

VOLUME FOUR OF FOUR

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Horry County

Benjamin H. Culbertson, Circuit Court Judge

RECEIVED

SEP 14 2015

S.C. Supreme Court

JOHN B. FRAZIER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-002774

APPENDIX

ROBERT M. PACHAK

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

JOSHUA L. THOMAS

Assistant Attorney General

P. O. Box 11549

Columbia, SC 29211

ATTORNEYS FOR RESPONDENT

INDEX

INDEX	i
TRIAL TRANSCRIPT	1
APPLICATION FOR POST-CONVICTION RELIEF	1342
AMENDED APPLICATION FOR POST-CONVICTION RELIEF	1350
RETURN AND MOTION TO DISMISS	1374
AMENDED RETURN	1378
POST-CONVICTION RELIEF HEARING TRANSCRIPT	1382
ORDER OF DISMISSAL	1647
POST-TRIAL MOTION	1677
STATE'S MOTION TO STRIKE	1691
REPLY TO MOTION TO STRIKE	1700
INDICTMENTS	1703

John Frazier - Direct by Ms. Williams

119

1 actually talks about it, he reads on line three, he produced a
2 list, "That I had the most confidence" -- tell me what he
3 says?

4 A He said, "I produced a list that had the most confidence
5 in that, in that -- of the nine millimeter Luger calibers and
6 the 38 brands long." "The list was" -- "How many?" "38.
7 There are 38 lists of nine millimeter." Okay. But it's what
8 I said a minute ago when you take in everything because his
9 list was longer than just the nine millimeter Luger. His list
10 also included the 380s, the 357s, which made the list grow to
11 66 different types of guns that could've been used, and no,
12 the Glock was not on there because it has an opposite twist
13 than --

14 Q And he specifically testified that it could not have been
15 the Glock; correct?

16 A Right. Because --

17 Q Right here on page 826 read that question, line 15.

18 A "All right. So whatever, whatever gun might have fired
19 those rounds, it wasn't the Glock, was it?" "No, Sir. It was
20 not." He went on to ask him, "So you're not" -- so -- he
21 asked him, "Is there any -- are you saying -- did you find any
22 evidence to link the bullets that you tested to Defendant
23 Frazier?" He said, "No, sir. None of the testing that I did
24 could be linked -- could link the bullet fragments that were
25 taken from the victim to John Boyd Frazier."

1 Q I want you to read specifically on page 828 number two
2 through number four, five.

3 A Right. "All right. And there are literally how many
4 guns out there that could have fired?" Answer, "Thousands,
5 maybe millions, I would -- it could be a high -- it could be
6 as high as a million. I would hesitate to say without the --
7 without having the information, but millions."

8 Q All right. So what, if any, is your objection to that
9 testimony coming in and Mr. Martin's objections or non-
10 objections to that testimony?

11 A I don't necessarily have any objections to that
12 testimony, but the issue is is Mr. Martin should've brought up
13 the fact that it -- should have argued better about the fact
14 that I didn't own a gun capable of firing the rounds that
15 fired the fatal shots. He just kind of left it laying there.
16 He didn't make, he didn't make a -- I don't think he made a
17 good enough argument to the jury of the significance of the
18 fact that there were millions of guns out there that could
19 have fired the -- fired these bullet and I did not own a gun
20 that could have fired these bullets.

21 Q All right. Is it your position here that, that --

22 MS. WILLIAMS: I beg the Court's indulgence for just one
23 moment, Your Honor.

24 THE COURT: All right.

25 BY MS. WILLIAMS:

John Frazier - Direct by Ms. Williams

121

1 Q All right. All right. The next issue, and you mentioned
2 it in your initial talking was you are here today alleging
3 that there was subordination of perjury by the State?

4 A Yes.

5 Q Tell me about that.

6 A That goes, that goes back to the, the suppressed
7 statements by Mark and Donna Hobbs where we know, where we
8 know from memorandums sent, where we know from testimony from
9 the record that Mark and Donna Hobbs gave recorded statements
10 to the police on June the 10th and June the 11th. It is, it is
11 my belief under Smith v. Wainwright [spelled phonetically] and
12 Snyder v. Estelle [spelled phonetically] that the State knew
13 that the description that the Hobbses gave on June the 10th and
14 June the 11th was only white male, dark clothes with no other
15 significant description -- descriptonal features that
16 pertained to me. Therefore, they suppressed those statements,
17 knew -- knowing that the Hobbses were going to lie on the
18 stand to say that it was me when it wasn't me.

19 Q Did Solicitor Hembree even address the changes in his
20 close?

21 A In his close?

22 Q In his closing, remember, the closing about their
23 testimony?

24 A Well, he said they weren't, they weren't happy with it.
25 Be more specific.

1 Q In your brief you discuss that Solicitor Hembree went
2 along with that by putting them on the stand in that they --
3 he acknowledged that their descriptions had varied.

4 A Right.

5 Q Explain that.

6 A He admitted, he admitted that, that their testimony and
7 their descriptions -- he admitted that the majority of the
8 Hobbses' testimony was -- has changed. He admitted, and I
9 can't quote you the page, but he admitted that not only did
10 the distances change, he admitted that the description that
11 they gave changed. Everything about what they had to say from
12 their original statements to the Poole trial to my first trial
13 to the 2005 trial he admitted that everything changed and
14 everything changed to better the State, everything that they
15 said changed to help the State. He admitted that, and that
16 being the case then he knew that -- wait a minute -- the
17 testimony -- where, where, where Kent Robey said -- where the
18 memorandum from Bill Frontz to Kent Robey said, "Our Detective
19 Terry Altman will have talked to the Hobbses prior to your
20 visit before they were shown the photo lineup." Mr. Martin
21 asked Mr. Frontz if he took the statement -- if he took a
22 statement that was recorded, audio, video or documented from
23 the Hobbses in their words of the person that they saw at the
24 hotel that night to which Mr. Frontz replied, "No, sir. I
25 wouldn't have been involved personally in that." So Mr.

John Frazier - Direct by Ms. Williams

123

1 Martin asked him, "Are you aware of any Myrtle Beach Police
2 Officer who took such a statement from the Hobbses prior to
3 the Altman's conversation and the photo lineup showing in June
4 -- in June 20 -- June 28, 1998 in Virginia?" Mr. Frontz
5 replied, "Yes, sir. There were officers from Myrtle Beach
6 Police Department who would have interviewed the Hobbses
7 before then, yes," and Mr. -- "Did anybody have them put in
8 their own words or write it, tape the description of the
9 person they say they saw to your knowledge?" "To my
10 knowledge, that would have been, that would have been taped.
11 We conduct all our interviews on tape. I feel confident in
12 saying that it would have been a taped interview."
13 Q Okay. Let me interrupt you.
14 A Okay.
15 Q So there was according to Detective Frontz, standard
16 Myrtle Beach operating procedure is they tape all the
17 interviews?
18 A All interviews in their section. Yes, ma'am.
19 Q Were you ever provided such copies?
20 A We were never, we were never given -- we were never
21 provided the statements from Mark and Donna Hobbs from June
22 the 10th or June the 11th.
23 Q Okay. So it is your position, if I understand correctly,
24 that based on the, the initial change in the Hobbses and, and
25 the changes and that the fact that, that, that based on that

1 memo that the Myrtle Beach had talked to them, but they had
2 never given that to you that their testimony obviously it did
3 morph and it did change; correct?

4 A Yes. Dramatically.

5 Q Okay. And the State did what with that morphing
6 testimony?

7 A He morphed that, he morphed that testimony to suit the
8 State and the State's case where they, where they -- where the
9 original description obviously did not -- well, their original
10 statements obviously did not describe me. He morphed their
11 subsequent statements from September the 3rd and testimony at
12 Poole's trial and my first trial to look like me.

13 Q Who is he?

14 A Solicitor Hembree, State Solicitor Greg Hembree.

15 Q How did -- how would he have done that?

16 A He knew that the -- he knew what they -- he obviously
17 knew what their original statements were from June the 10th and
18 the 11th, that we -- because we were never provided a copy.
19 All right. So the only conclusion is is because they did not
20 describe me in their original statements, that he had the
21 officers contact them on numerous occasions to provide them
22 with the information they needed to describe me. So he knew
23 when they got on the stand that he had to continue to help
24 them in their description of me during the trials, that their
25 testimony was false.

John Frazier - Direct by Ms. Williams

125

1 Q Well, do you mean -- tell me how he continued to help
2 them. You said that. What does that mean? Give me an
3 example.

4 A Because he kept allowing them to change their testimony.
5 He kept allowing them to move the, move the person that they
6 say they saw. He kept allowing them -- he continued to allow
7 them to change the distances, to change the time where in the
8 -- where even in, where even in the duplicate September 3rd
9 statements it's going on 12:00 o'clock. By the time we got to
10 the last -- this last trial in 2005 it's all the way back to
11 11:15 when the -- when even the first provided statements from
12 September 28th said going on midnight or around 12:00 o'clock.
13 By the time we got to 2005 and they're testifying for a sixth
14 time their timeframe has gotten all the way back to almost --
15 to like quarter after 12, I mean quarter after 11, excuse me.

16 Q And do Applicant's Nine and Ten go in with your argument?

17 A Arguments -- Nine and Ten go in with the argument because
18 they could not -- because they kept moving the person in Ten
19 from where they originally said they were and, and they kept
20 moving the person in Nine to where they originally said they
21 were and the fact they couldn't describe themselves.

22 Q I'm sorry. Did you get that?

23 A Where they couldn't describe themselves. I'm sorry.

24 Q Okay.

25 A He knew that they were going to lie based on the fact

1 that he read their original statements from June the 10th and
2 June the 11th. That's why they were -- that's -- in my
3 opinion is subordination of perjury. He knew that they did
4 not describe me and he knew they were going to lie when they
5 got on the stand. That's why he had them continue to change
6 their testimony and continue to have the officers contact them
7 without providing those conversations to us as well. Mark and
8 Donna Hobbs should have been impeached from the very beginning
9 and this whole case should have been thrown out under
10 subordination of perjury.

