I  
14 understood her situation. And, you know, and I  
15 understood my situation.

16 MR. GOURLEY: I got you. Your Honor, I  
17 don't have any other questions. Thank you,  
18 Mr. McCoy.

19 THE COURT: Redirect?

20 MR. BROOKS: No, sir.

21 THE COURT: Thank you, Mr. McCoy. You can  
22 step down Next witness. Are you going to have  
23 any other witnesses, Mr. Brooks?

24 MR. BROOKS: I would call Mr. Johnson.

25 I.S. Levy Johnson, being first

## I.S. Levy Johnson-Direct by Brooks

1 duly sworn, testified as follows:

2 THE BAILIFF: State your full name and  
3 spell your last for the record.

4 A I.S. Levy Johnson. Last name is spelled  
5 J-O-H-N-S-O-N.

6 DIRECT EXAMINATION by Mr. Brooks:

7 Q Mr. Johnson, how are you doing today?

8 A I am doing fine, Mr. Brooks.

9 Q You represented Mr. McCoy in this case, is  
10 that correct?

11 A I did.

12 Q Okay. I want to ask you to take a look at  
13 what has been identified as Applicant's 1.

14 A I have.

15 Q Did you have that at the beginning of the  
16 trial?

17 A I do not recall. What was the date of the  
18 trial?

19 Q September 22, 2008.

20 A Was what?

21 Q September 22nd, 2008.

22 A September 22nd, 2008. I do not recall.

23 Q As a matter of fact, you had filed a  
24 standard discovery and Brady motion in this case,  
25 is that correct?

I.S. Levy Johnson-Direct by Brooks

1 A That is correct.

2 Q And that is a, what you looked at is  
3 Applicant's No. 1. That is a detailed statement  
4 from Kimberly Delay.

5 A I don't know if it is detailed statement,  
6 but it is a partial statement from Kimberly Delay.  
7 It looks like some of it has been deleted.

8 Q Did you, in that statement, does it  
9 indicate her statement about not knowing anything  
10 about McCoy's murder case?

11 A Of course the exhibit speaks for itself.  
12 But there is a sentence here that says Delay  
13 claims she never heard McCoy talk about it, nor  
14 does she know anything about the murder.

15 Q And do you recall her testimony during the  
16 trial?

17 A I do not recall her testifying. And I do  
18 recall her giving damaging testimony against  
19 Mr. McCoy.

20 Q If you had had that statement from her  
21 prior to the trial, is that something that could  
22 have been used to cross examine her?

23 A Certainly.

24 THE COURT: Could you clarify with  
25 Mr. Johnson if he ever got it during the trial.

I.S. Levy Johnson-Direct by Brooks

1 Q Did you ever get this statement during the  
2 trial?

3 A I do not recall. . . Honestly I do not  
4 recall. By way of information I filed the motion,  
5 the Brady motions, the routine Brady motions.  
6 During the course of my representing Mr. McCoy, he  
7 persisted in his contention that there were Brady  
8 violations. For his benefit and for my  
9 protection, I filed a motion with Judge King. And  
10 for probably the first time in my career, Judge  
11 King required Ms. Fant to submit to him all of the  
12 information that they had compiled during the  
13 course of their investigation.

14 Judge King personally reviewed all of the  
15 material, and ruled that the State had complied  
16 with the Brady motion.

17 Q Okay. But if you did have this statement  
18 by Kimberly Delay, is it fair to say that you  
19 would use it in the cross examination of her  
20 during her testimony?

21 A I would have used it, but I think it's  
22 fair if you the read the transcript, that I did an  
23 adequate job in cross examining her without it.  
24 We were -- it is true that Mark and I were  
25 surprised that they brought her in to testify

I.S. Levy Johnson-Direct by Brooks

1       against him. But I think under the circumstances,  
2       we did an adequate job of cross examining her,  
3       trying to bring out No. 1, the impeachable  
4       evidence.

5               My recollection, Mr. Brooks, is that it  
6       might have been on a Monday or Tuesday that she  
7       was brought in to testify. She had been  
8       interviewed that Sunday evening. And my  
9       recollection is that the investigators did not  
10      have a written statement or recorded statement.  
11      So Ms. Fant did not have anything physically to  
12      give me. Also there was nothing exculpatory in  
13      what she said, as I indicated. And I say this  
14      unequivocally, she made a dramatic difference the  
15      outcome of the trial. She came in and testified  
16      against him.

17            Q     She being Kimberly Delay.

18            A     Kimberly, yeah.

19            Q     And I ask you to take one more look at  
20      this. It does indicate that statement was given  
21      January 22nd 2008.

22            A     That's correct.

23            Q     To law enforcement, to Sumter Police  
24      Department.

25            A     I can't testify to that, but there are

I.S. Levy Johnson-Direct by Brooks

1 three witnesses. And I can only make out one  
2 signature. It looks like Eugene Williams. I  
3 don't know who he works for.

4 Q Now, mr. Johnson, I am going to ask you to  
5 also take a look at what is -- I am going to go  
6 back and ask you to take a look at what is  
7 Applicant's No. 2 and 3.

8 A Referring to Applicant's Exhibit No. 2,  
9 what is your question?

10 Q I was going to ask you to take a look at  
11 that.

12 A Okay.

13 Q And also if I can take that back from you,  
14 and ask you to took a look Applicant's No. 4.

15 A Referring to Applicant's No. 4, what is  
16 your question?

17 Q Is that a -- does that appear to be a  
18 statement obtained by law enforcement, the federal  
19 government, from a Lattimore Holmes?

20 A It does not. I see at the top now, It  
21 says source, Lattimore Holmes. But the statement  
22 refers only to source. But this a standard form  
23 that is used by special agents during  
24 investigations.

25 Q Did you get a statement, a prior

I.S. Levy Johnson-Direct by Brooks

1 statement, given by Lattimore Holmes, as a part of  
2 the trial in this case?

3 A I do not recall. As I've indicated, I  
4 filed a motion and everything -- it is my practice  
5 that everything I get, I supply a copy of it to my  
6 clients. As Mr. McCoy has corroborated, I meet  
7 with him on multiple occasions. I mean it is very  
8 unusual for a lawyer to meet with a client 8 or  
9 more times and he and I worked well together. We  
10 were sort of like a partnership. Because as you  
11 can see from these documents, he's very actively  
12 involved in any aspect of his case.

13 Just like you have got all these  
14 communications, I similarly got the same kind of  
15 communications. So everything I had I supplied  
16 him. And we met at the Alvin Glen Detention  
17 Center to go over those matters in detail. And  
18 they would reserve a room for us where we met.  
19 And so whatever Ms. Fant supplied me, I shared it  
20 with him. But I just can't, you know, four years  
21 tell you that I got this or got that.

22 But I can tell you, I vigorously defended  
23 him. I mean I gave him effective, excellent  
24 representation. I'm just not saying that self  
25 serving, but Mark knows that I -- and his

## I.S. Levy Johnson-Direct by Brooks

1 testimony corroborates it today. I worked hard  
2 for Mark. And you can see from the the  
3 transcript. I went to the scene. I learned the  
4 streets and I walked the walk where the incident  
5 happened. I went to the houses that said were  
6 involved in it. And everything that a lawyer  
7 could do for Mark, I did it for him.

8 Q Yes, sir.

9 A But I still don't hold any hostility  
10 against him for filing this PCR. No hard feelings  
11 whatsoever.

12 Q Yes, sir. Now do you recall at the start  
13 of the trial, getting a statement from Solicitor  
14 Fant about a James Pleasant?

15 A I do not. But it would not have been  
16 unprecedented. I've had it happen all my career.  
17 But even if I have gotten a statement unlike  
18 Mark's theory of it, I would not have called  
19 Mr. Pleasant.

20 Our trial strategy was to allow the State  
21 to put up their case. We would not put up any  
22 witnesses. But the sole strategy and purpose to  
23 allow me to have the closing argument. So If I  
24 had put up a witness, Mr. Pleasant or Mark or  
25 anybody else, that would have nullified my effort

I.S. Levy Johnson-Direct by Brooks

1 to make the closing argument. And so any  
2 statement Mr. Pleasant had -- if I had gotten a  
3 statement from -- about Mr. Pleasant, our trial  
4 strategy would have precluded me putting him up.  
5 And it would have been consistent my impression  
6 and feelings that it would have been detrimental  
7 to Mark instead of beneficial.

8 If you will examine the witnesses in  
9 Mark's case, the major commonality is, that were  
10 his friends. They were his acquaintances. And  
11 they are ones who were testifying against him. So  
12 it would have been a substantial risk to put up  
13 Mr. Pleasant as one of our witnesses. And he  
14 would have testified. And just like we are  
15 pointing out these inconsistencies that people  
16 gave these statements inconsistent. We would have  
17 put a substantial risk of putting him up, and then  
18 he would have testified against Mark.

19 So No. 1, it would have been inconsistent  
20 with our trial strategy to put up any witnesses.  
21 No. 2, it would have been a substantial risk to  
22 put up Mr. Pleasant. Because I think he would  
23 have turned on Mark.

24 Q Can you elaborate on why you thought that  
25 way about Mr. Pleasant?

## I.S. Levy Johnson-Direct by Brooks

1           A     Because of the pattern of testimony of  
2     the other witnesses.  If you look at all of these  
3     witnesses other than the police officers, all of  
4     those persons were his either personal friends,  
5     his acquaintances, had some relationship with him.  
6     And all of them just turned on Mark.  So it would  
7     have been something that I felt would have hurt  
8     him rather than him.

9                     I mean in the abstract now you can come  
10    back and say, oh, he's saying all these favorable  
11    things.  But a lot of those people said favorable  
12    things about Mark before the trial.  But after the  
13    trial -- but during the course of trial, they gave  
14    damaging testimony.  And Kimberly is an example.

15           Q     Mr. Johnson, do you remember the judge had  
16    said what he said about the jury charge?

17           A     Right.

18           Q     And I believe you objected to it, and  
19    asked for it be played back.  Is that correct?

20           A     That's correct.

21           Q     You didn't make any type of motion to  
22    mistry the case or anything like that.

23           A     No, he gave a curative instruction that I  
24    thought was beneficial.  Because the last thing  
25    that they heard, was a reiteration of a charge

## I.S. Levy Johnson-Direct by Brooks

1 that would say to him, you know, you are not  
2 obligated to find him guilty. And if you will  
3 look at Judge King's charge, his definition of  
4 presumption of innocence was very lucid. And I  
5 thought it was very impressionable for jurors.  
6 The problem in this case was not the jury charge.  
7 The problem in the case was Mark's friends;  
8 alleged friends or acquaintances or whatever you  
9 want to call them.

10 Q So basically to summarize it, the State's  
11 case was, Kimberly Delay, Lattimore Holmes and  
12 the other witnesses that you characterize as  
13 friends and acquaintances. And that was the  
14 State's. It wasn't forensics -- it wasn't a  
15 forensic's types case, fingerprints, DNA, or  
16 anything like that.

17 A It was a case of eye witness testimony.  
18 It was a case corroboration of the relationship  
19 between him and the deceased. It was the case of  
20 a drug dealer who had some hostility and animosity  
21 against the deceased. It was a case where  
22 Mark McCoy took it upon himself to show that he  
23 was a kingpin in that area, in that community.  
24 And he was going to show people that he was the  
25 man. And he shot this young man in cold blood.

I.S. Levy Johnson-Direct by Brooks

1 Q I guess an even better question from my  
2 standpoint is, to summarize what the State's case  
3 was, it wasn't a forensics type of case.

4 A No, because the murder weapon was not  
5 found. But the description by his friends of how  
6 he was operating this drug house, and how they  
7 testified that he had house across the street. He  
8 had these young ladies in the house selling drugs.  
9 And when they needed to be supplied, they would  
10 come across and get drugs from him and Kimberly.  
11 And Kimberly would be there witnessing. And Mark  
12 would get the drugs.

13 And how he came in and changed clothes.  
14 And he went out and got on his bicycle. And I  
15 think it was Holmes who was right there by the  
16 fence and saw the shooting. I mean it was a  
17 strong case against him. And I really did  
18 everything in my power to vigorously defend him.  
19 I mean, it was not something that I took lightly.  
20 Because when you represent somebody charged with  
21 murder, that's an awesome responsibility. And as  
22 I said, Mark and I had a wonderful relationship.  
23 I mean we worked together. And he was heavily  
24 involved in the strategy. Everytime I would meet  
25 with him, he would have nuance about the case;

## I.S. Levy Johnson-Direct by Brooks

1 that he wanted to make sure that I seen this. Did  
2 you overlook this Mr. Johnson. Do you photo right  
3 here, Mr. Johnson. Do you see this inconsistency  
4 right here Mr. Johnson.

5 So it was a real partnership in trying to  
6 defend him.

7 MR. BROOKS: I beg the court's indulgence,  
8 Your Honor.

9 Q Mr. Johnson, did Ms. Fant give you any  
10 information about any deal for Kimberly's Delay's  
11 testimony prior to her giving testimony?

12 A I do you recall her giving any information  
13 about any deal. But as you know, Mr. Brooks,  
14 deals are as common as night following day.

15 Q Also, Mr. Johnson, looking back at the FBI  
16 report, where it says source. Presumably this is  
17 statement from Lattimore Holmes. Did you have an  
18 opportunity to review it?

19 A View it where?

20 Q Right now.

21 A Yes, I've glanced. Yes, uh-huh.

22 (affirmative.)

23 Q In that statement it talks about their  
24 being some fight between the perpetrator and the  
25 alleged victim, is that correct?

I.S. Levy Johnson-Direct by Brooks

1           A     Yeah, prior to the assault.   McCoy began  
2     assaulting Pettis and Pettis got in a hit on  
3     McCoy.   That's correct.

4           Q     Would the fact that this has some bearing  
5     that there was a fight going on.   If you would  
6     have had that, and that testimony had come out,  
7     would you have asked the court for a lesser  
8     included offense as a part of the jury charges?

9           A     Perhaps I would have.   There is that  
10    possibility.   You know and that's a very difficult  
11    question for a lawyer, a difficult decision for a  
12    lawyer to make.   Because one strategy is that you  
13    go with the single charge of murder.   And you  
14    worry about giving them a jury charge of voluntary  
15    manslaughter, because they might compromise on  
16    you; that they can't prove the case of murder, but  
17    he did something wrong, therefore we will go with  
18    voluntary manslaughter.   I'm sure you've been in  
19    that situation where you had to make that  
20    decision.   But I cannot tell you right now,  
21    Mr. Brooks, if I had this information, I would  
22    have gone with the murder and voluntary  
23    manslaughter.

24           MR. BROOKS:   I beg the court's indulgence,  
25    Your Honor.   No other questions, Mr. Johnson.

## I.S. Levy Johnson-Cross by Gourley

1 THE COURT: Cross examination?

2 MR. GOURLEY: Yes, sir, Your Honor.

3 Cross Examination by Mr. Gourley:

4 Q Mr. Johnson.

5 A Good afternoon.

6 Q Mr. Johnson, how long have you been  
7 practicing law?

8 A 45 years. Can I strike that from the  
9 record?

10 Q And you were retained in this case?

11 A I was.

12 Q Did you all review discovery and  
13 everything?

14 A We did.

15 Q And I heard you talk briefly on direct  
16 about your investigation in the case. Can you can  
17 just go into a little bit of detail about your  
18 preparation?

19 A Well as you're aware, Mark was  
20 incarcerated at Alvin Glen Detention Center so  
21 that gave him access to me. So and as he has  
22 indicated, I visited him on numerous occasions.  
23 In addition, and when I did visit him, we talked a  
24 strategy and we reviewed the discovery. I made  
25 trips over here to Sumter. I always go to the

## I.S. Levy Johnson-Cross by Gourley

1 scene of an alleged incident. And I don't recall  
2 the streets. But it seemed like Blanding was one  
3 of the streets. Edwards was one of the streets.  
4 So I physically went to those areas. You will see  
5 some testimony in the record where there was some  
6 reference of field and some reference to a fence.  
7 So I physically went to that field. I physically  
8 saw that fence.

9 And there was some allegation about a  
10 store being broken into. I located that store.  
11 And I traveled all those areas in order to get a  
12 sort of -- what you need to do is sort of get a  
13 mind picture, get a visual of when people make  
14 references to different locations. So I did all  
15 of that.

16 Q And what witnesses? Did you interview any  
17 witnesses?

18 A I did. You will find in the record that  
19 there were allegations that Mark communicated with  
20 Kim to discuss their testimony. There was a  
21 threat of obstruction of justice made. And there  
22 were some -- there were allegations. And there  
23 were attempts made on some people to change their  
24 testimony. And so that was pursued also.

25 MR. GOURLEY: Going back briefly, Your

## I.S. Levy Johnson-Cross by Gourley

1 Honor, If I may approach?

2 THE COURT: Yes, sir.

3 Q Regarding Lattimore Holmes statement,  
4 which I believe is---

5 THE COURT: No. 4?

6 Q No. 4, Yes, Your Honor. Can you read the  
7 date of that, Mr. Johnson?

8 A Date of which?

9 Q Applicant's No. 4 that was signed?

10 A 1/25/08.

11 MR. GOURLEY: And, Your Honor, just for  
12 your reference, we are going to start on page  
13 232?

14 THE COURT: Page what?

15 MR. GOURLEY: 232 of the---

16 THE COURT: The record on appeal or trial  
17 transcript?

18 MR. GOURLEY: The trial transcript, Your  
19 Honor.

20 Q This is your cross examination of  
21 Mr. Holmes. Just, if you will read that just  
22 briefly.

23 THE COURT: Let me make sure I have got.  
24 I've got it.

25 Q Mr. Johnson, I'll let you finish reading

## I.S. Levy Johnson-Cross by Gourley

1 it. I apologize.

2 A Okay, I've read it.

3 Q Mr. Johnson, during your cross examination  
4 you've referenced to the point that Mr. Holmes did  
5 make a statement in January of 2008, Correct?

6 A Right, uh-huh. (Affirmative.)

7 Q So potentially you would have been aware  
8 of the statement prior to at least Mr. Holmes'  
9 testimony?

10 A That's correct.

11 Q Okay. Thank you, Mr. Johnson.

12 Mr. Johnson, I'm also going to show you one more  
13 thing. Is this your motion that you made  
14 regarding an inspection of the solicitor's file to  
15 Judge King?

16 A It is.

17 Q Okay.

18 A And that was made on July 2nd -- July 22nd  
19 of 2008.

20 Q And subsequently following that is that  
21 Judge King's order?

22 A Wait, I gave you the wrong date. I filed  
23 the motion on June 3rd 2008. And Judge King  
24 issued his order on the 22nd of July 2008.

25 Q And ordering that, the Solicitor's file,

I.S. Levy Johnson-Cross by Gourley

1 that you review the Solicitor's file for any  
2 potential Brady material, correct?

3 A That's correct. And then on August 19th  
4 2008, he issued an denying motion for the  
5 disclosure of evidence, Brady motion and motion  
6 for speedy trial.

7 MR. GOURLEY: Your Honor, I would mark as  
8 State's 1.

9 THE COURT: What is that?

10 MR. GOURLEY: It would be a motion for in  
11 camera inspection.

12 THE COURT: Any objection, Mr. Brooks?

13 MR. BROOKS: No, sir.

14 MR. GOURLEY: And I will make copies at  
15 the break, Your Honor, for everybody. I  
16 apologize.

17 (Motion for in camera inspection marked  
18 State's Exhibit No. 1 for evidence.)

19 THE COURT: The date of the motion is  
20 again what? June what?

21 MR. GOURLEY: June 3rd, 2008, Your Honor.

22 A Your Honor, I am out of place in telling  
23 you not only is the motion, but there is an order  
24 attached.

25 THE COURT: It's all Exhibit 1?

## I.S. Levy Johnson-Cross by Gourley

1 MR. GOURLEY: Yes, sir. It's all stapled,  
2 together, Judge.

3 A I am trying not to practice law, Your  
4 Honor.

5 THE COURT: Okay.

6 Q Mr. Johnson, did the defendant ever tell  
7 he was present at murder scene? At the scene of  
8 the murder?

9 A I can't answer that question.

10 Q You don't recall?

11 A I do recall, but because of my  
12 attorney/client relationship---

13 Q Okay.

14 A ---I'm not going to disclose what he told  
15 me.

16 Q Well once what he filed a PCR application,  
17 your attorney/client is waived. However, I  
18 understand. I beg the Court's indulgence, Your  
19 Honor.

20 THE COURT: Okay.

21 Q Mr. Johnson, did you feel any need to  
22 object to the jury charge regarding the -- well  
23 you did object to the jury charge, correct?

24 A Right.

25 Q When Judge King ruled, stated that you can

## I.S. Levy Johnson-Cross by Gourley

1 find the defendant guilty both ways?

2 A Yeah. It was an inadvertent statement  
3 made by Judge King. But the totality -- if you  
4 look at the totality of Judge King's jury charge,  
5 it was very well balanced. It was the  
6 conventional charge that is given. And so I did  
7 not find anything that would prejudice to Mark in  
8 the charge, or the manner in which the charge was  
9 delivered.

10 Q Regarding Kimberly Delay's testimony at  
11 the trial, she never actually testified that she  
12 saw the murder take place, right?

13 A Well that's correct. No, that is correct.  
14 My recollection is that she testified that she  
15 recalls when he came to the house and changed  
16 clothes. She recalled that when he came back, he  
17 was breathing heavily. And maybe she testified  
18 that he was perspiring. I can't say. But there  
19 was indication that he was breathing heavily; that  
20 he was in a camouflage outfit; that she had seen  
21 him on occasions with weapons, with guns. And so  
22 what she primarily was, was a witness to  
23 corroborate and tie up some loose ends. But she  
24 never testified that she was an eye witness to the  
25 incident.

I.S. Levy Johnson-Cross by Gourley

1 MR. GOURLEY: Your Honor, If I may  
2 approach one for time.

3 THE COURT: All right.

4 Q Your Honor, referencing, Applicant's 1, in  
5 Ms. Delay's statement, she never specifically says  
6 that she saw Mr. McCoy murder, allegedly murder  
7 the victim in this case, correct?

8 A That's correct.

9 Q And she just says that---

10 A Her statement says she claims she never  
11 heard McCoy talk about it. Nor does she know  
12 anything about the murder.

13 Q About the murder itself taking place,  
14 correct?

15 A That's correct.

16 Q Not about about the fact that Mr. McCoy  
17 came to the house and changed clothes, right?

18 A That's correct.

19 MR. GOURLEY: Your Honor, I have no  
20 further questions. Thank you, Mr. Johnson.

21 THE COURT: Redirect, Mr. Brooks?

22 MR. BROOKS: I beg the court's indulgence,  
23 Your Honor.

24 Cross Examination by Mr. Brooks:

25 Q Mr. Johnson, you said that Kimberly

## I.S. Levy Johnson-Redirect by Brooks

1 Delay's testimony was very damaging.

2 A That's correct.

3 Q Why was it damaging?

4 A The source. She was his girlfriend. She  
5 came in, and when she testified about his attire,  
6 and how he had come to the house and changed  
7 clothes. How he left on the bicycle. And this is  
8 my recollection, had come back and was breathing  
9 hard. That was, as you know, Mr. Brooks, a trial  
10 is a puzzle. And each piece you put the puzzle  
11 especially, from a prosecution point of view.  
12 What they are doing is taking these different  
13 pieces of the puzzle and putting it together. And  
14 that was just a piece of the puzzle.

15 But the fact that she was his girlfriend,  
16 and had come in and testified against him. I  
17 think that gave great weight and credibility to  
18 her testimony. That's the reason I say that.

19 Q In terms of the allegation, he had come  
20 home and changed clothes. I believe there was an  
21 allegation he had guns?

22 A That's correct.

23 Q That's the parts of her testimony that you  
24 felt were very damaging.

25 A That's correct.

## I.S. Levy Johnson-Redirect by Brooks

1 Q Now when Mr. Gourley asked you about your  
2 cross examination of Mr. Holmes, Lattimore Holmes.

3 A Right.

4 Q And showed you the points in the  
5 transcript of record on appeal, where you talked  
6 about Mr. Holmes giving a prior statement to law  
7 enforcement.

8 A Right.

9 Q But nevertheless, you never got the actual  
10 statement.

11 A The cross examination of Mr. Holmes  
12 indicates that I did get the statement, because  
13 their -- the nature of my questions indicate that  
14 I gave a statement. You know, those FBI, 302  
15 forms and the way they are written and how they  
16 use their language source and stuff like that.  
17 But the pattern of questions that I asked would  
18 indicate to me, Mr. Brooks, that I did have a  
19 statement.

20 MR. BROOKS: I beg the court's indulgence.

21 THE COURT: All right.

22 Q Mr. Johnson.

23 A Yes.

24 Q In the cross examination phase of  
25 Mr. Lattimore Holmes that Mr. Gourley showed you

## I.S. Levy Johnson-Redirect by Brooks

1 on the record on appeal in the transcript, you  
2 answered earlier that that must have indicated  
3 that you had that prior statement of Lattimore  
4 Holmes?

5 A That indicated to me that I either had  
6 this statement or I had knowledge of the  
7 statement. Because you see I made reference to  
8 the date of January. I made reference to the  
9 year. And I made -- if you show it to me again, I  
10 can point out the different things that they are  
11 indicia of the fact that I must have had some  
12 knowledge that the statement existed.