11 Q Okay.

12 A But Morgan did not even think about bringing up that
13 issue.

14 Q And he never raised it?

15 A He never raised the issue of that -- he never raised the
16 issue on any of that.

17 Q Okay. You also put forth in your application that the
18 State failed to present competent evidence of guilt?

19 A Yes.

20 Q Explain that to me.

21 A Okay. There is absolutely -- I'm sorry. Excuse me.
22 There is absolutely no physical or forensic evidence in this
23 case whatsoever that can place me in the State of South
24 Carolina, let alone at the actual crime scene.

25 Q Hold on, Mr. Frazier, one moment. I'm going to hand you

John Frazier - Direct by Ms. Williams

127

1 what has been marked for identification as Applicant's Number
2 20?

3 A That's it.

4 Q Tell me what do you recognize that as?

5 A That is a hand-drawn, not to scale, of the area between
6 76th Avenue and 82nd Avenues North, Myrtle Beach, South
7 Carolina.

8 Q Who hand drew it?

9 A I did.

10 Q Is that yours and something you created?

11 A That's something that I created.

12 Q And is this Number 20 an accurate copy of what you're
13 actually holding in your hand?

14 A That is.

15 MS. WILLIAMS: Your Honor, we would move Applicant's
16 Number 20 into evidence.

17 THE COURT: Any objection?

18 MR. THOMAS: I mean, obviously as long he's just using it
19 for demonstrative purposes to demonstrate his theory I don't
20 think I have an objection to it.

21 THE COURT: All right. This wasn't used at trial or
22 anything?

23 MS. WILLIAMS: No, sir.

24 THE COURT: It's just something he's done for this?

25 MS. WILLIAMS: Yes, sir.

1 THE COURT: Okay.

2 MS. WILLIAMS: It's for his purposes in explaining his
3 theories today to the Court.

4 THE COURT: All right. Applicant's Exhibit Number 20
5 admitted into evidence without objection.

6 (Applicant's Exhibit Number 20 [Sketch] admitted into
7 evidence and appropriately marked.)

8 A Okay.

9 Q All right.

10 A Well, I want to make a note that it's not to scale
11 because I don't know the exact scale, but you all have aerial
12 photographs of the hotel and the scene. Excuse me. There are
13 multiple instances where Mark and Donna Hobbs where they came
14 out of the back of the hotel. They moved the suspect that
15 they said they saw on the sidewalk in their, in their -- in
16 the first trial in 2000.

17 Q I need for you to point this on me when you talk to --
18 reference this.

19 A Sorry.

20 Q So when it's plain in the record.

21 A At the back of the hotel right here where --

22 Q And you're indicating down at the bottom which has pool
23 bar?

24 A Yes. The doors leading from the pool out onto the pool
25 deck is where Mark and Donna Hobbs claim they came out of the

1 hotel.

2 Q Okay.

3 A The second -- the star on the sidewalk, which has a first
4 designation beside side of it, that distance in their original
5 statements that were provided to us on September 28th said 80
6 feet. Did you ever go and make a measurement? That distance
7 changed every time they made a statement. Where the person
8 was standing right there where the star is on the sidewalk in
9 the first trial they said -- in the statements that they gave
10 that were provided on the 28th in the first trial, they said
11 that the person was standing in the parking lot, not actually
12 on the sidewalk. By the time we got to the 2005 trial, the
13 person had gone seven inches up higher onto the sidewalk and
14 then moved further up the incline away from the beach raising
15 the person above the fence line. When they gave their
16 original statements, they said that they were on the boardwalk
17 where these bushes are right here on this corner on the
18 parking lot end --

19 Q And that's at the corner of the pool bar again?

20 A Right. Well, on the opposite end where the pool bar's on
21 the right, it's on the other end on the left.

22 Q All right.

23 A They said that they were there. As the trials continued
24 and every time they made a statement either, either in-camera
25 or jury testimony, they continued to move further down the

1 boardwalk towards the beach where there were trees -- where
2 there were bushes right here that blocked. There were seven
3 to eight -- seven to eight feet high that would have blocked
4 their view from the parking lot end of the boardwalk. They
5 would not have been able to see a person standing in the dunes
6 behind the hotel.

7 Q And --

8 A The Solicitor had them moved, during the course of every
9 trial, the Solicitor Hembree had them move further down the
10 boardwalk till they were on the sand on the beach end of the
11 boardwalk where there were no bushes, and that distance from
12 the end of the boardwalk to where they said the suspect was
13 behind the hotel changed from 40 to 50 feet to 12 to 15 feet
14 during the subsequent trials. Every time they spoke, that
15 distance shrunk as well. The most -- one of the, one of the
16 -- another significant thing that I feel is Mark and Donna
17 Hobbs, whether they were at the beach end or the boardwalk
18 end, or the beach end of the boardwalk or the parking lot end
19 of the boardwalk, they never left this area and they testified
20 that they never left 76th Avenue boardwalk. Mr. Martin did
21 ask them, "Did you follow the suspect down the beach?" "No.
22 We did not." "What did you do when the man walked out of
23 view?" They testified, "When the man walked out of view we
24 went back into the hotel." From this end at 76th Avenue to
25 right here where this star is with the circle that says actual

John Frazier - Direct by Ms. Williams

131

1 crime scene 11:40 p.m. is 3,168 feet away. That's six-tenths
2 of a mile. Like I said before, even an experienced sprinter
3 couldn't run that fast between 11:40 and 12:00 a.m.

4 Q So --

5 A But they said, they said that the person they saw was
6 walking towards the crime scene after the crime had already
7 happened. My position is is if Mark and Donna Hobbs are to be
8 believed that Mark and Donna Hobbs put me at the hotel going
9 on midnight after the crime had happened, not placing me at
10 the crime scene.

11 Q And you get the crime, you put that in there because of
12 why? What, what evidence was in the trial about that actual
13 time of death?

14 A Be more specific.

15 Q When Mr. Poole died, when did, when did --

16 A That was -- oh, because Scott Brown brought up the fact
17 that he radioed in -- he saw Renee Poole at 11:45, radioed in
18 a few minutes after that and Office Aiossa responded at 12:51
19 a.m. where this is over a half a mile distance.

20 Q Okay.

21 A I couldn't do it. I couldn't do it in my prime.

22 Q All right. What else do you say that, that, that -- what
23 was the actual evidence that was submitted that was
24 circumstantial that supposedly placed you at the crime scene?

25 A Right. The State brought up the fact, the State brought

1 up that there were items surrounding Mr. Poole's body on the
2 beach. Then they brought up the fact that the wallet was
3 found in Mr. Sirles's yard, back yard up here marked with a
4 triangle and wallet that, that was found months later,
5 actually a month later in July soaking wet. The issue being
6 Detective Frontz in his note said -- no.

7 Q Let me ask you.

8 A Right. Okay.

9 Q You're not answering my question.

10 A Go ahead.

11 Q My question is what was their circumstantial evidence
12 that placed you at the scene? This was a circumstantial case;
13 correct?

14 A That's all there was.

15 Q Okay. What evidence did they have that placed you at the
16 scene?

17 A Nothing.

18 Q What did they claim they had that placed you at the
19 scene?

20 A They claimed that the wallet -- they claimed that since
21 the wallet was taken from the victim that he was robbed and
22 that put me at the crime scene, but when they tested the
23 wallet they found no fingerprints, no DNA, no hair fibers,
24 blood or anything on the wallet that could be linked to me.

25 Q Was any of your DNA found at the actual murder scene?

John Frazier - Direct by Ms. Williams

133

1 A There was nothing found -- there was nothing found at the
2 actual crime scene that could be linked to me at all. There
3 was no DNA, blood, hair, fibers, fingerprints, footprints.
4 There was nothing at the actual crime scene on any of the
5 items found on the sand, in the sand, under the sand or the
6 unspent bullets they found or the spent shell casings did not
7 have fingerprints that could be linked to me at the actual
8 crime scene.

9 Q But the Hobbses did identify you in the photo lineup and
10 identified you as the person that they saw basically six-
11 tenths of a mile away; correct?

12 A Six-tenths of a mile away, yes.

13 Q All right. So that would have put you there and it -- I
14 mean, that was part of the evidence that they used?

15 A That was part of what the State used to try and put me
16 there.

17 Q All right. And then what else did they use about the
18 conspiracy?

19 A That, that I had --

20 Q Well, let me say this, and was the rest of their theory
21 the conspiring between you and Ms. Poole to commit this
22 murder; correct?

23 A Yes.

24 Q That was the circumstantial?

25 A That was their circumstantial, yes, where they had no

1 evidence on that either.

2 Q No physical evidence?

3 A They had no physical evidence. They found no e-mails,
4 computer chats, recordings of any kind between Ms. Poole and
5 myself and any kind of conspiratorial conversations about the
6 death of her husband.

7 Q Did Mr. Martin make motions to have it dismissed based on
8 lack of proof, that the circumstantial evidence did not rise
9 to a level that met the burden?

10 A No.

11 Q There were no motions made?

12 A Not that I'm, not that I'm aware of. If he did he did it
13 out of my presence because I didn't ever hear him make it.

14 Q Okay. Is there anything else you want to address to the
15 Court about the lack of competent evidence of guilt of you?

16 A The State has had the opinion that the crime scene
17 encompasses over half a mile. Detective Frontz in his notes
18 stated that himself, Corporal Hull and eight other patrolmen
19 did a search approximately five feet apart, that would make it
20 50 feet wide from the murder scene west through the
21 residential houses, neighborhoods and alleyways and found no
22 evidence, no items that would be considered evidence or
23 relevant evidence to tie to this case, meaning that when they
24 did their search that the Myrtle Beach Police Department
25 considers 50 feet to encompass an actual crime scene, not

John Frazier - Direct by Ms. Williams

135

1 3,160 feet or 3,110 feet at that point.

2 Q Well, let me ask you this. They swept on forward; didn't
3 they?

4 A But they went -- right. They went from the beach west
5 and beach -- from the beach west would put them directly in
6 the path of Mr. Sirles's backyard.

7 Q Where the wallet was eventually found?

8 A Where the wallet was eventually found a month later.

9 This -- another significance is is while Mr. Sirles's
10 surrogate testimony was read through Investigator Long at the
11 second trial, Mr. Martin never called Mr. Sirles's son to
12 testify when it was found out that Mr. Sirles's son had
13 actually been staying at the house for an undetermined amount
14 of time up until July the 4th when the wallet was found in Mr.
15 -- by Mr. Sirles in the backyard. So we don't know why they
16 -- why the police officers doing a search would not have found
17 it when they swept through there during their search, but then
18 for it to be found a month later after the man's son had been
19 staying at the house for an undetermined amount of time, then
20 when Mr. Sirles shows up the wallet is suddenly found, but the
21 -- like I said, they tested it and there was nothing in it, on
22 it or about it that could be linked to me. They found no
23 fingerprints, no hair, blood, fibers, nothing.

24 Q Okay.

25 A That's one of the things that I've been screaming to

1 Morgan all along. There is no physical evidence or forensic
2 evidence that can place me in Myrtle Beach, South Carolina,
3 let alone at 82nd Avenue to commit this crime.

4 Q Speaking of forensic evidence, was your car searched by
5 the police department after this?

6 A My Blazer?

7 Q I -- yes.

8 A No.

9 Q I'm -- let me ask it, was it tested by the FBI?

10 A The Blazer was not. Mr. Schettler's car was.

11 Q That's what I meant. I'm sorry.

12 A Yes.

13 Q You correct me. Tell me what if -- tell me -- tell me
14 about that and the evidence with regard to that that would
15 have connected you to the crime scene.

16 A Oh, anybody, anybody has ever walked on the beach --

17 Q No. What did the report -- what -- which --

18 A Oh, they found absolutely nothing.

19 Q What came into evidence about that?

20 A They brought -- they, they tested the floor mats. They
21 tested the floor mats and the towel -- the floor mats that
22 were in the, in the floorboard and the towels that were in the
23 seats of the car. They tested, they tested the undercarriage
24 of the car for sand. They tested the wheel wells and inside
25 the rim of the wheels for sand and, and, and checked the tires

John Frazier - Direct by Ms. Williams

137

1 themselves, and the report said that they found no significant
2 amount of sand in the tires, in the, in the wheels, the wheel
3 wells, the undercarriage and the floor mats or the towels of
4 the car. They sent the towels, the floor mats to the FBI lab
5 in Washington, D.C. We have that marked as a Defense Exhibit
6 from the trial, and the FBI report came back stating that,
7 that the sand tested from the floor mats, the towels of the
8 car to the sand found on the victim were dissimilar and could
9 not be connected to each other. I'm paraphrasing because I
10 don't have it in front of me. You've got it over there.

11 Q But that FBI report came into evidence; correct?

12 A That FBI report came into evidence as a Defense Exhibit,
13 that it was also noted in the SBI report that the tires on the
14 car were bald, and as Mr. Schettler testified there were bugs
15 on the front -- there were no bugs on the front of the car.

16 Q So is that part of your claim that there was no -- there,
17 there was not enough true circumstantial evidence regarding
18 you and this case?

19 A There was no circumstantial evidence.

20 Q I mean, it was circumstantial but no hard evidence?

21 A No. None, none whatsoever.

22 Q Okay.

23 MS. WILLIAMS: Beg the Court's indulgence for just one
24 moment.

25 THE COURT: All right.

1 MS. WILLIAMS: Your Honor, may we approach?

2 THE COURT: Yeah.

3 (Whereupon, a bench conference is held.)

4 THE COURT: All right. Let's take about a 10-minute
5 break at this point in time. All right. Mr. Frazier, we're
6 still in the middle of your testimony. So you cannot discuss
7 your testimony with anyone, whether what you've testified to
8 thus far, what you anticipate testifying to in the future.
9 Okay?

10 A Yes, sir.

11 THE COURT: All right. Let's take about a 10, 15-minute
12 break.

13 MS. WILLIAMS: Thank you, Your Honor.

14 OFF THE RECORD

15 (On the record.)

16 BY MS. WILLIAMS:

17 Q John, and in cleaning up, I realized -- I'm going to hand
18 you what's been marked for identification as Applicant's
19 Number 21. That was a hearing from the 2000 -- this is a
20 transcript of the 2000 trial where there was a motion on the
21 Hobbses' identification and suppression of that; correct?

22 A Yes.

23 Q All right. Now, there was not a hearing on this in the,
24 in the 2000 -- a similar hearing as to this in the 2005 trial;
25 correct?

John Frazier - Direct by Ms. Williams

139

1 A Correct.

2 MS. WILLIAMS: I would move into evidence Applicant's
3 Number 21 at this time.

4 THE COURT: Any objection?

5 MR. THOMAS: No objection.

6 THE COURT: Applicant's Exhibit 21 admitted into evidence
7 without objection.

8 (Applicant's Exhibit Number 21 [Transcript - Hearing on
9 Identification] admitted into evidence and appropriately
10 marked.)

11 BY MS. WILLIAMS:

12 Q Okay. On the topics that we have discussed so far, is
13 there anything else you wish to add or inform the Court on the
14 topics that we have addressed so far?

15 A A few things, yes.

16 Q And what are those?

17 A In interviews from and notes from Myrtle Beach Police
18 Department, we found out that there were people on the
19 boardwalk beach accesses at 82nd Avenue and then through Mr.
20 Hensley's testimony at the pagoda that he stopped at. There
21 were people at those beach access points. I asked Mr. Martin,
22 I said, "Did any of these people get questioned?" He said,
23 "Well, I'm sure they did." I said, "Okay. Where are those
24 interviews at so we can find out if any, if there might be
25 some suspects there," because as Mr. Hensley testified

1 earlier, he saw people out on the beach. There's reports that
2 there were people on the, on the beach access at 82nd Avenue
3 from the police department. Mr. Aiossa testified that he
4 blocked cars in at 82nd Avenue. There's reports from other
5 officers that on the beach access where Mr. Hensley said he
6 was at there were people there. None of these people were
7 called to testify. None of these people were called to see if
8 they saw a suspect dressed in black.

9 Q Did the Myrtle Beach Police interview them?

10 A I, I think they did from -- based on what I gathered from
11 the notes from the detectives, but I never saw a copy of any
12 of the interviews.

13 Q All right.

14 A We only saw a copy of one from Daniel Matheau [spelled
15 phonetically] who said he saw a couple of cars in the area
16 driving away.

17 Q Did your investigator follow up on any of the other
18 potential witnesses/suspects who might have been near the
19 scene?

20 A Not that I know of from the people that were blocked in
21 at those access points.

22 Q Okay. So your position on that is that there were other
23 folks Mr. -- what, what did Mr. Martin not or not do with
24 regard to that?

25 A Mr. Martin did not, did not bring or interview the people

John Frazier - Direct by Ms. Williams

141

1 that were blocked in at 82nd Avenue or the other avenue where
2 the pagoda was at, where Hensley was at because we know from
3 one of those interviews from a Daniel Matheau that there were
4 -- that he saw cars, two cars driving away from the area
5 around the time of the crime, which those cars did not match
6 the description of my blazer or Mr. Schettler's Acura. That
7 being said, it falls under the fact that nobody or nothing was
8 presented or can be presented that shows that Mr. Schettler's
9 Acura or my Blazer with the personalized tag was seen in the
10 area between 76th and 82nd Avenue, but Mr. Martin didn't bother
11 to try and investigate or question these people.

12 Q And was Mr. Matheau's testimony proffered at trial as
13 potential testimony that could have helped you?

14 A No. I don't even think he even -- I don't even think Mr.
15 Martin called him.

16 Q Okay. All right. Anything else with regard to the
17 issues that we have already addressed that you want to bring
18 to the Court's attention?

19 A Not that I can think of.

20 Q All right. The other issue -- there was another issue
21 that you raised in your application regarding potential third-
22 party guilt.

23 A Yes.

24 Q Tell me about that and what you wish the Court to know
25 regarding your argument of third-party guilt.

1 A I'm claim -- I claim and have claimed from the very
2 beginning that Raymond Bruce Wolford had the motive, means and
3 opportunity to commit this crime. Mr. Wolford had had a long-
4 going, long-term, loving, committed, caring sexual
5 relationship with Kimberly Renee Poole.

6 MR. THOMAS: Objection. Foundation.

7 THE COURT: Overruled. I'll allow it. Go ahead.

8 Q Continue.

9 A We know from interviews that he had weapons that could
10 have been on the SLED's list that were never investigated.

11 Q By Mr. Martin?

12 A By Mr. Martin.

13 Q Okay. Did the police investigate?

14 A Or the police. No. The police treated Mr. -- the Myrtle
15 Beach Police Department treated Mr. Wolford as a, as a, as a,
16 as a victim. No. Not a victim, but as a -- I don't know what
17 you would call it because within days after this crime Mr.
18 Wolford's now ex-wife, Ms. Fox, was in a near fatal car
19 accident, and he played the wounded husband trying to take
20 care of the wife with the police.

21 Q All right. Let's stop for a minute and let -- I want to
22 make sure the Court understands. Mr. Poole was murdered here
23 in Myrtle Beach; correct?

24 A Yes, ma'am.

25 Q And then when his family was notified and Ms. Poole's

John Frazier - Direct by Ms. Williams

143

1 family was notified as well; correct?

2 A Yes, ma'am.

3 Q And then were you -- was your name basically immediately
4 given to the police?

5 A From what I was told my name was given to the police at
6 -- from the Poole family as one of -- as, as the guy who was
7 having an affair with Renee.

8 Q All right. And then so the Court is aware, basically,
9 the police initially talked to Ms. Poole and then they talked
10 to her numerous times and the -- that, that their talks with
11 her shifted; correct?

12 A Yes. She -- I think she was interviewed for like 18 or
13 20 hours straight.

14 Q All right. But eventually out of those interviews what
15 did she -- so the Court is fully aware -- what did she tell
16 them about you in the interview?

17 A She, from what I gather, she told them that the person
18 that committed the crime had my mannerisms and voice or
19 mannerisms and body style or something like that.

20 Q All right. But you were basically pointed and, and
21 enough about you is pointed out so that the police came to
22 you; correct?

23 A They had already came to me at that point because the
24 Poole family had give them my name. That's when they sent
25 Officer Mills to my house.