13 In addition, if you look at cross  
14 examination questions, would indicate that I had  
15 some indication. And you'd also see there was  
16 effective cross examination of him.

17 MR. BROOKS: I beg the court's indulgence.

18 THE COURT: All right.

19 MR. BROOKS: No other questions.

20 THE COURT: Anything else, Mr. Gourley?

21 MR. GOURLEY: Very briefly, Your Honor.

22 Recross Examination by Mr. Gourley:

23 Q Mr. Johnson, you stated that Ms. Delay's  
24 testimony was very detrimental in your opinion,  
25 because she was the girlfriend of Mr. McCoy,

## I.S. Levy Johnson-Recross by Gourley

1 correct?

2 A That's correct.

3 Q And additionally other witnesses were  
4 friends of Mr. McCoy as well, correct?

5 A That is correct.

6 Q And they would essentially have the same  
7 weight, as far as---

8 A I don't know if they had the same weight.  
9 But the fact that they were his friends and  
10 testifying against him, I think that increased  
11 their credibility.

12 Q Okay. And, Mr. Johnson, was it the  
13 defense's theory that the State would not be able  
14 to prove that Mr. McCoy was at the scene of the  
15 murder? At the murder scene.

16 A That was part of it. And hopefully,  
17 through the cross examination that we would  
18 impeach the witnesses. Because as Marcus  
19 indicated, most of them had some type of deal.  
20 And so the strategy was to try to impeach them to  
21 demonstrate that they had vested interest in the  
22 outcome; that they were benefiting from their  
23 testimony. And that's the reason they were  
24 testifying against him. That was the strategy,  
25 obviously it didn't work.

## I.S. Levy Johnson-Recross by Gourley

1 Q And these witnesses weren't very credible  
2 witnesses based off of their prior records and  
3 drug dealers and so on and so forth, correct?

4 A What's your question now?

5 Q The witnesses that testified during the  
6 trial were not perfect angels, correct? They were  
7 mostly Mr. McCoy's friends or drug dealers or had  
8 prior records, so on and so forth, right?

9 A That's very true.

10 Q Okay.

11 A I don't think they have reservations in  
12 heaven.

13 MR. GOURLEY: Thank you, Mr. Brooks.

14 THE COURT: Anything else, Mr. Brooks?

15 MR. BROOKS: Nothing further.

16 THE COURT: Thank you, Mr. Johnson. You  
17 can step down.

18 A Thank you.

19 MR. GOURLEY: Your Honor, if we may have  
20 just a 5 minute recess.

21 THE COURT: We'll take about 5 minutes.

22 Thank you.

23 MR. JOHNSON: Could you ask the judge if I  
24 may be excused?

25 MR. GOURLEY: Your Honor, if Mr. Johnson

## I.S. Levy Johnson-Recross by Gourley

1 may be excused.

2 THE COURT: All right. You all come on  
3 up.

4 (Whereupon, the attorneys approach and  
5 confer with judge.)

6 MR. BROOKS: Your Honor, we would call  
7 Kimberly Delay.

8 Kimberly Delay, being first  
9 duly sworn, testified as follows:

10 MR. GOURLEY: Judge, before we begin, Ms.  
11 Delay did testify at trial. I had Ms. Butler from  
12 the public defender's office advise her of her  
13 rights and any possible perjury from the outcome  
14 of that. Ms. Butler subsequently went down to the  
15 public defender's office, but I can have her back  
16 up here.

17 THE COURT: Well I not going to wait.

18 MR. GOURLEY: Okay.

19 THE COURT: Let's put it that way.

20 MR. GOURLEY: Okay.

21 THE COURT: And, you know anybody who has  
22 testified in a proceeding before, I certainly  
23 never advise them of their constitutional  
24 rights.

25 MR. GOURLEY: Yes, sir.

## I.S. Levy Johnson-Recross by Gourley

1 THE COURT: Because I would assume that  
2 they're going to be telling the truth.

3 MR. GOURLEY: Yes, sir.

4 THE COURT: Or at least something  
5 consistent. So if she has counsel and counsel  
6 wanted to be here, then counsel needs to have been  
7 here already. I'm not going to wait on her.

8 MR. BROOKS: I think what they were saying  
9 is, you know, she came here. She's not  
10 necessarily represented. And out of an  
11 abundance of caution, that's what I---

12 THE COURT: That' not my issue.

13 MR. GOURLEY: Okay. Thank you, Judge.

14 THE BAILIFF: Please state your full name  
15 and spell your last name for the record.

16 A Kimberly Delay. D-E-L-A-Y.

17 THE COURT: I will tell her if you want me  
18 to. Ma'am, if you give sworn testimony today  
19 different from what you have given in a  
20 proceeding before under oath, the authorities  
21 can prosecute you for perjury. So that's what  
22 a lawyer would tell her. So aside from that,  
23 this is a hearing on a post-conviction relief  
24 application. And anymore than any other  
25 witness who has testified, they have got to

Kimberly Delay-Direct by Brooks

1 tell the truth. Okay. It's up to me to weigh  
2 credibility.

3 In other words, I really don't understand  
4 what you are talking about. If this -- If I've  
5 got to advise her of that, then do I do that with  
6 every witness who has deposed in a wreck case?  
7 Have you talked to a lawyer, ma'am?

8 A I talked to a public defender when I came  
9 in.

10 THE COURT: Is she your lawyer?

11 A No, sir.

12 THE COURT: Well the public defender's  
13 office isn't here to just talk to people. They  
14 talk to their clients.

15 MR. GOURLEY: Yes, sir. I understand.

16 THE COURT: Okay.

17 Direct Examination by Mr. Brooks:

18 Q Ms. Delay, you testified in Mr. McCoy's  
19 trial, is that correct?

20 A Yes, sir.

21 Q And but before that, you had conversations  
22 with law enforcement about Mark. Is that correct?

23 A Yes, sir.

24 Q What did you tell Mark -- law enforcement  
25 about Mark prior to his trial?

Kimberly Delay-Direct by Brooks

1 A Which time?

2 Q The first time.

3 A The very first time?

4 Q The very first time that they talked to  
5 you about this case which he has been convicted  
6 of.

7 A The very first time I told them that I  
8 didn't know anything about it, because I wasn't  
9 with him at that time.

10 Q Okay. What did you tell them after that?

11 A I told them what they wanted to hear.  
12 Well, after that, after that initial first time,  
13 the second time I stated that I didn't know  
14 anything. The third time when they came again,  
15 when I was incarcerated and I started telling them  
16 information about the clothing. Okay.

17 Q And is that what you told the last time  
18 about the clothing, is that what you told the  
19 court during the trial?

20 A To be honest, I don't know remember word  
21 for word during the trial.

22 Q Were you pressured to make any statements  
23 against Mr. McCoy?

24 A Oh, yeah. Oh, yes.

25 Q What kind of pressure?

## Kimberly Delay-Direct by Brooks

1           A     I was told that I was going to more time  
2           than him; that I was facing a lot of federal time;  
3           that I was going to be charged with accessory to  
4           the fact and conspiracy to commit murder.

5           Q     Now you do recall you testified in the  
6           trial with Mark.

7           A     Yes.

8           Q     And you remember the gist of what you said  
9           in this trial, is that correct?

10          A     Correct.

11          Q     Is what you said in that trial, correct?

12          A     No, sir.

13          Q     Now you heard the court.

14          A     Yes.

15          Q     Judge James tell you what he said, is that  
16          correct?

17          A     Yes, sir.

18          Q     Now what did you know?

19          A     I didn't know anything.

20          Q     What did you know about the clothing?

21          A     Nothing. I mean at that time, when they  
22          brought to my attention about camouflage,  
23          everybody was wearing camouflage around that time.

24          Q     Okay. Was Mark wearing camouflage?

25          A     That day?

Kimberly Delay-Direct by Brooks.

1 Q Correct.

2 A I am not sure.

3 Q You know that's different than what you  
4 said at trial.

5 A Yes, I know.

6 Q Well why did you say that at trial?

7 A I was scared. I've never been in trouble.  
8 I was facing a lot of time.

9 Q Did you have a lawyer then?

10 A I had a federal defense attorney.

11 Q Is that Catherine---

12 A Catherine Leek.

13 Q That's out of Georgia, is that correct?

14 A Yes, sir.

15 Q Did you have any knowledge about Mark on  
16 that day,---

17 A No.

18 Q ---that the incident occurred? None  
19 whatsoever. Is that a no?

20 A No.

21 Q You might have heard me say this before,  
22 but you've got to say yes and no, so the Court  
23 Reporter can take it down. You can't just nod  
24 your head. So now you said you were scared and  
25 pressured. They told you you were facing a lot of

Kimberly Delay-Direct by Brooks

1 time. They, who is they?

2 A Catherine Fant. Two detectives.

3 Q Detective Culick?

4 A Yes. And I don't know the other one.

5 Q Eugene Williams.

6 A Well Eugene Williams in the interview  
7 room, he was basically telling me well, you need  
8 to tell whatever you know. And I told him I  
9 didn't know anything.

10 Q And that's the statement you signed back  
11 in January---

12 A Yes.

13 Q ---of 08?

14 A Yes.

15 Q That was -- you did in fact sign that  
16 statement.

17 A Yes, sir.

18 MR. BROOKS: Your Honor, may I approach  
19 the witness?

20 THE COURT: Yes, sir.

21 Q Ms. Delay, I am going to hand you what has  
22 now been identified as Applicant's No. 1. I want  
23 you to take just a brief minute to review it.

24 A Uh-huh. (Affirmative.)

25 Q Is that a yes?

Kimberly Delay-Direct by Brooks

1 A Yes, sir.

2 Q Is that in fact the statement that you  
3 gave Detective Eugene Williams about -- about the  
4 incident that Mark is charged with for murder?

5 A I am sorry, could you repeat that?

6 Q I said is that the statement that you gave  
7 law information about Mark's involvement in the  
8 murder? Or what you knew Mark's involvement in  
9 the murder?

10 A Yes.

11 Q And it has your signature on it.

12 A Yes, sir.

13 MR. BROOKS: Your Honor, we would ask  
14 that---

15 THE COURT: Well I'll allow it in. But  
16 can you ask the witness about the deleted  
17 paragraphs? Because I want to see the whole  
18 thing. I don't know who had got it. But if  
19 somebody has got it, I want it. No, not you,  
20 Mr. McCoy. Your lawyer or Mr. Gourley.

21 MR. GOURLEY: I'll check the Clerk's  
22 Office, Your Honor. Or the Solicitor's office.

23 THE COURT: It's not going to be in the  
24 clerk's file.

25 MR. GOURLEY: Solicitor's office.

Kimberly Delay-Direct by Brooks

1 THE COURT: Okay. It's in. I would  
2 assume that at some point it took a form that did  
3 not have, and this is at least a 24-paragraph  
4 statement. Paragraph 1, 2, 3 and 23, are present.  
5 The other ones are blocked out.

6 MR. BROOKS: Between me and Mr. Gourley,  
7 we'll make sure we get the actual---

8 THE COURT: Today.

9 MR. BROOKS: Yes, sir.

10 THE COURT: I'll make, let me just. I  
11 don't know what the situation is, but page 2 has  
12 her signature on it. Page 3 has a paragraph 1, 2,  
13 3 on it. And then it goes to page 7. So I don't  
14 know where the rest of it is. And it may be  
15 totally irrelevant to this case, but somebody has  
16 got to explain it.

17 MR. BROOKS: I beg the court's indulgence,  
18 Your Honor.

19 THE COURT: And, you know, to the extent  
20 this is a PCR case we need to keep that in mind.  
21 This is not a new trial motion.

22 MR. BROOKS: Mr. Gourley, we've got the  
23 whole.

24 THE COURT: Staple it together and mark it  
25 for ID.

Kimberly Delay-Direct by Brooks

1 (Interview Form marked as Plaintiff's No.  
2 5 for Id.)

3 MR. BROOKS: Judge, we would mark it as a  
4 totally separate exhibit.

5 THE COURT: No. 5.

6 Q Kimberly, is this a complete version of  
7 your statement?

8 A Yes.

9 Q That you gave to Eugene Williams, Sumter  
10 County Law Enforcement, back on January 22, 2008.

11 A Yes sir.

12 THE COURT: Any objection to that, Mr.  
13 Gourley?

14 MR. GOURLEY: No, Your Honor.

15 THE COURT: It's in.

16 (Interview Form marked Plaintiff's Exhibit  
17 No. 5 into evidence.)