1 Q All right. And then did Ms. Poole basically eventually
2 name you as the perpetrator?

3 A Actually I think it was her attorney who did.

4 Q But you were named.

5 A I was named, yes.

6 Q Okay. So you were named and Mr. Wolford was never named?

7 A No.

8 Q All right. And then once that happened she was charged
9 as well; correct?

10 A Yes.

11 Q All right. And then through the course of this and even
12 came with your trial, did she testify at your trial?

13 A No.

14 Q Why?

15 A She pled the Fifth. She claimed that she didn't want to
16 incriminate herself.

17 Q Because she was still a Defendant charged with murder as
18 well; correct?

19 A By the time my first trial came up she had already been
20 convicted, but she had pending appeals.

21 Q Okay. So she didn't testify at yours, all pleading the
22 Fifth?

23 A Right.

24 Q All right. Now, continue. What, if anything, was your
25 discussions with Mr. Martin, part of your defense, anything at

John Frazier - Direct by Ms. Williams

145

1 all when you brought up about third-party guilt?

2 A He said we couldn't -- he said we couldn't present
3 anything pertaining to third-party guilt because the way the
4 law reads from State v. Gregory and State v. Gay.

5 Q All right. And tell me what you think he should have
6 done that he did not do with regard to your potential defense
7 of third-party guilt?

8 A He should have at the very least proffered the third-
9 party guilt argument to the Court so that it would be a part
10 of the record so instead of being State v. Holmes it would be
11 State v. Frazier who overturned the third-party guilt ruling
12 in South Carolina, but he didn't even try to proffer the
13 third-party guilt argument.

14 Q Okay. Tell me what evidence that you knew that you had
15 him investigate that you believe could have been presented
16 with -- if, if the Judge had let it in, and understand -- and
17 we understand in a third-party that the Judge makes the ruling
18 as to whether or not it comes in or not; correct?

19 A Right.

20 Q All right. But what evidence did you think that he
21 should have proffered in addition to what we've put in here
22 today or that he knew about with regard to third-party guilt?

23 A Everything, everything pertaining to their relationship,
24 the fact that he had, the fact that he had guns that could
25 have been on the list from, from SLED, the fact that he had a

1 long-term relationship with Ms. Poole, the fact that his wife
2 was in a near-fatal car accident within days after, after Mr.
3 Poole was killed. He should have brought up the fact that Mr.
4 Wolford continued to call my private investigator to find out
5 where the investigation was going or whether or not I was
6 being charged and what was going on with me, but I think one
7 of the most shocking things that happened was at the second
8 trial after Mr. Wolford -- well, while Mr. Wolford was
9 testifying Mr. Morgan dropped the ball in my opinion on
10 Wolford while he was questioning him but after he was done
11 questioning him --

12 MR. THOMAS: I'm going to object to this as being hearsay
13 what -- he's going to testify to what Mr. Wolford said to Mr.
14 Martin outside in the hallway.

15 Q Well, let me ask this. We can -- and let's don't go
16 there.

17 A Okay.

18 Q Was there something based on what happened that you think
19 Mr. Martin should have done based on a conversation he had
20 with Mr. Wolford?

21 A He should have came back in and declared a mistrial. He
22 should have came back in and hollered for the Judge to call
23 Mr. Wolford back in and, and demanded the third-party guilt
24 argument to be, to be heard.

25 Q Okay. What evidence did you think that Mr. Martin had or

John Frazier - Direct by Ms. Williams

147

1 that you and, and -- or what evidence, if any, did you and
2 your defense team have ready that could have put Bruce Wolford
3 as the, the -- as a potential suspect as opposed to you?

4 A Be more specific.

5 Q Well, just -- I want you to summarize it. You started
6 going. Is that it?

7 A Oh, well, the white male, dark clothes, Chris Hensley's
8 composite drawing with the man with, with long blonde hair.
9 Mr., Mr. Hobbs's original description from the September 3rd
10 where the -- where he described the man as having a ponytail.

11 Q Do you have a ponytail?

12 A I've never worn a ponytail. I've never in my life worn a
13 ponytail.

14 Q Okay.

15 A I mean, you go back to grade school and high school
16 pictures and ask my family I've never had a ponytail.

17 Q Was any evidence presented about your ponytail or lack
18 thereof of a ponytail?

19 A No.

20 Q All right.

21 A Everything that we found out through our investigation
22 pointed to Mr. Wolford. There was, there was numerous chat
23 logs, numerous phone calls, numerous liaisons. He even
24 provided the police department with a tape of him and Renee
25 having sex.

1 Q Did you guys get a copy of that?

2 A I don't know. I never wanted to see that, but --

3 Q All right.

4 A He gave that to the police. I know, I know for a fact
5 from Renee that a former boyfriend of hers gave a tape of him
6 and Renee having sex to the Poole family to try and get her to
7 leave him alone. I mean, there was a fact that she had
8 multiple boyfriends, but most of them, including myself, were
9 trying to get away from her because we knew she was batty for
10 lack of a better term.

11 Q Okay.

12 A But everything that we found showed that Mr. Wolford
13 stayed in a continual relationship with her --

14 Q Did you --

15 A -- that he was in a relationship before I ever met these
16 people, that he was in a relationship while I knew these
17 people and after I knew these people. If I had known any of
18 this I wouldn't have even looked a second way that direction,
19 but --

20 Q In your opinion did Mr. --- was there, was there any
21 evidence that Mr. Martin could have presented about Bruce
22 Wolford's ability to be present at the crime scene or the
23 ability to actually be the perpetrator?

24 A Well, yeah. He lied about his alibi. When the police --
25 no. Excuse me. Let me be very specific about this. When the

John Frazier - Direct by Ms. Williams

149

1 police started investigating the crime, the murder, Mr.
2 WOLFORD went to the office manager at -- where he worked.

3 MR. THOMAS: Objection. Hearsay.

4 MS. WILLIAMS: Well, Your Honor, I present this as
5 evidence that Mr. Frazier had provided to Mr. Martin, and, and
6 based on this evidence did Mr. Martin do or not do anything
7 about it, and I intend to ask Mr. Martin, but I wanted to get
8 Mr. Frazier's testimony about what he thought Mr. Martin --
9 evidence Mr. Martin had that he could have investigated, did
10 investigate or did not investigate.

11 THE COURT: But is this information that he provided Mr.
12 Martin himself or that he's saying somebody else provided it?

13 A It was given to us by -- it was given to me as, as the
14 client of, of Daryl Wilson.

15 Q Okay.

16 THE COURT: Did he present it to Mr. Martin?

17 A It was all presented as, as, as a group.

18 THE COURT: Did you present it to Mr. Martin?

19 MS. WILLIAMS: No. Mr. -- did -- did Mr. --

20 THE COURT: Okay. I sustain the objection then.

21 Hearsay.

22 A Okay.

23 MS. WILLIAMS: Okay.

24 BY MS. WILLIAMS:

25 Q Okay.

1 A Okay.

2 Q So but there was, there was lots of evidence that you
3 gave Mr. Martin; correct?

4 A There was lots of evidence that Mr. Martin had at his
5 disposal --

6 Q Okay.

7 A -- that could have been used to show Mr. Wolford's being
8 the man who shot Brent Poole.

9 Q But at that time the law was such that Mr. Martin did not
10 present third-party guilt; correct?

11 A Right. He said -- he told me that the circumstance, and
12 he -- and I have to paraphrase because what he said. He said
13 the circumstances surrounding a third-party guilt person has
14 to be so completely separate from anything that could be tied
15 to you that we can't present it unless it's completely
16 separate. I didn't understand at the time. I do now after
17 reading the law, but I presented Mr. -- I presented Mr. Martin
18 with the argument that showed a completely separate set of
19 circumstances that could be tied -- that could show Mr.
20 Wolford's -- Mr. Wolford's committing the murder that could
21 not be tied to me at all in any way and Mr. Martin didn't want
22 to hear it.

23 Q All right. And was any of that additional evidence
24 proffered?

25 A No. He didn't try and proffer anything third-party in

John Frazier - Direct by Ms. Williams

151

1 the second trial.

2 Q But did he try at the first trial?

3 A He tried poorly.

4 Q But he tried at the first trial.

5 A He tried, and he was, he was shut down almost immediately
6 by Mr. Peeples, by Judge Peeples, excuse me.

7 Q Okay.

8 A I mean, we had a mountain of evidence that we couldn't --
9 that Martin said we couldn't use because of the way the law is
10 read in South Carolina that showed that Bruce Wolford killed
11 Brent.

12 Q Okay.

13 A But we couldn't present any of it.

14 Q And he did not proffer it; correct?

15 A He did not try and proffer any of it at the second trial.

16 Q All right.

17 MS. WILLIAMS: Beg the Court's indulgence for just one
18 moment.

19 BY MS. WILLIAMS:

20 Q Is there anything else on the issue of your potential
21 defense of third-party guilt that you want to make the Court
22 aware of?

23 A Yeah. Yes. But I'm not sure how. Mr. Wolford tried to
24 collect reward money. Mr. Wolford tried to sway the police
25 investigation whenever they talked to him about me or the

1 crime. They never treated Mr. Wolford as a suspect even
2 though they knew that Ms. Poole had had relationships with
3 multiple men while she was married. Mr. Wolford tried to --
4 he claimed to the police that there -- that, that there were
5 various things that I did to try and goad Mr. Poole into
6 arguments or fights or things like that that were not true.
7 He lied on the stand about instances that happened at the club
8 where there was, there -- where he was not -- where it was
9 just a blatant lie.

10 Q Was there any evidence presented to counter that?

11 A We made the argument, and he recanted a lot of it on
12 trial the second -- at the second trial he recanted a lot of
13 it. The majority of what he claimed to the police he recanted
14 at the second trial, yes.

15 Q Okay.

16 A I can't bring that up. I don't know what else I can
17 bring up. If you could be more specific I can, but I don't
18 know what else I can bring up.

19 Q Well, that's all right. All right. Let's move on.
20 There was another issue that you brought forth to me regarding
21 your indictment.

22 A The invalidity of the indictment?

23 Q Mr. Frazier, I'm going to ask you what's been marked as
24 identifications as Applicant's 22, 23, and 24.

25 A Yes, ma'am.

John Frazier - Direct by Ms. Williams

153

1 Q Tell me, can you identify each of those? What is 22?

2 A Twenty-two is the true-billed stamp from the indictment
3 -- yeah -- the indictment for murder, armed robbery,
4 conspiracy with a true-bill stamp on it.