18 Q Kimberly, finally what you're saying is  
19 that your testimony in the trial was not true.

20 A Yes.

21 Q And your testimony here today is true.

22 A Yes.

23 Q Which is consistent with your prior  
24 statement to Detective Williams.

25 A The original first statement that I made.

## Kimberly Delay-Cross by Mr. Gourley

1 Q In January 22, 2008.

2 A Yes, sir.

3 MR. BROOKS: No other questions, Judge.

4 THE COURT: Mr. Gourley.

5 CROSS EXAMINATION by Mr. Gourley:

6 Q Ms. Delay, you said you were threatened  
7 with additional federal charges accessory for  
8 murder -- accessory after the fact and conspiracy  
9 to commit murder?

10 A Yes, sir.

11 Q Were you ever indicted for any of those  
12 charges?

13 A No, sir. But I was indicted for  
14 obstruction of justice.

15 Q And you stated you only had a federal  
16 defense attorney?

17 A Yes.

18 Q And Arthur Wilder represented you at any  
19 point and time as well?

20 A For a month. But I never spoke to him,  
21 never seen him. He never came and saw me.

22 Q But he did represent you though. He was  
23 your attorney?

24 A I think so, yes.

25 Q And you did testify at trial, right?

## Kimberly Delay-Cross by Mr. Gourley

1 A Yes.

2 Q And you testified that Mr. McCoy came into  
3 the house, changed clothes in the camouflage and  
4 then left, correct?

5 A That's what I said, yes.

6 Q And today your testimony is that that is  
7 not true.

8 A Yes.

9 MR. GOURLEY: I have no further questions,  
10 Your Honor.

11 THE COURT: Redirect?

12 MR. BROOKS: No other questions.

13 THE COURT: Does anybody -- how did these  
14 things get redacted, Mr. Brooks? On Exhibit 1?  
15 Obviously Mr. McCoy has had the full statement,  
16 all paragraphs. How did it get redacted? Tell  
17 your lawyer. And if Ms. Fant knows, she can  
18 tell you, Mr. Gourley.

19 MR. BROOKS: Judge, my client tells me  
20 that he had what is Applicant's Exhibit 1, he  
21 had redacted the other paragraphs pertaining to  
22 the drug case, the federal drug case.

23 THE COURT: Mr. Gourley, is that what?

24 MR. GOURLEY: No, Your Honor. According  
25 to Ms. Fant, Mr. McCoy had federal charges in

Catherine Fant-Direct by Brooks

1 Georgia. He also had state charges in South  
2 Carolina. The redacted versions do not deal  
3 with the State of South Carolina charges. They  
4 deal with the federal charges. And therefore,  
5 Ms. Fant redacted those.

6 THE COURT: Okay. I just wanted a little  
7 explanation on that. Next witness.

8 MR. BROOKS: You can come down. We would  
9 call Catherine Fant.

10 Catherine Fant, Being first  
11 duly sworn, testified as follows:

12 BY THE BAILIFF: Please state your full  
13 name and spell your last name for the record.

14 A Catherine Fant. F-A-N-T.

15 Direct Examination by Mr. Brooks:

16 Q Ms. Fant.

17 A Yes.

18 Q How are you today?

19 A Good.

20 Q And you were the prosecutor with the  
21 solicitor's office that prosecuted Mark McCoy in  
22 this case, is that correct?

23 A That's correct.

24 Q And can you take a look at Exhibit --  
25 Applicant's No. 2 and Applicant's No. 3?

Catherine Fant-Direct by Brooks

1 A Okay.

2 Q Is this basically to summarize a  
3 correspondence that you got from the federal  
4 defender's office in Georgia and your response  
5 back to them, is that correct?

6 A Yes.

7 Q And it's about Kimberly Delay.

8 A Correct.

9 Q And you actually submitted an affidavit in  
10 support of Kimberly Delay, is that correct?

11 A Can I explain fully what happened?

12 Q You can explain, but is it a yes?

13 A Yes.

14 Q Now you want to explain.

15 A Yes. How that came about, there was no  
16 deal with Kimberly Delay. We were not going to  
17 give her deal, because she had never told what had  
18 happened. The -- when she met with Detective  
19 Eugene Williams at the Sumter Police Department,  
20 she said she basically didn't know what had  
21 happened on the day of the murder. And she stuck  
22 with that, until we were notified right before the  
23 trial by the federal authorities, that she wanted  
24 to testify.

25 Mr. Wilder had asked me about a deal for

## Catherine Fant-Direct by Brooks

1 her, and I specifically told him we would give her  
2 a deal.

3 Q Mr. Wilder, as in Arthur Wilder?

4 A As in Arthur Wilder, who was her attorney,  
5 on two separate state charges that she had. And  
6 he was her attorney for both of them. He wanted  
7 her to cooperate, and had asked me several times  
8 about it. And the problem was she wasn't  
9 cooperating at that point. So there was  
10 absolutely no agreement for her. I understand  
11 that the letter that Ms. Leek sent, mentioned that  
12 I had agreed to dismiss charges, but that is not  
13 correct.

14 What I had agreed to do was, we had would  
15 reconsider everything if she testifies, after she  
16 testifies, we will see where we are. It's  
17 important to note that because the -- I did not in  
18 fact dismiss the charges against Ms. Delay.  
19 Except there was one -- the one case. And if I  
20 can refer to my notes, because I went to the  
21 solicitor's office right before I came up here.

22 I pulled her two files. The first one was  
23 an indicted case. Indictment 08-035. I did  
24 nol-pros that on October the 20th 2008. That was  
25 after Mr. McCoy's trial, but it had nothing to do

## Catherine Fant-Direct by Brooks

1 with that. It was because, and it's written right  
2 on the front of the trial. She had -- she was  
3 going federal. She had a federal case going.  
4 Standard procedure in the solicitor's office that  
5 we just didn't bother to go forward prosecuting  
6 cases that the feds. had an involvement in,  
7 because we knew that she was going to be punished  
8 there.

9 THE COURT: With the same set of facts?

10 A No, it was not the exact same case, no.

11 THE COURT: Okay.

12 A But it was more an expediency because of  
13 that. The second case did not get dismissed until  
14 May 14th of 2010. And what happened then was,  
15 Mr. Wilder came to me and said, what are you going  
16 to do with this case. And I said well, I don't  
17 know yet. We are still pondering what we are  
18 going to do with it. He certainly did not say you  
19 agreed to dismiss it if she testified, because  
20 obviously you know Mr. Wilder. He would have been  
21 on my case every day of the week, all day, until I  
22 dismissed it if there had been any agreement on  
23 that. Instead what he told me was that, and I  
24 can't remember exactly what had happened. But  
25 there was some hang up between her being held on

## Catherine Fant-Direct by Brooks

1 her federal charges and they would not let her  
2 start her, I believe, either her probationary  
3 sentence on her whatever on her federal charges,  
4 because she had state charges pending.

5 And at that point, she had been held since  
6 September 2008, when she testified, to May the  
7 14th of 2010. Over a year and a half basically,  
8 which is more punishment she would have gotten on  
9 the drug charges. And so, at that point, I was  
10 like as a fairness issue, I dismissed it because  
11 that case had not been indicted. I dismissed with  
12 leave to restore. That is written right on the  
13 front of the file; letting him know that this was  
14 a dismissal because she was in the predicament she  
15 was in. I didn't think it was fair she was doing  
16 time, without actually having a sentence on those  
17 charges, and that if decided that we would pick it  
18 back up. But there was on deal in that regard.

19 Q You had obviously seen Applicant's No. 5,  
20 is that correct?

21 A Yes.

22 Q That is a complete version, a complete  
23 copy of Ms. Delay's statement to law enforcement.

24 A Yes, except it is not a statement.

25 Q Okay.

## Catherine Fant-Direct by Brooks

1           A     She was interviewed, and these are the  
2 notes that were taken by Detective Williams, I  
3 believe. And if you will see at the top, it says  
4 Sumter Police, Report of Investigation. It was  
5 their notes on what she told them that day. And  
6 so, yes, this -- that is what that is.

7           Q     Did you give that Mr. Johnson as part of  
8 discovery?

9           A     Not initially. My position was as a  
10 prosecutor always was, that I went by the rules.  
11 And the rules as you are well aware say that you  
12 do not have to give a statement unless it's  
13 exculpatory until the witness has -- until after  
14 they have testified at trial. Because I was  
15 refusing to give over the statements of people  
16 that we thought Mr. McCoy still had access to or  
17 would try to get access to. Because you have to  
18 understand he was being held in Richland County  
19 Detention Center. And they were recording all of  
20 his conversations, which we had. And we were  
21 listening to. So we knew what he was doing and  
22 who he was talking to.

23                     And so finally when Mr. Johnson brought  
24 his motion that is when we went before Judge King.  
25 He ordered me to give everything to him. He

## Catherine Fant-Direct by Brooks

1 looked at everything and then said---

2 Q Let me ask you this, Ms. Fant. That's  
3 after the trial.

4 A No, that was--

5 Q This is before---

6 A ---before the trial.

7 Q ---the trial. Oh, okay. Go ahead, I'm  
8 sorry.

9 A Yes. It was about 2 or 3 months before  
10 the trial.

11 Q Okay.

12 A Because I wasn't going to turn over  
13 anything that wasn't exculpatory unless the judge  
14 ordered me to do it, because I was afraid of what  
15 would happen to the witnesses in the case. As you  
16 heard today, most of them were friends or  
17 acquaintances of Mr. McCoy. And so we -- I did  
18 not give it over. But abided by, and the judge  
19 reviewed it and determined there was nothing  
20 exculpatory in it.

21 Q You gave everything to Judge King.

22 A Absolutely. He saw everything. And he  
23 determined there was nothing exculpatory in it.  
24 And then ruled that we would comply with the rest  
25 of the rule, which is, that you give over at

Catherine Fant-Direct by Brooks

1 trial. At the beginning of trial, I gave all of  
2 the witness statements to Mr. Johnson at that  
3 time. The -- this statement would have been  
4 redacted by myself to take out anything that did  
5 not have to do with the murder for which Mr. McCoy  
6 was charged on.

7 THE COURT: Did you turn it over to Judge  
8 King in its full form?

9 A Yes, sir. And so all of the stuff about  
10 what happened that's irrelevant to the testimony,  
11 particularly about the Georgia stuff and things  
12 like that, that was redacted. Because he had not  
13 yet had his case in Georgia. The only way he  
14 could have gotten the redacted statement was from  
15 me when I gave it Mr. Johnson at the trial. He  
16 got the the whole statement when his Georgia case  
17 went forward, and he got that through the federal  
18 discovery, because obviously it talked about stuff  
19 that had happened in Georgia. And at that point,  
20 it didn't matter because our case was over, and we  
21 weren't concerned that he had it or didn't have  
22 it.

23 In particular, I would point out that on  
24 the part that Mr. McCoy is alleging is  
25 exculpatory, the statement that Delay claims she

## Catherine Fant-Direct by Brooks

1 never heard McCoy talk about it, or does she  
2 anything about the murder. Judge King didn't find  
3 it exculpatory, and it's not exculpatory for this  
4 reason. Kim Delay never said that Mark McCoy said  
5 anything about the murder. She never said he told  
6 her one word. So certainly it's not exculpatory,  
7 because that never changed. And the part about  
8 her not knowing anything about the murder, she  
9 held back. She never testified at trial she knew  
10 about the murder at all. All she knew about was  
11 what had what happened that day. How he was  
12 dressed. How he acted. That's what she testified  
13 to. And obviously the judge agreed with us, that  
14 it wasn't exculpatory.

15 Q Now, Ms. Fant, did you talk to Ms. Delay  
16 prior to her testifying?

17 A I did not.

18 Q You did not.

19 A No, I did not.

20 Q Do you know if anybody in law enforcement  
21 who did?

22 A Obviously, these officers, whoever was  
23 present this day, talked to her. Obviously these  
24 officers whoever was there, Lieutenant --  
25 Detective Williams and whoever talked to her at

Catherine Fant-Direct by Brooks

1 some point.

2 Q Let me be more specific. Did anybody talk  
3 to her just shortly before Mr. McCoy's trial?

4 A Correct. But that was not me.

5 Q It was not you.

6 A It was Detective Irene Culick.

7 Q Okay.

8 A And Detective Angie Rabon. Now Lieutenant  
9 Rabon and Sergeant Culick with the Sumter Police  
10 Department.

11 Q Okay. So you weren't involved in whatever  
12 conversations took place.

13 A No, because it was immediately before  
14 trial when we were notified that she had had a  
15 change of heart. She kind of flip flopped and we  
16 would hear from her federal defender every once in  
17 a while. She wants to help. She doesn't want to  
18 help. She's not going to testify, the last  
19 minute. She was transported the last Sunday  
20 before the trial began on Monday.

21 That night I was preparing for the trial.  
22 I didn't have time to talk to Ms. Delay. So both  
23 the detectives interviewed her beforehand.

24 Q You didn't give any type of instruction to  
25 these defectives in talking with them, did you?

## Catherine Fant-Cross by Gourley

1           A     They knew the case as well as I did. No,  
2 I did tell them. I never tell them what to ask.  
3 They're two of Sumter's best.