5 Q And the true-bill stamp is?

6 A August 26, 1999. All right.

7 Q And 23 is a duplicate of that; correct?

8 A Yes, ma'am.

9 Q All right. And then 24 is?

10 A Twenty-four is the affidavit for armed --

11 Q That's the warrant; correct?

12 A The warrant, yeah, yeah, yeah. Sorry. The arrest
13 warrant for armed robbery and murder.

14 Q Warrant number 387458, 387464.

15 A Yes. Yes.

16 Q All right.

17 MS. WILLIAMS: I would at this time move Applicant's 22,
18 23 and 24 into evidence.

19 THE COURT: Any objection?

20 MR. THOMAS: No objection to those coming in as
21 evidence, Your Honor. They're already in your packet I think.
22 I am, however, going to object to this line of questioning
23 regarding the indictment and where I think she's going with
24 this because it is not in the original application or in the
25 March 14th corrected amended motion to supplement PCR

1 application. There's no allegations in here about any
2 indictment issues. So I would just object to that as not
3 something that's been pled.

4 THE COURT: Has it been pled?

5 MS. WILLIAMS: Your Honor, he is correct. They were not
6 in my actual application, in the actual written applications
7 that we sent into. In my post-conversations with Mr. Frazier,
8 he has brought to my attention and wanted to submit before the
9 Court that there was over a year between when he --

10 THE COURT: Okay. If, if it's not alleged in the
11 petition I sustain the objection. You've got to give them
12 notice, but Applicant's Exhibits Number 22, 23 and 24 are
13 admitted into evidence without objection. Is that correct?

14 MR. THOMAS: No objection to the admission of those.

15 THE COURT: All right.

16 (Applicant's Exhibit Number 22 [Indictment True-Billed 8-
17 26-99], Applicant's Exhibit Number 23 [Indictment True-Billed
18 8-26-99] and Applicant's Exhibit Number 24 [Affidavit, Warrant
19 387458] admitted into evidence and appropriately marked.)

20 BY MS. WILLIAMS:

21 Q There was one other -- are there any other issues that
22 you have that you wanted to present to the Court today?

23 A The confrontation clause, Sixth Amendment violations.

24 Q Tell me why you think -- why you believe there was a
25 confrontation clause, a Sixth Amendment violation.

John Frazier - Direct by Ms. Williams

155

1 A The biggest issue with the confrontation clause was with
2 the photographic lineup. The photographic lineup was put
3 together by Winston-Salem Police Department employee. I don't
4 know if she was an officer, Lisa Means, and when we went to
5 trial the State called Winston-Salem Police Department Officer
6 Mills. Am I correct in his name? No. Rowe. Sorry. Mike
7 Rowe as -- to testify to the photographic lineup. I made an
8 argument to Morgan that Mr. Rowe -- I'm sorry. I'm sorry. I
9 want to make sure I've got the name -- yeah, "Mr. Rowe, did
10 not put together the photo lineup. So how are we going to be
11 able to question him about how they put the photo lineup
12 together?" Mr. Martin said, "Let me handle this," and shut me
13 down, but my argument was the Sixth Amendment confrontation
14 clause allows for -- requires for the technician who presents,
15 who, who, who compiles a document for court purposes is
16 required to come to court to testify to their own work. I
17 wanted to ask why I was put in the number one position. I
18 wanted to ask why I was only one of two people in a dark-
19 colored t-shirt in the entire photo lineup. I wanted to ask
20 why I was the only one with large round eyes or a high
21 forehead, and when it was asked to Mr. Martin, Mr. Martin
22 said, "I got this. Don't worry about it," and he never
23 questioned Detective Rowe about this, but Detective Rowe
24 admitted that he was not the person who put the photo lineup
25 together. All he did was fill out a form requesting the photo

1 lineup to be made. Where I wanted Mr. Martin to ask these
2 specific questions about how the photo lineup was made and why
3 it was made that way, he didn't nor could he because Mr. Rowe
4 was a surrogate witness pertaining to the photo lineup being
5 constructed, so he didn't have the knowledge or the ability to
6 answers the questions that I wanted asked. So Mr. Martin
7 didn't ask the questions.

8 Q Well, tell me how you were prejudiced by -- were -- do
9 you think that had some impact on the outcome of your trial?

10 A I do because, because for, one, the photo lineup is
11 biased in its entire nature because the original description
12 that we have gathered was white male, dark clothes. There are
13 only two people in the photo lineup in dark clothes. Then as
14 progressive statements came out from the Hobbses and their
15 descriptions changed more and more, large round eyes and high
16 forehead came out after my mug shot was taken. After they
17 were shown the photo lineup is when these other descriptions
18 came out, but in the photo lineup I am the only person with
19 large round eyes and a high forehead in the number one
20 position in a dark colored t-shirt. Mr. Rowe made the
21 comment, "Well, Mr. Frazier chose the clothes he was wearing
22 when he had his mug shot made." That's irrelevant to the
23 issue. The issue is is he was not the one who put the photo
24 lineup together. So he couldn't answer the questions on why
25 they didn't include all six people in dark clothes or dark t-

John Frazier - Direct by Ms. Williams

157

1 shirts, why they didn't include six people with large round
2 eyes and high foreheads.

3 Q And you think that is relevant and prejudicial to your
4 case because why?

5 A Because the only photograph that the State of South
6 Carolina had of me was the mug shot that was taken the day
7 that I was arrested because there have never -- because I've
8 never been arrested before. So there are no previous mug
9 shots of me. So they did not know -- the police, Detective
10 Frontz, Detective Altman, none of the Myrtle Beach Police
11 Department knew what I looked like until I was arrested and
12 they took my mugshot.

13 Q Was the photo lineup done before or after you were
14 arrested?

15 A The photo lineup was done within a matter of hours after
16 I was arrested, but they were not -- but the Hobbsses were
17 never shown the photo lineup until the 28th of June, where I
18 was arrested on the 13th.

19 Q Okay. And that's significant to you because?

20 A Because the photo lineup should never have been allowed
21 as evidence -- it should not -- it should not have been
22 admissible as evidence because of its biased nature and
23 because we were not allowed -- afforded the opportunity to
24 question the technician who constructed the photo lineup on
25 why they did it this way instead of making it more un-

1 prejudicial for lack of a better word.

2 Q I got you. And, and does that play into your issue with
3 the Hobbses' testimony overall?

4 A It does because once, once the Myrtle Beach Police
5 Department saw the photograph -- saw the mug shot of me, then
6 they took that mugshot and that's when the subsequent phone
7 calls started happening between the Myrtle Beach Police
8 Department and Mark and Donna Hobbs before they were shown the
9 photo lineup which biased their testimony and statements
10 towards me.

11 Q Well, the reality of it is you were never provided copies
12 of those conversations; right?

13 A Right.

14 Q So we don't know what was contained in them.

15 A Right.

16 Q Okay.

17 A But we know that from, from the time that they -- from
18 the time the Myrtle Beach Police Department had my mug shot
19 until they gave their statements on September 3rd, that was
20 when the large round eyes and a high forehead came into play.

21 Q Okay.

22 A Because we don't know what was said before because it was
23 never provided to us.

24 Q All right. What if anything else do you wish to present
25 to the Court?

John Frazier - Direct by Ms. Williams

159

1 A I, I don't know quite how to say it. I believe -- I
2 fully believe that the State's theory about this case has been
3 wrong from the very beginning. The State's theory has been
4 that the person who killed Brent Poole was in love with Renee
5 Poole. Okay. And I fully believe that that is true. I fully
6 believe that the person who killed Brent Poole was in love
7 with Renee Poole, but I also know that it was not me. I know
8 that I did not kill Brent Poole. I know that Bruce Wolford
9 was in love with Renee. I know that Bruce Wolford had the
10 means and the opportunity to kill Brent. I know that he had
11 made threats on other people.

12 MR. THOMAS: Objection, Your Honor. That's hearsay
13 again.

14 THE COURT: Sustained.

15 MR. THOMAS: And I ask that that be stricken.

16 THE COURT: All right. Stricken from the record.

17 A From testimony that was given in the record and some
18 testimony that was never presented by Mr. Martin and contrary
19 to what a lot of people believe, I did not, I do not fall in
20 love very easily, and I never did. I did try and help a lot
21 of girls, a lot of women that I knew that needed help. Thomas
22 Pedersen testified at the trial that he knew that Ms. Poole
23 was trying to find -- was seeking a divorce. All I was trying
24 to do was help. I didn't know I was getting pulled into a
25 crazy situation. If I had known, like they say, hindsight is

1 20-20, I don't have it, but I didn't kill Brent. I was not in
2 love with Renee Poole, and regardless of what the State thinks
3 about me, regardless of what the State says about me, they
4 said that I was so in love that I had to kill Brent to get his
5 family, that is not true, either, Your Honor. I had a family,
6 my own. I had a two-year-old daughter at the time, and I kept
7 my private family life separate from those people because of
8 who those people were. Yes. I did some, some disparaging
9 things by, by working that -- by working part-time at this --
10 at one of these places. I didn't work where they worked, but
11 I worked at another place, and no, I shouldn't have been
12 working there, as my mom continued to tell me, but I did, and
13 I did because I was a single male, but at the same time, I had
14 a family already, and I don't know if they'll let me show you,
15 but I'm going to hold them up anyway. This is my daughter. I
16 haven't seen her in 16 years. She was two years old when I
17 got arrested. I haven't seen her in 16 years because of this
18 because I was accused of a crime that I did not commit.
19 There's evidence showing that I was not, there's testimony
20 showing that I was not in the State of South Carolina.
21 Officer Mills said that he found me asleep in my home when he
22 came to my house, which is exactly where I was at. I did not
23 kill Brent. They said if Mr. -- Mr. Hembree said, excuse me,
24 because it breaks my heart, Mr. Hembree said that Brent Poole
25 said, "Don't kill me. I have a daughter." You have no idea

John Frazier - Direct by Ms. Williams

161

1 how much that hurt me because I had a daughter as well. I
2 kept her in that -- my family shielded from all these people
3 because I knew all these people were deranged.