4           Mr. BROOKS: I beg the Court's indulgence,  
5 Your Honor.

6           THE COURT: Yes, sir.

7           MR. BROOKS: No other questions, Ms. Fant.

8           THE COURT: Mr. Gourley.

9           Cross Examination by Mr. Gourley:

10          Q     Ms. Fant, in this trial, did you turn  
11 everything over that deemed exculpatory?

12          A     Absolutely.

13          Q     Or impeaching?

14          A     Absolutely.

15          Q     And I believe you stated Ms. Delay, I  
16 guess, it wasn't a statement. Ms. Delay did not  
17 give a statement to the police, correct?

18          A     Correct. It was things she had said as  
19 written down by a detective in his report.

20          Q     Okay. And in regards to Lattimore Holmes'  
21 statement, did you turn that over to Mr. Johnson  
22 at the beginning of the trial?

23          A     Yes. The reason I know that is a couple  
24 of reasons. One, I gave all of the statements  
25 over to Mr. Johnson at the beginning of trial at

## Catherine Fant-Cross by Gourley

1 once. That's my normal practice, because I've  
2 always found the rule a bit ridiculous to hand it  
3 over after they testify, because that's kind of  
4 difficult for the defense attorney to read it at  
5 the same. By then, they already had our witness  
6 list. Our whole purpose for not giving over the  
7 statements until absolutely the last minute was  
8 because, we were afraid for and in fear for some  
9 of these witnesses.

10 And so they knew who they were at that  
11 point. There was no problem. The other thing is  
12 regarding the -- and the reason I know this is  
13 because the statement from James Pleasant was  
14 given over at that time, because he was in fact  
15 listed as a potential witness at trial. We were  
16 still looking for him at that point. He -- we  
17 couldn't find him anywhere. The police looked for  
18 him everywhere to try to subpoena. And in an  
19 abundance for caution that he might turn up, you  
20 know, before the trial was over, I gave that  
21 statement to Mr. Johnson at that time. There is  
22 no way he could have had that statement otherwise,  
23 because Mr. Johnson -- excuse me, because  
24 Mr. Pleasant didn't testify. He never showed up.  
25 There never was a point to ask him anything. And

Catherine Fant-Cross by Gourley

1       therefore, I am quite positive that is where he  
2       got the statements.

3               The other reason I know that I gave him  
4       the statement and that Mr. McCoy didn't get it  
5       from his federal case is because Lattimore Holmes'  
6       statement had absolutely nothing to do with  
7       Mr. McCoy's federal charges. His federal charges  
8       were in the State of Georgia. Mr. Holmes'  
9       statement is not even a statement. Again, it's  
10      ATF Agent Richard Brown's notes of the interview  
11      with Lattimore Holmes. He -- all it is about is  
12      what happened on the day of the homicide.

13              Therefore, not only would the Georgia  
14      prosecutor not have access to our files from South  
15      Carolina or the federal governments files from  
16      South Carolina, it was totally irrelevant to their  
17      case. So I am quite certain that it was turned  
18      over with every witness statement that at that  
19      point was required to be turned over, was turned  
20      over at the beginning of trial with the witness  
21      list.

22              THE COURT: May I clarify, Mr. Gourley?

23              MR. GOURLEY: Yes, Your Honor, please.

24              THE COURT: Did you turn over the  
25      redacted statement of Ms. Delay at the beginning

## Catherine Fant-Cross by Gourley

1 of the trial?

2 A Yes.

3 THE COURT: To Mr. Johnson?

4 A Yes. I did it all at one time. All of  
5 the statements.

6 MR. GOURLEY: May I continue, Judge?

7 THE COURT: Yes, sir. Sorry.

8 Q Ms. Fant, Mr. McCoy has alleged that there  
9 were several plea deals arranged before anybody  
10 testified. Can you talk about that just briefly?

11 A Sure. As I mentioned earlier with  
12 Ms. Delay there was no agreement. Obviously both  
13 Mr. Wilder and Ms. Leek were hoping that if  
14 Ms. Delay testified, that she would get some  
15 benefit for it. And ultimately she did. I did  
16 file an affidavit that I sent to Ms. Leek. At  
17 that point not because there was a deal, but  
18 because it was the right thing to do. She got  
19 credit towards her sentencing, based upon the fact  
20 that she had cooperated. And my affidavit was a  
21 statement to the effect that we felt like she had  
22 fully cooperated once she got here, and that she  
23 had told the truth.

24 Interestingly one of the reasons that we  
25 decided to put her up and the belief that she was

## Catherine Fant-Cross by Gourley

1 telling the truth; is that, we could corroborate  
2 everything she said with either testimony from  
3 other witnesses or the conversations that had been  
4 recorded at the detention center between him and  
5 Ms. Delay. So we had to doubt at that point that  
6 she was telling us the truth the about her limited  
7 role in it. I mean, she was limited witness. She  
8 obviously knew what had happened at the house, not  
9 at the murder scene.

10 As to Mr. Holmes or anyone else, all the  
11 federal witnesses that testified, Mr. Holmes was  
12 still in custody at that point. We obviously had  
13 nothing to offer him. However the federal  
14 government has a rule of procedure where after a  
15 witness has a testified or a defendant who is  
16 currently incarcerated or has a conviction  
17 testifies, they can go back and get credit for  
18 that, for cooperation after the fact. And that is  
19 at Mr. Holmes did.

20 I had nothing to offer him. However  
21 because the issue was brought up, Judge King  
22 allowed Mr. Holmes' plea agreement into evidence.  
23 And he was extensively cross examined about that.

24 THE COURT: Mr. Holmes' plea agreement?

25 A Yes.

Catherine Fant-Cross by Gourley

1 THE COURT: Okay.

2 A With the federal government. Showing that  
3 obviously because a big part of that is if it's  
4 further found that you don't tell the truth, and  
5 you testify, they can revoke your federal, your  
6 whole federal deal. And he could actually have  
7 served life in prison. So there was certainly no  
8 agreement with him on the part of the State. The  
9 fact is, he got an after the fact benefit from the  
10 federal government because he did come. And  
11 according to everybody, and what we knew, testify  
12 truthfully.

13 Q Ms. Fant, was Ms. Delay ever charged with  
14 accessory after the fact or conspiracy to commit  
15 murder?

16 A Absolutely not. There was no discussion  
17 at all that we thought that she had anything to do  
18 to with the actual homicide. And I don't even  
19 know where she would have gotten that from.

20 Q And Mr. Brooks brought up the point about  
21 the potential voluntary manslaughter charge given  
22 I think, one of the witness' statements. Do you  
23 feel that was inappropriate in this case?

24 A No. And in fact I would have fought it  
25 vigorously. Mr. Johnson's first of all, their

## Catherine Fant-Cross by Gourley

1 whole strategy was, you know, that he wasn't and  
2 he didn't do this. And so I think it would  
3 inconsistent with any of the testimony that was  
4 given. But secondly, as you know, voluntary  
5 manslaughter results from a killing that is  
6 committed in the heat of passion. This was a  
7 premeditated homicide, where if there was any sort  
8 of scrap or scuffle at all, it brought on by  
9 Mr. McCoy chasing the victim down; pushing him off  
10 his bike, and then shooting him in the back.

11 It certainly is not a case under any  
12 circumstances, and I don't any judge could have  
13 found that they were involved in some sort of  
14 heated altercation that got out of hand and he had  
15 to -- you know, killed him in a heat of passion.  
16 It was -- there was just nothing in the record.  
17 And I certainly would have fought tooth and nail  
18 to not have that charged.

19 MR. GOURLEY: I beg the Court's  
20 indulgence.

21 THE COURT: All right.

22 MR. GOURLEY: I don't have any other  
23 questions. Thank you, Ms. Fant.

24 THE COURT: Redirect?

25 MR. BROOKS: Court's indulgence. No other

## Sergeant Culick-Direct by Gourley

1 questions of Ms. Fant.

2 THE COURT: Thank you, Ms. Fant. You can  
3 step down. If you have any exhibits make sure  
4 you leave them there, okay. Mr. Brooks.

5 MR. BROOKS: Judge, that is the  
6 applicant's case.

7 THE COURT: Mr. Gourley:

8 MR. GOURLEY: Judge, we would just call  
9 Sergeant Culick very briefly.

10 Sergeant Irene Culick, Being  
11 first duly sworn, testified as follows:

12 THE BAILIFF: Please state your full name  
13 and spell your last name for the record.

14 A It's Irene Culick. Last name is  
15 C-U-L-I-C-K.

16 DIRECT EXAMINATION by Mr. Gourley:

17 Q Sergeant Culick, where do you currently  
18 work?

19 A I currently work for the Sumter Police  
20 Department.

21 Q How long have you worked there?

22 A A little over 15 years.

23 Q Did you have an opportunity to this case?

24 A 16 years now.

25 Q Did you have an opportunity to work on

## Sergeant Culick-Direct by Gourley

1 this case?

2 A I did. I did assist with this case.

3 Q And did you specifically do an interview  
4 with Ms. Delay?

5 A I did. We were contacted by the ATF. I  
6 believe the agent at that time was Richard Brown,  
7 in reference to Kim Delay having information in  
8 reference to a murder that we had, that was  
9 committed by her boyfriend.

10 Q Do you recall specifically what Ms. Delay  
11 stated during that interview?

12 A I do. I was trying to read to over some  
13 stuff. It's been a long time.

14 MR. GOURLEY: Judge, if I may approach  
15 just very briefly.

16 THE COURT: And what I call sergeant, I  
17 almost called you detective. Agent Brown  
18 contacted you about Ms. Delay having information  
19 about a murder you were handling, or a murder that  
20 Sumter had?

21 A Sumter had. It wasn't my case. But we  
22 were all assisting with it. And I believe ATF was  
23 involved because of some other drugs and things,  
24 and other witnesses, federal witnesses.

25 Q Sergeant Culick, I am showing you

## Sergeant Culick-Direct by Gourley

1 Applicant's No. 5. That's a full version of  
2 Ms. Delay's interview. Were you there during this  
3 time?

4 A I was not involved in this.

5 Q Okay. But you there her last interview.

6 A Yes, I was with the initial investigators  
7 that were assigned to the case with those  
8 interviews.

9 Q You were with Ms. Delay in her last  
10 interview when she gave a statement that or stated  
11 that she was at the the house when Mr. McCoy came?

12 A Myself and Lieutenant Rabon, we rode with  
13 the agent to where she was being housed out of  
14 state. And interviewed her with him. Listened to  
15 what she had to say. She talked a lot about  
16 meeting a friend there in jail that told her that  
17 she needed to do the right thing; that she needed  
18 to talk. She talked about being with Mr. McCoy  
19 since she was a very young girl. And that he has  
20 pretty much controlled what she done. She talked  
21 about recordings. We had recordings from the  
22 detention center where Mr. McCoy was being held.  
23 And those recordings were between him and her.  
24 And they talked about doing specific things in  
25 reference to the drugs and this case and

## Sergeant Cullick-Direct by Gourley

1 witnesses. And so she just explained all of that  
2 to us, what she was supposed to do, her role. She  
3 talked about her story was supposed to be braiding  
4 and braiding someone's hair. And she had to make  
5 it longer period of time.

6 And I believe she talked about micro  
7 braids would be a long time or take a long time to  
8 do. She talked about their dog they had named  
9 bricks. Yeah, she talked for a while.

10 Q Did you ever coerce her or threaten her in  
11 any way?

12 A No. No, sir.

13 Q Did you ever threaten her with accessory  
14 after the fact of conspiracy to commit murder?

15 A No, sir.

16 Q Were you able to corroborate her statement  
17 or her information that she gave you?

18 A Yes. We had no reason to doubt her  
19 because of the recordings that we had. And  
20 because of her relationship. Even after her  
21 testimony in court when she came back to the  
22 station, she talked again with Lieutenant Williams  
23 who she initially talked to in the first  
24 interview. And even told him more than what she  
25 told on the stand about them going to Ivan

## Sergeant Culick-Cross by Brooks

1 Sanders' house afterwards. And that she was just  
2 scared to say everything on the stand. Talked  
3 about being scared of Ivan, who was still out and  
4 just a lot of things. And she was talking about  
5 getting her life back together and straight. And  
6 wanted to move on.

7 MR. GOURLEY: I have no further questions,  
8 Your Honor.

9 THE COURT: Mr. Brooks.

10 Cross Examination by Mr. Brooks:

11 Q Sergeant Culick.

12 A Yes, sir.

13 Q How are you doing today?

14 A Good. How are you?

15 Q I'm doing good. Now you said you never  
16 talked to Ms. Delay prior to her testifying at  
17 trial about potential criminal consequences?