4 MR. THOMAS: Objection, Your Honor. I've let this go on
5 long enough, but he's making ad hominem attacks against the
6 victim at this point. I, I would just -- it's non-responsive
7 to any question.

8 THE COURT: Sustained.

9 Q Is there any other argument that you wish to present to
10 the Court?

11 A I don't know.

12 Q I'm sorry?

13 A I don't think so.

14 MS. WILLIAMS: Beg the Court's indulgence for just one
15 moment.

16 THE COURT: All right.

17 BY MS. WILLIAMS:

18 Q That's all the questions that I have, Mr. Frazier.
19 Please ask -- please answer any that the Attorney General may
20 ask and/or the Court.

21 THE COURT: All right. Cross examination?

22 MR. THOMAS: May we approach briefly, Your Honor?

23 THE COURT: Yeah.

24 (Whereupon, a bench conference is held.)

25 THE COURT: All right. We'll go ahead and we'll recess

1 at this point in time for the remainder of the day until 9:30
2 tomorrow morning. Mr. Frazier, we're still in the middle of
3 your testimony, so you cannot discuss your testimony with
4 anyone, either what you've testified to thus far or what you
5 -- excuse me -- anticipate testifying to in the future; okay?

6 A Yes, sir.

7 THE COURT: All right. We'll stay in recess until 9:30
8 tomorrow morning.

9 MR. THOMAS: Thank you, Your Honor.

10 MS. WILLIAMS: Thank you, Your Honor.

11 THE COURT: Thank you.

12 (Adjourned for day.)

13

14

15

16

17

18

19

20

21

22

23

24

25

1 OFF THE RECORD

2 (On the record, June 17, 2014.)

3 THE COURT: All right. Let's go ahead and put him under
4 oath again, please.

5 Whereupon, John Boyd Frazier is called to the stand, duly
6 sworn by the clerk.

7 THE COURT: All right. Ms. Williams, anything
8 preliminary before we get started?

9 MS. WILLIAMS: No, sir. Not that I am aware of.

10 THE COURT: All right. Mr. Thomas?

11 MR. THOMAS: May it please the Court?

12 THE COURT: Anything from the State preliminary before we
13 get cross examination?

14 MR. THOMAS: I guess you ask the witness has he had any
15 discussions with anyone about his testimony.

16 THE COURT: All right. All right. Mr. Frazier, when we
17 broke yesterday I had instructed you that we were still in the
18 middle of your testimony and that you were not to discuss your
19 testimony with anyone, either what you have testified to thus
20 far or what you anticipate testifying to in the future. Have
21 you discussed your testimony with anyone?

22 MR. FRAZIER: No, sir.

23 THE COURT: All right. All right. Mr. Thomas, cross
24 examination.

25 MR. THOMAS: May it please the Court?

1 THE COURT: Yes, sir.

2 CROSS EXAMINATION

3 BY MR. THOMAS:

4 Q All right. Mr. Frazier, you had your opportunity
5 yesterday to give your version of things and to pontificate a
6 little bit. So today's my day. So I'm going to ask you some
7 simple yes or no questions. If you feel like you need to
8 explain something, go ahead, but for the most part I just want
9 yes or no answers. Do you understand that?

10 A Yes, sir.

11 Q All right. Your first issue is jury sequestration.

12 A Yes, sir.

13 Q All the jurors that stood up and said they had some prior
14 knowledge of the case and couldn't set aside their opinions
15 they were set aside, not allowed to sit on the jury; isn't
16 that correct?

17 A No, sir.

18 Q And Mr. Martin asked the Judge if he could sequester the
19 jurors and the Judge told him no, that she didn't see any
20 reason for it?

21 A Not that I'm aware of. No, sir.

22 Q And the Judge asked the jury every time they came back
23 from a break whether they had had any contact with anyone
24 about the case or whether they had had any discussions. She
25 asked them that; didn't she?

John Frazier - Cross by Mr. Thomas

165

1 A Yes. She did ask them that.

2 Q Regarding Ms. Mishler's testimony, I think you said
3 yesterday that her testimony was that you were in love with
4 Ms. Poole, but isn't it in fact true that her testimony was
5 that one day you called the Poole residence angry and were
6 yelling about Mr. and Mrs. Poole. Isn't that what her
7 testimony was?

8 A That's what she claimed.

9 Q Regarding Mr. Frontz's testimony and the Hobbsses'
10 interview and things like that, Mr. Frontz never said he took
11 an interview of the Hobbsses himself; did he?

12 A He said he never did. Right. Correct.

13 Q And his only testimony was that he took a phone call from
14 you?

15 A No. He testified to other things, but he did take a
16 phone call from me as well.

17 Q Right. He testified he took a phone call from you. You
18 called in to give them some information --

19 A Yes, sir.

20 Q -- as you had been requested?

21 A Yes, sir.

22 Q And I guess he also testified that he was part of the
23 executing the search warrant, they found your calendar and
24 things of that nature?

25 A That was later in South Carolina. That was the --

1 Q Regarding this alleged recording from June 10th, do you
2 have a copy of that with you today?

3 A Excuse me. The what?

4 Q The recording of the testimony of the Hobbsses or the
5 statement the Hobbsses gave on June 10th that you were talking
6 about yesterday? Do you have a copy of that today?

7 A No, sir. It was never provided by the State.

8 Q So you don't have one?

9 A No, sir.

10 Q You can't produce one?

11 A They never produced one to us.

12 Q And in fact, Officer Beatty, the person you talked about
13 composing the lineup, she's not here to testify today either;
14 is she?

15 A It was Detective Richard F. Beatty.

16 Q He's not here to testify; is he?

17 A I don't know.

18 Q So you have no -- you can't proffer any testimony about
19 what he did to compose that lineup?

20 A Mr. Morgan never called him.

21 Q And you haven't called him here today, either, or this
22 week?

23 A No, sir.

24 Q But at trial Detective Robey did testify as to how the
25 lineup was made; didn't he?

John Frazier - Cross by Mr. Thomas

167

1 A No, sir. He testified that he filled out the top of a
2 request form.

3 Q And he testified that the lineup was made by computer
4 based upon matches for race, height, weight, things of that
5 nature?

6 A No, sir.

7 Q But he testified he approved the form that was used and
8 the lineup that was created?

9 A He testified that he signed off as the person who
10 received it from the technician who created it.

11 Q And he also testified that he approved it, he looked at
12 it and said, "I think this is an appropriate lineup?"

13 A I believe that's what he said.

14 Q In the face of all that testimony from Mr. Robey, Mr.
15 Martin still objected to the introduction of that lineup;
16 didn't he?

17 A Yeah. I believe he did.

18 Q And after all that, the Hobbsses, you know, I think we can
19 agree that the Hobbsses' testimony was inconsistent about the
20 distances. I think we've agreed on that; right?

21 A Very much so. Yes.

22 Q But we can also agree that Mr. Martin pointed that out to
23 the jury. He questioned them about that, and he pointed that
24 out to the jury in his closing arguments; didn't he?

25 A He pointed out to the jury, yes, that their testimony

1 changed.

2 Q But we can agree that the one part of their testimony
3 that's been consistent all along is that you were the person
4 they saw on the beach that day.

5 A That was the only thing that they could remember.

6 Q And I know you've been trying to make light of a very
7 serious situation and talk about how the composite looks like
8 George Clooney and you don't, but the truth is your attorney
9 argued to the jury that that composite didn't look like you;
10 didn't he?

11 A He made an argument to that effect.

12 Q And everyone agreed with that. The Hobbses agreed that
13 composite didn't look like you.

14 A No, sir. The Solicitors had them say -- well, actually
15 Ms. Hobbs said, "I think it looks like him. Don't you?"

16 Q We would agree Mr. Hemsley [sic] said the composite he
17 made didn't look anything like you?

18 A Hembree?

19 Q Hemsley, Mr. Hemsley [sic].

20 A Hensley, yeah, he said --

21 Q Hensley.

22 A -- the composite he did didn't look anything like me.

23 Q And he agreed that that composite didn't look anything
24 like the person he actually saw on the beach that day either.

25 A That's what he said yesterday.

John Frazier - Cross by Mr. Thomas

169

1 Q All right. And Mr. Martin actually moved to exclude the
2 composite initially; didn't he?

3 A I don't remember the arguments for that.

4 Q But eventually he introduced it to help prove that the
5 composite -- I mean, that was sort of his whole point was that
6 the composite didn't look like you. He argued that to the
7 jury?

8 A He, he put up the, the comparison between the mug shot,
9 my mug shot and the composite drawing done by the Hobbsses.

10 Q So he did the -- he, he, he, he vociferously argued that
11 the identification in this case was bad, that was your
12 defense; wasn't it?

13 A That was part of the defense, but he wasn't very thorough
14 with his arguments.

15 Q Moving on to the closing, you remember that Mr. Martin
16 objected to the Solicitor's statement that your experts were
17 bought and paid for?

18 A Yes.

19 Q And the Judge told the jury to disregard that?

20 A Yes.

21 Q He also objected to the arguments about the constitution
22 or about the officer being able to constitutionally search
23 around your yard to look at Mr. Schettler's car? He objected
24 to that; didn't he?

25 A I don't remember him objecting to that one.

1 Q But everything that he objected to the trial Judge said,
2 "I sustain your objection," and struck that, struck that
3 argument?

4 A Not every one, no. They actually had a bench conference
5 about -- after Mr. Martin objected I think the second or third
6 time they had a bench conference to discuss what Mr. Schettler
7 said.

8 Q And regarding -- I think you had some complaints about
9 the, the statements that Ms. Poole made that Mr. Hembree
10 discussed in closing arguments, but isn't the only statement
11 that the Judge actually allowed in was that she said, "My
12 husband's been shot?"

13 A That was after, after Officer Brown had testified to
14 other things that she had said. Judge Thomas made the ruling
15 that her statements were testimonial in nature, therefore,
16 inadmissible except for, "My husband has been shot."

17 Q And that was the only part of the testimony Mr. Hembree
18 referred to in closing; isn't it?

19 A No, sir.

20 Q Regarding Ms. Poole's statements, the State didn't
21 attempt to introduce her confession in this case; did they?

22 A Not outright, no, sir.

23 Q All right. In fact, I think you said yesterday that she
24 named you as a suspect, but in reality didn't she give a full
25 confession that said you and her planned this murder together?

John Frazier - Cross by Mr. Thomas

171

1 A I don't know exactly what her confession was.

2 Q So your theory is that you had no -- nothing to do with
3 planning this, that she planned it with someone else? She was
4 going down for this why would she drag you down with her?

5 A It was told to me later on that she gave them my name
6 because she thought -- because she knew that I worked third
7 shift and I would have an alibi. So she gave them my name to
8 try and get away with it.

9 Q Well, speaking of sort of your theories of the case, you
10 talked yesterday about Mr. Sirles, the man whose yard the
11 wallet was found in?

12 A Mr. Sirles, yes, sir.

13 Q Sirles, and you talked about how his son was living in
14 the house, and that he was living there when the wallet was
15 found.

16 A It was their vacation home.

17 Q It's not -- you're not seriously trying to get up here
18 and testify that Mr. Sirles's son planted that wallet there?

19 A No, sir.

20 Q All right. But you do think the wallet was planted by
21 somebody?

22 A Yes, sir.

23 Q Well, let me ask you this. If I'm going to go to the
24 trouble of planting a wallet to try and frame you, why don't I
25 put some DNA evidence on it or some fingerprints? Why was

1 | there nothing linking you to the wallet if it was planted?

2 | A | Because I didn't have -- those people didn't have any
3 | contact with me, and I didn't have any contact with them.

4 | Q | So you're not saying -- so -- all right.

5 | A | I had no contact with the Pooles or Mr. Wolford in a, in
6 | a while for them to collect anything like that to plant on it.

7 | Q | Regarding this argument you've made that Mr. Martin
8 | didn't object strong enough to the conspiracy charge, didn't
9 | he raise that pretrial and try to exclude all the testimony
10 | regarding the conspiracy?

11 | A | We never had a pretrial hearing.

12 | Q | But after the jury was selected and sworn, you had
13 | pretrial motions to exclude Ms. Poole's statements and to
14 | exclude any evidence of a conspiracy.

15 | A | There were motions made. I'm, I'm not exactly sure
16 | exactly which ones there were so many made.

17 | Q | Do you remember Mr. Martin moving for a directed verdict
18 | after the State finished its case?

19 | A | Yes, sir.

20 | Q | Do you remember him renewing his motion after you
21 | finished your case?

22 | A | Yes, sir.

23 | Q | And after the jury returned a verdict he moved for a new
24 | trial?

25 | A | I believe so, yes, sir.

John Frazier - Cross by Mr. Thomas

173

1 Q In fact he moved for a directed verdict because there was
2 no direct forensic evidence tying you to the crime scene;
3 isn't that right?

4 A That's what we're arguing. Yes, sir.

5 Q Regarding this TZ75 that we've talked about, that murder
6 -- they never actually matched a weapon to you; correct?

7 A Correct.

8 Q And Mr. Martin argued that to the jury?

9 A Not, not like he should have, no, sir.

10 Q Speaking of the TZ75, what'd you say happened to it?

11 A I sold it at a gun show in July of 1997.

12 Q Who'd you sell it to?

13 A It's -- and when they do gun shows in North Carolina,
14 when you show up at the gun show with a used weapon, the
15 officers at the front door inspect the gun. They pull the --

16 Q I asked you who you sold it to.

17 A I don't know because you walk around --

18 Q Okay.

19 A -- with a gun, and if anybody's interested in buying it,
20 they purchase it right there.

21 Q So you just, you just gave this, this TZ75, you sold it
22 to somebody. How much did you get for it?

23 A \$250.

24 Q Is that enough to buy you a Glock?

25 A No, sir. I had, I had another 75 for the Glock.

1 Q So you remember that you got \$250 for it, but you don't
2 remember who you sold it to or you don't have any paperwork to
3 show that you sold it?

4 A In North Carolina you don't have to have paperwork when
5 you're selling a gun to an individual to individual, only when
6 you purchase new from a dealer.

7 Q Talking about third-party guilt, you discussed all that
8 with your attorney; right? You discussed your, your theory
9 that Mr. Wolford was actually the perpetrator in this crime?

10 A Yes.

11 Q And he actually -- they tried to raise it at the first
12 trial; didn't they?

13 A They tried to.

14 Q All right. And Judge Peeples told them that there was
15 not --

16 A Right.

17 Q -- that wasn't sufficient evidence?

18 A Absolutely not is what he, what he said.

19 Q All right. But Mr. Martin had all this evidence that
20 you've talked about the past two days? These are discussions
21 you've had with him? He was aware of all this?

22 A The majority of it, yes, sir.

23 Q One of your theories was that Mr. Wolford owned one of
24 the weapons that was on the list the SLED agent testified to.
25 Where is your, where is your evidence, where is your paperwork

John Frazier - Cross by Mr. Thomas

175

1 to show he owned one of those weapons?

2 A We had a statement from Amy Marie Dudas that my
3 investigator provided to me where she said she saw him with
4 two semi-automatic handguns in his possession.

5 Q Did she say specifically what kind of semiautomatic
6 handguns those were?

7 A She did not know what type -- she didn't know what type
8 but she said they were nine millimeter.

9 Q Okay. But the list that the SLED agent provided didn't
10 include every nine millimeter ever made in the history of the
11 world; did it?

12 A No. But it was pretty thorough on the Lugar style.

13 Q You also take issue with Mr. Martin's failure to
14 interview people that were on the beach that night?

15 A Yes, sir.

16 Q Did you bring any of those people to testify today?

17 A No, sir. We have no way of finding them.

18 Q And in fact you don't have anyone that can come testify
19 that they saw Bruce Welford in Myrtle Beach that night; do
20 you?

21 A No, sir.

22 Q All you really have to support your theory that he's the
23 perpetrator is evidence that he was sleeping with Renee Poole;
24 isn't that correct?

25 A Before I ever met them and after I knew them, yes, sir.

1 Q In fact she was sleeping with any number of people;
2 wasn't she? She had romantic relationships with more than
3 just you and Mr. Wolford?

4 A Yes, sir.

5 Q Does that upset you that she was sleeping with other men?

6 A Not in the slightest.

7 Q But you did testify that you wanted her -- you were going
8 to help her leave her husband?

9 A She asked for help. She knew as well as some of the
10 other girls that worked at the club that I was willing to help
11 them if they needed a place to stay to get to better
12 themselves.

13 Q And you'd have us think that you're a big, kind-hearted
14 person, that you'd do anything to help her; isn't that right?

15 A Not anything, no.

16 Q You took issue with Mr. Bollow's testimony about your
17 Blazer being parked at Renee Poole's house? You're saying
18 your car was never parked over there?

19 A No, sir. Actually, Mr. Bollow gave a description to the
20 police that he saw a white male with long hair driving a small
21 red car at the Poole house.

22 Q Well, I think we can agree that there were lots of men --

23 A Yes.

24 Q -- driving cars over there to her house, but he testified
25 he saw your car; isn't that correct?

John Frazier - Redirect by Ms. Williams

177

1 A No. He testified that he saw a black Blazer, not my car
2 or me.

3 Q You familiar with any of Ms. Poole's other boyfriends?
4 Did they have black Blazers?

5 A No, sir. I don't know, but I know Mr. Wolford's ex-wife,
6 Courtney, drove a red, a little red Miata and he had long, and
7 he had long hair, but Mr. Bollow said that he told the police
8 that --

9 MR. THOMAS: No further questions, Your Honor.

10 THE COURT: All right. Redirect?

11 REDIRECT EXAMINATION

12 BY MS. WILLIAMS:

13 Q Mr. Frazier, you were in the process of answering
14 something about that the Attorney General asked you about Mr.
15 Bollow and some of the questions about the car.

16 A Yes. Yes, ma'am.

17 Q What were you trying to say?

18 A Mr. Bollow gave a statement that he saw a, a white male
19 with long hair driving a small red car at the Poole residence
20 on multiple occasions. We tried to present this information
21 to Morgan -- Morgan was not interested -- because Courtney at
22 the time owned a little red Miata and Bruce had -- was a white
23 male with long hair -- before she had her near fatal car
24 accident --

25 Q Okay.

1 A -- in the little red Miata.

2 Q All right. Just briefly, the Attorney General asked you
3 about Detective Frontz and testifying. While he did testify
4 that he did not perform the actual interviews; correct?

5 A Correct. He said he did not actually interview them
6 himself, but detectives in his section did, and as general
7 protocol for his section, they recorded all of their
8 interviews.

9 Q Okay. And the argument about the -- the ID argument
10 about the hearings, you were talking about that, that you said
11 Mr. -- your position was Mr. Martin -- I didn't really
12 understand what the question was and what the answer. There
13 was an argument in 2000. Was there an argument in 2005 is
14 your position. Is that what we're talking about?

15 A About the --

16 Q The Hobbsses' identification.

17 A That there have been multiple arguments about the
18 Hobbsses' identification as being unreliable, but Mr. Martin
19 did not bring the argument to, to -- at the second trial
20 showing from their first trial and their statements the, the
21 dramatic change from their statements from the September 3rd to
22 the 2000 trial to the Judge's attention in the arguments in
23 2005. He just made the grand statement that their testimony
24 has changed. He didn't show from statements in the first
25 trial testimony how much it had actually changed.

John Frazier - Redirect by Ms. Williams

179

1 Q Okay.

2 MS. WILLIAMS: All right. Beg the Court's indulgence for
3 just one moment. Your Honor, that's all the questions that --
4 well --

5 A He asked me about the wallet.

6 Q I'm sorry. Okay. Tell me about -- yeah. Tell me about
7 what you were -- I think you were explaining about the wallet.
8 Tell me about that.