18 A We, what my role was, it was to get her  
19 information. It was to get the information she  
20 had and to pass it along. I was not lead agent on  
21 this case. So my role was to assist because there  
22 were so many witnesses that they were dealing  
23 with, with the federal side and coordinating, so  
24 that was my function and role.

25 Q So you talked -- how many times did you

## Sergeant Culick-Cross by Brooks

1 talk to Ms. Delay before Mr. McCoy's trial?

2 A I would say, I think it was two times  
3 before the trial. Once when we went out of state,  
4 and once she got back here before---

5 Q Before the trial.

6 A Right before the trial. Because we didn't  
7 know if she was really going to testify. She was  
8 really scared. She loved him.

9 Q Right before the trial. That second time  
10 you talked to her right before the trial. You  
11 talked to her with now Lieutenant Rabon.

12 A That's correct.

13 Q And it was just the three of you all.

14 A That's two. Just the two of us.

15 Q Well counting Ms. Delay. It was just the  
16 three---

17 A Yes.

18 Q ---of you all having a conversation. And  
19 no pressures about the potential consequences,  
20 criminal consequences to Ms. Delay was ever  
21 indicated to her.

22 A No.

23 Q By you or Detective Rabon.

24 A No. That's not why we were there. There  
25 were plenty of witnesses. Wade Kolb was the

## Sergeant Culick-Cross by Brooks

1 attorney for one of the co-defendants in the case.

2 They were willing to testify, tell the whole  
3 story. That was Dukes.

4 Q I'm not talking about Dukes.

5 A I'm just saying there was, according to my  
6 knowledge of this case, there were enough  
7 witnesses to come forward. I think she wanted to  
8 come forward because of all the stuff she was  
9 involved in in Georgia. And that's why -- her and  
10 her attorney reached out I guess to the federal  
11 side to talk about, she wants to talk. So...

12 Q Now in a prior interview with her, she  
13 indicated that she didn't know anything, and did  
14 not want to testify. Is that right?

15 A I wasn't involved with that interview.

16 Q Okay. But you said you had two interviews  
17 with her prior to her testifying in the McCoy  
18 case. Is that correct?

19 A The first one was when I was told, she  
20 wants to talk. Will you go out of state with the  
21 agent to talk about---

22 Q That was the trip. That was the trip you  
23 all took to Georgia.

24 A Correct.

25 Q Is it your testimony that she indicated

## Sergeant Cullick-Cross by Brooks

1 she wanted to help during that conversation?

2 A Yes. She stated that she wanted to talk  
3 about what happened. She had been thinking a lot  
4 since she had been in jail. She had been talking  
5 to another inmate that was in jail with her, that  
6 was telling her she needed to get her life  
7 straight. She needed to tell the truth and was  
8 trying to get her on the right path. She cried in  
9 there a lot. She was distraught. You know, just  
10 thinking I guess about her charges. I guess they  
11 were caught with a lot of drugs out of town in  
12 their vehicle or something. And she just had a  
13 lot on her.

14 Q Did she give you any indication that she  
15 did not want to testify?

16 A She did not.

17 Q At all?

18 A She didn't want to see him in the  
19 courtroom. She kept asking was he going to be in  
20 the courtroom. Was he going to be there listening  
21 to her.

22 Q There were no threats or pressures about  
23 any potential criminal consequences if she didn't  
24 testify.

25 A No.

Lieutenant Rabon-Direct by Gourley

1 MR. BROOKS: I beg the Court's indulgence,  
2 Your Honor.

3 MR. BROOKS: No other questions, Judge.

4 THE COURT: Redirect?

5 MR. GOURLEY: No, Your Honor.

6 THE COURT: Thank you, sergeant, you can  
7 step down.

8 THE COURT: Any other witnesses?

9 MR. GOURLEY: Yes, Your Honor. We would  
10 just call Lieutenant Rabon to the stand.

11 Lieutenant Angela Rabon, being first duly  
12 sworn, testified as follows:

13 THE BAILIFF: Please state your name full  
14 and spell your last name for the record.

15 A Angela Rabon. And it's R-A-B-O-N.

16 DIRECT EXAMINATION by Mr. Gourley:

17 Q Lieutenant Rabon, where do you work?

18 A Sumter Police Department.

19 Q And how long have you worked there?

20 A Since 1997.

21 Q Did you have an opportunity to work on  
22 this case?

23 A I did.

24 Q And did you specifically interview Kim  
25 Delay?

Lieutenant Rabon-Direct by Gourley

1 A I did.

2 Q And during that interview, did you ever  
3 force her or threaten her?

4 A No, I didn't.

5 Q And do you recall her testimony? Or not  
6 her testimony, but her discussions with you during  
7 that interview?

8 A Yes.

9 Q And can you briefly discuss those? Your  
10 recollection of those.

11 A Well I went Sergeant Culick and  
12 Agent Brown to Georgia on the initial interview.  
13 This was after we were contacted which was a shock  
14 to us that we by no means expected Kimberly Delay  
15 to testify against Wise, because of their close  
16 relationship. But we went to Georgia. I was not  
17 in the interview with Agent Brown and Sergeant  
18 Culick in Georgia. I was doing other things. She  
19 had given permission to read letters, that kind of  
20 thing. So I was out doing that while they were  
21 interview there. But I did speak with her when  
22 she did come to Sumter just previously to trial.  
23 And during those interviews, she spoke about a lot  
24 of the things we already knew. And I really feel  
25 that that's why she did, you know, decide to

## Lieutenant Rabon-Cross by Brooks

1 assist because she knew we knew through the  
2 recordings that were taken from the detention  
3 center.

4 THE COURT: Okay. Just to clarify, during  
5 that interview, that last interview before  
6 trial, you never threatened her or forced her  
7 with any additional charges or anything like  
8 that?

9 A No, I did not.

10 Q Did you promise her anything?

11 A No, we didn't.

12 MR. GOURLEY: No further questions, Your  
13 Honor.

14 THE COURT: Mr. Brooks.

15 Cross Examination by Mr. Brooks:

16 Q It's Lieutenant.

17 A Lieutenant.

18 Q Now had same the conversations. Your  
19 testimony is you had the same conversations with  
20 Kimberly Delay that Sergeant Culick did.

21 A Here in Sumter.

22 Q Here in Sumter. So you only had  
23 interaction with her one time.

24 A That's correct. I did meet her in  
25 Georgia, but I was in and out while they---

Lieutenant Rabon-Cross by Brooks

1 Q Okay.

2 A ---were doing the interview.

3 Q And it's your testimony that that one  
4 time, you obviously had a lot more interaction  
5 with her prior to Mr. McCoy's trial. There was no  
6 pressure. No, if you don't testify, you know, you  
7 are going to face. Your testimony is that none of  
8 that happened.

9 A None of that happened. I mean, which  
10 really I mean she was a federal prisoner in  
11 another state. Her attorney reached out to us.  
12 So that's no need for us to talk about. Her  
13 attorney had that part covered. So we were just  
14 basically getting the facts of what she was  
15 wanting to relay to the court.

16 Q So is that basically what you all  
17 discussed is what she was going to testify to?

18 A Basically her knowledge and the facts of  
19 which we already knew like in recordings. Like  
20 her part that he had convinced her. There were  
21 messages she was supposed to take to certain  
22 people. She was supposed to read them, which was  
23 to tell them how they were testify. And then she  
24 was to destroy the letters.

25 Basically what she was supposed to be

## Lieutenant Rabon-Cross by Brooks

1 doing at the time of the murder, which would say  
2 she didn't have knowledge. And that's the  
3 braiding. Just things that Mr. McCoy had  
4 explained that she needed to do to take care of  
5 business. And all that was corroborated on the  
6 recordings. So it's really what she told us we  
7 knew, because we heard them communicate that in  
8 the recordings.

9 Q And basically that's what you all talked  
10 about prior to her testifying?

11 A That's correct.

12 Q Do you recall how long that communication  
13 with you and Sergeant Culick and Ms. Delay?

14 A I don't know exact like minutes, hours.  
15 But it was one day. A small time frame within a  
16 day before the trial. I don't even believe it was  
17 trial date. I think it was maybe a day before the  
18 trial, probably. If I had to guess, I don't know  
19 for certain.

20 MR. BROOKS: I beg the court's indulgence,  
21 Your Honor. No other questions, Judge.

22 THE COURT: Redirect?

23 MR. GOURLEY: No, Your Honor.

24 THE COURT: Thank you, lieutenant. You  
25 can step down.

Lieutenant Rabon-Cross by Brooks

1 MR. GOURLEY: That would be the State's  
2 case, Your Honor.

3 THE COURT: Anything in reply, Mr. Brooks?

4 MR. BROOKS: No, sir.

5 THE COURT: Anything that you would like  
6 to like to put on the record before we conclude,  
7 Mr. Brooks?

8 MR. BROOKS: Just briefly, Judge, that  
9 obviously you heard the testimony of this  
10 afternoon. Our position, we have highlighted it  
11 with my client's testimony. What we put forth to  
12 the court in terms of the Brady violations and  
13 ineffective assistance of counsel. We think that  
14 those rise to the level of prejudice for my  
15 client, and that he should be entitled to a new  
16 trial.

17 THE COURT: Mr. Gourley.

18 MR. GOURLEY: Your Honor, I believe that  
19 in regards to the Brady motions, Ms. Fant has  
20 testified that she turned over everything that  
21 was exculpatory or impeaching to Mr. Johnson  
22 either before trial or during the course of her  
23 interactions with Mr. Johnson. Additionally,  
24 Judge King looked over that. You've got the  
25 motions before you regarding that. Regarding

1 the ineffective assistance of counsel claim  
2 that Mr. Johnson failed to investigate or  
3 interview witnesses, Mr. Johnson testified they  
4 went out to the scene. Reviewed the scene.  
5 Talked to any additional witnesses that  
6 Mr. McCoy gave them.

7 Your Honor, for those reasons, we would  
8 submit to the court that the applicant has not met  
9 his burden. He has failed to show any prejudice  
10 as a result of any alleged deficiencies by trial  
11 counsel or any Brady motion violations. We would  
12 respectfully request this court to deny  
13 applicant's PCR applicant.

14 THE COURT: Anything else, Mr. Brooks?

15 MR. BROOKS: Judge, I don't want to  
16 belabor the point. But you've heard the  
17 testimony, and you understand what our  
18 position.

19 THE COURT: Yes, sir. Mr. McCoy, what I  
20 am going to do is, I have a fair amount of  
21 materials to review obviously. I'm going to  
22 review it all. I'll read every word of it. I  
23 always do. I will make a decision. If I deny  
24 your application you or Mr. Brooks will get an  
25 order. He'll educate you on your right to

1 appeal. If I grant your application, the State  
2 will have the right to seek relief from my  
3 order. But whatever the decision is, you will  
4 get a copy of it from your lawyer. Do you  
5 understand that?

6 THE APPLICANT: Yes, sir.

7 THE COURT: It will necessarily take some  
8 time for me to review it. I won't take very  
9 going long. It will probably be within the  
10 next week or so. All right. Thank you  
11 everyone.

12 MR. BROOKS: Thank you, Judge.

13 ----End of Requested Transcript of Record----

14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

C-E-R-T-I-F-I-C-A-T-E

I, Margaret T. Sullivan, Court Reporter, for the Third 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 on February 27, 2014, in the Common Pleas nonjury, Sumter County, Sumter, South Carolina.

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

10 19 14      Margaret T. Sullivan  
DATE                      COURT REPORTER  
My Commission expires: 9/7/2021

STATE OF SOUTH CAROLINA  
COUNTY OF SUMTER

RECORDED  
2014 JUN -3 PM 1:41

IN THE COURT OF COMMON PLEAS  
FOR THE THIRD JUDICIAL CIRCUIT

Mark McCoy, #210705,

Applicant,

v.

State of South Carolina,

Respondent.

JAMES C. CAMPBELL  
CLERK OF COURT  
SUMTER COUNTY, S.C.

Case No. 2012-CP-43-01090

**ORDER OF DISMISSAL**

CERTIFIED TRUE COPY  
OF ORIGINAL FILED

*[Signature]*  
DEPUTY CLERK OF COURT  
SUMTER COUNTY  
SOUTH CAROLINA

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on June 5, 2012. Respondent made its return on November 30, 2012. An evidentiary hearing into the matter was convened on February 27, 2014, at the Sumter County Courthouse. Applicant was present at the hearing and was represented by Charles T. Brooks, III, Esquire. Respondent was represented by Assistant Attorney General Daniel Gourley of the South Carolina Attorney General's Office.

**PROCEDURAL HISTORY**

The records before this Court indicate Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Sumter County Clerk of Court. Applicant was indicted at the September 2008 term of the Sumter County Grand Jury for murder and possession of firearm or knife during the commission of a violent crime (2005-GS-43-033). I.S. Levy Johnson, Esquire, represented him. On September 22-25, 2008, Applicant proceeded to a jury trial before the Honorable Howard P. King. On September 25, 2008, Applicant was found guilty on all counts. Judge King sentenced Applicant to life imprisonment for murder and five years imprisonment for possession of a firearm during the commission of a violent crime with all sentences to be served consecutively.

*[Handwritten mark]*

A timely Notice of Appeal was filed, and following the submission of an Anders brief, the South Carolina Court of Appeals dismissed the appeal. State v. McCoy, 2011-UP-278 (Ct. App. filed June 8, 2011). The Remittitur was sent on August 11, 2011.

### ALLEGATIONS

1. Ineffective Assistance of Counsel.
  - a. "...failure to continue his objection to the false material evidence being used by the solicitor; that counsel previously had objected to."
  - b. "...failure to request trial judge to instruct the jury on the lesser included offense of voluntary manslaughter."
  - c. "...failure to object to trial judge's instruction to the judge to find applicant guilty of the charge."
2. Prosecutor's misconduct.
  - a. "Violation of Brady v. Maryland 373 US 83 (1963)."
  - b. "Material evidence suppressed by prosecution."
3. Due Process Violation.
  - a. "...when the Magistrate Judge issued arrest warrant based on information that never existed for probable cause."
  - b. "...as a result of prosecutorial misconduct by Solicitor Fant, Special Agent, and Police withholding crucial prosecution's witnesses statements of fact..."
  - c. "...violated by Solicitor Fant's misconduct making promise and favor (agreements) within the criminal justice system with crucial witness and not correcting her false information to the jurors (solicitors)."
  - d. "...as a result of the misconduct by the solicitor, in regard of suppressing evidence that was material, before and during applicant's trial thus the material evidence exposes solicitor deliberately allowing overlooking false testimony from crucial federal inmate witnesses along with solicitor misleading court and juror's with false information herself."
  - e. "...violated by the trial judge's erroneous instruction to find the applicant guilty, even if the evidence does not convince the jury."

### SUMMARY OF TESTIMONY PRESENTED

At the evidentiary hearing, Applicant testified on his own behalf. Additionally, Applicant called I.S. Levy Johnson (Counsel), Esquire, Kim Delay (Delay), and Catherine Fant (Assistant Solicitor Fant), Esquire. The State called Sergeant Irene Culick and Lieutenant Angela Rabon. This Court also had before it a copy of trial transcript, the Sumter County Clerk of Court records, the Applicant's South Carolina Department of Corrections records, Appellate

records, the PCR application, and the return. Applicant also introduced various exhibits, including Kimberly Delay's statement, a letter from Assistant Solicitor Fant to Federal Public Defender Catherine M. Leek, Esquire, and an affidavit of Assistant Solicitor Fant regarding Delay's testimony at Applicant's trial

During the evidentiary hearing, Applicant stated that he met with Counsel eight or nine times prior to his trial. Applicant stated that he reviewed all discovery material with Counsel prior to his trial. Applicant stated that Assistant Solicitor Fant committed a Brady violation in failing to turn over Delay's statement. Applicant stated Delay testified in the case and the statement should have been turned over in his discovery material. Applicant stated he became aware of the statement through the discovery process in his federal case. Applicant further stated Delay was promised that her charges were going to be dropped if she testified against Applicant. Applicant stated Assistant Solicitor Fant wrote an affidavit stating that Delay's testimony was crucial in convicting Applicant. Applicant stated Assistant Solicitor Fant failed to turn over the information regarding Delay's alleged deal. Applicant stated both he and Counsel were surprised when Delay took the stand and testified. Applicant stated Counsel should have moved for a mistrial because Counsel did not get an opportunity to speak to Delay prior to her testifying.

Applicant further alleged that Lattimore Holmes (Holmes) testified that he did not give a statement to the police during his trial. However, Applicant stated that Holmes gave a statement to the police and it was not turned over during the discovery process. Applicant stated Holmes testified that he had not been promised anything for his testimony. However, Applicant stated that he learned through personal investigation that Holmes' sentence was reduced because of his cooperation in Applicant's case.

Applicant further stated that James Pleasant's (Pleasant) statement was not turned over until the day of trial. Applicant stated Counsel was ineffective for not asking for a new trial because of Assistant Solicitor Fant's failure to turn over Pleasant's statement. Applicant asserted that Assistant Solicitor Fant's failure to turn over Pleasant's statement amounted to a Brady violation. Applicant stated Counsel did not have enough time to review the statement, investigate Pleasant, and determine if he was a necessary witness for Applicant's case. Applicant stated Pleasant did not testify at trial. Applicant stated that there were several inconsistencies between Pleasant's and Holmes' statements to police. Specifically, Applicant stated both Pleasant and Holmes viewed the shooter coming from opposite directions.

Applicant further stated Counsel had not spoken to any witness involved in the case. Applicant stated a witness, Joseph Sumter (Sumter), had a lot of information and Counsel failed to interview him. Applicant further stated Counsel was ineffective for failing to put up a defense. Applicant stated he had an alibi defense, but Counsel failed to properly investigate into this defense. Applicant stated the only witness Counsel met with was Ivan Sanders. Applicant stated that had Counsel investigated the various witnesses the outcome of the trial would have been different. Applicant recalled apologizing to the family of the victim.

Applicant further claimed that Counsel was ineffective for failing to object to the jury instruction. Specifically, Applicant stated that Counsel should have objected to the trial judge telling the jury to find him guilty "no matter what." Applicant stated he told Counsel to object to the jury instruction, but Counsel did not object in time. Applicant stated Counsel objected to the charge after the jury exited the courtroom. Applicant stated the judge asked the court reporter to play the tapes. Applicant stated the judge realized his mistake and recharged the jury.

Following Applicant's testimony, I.S. Levy Johnson (Counsel) was called to testify. Counsel stated he had a great working relationship with Applicant. Counsel stated he has been practicing law for forty-five years and was retained in Applicant's case. Counsel stated that he met with Applicant on multiple occasions and Applicant was very involved in the case preparation. Counsel stated Applicant was provided a copy of everything. Counsel stated he gave "effective representation." Counsel explained he went to the scene, walked the area, went to the various houses, investigated, and did "everything a lawyer could do." Counsel stated that he filed a standard Brady motion. Counsel explained that Judge King reviewed all material in the case to determine what material would fall under Brady. Counsel stated Judge King ruled that the State had complied with the Brady motion. Counsel stated he adequately cross-examined Delay during the trial. Counsel stated that he interviewed her prior to trial and was surprised that she testified against Applicant. Counsel believed that Delay's testimony made a dramatic difference in the outcome of the trial.

Counsel further explained that all of Applicant's witnesses were friends or acquaintances. Counsel stated the witnesses all said favorable things during the course of trial preparation, but during the trial their testimony became less favorable. Counsel stated he could not recall receiving a statement from James Pleasant (Pleasant). Counsel stated he did not call Pleasant because he did not feel it would be beneficial to Applicant's case. Counsel stated he felt Pleasant may turn on Applicant and did not feel it was worth the risk. Counsel further reasoned that it was his trial strategy to not call any witnesses or introduce any evidence to preserve the last closing argument.

Counsel stated Applicant was found guilty due to the numerous eye witnesses and his relationship with the deceased. Counsel further stated Delay witnessed Applicant change into

BJ 5

camouflage clothes and returned shortly thereafter. Counsel stated a witness saw the shooting take place and identified the shooter wearing camouflage clothes. Counsel stated that he did object to the jury charge and the court reporter reviewed the tapes. Counsel stated that he did not feel a mistrial was warranted as the judge gave a curative instruction to the jury. Counsel stated he felt the curative instruction was helpful to Applicant's case because it repeated the premise that if the jury had a reasonable doubt about Applicant's guilt, it must find the Applicant not guilty. Counsel further stated that he did not request a voluntary manslaughter because there was no fight going on at the time of the murder.

Following Counsel's testimony, Kimberly Delay (Delay), was called to testify. Delay stated that she had three separate interviews with police. Delay explained that she told the police that she did not know anything about the crime during her first and second interview. Delay stated during her third interview, she lied to police about the type of clothing the Applicant was wearing. Delay explained that she felt coerced because the police threatened to charge her with accessory after the fact and conspiracy to commit murder. Delay further stated she had federal charges pending at the time of her interview. Delay stated that her testimony during Applicant's trial was a lie. Delay stated that she did not know anything about the clothing and that everyone wore camouflage.

Following Delay's testimony, Catherine Fant (Assistant Solicitor Fant) was called to testify. Assistant Solicitor Fant stated she was the prosecutor for the Solicitor's office. Assistant Solicitor Fant stated that she turned over all exculpatory material. Assistant Solicitor Fant explained that Delay did not give a statement and she was not required to turn over their notes. Assistant Solicitor Fant further explained that she turned over Lattimore Holmes' statement. Assistant Solicitor Fant stated she turned over James Pleasant's statement prior to trial out of an

B/6

abundance of caution. Assistant Solicitor Fant stated prior to trial, Judge King personally reviewed all material in Applicant's case. Assistant Solicitor Fant stated that Judge King ruled that the State complied with the Brady motion. Assistant Solicitor Fant stated that she turned over all witness statements to Judge King at the beginning of the trial.

Assistant Solicitor Fant stated that Delay had no deal in this case because Delay never explained what happened. Assistant Solicitor Fant recalled that Arthur Wilder, Esquire, represented Delay on her two separate state charges and attempted to get Delay to cooperate with the State. Assistant Solicitor Fant stated she was notified by the Federal Government that Delay wanted to testify in Applicant's trial. As a result, Assistant Solicitor Fant stated Lieutenant Rabon and Sergeant Culick with Sumter County Sheriff Department met with Delay.

Assistant Solicitor Fant stated Delay's charges were not dismissed because of her testimony during Applicant's trial. Instead, Assistant Solicitor Fant stated one charge was *nolle prossed* and the second dismissed with leave to restore due to Delay's pending federal charges. Assistant Solicitor Fant restated that there was no deal given to Delay in regards to her cooperation with the state in Applicant's case. Assistant Solicitor Fant explained that she wrote a letter to Delay's Federal Public Defender Catherine M. Leek, Esquire, stating that Delay had testified truthfully during Applicant's trial because it was the right thing to do. Assistant Solicitor Fant stated that Delay was never charged with accessory after the fact or conspiracy to commit murder.

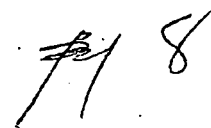
Following Assistant Solicitor Fant's testimony, Sergeant Irene Culick testified. Sergeant Culick stated that she has been an officer for fifteen years. Sergeant Culick stated that she assisted with the case. Sergeant Culick stated she was contacted by Agent Richard Brown of the Alcohol, Tobacco, Firearms, and Explosives Bureau regarding Delay's willingness to speak to

police. Sergeant Culick stated that she, along with ATF Agent Brown and Lieutenant Rabon, interviewed Delay out of state. Sergeant Culick and her fellow interviewers were able to corroborate the validity of the information given by Delay in the interview with information in recorded conversations between Delay and the Applicant provided by the jail. Specifically, Delay spoke in the interview about her discussion with the Applicant about a potential alibi involving micro-braiding and their dog named Brick. Sergeant Culick stated they had no reason to doubt Delay's information.

Following Sergeant Culick testimony, Lieutenant Rabon was called to testify. Lieutenant Rabon stated that she has been with the police department since 1997. Lieutenant Rabon stated she investigated Delay and did not threaten or coerce her during their interviews. Lieutenant Rabon stated she went with Sergeant Culick and ATF Agent Brown to Georgia and interviewed Delay. Lieutenant Rabon stated she was shocked by Delay's cooperation due to her close relationship with Applicant. Lieutenant Rabon stated they were able to corroborate Delay's statements in the interview with various statements in conversations between Delay and the Applicant recorded by the jail. Lieutenant Rabon stated Delay was ordered by Applicant to take letters to witnesses who planned to testify at his trial.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).



In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. Below are this Court's findings in regards to each of Applicant's allegations of ineffective assistance of counsel.

#### INEFFECTIVE ASSISTANCE OF COUNSEL

*Trial Counsel ineffective for failing to call James Pleasant as a witness.*

This Court finds Applicant's allegation that Counsel was ineffective for failing to call Pleasant as a witness meritless. Our courts are understandably wary of second-guessing defense

counsel's trial tactics. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). See also Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005) and McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003).

Counsel testified he did not call Pleasant for two reasons. First, that he wanted to preserve the last argument. Secondly, that there was a substantial risk in calling Pleasant to testify because Pleasant could have easily turned on the applicant in his testimony. Pleasant's statement to the police includes his account of the shooting. He identified the shooter as a 5'4" male wearing a camo jacket with his face wrapped in camo cloth. It should be noted that the applicant is around 5'4". That, along with Delay's testimony that she saw the applicant wearing camo immediately after the shooting, would certainly not have been helpful to the Applicant's case. This Court finds that the decision by trial counsel to absent Pleasant's testimony was a valid strategic decision. In addition, because Pleasant did not testify at the PCR hearing, there is no evidence that Pleasant's testimony would have included anything favorable to the Applicant's case. An 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, 509 S.E.2d 807 (1998). This Court finds that Applicant has failed to meet his burden of proof in regards to this allegation, and accordingly this allegation must be denied and dismissed with prejudice.

*James Pleasant statement contradicts State theory of case.*

Applicant alleges that Pleasant's statement contradicted the State's theory of the case. This Court notes that the State is not required to tailor its presentation of evidence to the account given by any witness. Furthermore, this Court finds that this is not a valid ground for post-

conviction relief. Aside from two matters specifically mentioned in the statute, post-conviction relief is a proper avenue of relief only when the Applicant mounts a collateral attack challenging the validity of his conviction or sentence. Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000). Therefore, this claim is denied and dismissed with prejudice.

*Trial counsel should have requested a continuance because he had not spoken to anyone other than Joe Sumter.*

This Court finds the Applicant's claim that Counsel was ineffective for failing to request a continuance because he had only spoken with one witness, Joe Sumter, meritless. Counsel stated he gave "effective representation." Counsel went to the scene, walked the area, went to the various houses, investigated, and did "everything a lawyer could do." This Court finds that there would have been no good cause for a continuance.

Furthermore, the Applicant claims Counsel should have asked the judge for the opportunity to talk to Delay when she took the stand. Counsel testified that he had been in communication with Delay prior to trial. The transcript reveals Counsel was able to effectively cross-examine Delay and that additional time would not have made a difference. This Court finds that Applicant has failed to meet his burden of proof in regards to this allegation, and accordingly this allegation must be denied and dismissed with prejudice.

*Trial counsel should have asked for a mistrial based on the trial judge's jury charge that stated the jury must find the applicant guilty if the jury determined there was reasonable doubt.*

This Court finds the Applicant's allegation that Counsel should have asked for a mistrial based on the trial judge's jury charge, stating the jury must find the applicant guilty if a reasonable doubt is determined, is without merit. Counsel properly pointed out this misstatement to the trial judge and the judge properly recharged the jury. A mistrial would not have been granted in any event, in light of the curative charge. In addition, this court agrees with trial

counsel's testimony that the recharge was actually helpful, as it repeated the premise that if the jury had a reasonable doubt about the defendant's guilt, it must find the defendant not guilty. This Court finds that Applicant has failed to meet his burden of proof in regards to this allegation, and accordingly this allegation must be denied and dismissed with prejudice.

*Trial counsel should have pursued a voluntary manslaughter option on the verdict form.*

This Court finds the Applicant's allegation that Counsel was ineffective for failing to request a voluntary manslaughter option on the verdict to be without merit. This Court notes Applicant's trial theory was that he was not present at the scene and had no part in the crime at all. Applicant reasserted this argument during the PCR evidentiary hearing. Requesting a voluntary manslaughter option would be in direct contradiction to Applicant's purported trial strategy. This Court finds Counsel's strategic decision in not requesting a voluntary manslaughter option proper. Therefore, this Court finds that Applicant has failed to meet his burden of proof in regards to this allegation, and accordingly this allegation must be denied and dismissed with prejudice.

#### PROSECUTORIAL MISCONDUCT

*Solicitor failed to turn over statement by Kim Delay*

This Court finds Applicant's allegation that the Solicitor failed to turn over any required evidence is without merit. An individual asserting a Brady violation must demonstrate that evidence: (1) favorable to the accused; (2) in the possession of or known by the prosecution; (3) was suppressed by the State; and (4) was material to the accused's guilt or innocence or was impeaching. Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). A Brady violation does not warrant reversal if the evidence is merely cumulative or impeaching. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993). "Impeachment or exculpatory evidence is material

*BJ 12*

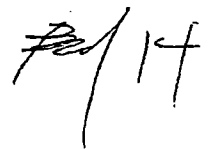
only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.*, 434 S.E.2d at 268. This Court finds both Assistant Solicitor Fant's testimony and Counsel's testimony credible. Furthermore, this Court finds both Applicant's and Kim Delay's testimony not credible.

During the evidentiary hearing, Applicant alleged Assistant Solicitor Fant committed a Brady violation because she failed to turn over Delay's alleged statement. During the trial, Delay testified that the Applicant had come to her house and changed clothes on the day of the murder. She testified he changed into camouflage clothes before leaving, and when he came back 3-5 minutes later, he was out of breath. Delay further testified that the Applicant changed clothes again after returning and said to her "Come on, baby, let's go." Delay had given a prior statement to law enforcement that she did not know anything about the murder. The Applicant claims this statement was inconsistent with the one Delay gave at trial and that the State should have disclosed it as Brady material. However, this Court finds that it is clear from the hearing transcript and PCR hearing testimony of both Counsel and Assistant Solicitor Fant that the trial judge, Judge King, reviewed *in camera* the Assistant Solicitor's entire file prior to trial. This review was pursuant to Counsel's June 3, 2008 motion for *in camera* inspection. Judge King concluded that the State met its discovery obligations. In addition, it clear from the transcript that Counsel was able to effectively cross Delay without the statement. Ms. Delay's testimony at the PCR hearing that her trial testimony was not true does not establish any PCR ground. She claims she was pressured with more prison time if she gave certain testimony, but I find this PCR testimony to be not credible. There is no credible evidence that her testimony was procured unlawfully. Therefore, this Court finds this allegation should be denied and dismissed with prejudice.

*Brady violation arising from a promise made by the State to Delay that all her charges would be dismissed in exchange for her testimony.*

This Court finds Applicant's allegation that the Solicitor committed a Brady violation by failing to disclose an alleged deal with Delay regarding her testimony is without merit. An individual asserting a Brady violation must demonstrate that evidence: (1) favorable to the accused; (2) in the possession of or known by the prosecution; (3) was suppressed by the State; and (4) was material to the accused's guilt or innocence or was impeaching. Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). A Brady violation does not warrant reversal if the evidence is merely cumulative or impeaching. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993). "Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id., 434 S.E.2d at 268. This Court finds Assistant Solicitor Fant's testimony credible. Furthermore, this Court finds both Applicant's and Kim Delay's testimony not credible.

Applicant claims that Delay was offered a plea deal in exchange for her testimony against him. Applicant claims this information was withheld from him. The evidence at the hearing establishes that the State never gave Delay a deal on her charges. Assistant Solicitor Fant testified Delay said from the beginning that she knew nothing about the murder and stuck with that assertion up to trial. Assistant Solicitor Fant got word Delay wanted to cooperate and then Delay told law enforcement (Sergeant Culick and Lieutenant Rabon) the substance of what she testified to at trial, i.e., that the Applicant came to her house out of breath, changed from camo to other clothes, and said "Come on, baby, let's go." Assistant Solicitor Fant testified that one charge of Delay's was *not proessed* because Delay was getting prosecuted federally on that set of



facts. Another charge (unindicted) was dismissed without prejudice in 2010 (this trial was in 2008). Therefore, this Court finds this allegation should be denied and dismissed with prejudice.

Brady Violation for failing to turnover statement by Lattimore Holmes.

This Court finds Applicant's allegation that the state committed a Brady violation for failing to turnover Lattimore Holmes' statement meritless. An individual asserting a Brady violation must demonstrate that evidence: (1) favorable to the accused; (2) in the possession of or known by the prosecution; (3) was suppressed by the State; and (4) was material to the accused's guilt or innocence or was impeaching. Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). A Brady violation does not warrant reversal if the evidence is merely cumulative or impeaching. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993). "Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id., 434 S.E.2d at 268. This Court finds Assistant Solicitor Fant's testimony credible. Furthermore, this Court finds Applicant's testimony not credible.

Applicant claims that he should have been given a statement given by Lattimore Holmes to law enforcement prior to trial. This statement, if in writing or otherwise summarized, would have been in Judge King's possession during his *in camera* review, so it is clear there was no Brady violation for the State failing to turn it over. Further, the trial transcript reveals that trial counsel was aware of a statement Holmes gave in January 2008, as counsel cross-examined Holmes about the statement (see page 232 ROA). The Applicant also seems to claim prosecutorial misconduct arising from Holmes' early release from a five year federal sentence within two months after the applicant's trial. It is true that Holmes did receive a downward departure because of his cooperation in the Applicant's case; however, there is no evidence that

15

the State sponsored that downward departure. Therefore, this Court finds this allegation should be denied and dismissed with prejudice.

*Brady violation for the State's failure to turn over a statement given by James Pleasant.*

This Court finds Applicant's allegation that the State committed a Brady violation for failing to turnover James Pleasant's statement is without merit. An individual asserting a Brady violation must demonstrate that evidence: (1) favorable to the accused; (2) in the possession of or known by the prosecution; (3) was suppressed by the State; and (4) was material to the accused's guilt or innocence or was impeaching. Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). A Brady violation does not warrant reversal if the evidence is merely cumulative or impeaching. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993). "Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id., 434 S.E.2d at 268. Additionally, this Court finds Assistant Solicitor Fant's and Counsel's testimony credible, while finding Applicant's testimony not credible.

This Court notes, Pleasant did not testify during trial. Assistant Solicitor Fant stated the statement was given to Counsel prior to trial. Furthermore, this statement was evidently part of Judge King's review. In addition, trial counsel moved for a mistrial on the basis of a Brady violation concerning Pleasant's statement. The motion was denied. Judge King ruled there was no Brady or Rule 5 violation. Based on the foregoing, this Court finds this allegation should be denied and dismissed with prejudice.

**ALL OTHER ALLEGATIONS**

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this order, the Court finds Applicant failed to present

*BJ 16*

sufficient evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

### CONCLUSION

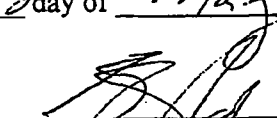
Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.


This Court notes that Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

### IT IS THEREFORE ORDERED:

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

AND IT IS SO ORDERED this 23 day of May, 2014.

  
 GEORGE C. JAMES, JR.  
 Presiding Judge  
 Third Judicial Circuit

  
 \_\_\_\_\_, South Carolina

WITNESSES

SPD

Rabon

AMENDED  
DOCKET NO. 2005-GS-43-33

The State of South Carolina

County of SUMTER

COURT OF GENERAL SESSIONS

SEPTEMBER TERM 2008

THE STATE

vs.

ROBYN L. DUKES

MARK A. WISE McCOY;

F413307, H679296

D/A: 06/09/04 (Dukes), 11/05/07 (McCoy)

ACTION OF GRAND JURY

James B. III

William Beaulieu

Foreperson of Grand Jury

Date:

VERDICT

Indictment for

MURDER, POSSESSION OF FIREARM  
OR KNIFE DURING THE COMMISSION  
OF A VIOLENT CRIME, ACCESSORY  
AFTER FACT OF A FELONY

Foreperson of Petit Jury

Date:

C. KELLY JACKSON, SOLICITOR

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF SUMTER ) MURDER, POSSESSION OF FIREARM OR  
 KNIFE DURING THE COMMISSION OF A  
 VIOLENT CRIME, ACCESSORY AFTER FACT OF  
 A FELONY

At a Court of General Sessions, convened on September 11, 2008, the Grand Jurors of SUMTER County present upon their oath:

CERTIFIED TRUE COPY  
 OF ORIGINAL FILE  
*Barbara Hays*  
 DEPUTY CLERK OF COURT  
 SUMTER COUNTY  
 SOUTH CAROLINA

COUNT ONE – MURDER

That MARK A. "WISE" McCOY did in Sumter County on or about June 8, 2004, feloniously, wilfully and with malice aforethought, either expressed or implied, kill one Donald Tyrone Pettis, Jr. by means of shooting him in the back with a handgun, and that the said Donald Tyrone Pettis, Jr. did die as a proximate result thereof.

COUNT TWO – POSSESSION OF FIREARM OR KNIFE DURING THE COMMISSION OF A VIOLENT CRIME

That MARK A. "WISE" McCOY in Sumter County on or about June 8, 2004, was in possession of and did visibly display a firearm, to wit: a handgun, during the commission of a violent crime as defined in Section 16-1-60, to-wit: murder, in violation of Section 16-23-490, Code of Laws of South Carolina (1976), as amended.

COUNT THREE – ACCESSORY AFTER THE FACT OF A FELONY

That ROBYN L. DUKES did in Sumter County on or about June 8, 2004, render assistance to a felon, namely, Mark A. "Wise" McCoy, who, on or about June 8, 2004, completed the crime of murdering Donald Tyrone Pettis, and said ROBYN L. DUKES did harbor or assist Mark A. "Wise" McCoy for the purpose of enabling him to escape detection or arrest.

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

*C. Kelly Jackson*  
 SOLICITOR