9 A He asked me about the wallet, and Morgan tried -- Morgan
10 did ask for a directed verdict on the wallet because what we
11 found was -- what we found out later was there was a partial
12 print found inside the wallet, but it could only be used --
13 there was only enough to be used as -- I don't know the word
14 -- exclusatory, to exclude somebody, and they tested the print
15 that was found on the wallet -- exclusionary, excuse me. They
16 tested the print found on the wallet to my fingerprints and
17 there was no match in any way. I asked him if the theory that
18 we had of a third-party guilt that matched Gregory and Gay
19 would apply to that since the wallet was not found the next
20 day by Detective Frontz, Corporal Hull and the other, and the
21 other eight officers who did the search from the beach west
22 through the residential neighborhoods as somebody else who
23 committed the crime stayed in Myrtle Beach and came and threw
24 the wallet into Mr. Sirles's yard a couple of days later. He
25 said the Judge would not allow us to present that argument

1 because it falls under third-party guilt. I said, "Well, the
2 issue is is they said that the partial print did not match any
3 of my prints at all, so why is the armed robbery charge still
4 lingering over my head when they have absolutely nothing."
5 That's the -- that was the State's only evidence for the armed
6 robbery charge. So at least the directed verdict should have
7 been ruled on the armed robbery by itself.

8 Q Was that -- there -- so there was a SLED report talking
9 about the partial print?

10 A Yes, ma'am. I don't know where it came -- I don't know
11 exactly which department it came from, but there was a report
12 that said there was a partial print and they tested against my
13 fingerprints and none of my prints matched the partial that
14 they found.

15 Q Was that report entered into evidence?

16 A I don't think he did because it fell under the third-
17 party guilt issue. Actually, I know it didn't because it fell
18 under third-party guilt. Anytime I brought up anything with
19 third-party guilt or Bruce Wolford he kind of shied away from
20 what I had to say, but that falls -- but -- sorry.

21 Q All right. Let me ask you this in a little bit, but were
22 there -- is there anything else that whether we're talking the
23 Attorney General asked you that you did not get to explain
24 fully in your responses to him?

25 MR. THOMAS: Objection. Calls for a narrative.

John Frazier - Redirect by Ms. Williams

181

1 MS. WILLIAMS: If he can narrow it.

2 THE COURT: I'll allow it. Go ahead.

3 A He spoke about Ms. Mishler and the phone calls. Actually
4 it was Ms. Mishler that called my house repeatedly that night,
5 the night in question, and -- but her reply testimony was
6 after my sister testified that she was there to say that I was
7 in love with Renee, but the argument that Morgan did not make
8 was the fact that this was inappropriate reply because it
9 would be unreasonable that Ms. Mishler would gain the
10 knowledge through a couple of phone calls in the middle of the
11 night to my house as opposed to my sister who has known me my
12 entire life would know whether or not that I was in love with
13 somebody. Morgan didn't make that argument as a part of the
14 reply from Ms. Mishler.

15 Q As part of the suppression or even an argument to the
16 jury?

17 A Right. Correct.

18 Q Okay.

19 A Because there's no way to glean that information from a
20 few phone calls in the middle of the night as opposed to
21 somebody who's known me my entire life.

22 Q Okay.

23 A In the -- I'm sorry. I don't know if I can --

24 Q Well, I was going to say are there other topics that he
25 required about that I want you to specifically make sure you

1 got to address your answers to his questions.

2 A The Hobbsses because in the 2004 South Carolina Supreme
3 Court Ruling in State v. Frazier the Supreme Court actually
4 said in their opinion that I should have been allowed to
5 impeach the reliability of the Hobbsses' identification, but
6 Mr. Morgan didn't bring that argument to the court when he was
7 making the argument about the Hobbsses. He never showed -- he
8 never said this is the opinion from the South Carolina Supreme
9 Court that we should have been allowed to impeach the Hobbsses'
10 reliability. He never brought that to the Court's attention.

11 Q So he only argued certain things but didn't argue
12 additional arguments to the problem.

13 A Right. And when we had a ruling from the South Carolina
14 Supreme Court that said we should have been allowed to impeach
15 that should have been number one priority but he didn't bring
16 that up.

17 Q Okay. Is there anything else?

18 A Irrelevant testimony from Ms. Jensen.

19 MR. THOMAS: Objection, Your Honor. That's outside the
20 scope of cross examination.

21 A Okay.

22 THE COURT: Sustained.

23 Q Anything else that he specifically asked you about?

24 A No, ma'am.

25 Q Okay.

John Frazier - Redirect by Ms. Williams

183

1 MS. WILLIAMS: Your Honor, then that's all the questions
2 that I have.

3 THE COURT: All right. You may step down. All right.
4 You can -- all right.

5 MS. WILLIAMS: Your Honor, I was going to say I beg the
6 Court's indulgence for one moment, please.

7 THE COURT: All right.

8 MS. WILLIAMS: Your Honor, that's our last witness that
9 we would be calling.

10 THE COURT: All right. The State?

11 MR. THOMAS: May we approach, Your Honor?

12 THE COURT: Yeah.

13 MR. THOMAS: A scheduling matter.

14 (Whereupon, a bench conference is held.)

15 THE COURT: All right. We'll go ahead and recess this
16 case because as I understand the scheduling we expected this
17 testimony to go through the remainder of the morning. So the
18 State's witness has not arrived yet. We'll get them here as
19 soon as we can. So we'll go ahead and recess this case till
20 11:30 or do we -- how do you all want to do it? Do you want
21 me to give you a set time or do you want to just say when Mr.
22 Martin gets here?

23 MR. THOMAS: My conversation with him yesterday afternoon
24 was he had a meeting at 10:30 and he was coming over here
25 immediately after that. He did not think it would be a long

1 meeting. He said he would be here no later than 11:30 but he
2 could be here as early as 11.

3 THE COURT: Okay. I'll do whatever you want to do. If
4 you want to wait until he gets here or if you want to plan
5 your schedule and go and just be back.

6 MS. WILLIAMS: Your Honor, it's fine -- it's fine till
7 when he gets here it'll be perfectly fine.

8 THE COURT: Okay.

9 MS. WILLIAMS: If it's earlier that's fine, too.

10 THE COURT: All right. All right. We'll go ahead and
11 recess this hearing until Mr. Martin gets here; okay?

12 MS. WILLIAMS: Thank you, Your Honor.

13 THE COURT: All right. Thank you very much.

14 OFF THE RECORD

15 (On the record.)

16 THE COURT: All right. Before we broke, Ms. Williams, I
17 understand that the Applicant has rested his case; is that
18 correct?

19 MS. WILLIAMS: Yes, sir.

20 THE COURT: All right. Anything from the State at this
21 point?

22 MR. THOMAS: Your Honor, the State would call Mr. Morgan
23 Martin.

24 THE COURT: All right, sir.

25 Whereupon, Morgan Martin is called to the stand, duly

Morgan Martin - Direct by Mr. Thomas

185

1 sworn by the clerk and testified as follows:

2 THE CLERK: Please have a seat. State your name for the
3 Court, spell your last name.

4 MR. MARTIN: Morgan Martin, M-A-R-T-I-N.

5 MR. THOMAS: May I approach the witness, Your Honor?

6 THE COURT: Yes, sir.

7 MR. THOMAS: I'm going to sit this right there.

8 MR. MARTIN: Okay.

9 MR. THOMAS: May it please the Court?

10 THE COURT: Yes, sir.

11 DIRECT EXAMINATION

12 BY MR. THOMAS:

13 Q Thank you, Mr. Martin, for working us in, working your
14 schedule around to get here a little early today. Just want
15 to start with some background information. How long you been
16 practicing law?

17 A Since 1978.

18 Q And has that been primarily criminal defense, criminal
19 work?

20 A Primarily probably. I do both civil and criminal
21 litigation now, but there's been an emphasis on criminal
22 throughout the years.

23 Q Regarding this John Boyd Frazier case, when did you first
24 become involved with this case?

25 A Well, I don't recall the exact date, but this, if I

1 believe John was arrested in July of '98, 1998, and it was
2 shortly thereafter.

3 Q And who else worked on this case with you?

4 A Well, Tommy Brittain and I and, and to some extent
5 different people in our law firm at the time did.

6 Q Did you have a private investigator on this case?

7 A There was a private investigator. I think his name was
8 Daryl Wilson. Now, he wasn't mine necessarily, but he was, he
9 was somebody that the family had found in Winston-Salem.

10 Q And did you -- so I'm assuming you used him instead of
11 your, your private investigator?

12 A Yes. Yes.

13 Q What kind of working relationship did you have with Mr.
14 Frazier?

15 A A good one.

16 Q Is it safe to say you all had regular contact with each
17 other?

18 A Yes.

19 Q And with his family?

20 A Yes.

21 Q Was he intimately involved in preparing the defense to
22 the case?

23 A Yes.

24 Q Something he's -- something I just want to ask you about
25 he's kind of raised. When you would -- when he would come to

Morgan Martin - Direct by Mr. Thomas

187

1 you with issues about things he wanted you to investigate or
2 things he wanted you to argue to the Judge, did you ever sort
3 of blow him off or shush him?

4 A Well, we tried this case twice, and I probably at some
5 point in time did tell John to shush, but whatever John
6 brought to my attention we considered, and I say me, Tommy
7 Brittain, whoever else was working on it, and we took it
8 seriously, obviously, and tried to do a thorough job of
9 ferreting out any issues that could help us defend John.

10 Q So did you file sort of your standard Rule 5 discovery
11 motions in this case, Brady?

12 A I'm sure we did. It's been a long time ago. So for me
13 to testify from direct memory is hard, but I'm sure we did.

14 Q But you do remember sort of receiving sort of voluminous
15 discovery from the State?

16 A Oh, yes. Oh, yes.

17 Q And you went over -- basically everything you got you
18 shared it with Mr. Frazier?

19 A Yes.

20 Q If you could just sort of off the top of your head just
21 give a brief summary of what the case, State's case was
22 against Mr. Frazier.

23 A The State's case was eyewitnesses from of all places
24 Goodview, Virginia, if I can recall, Donna and Mark Hobbs, and
25 it was clear that there would -- had been a relationship

1 between John and Renee Poole. There was testimony about
2 motive, and that was there, but if I recall correctly, the
3 thing that really tied this case together and got them to a
4 jury was the Hobbses placing John Frazier in Myrtle Beach
5 outside of that motel on the night in question, which was
6 about six or eight blocks from where Mr. Poole was shot.

7 Q So what was your overall sort of overarching, and we'll
8 get into specifics later, but what was your overall trial
9 strategy to sort of counter the State's evidence?

10 A Well, again, I'm trying to be as succinct as I can, and
11 it has been a long time, but it was to discredit the
12 eyewitness identification of Mark and Donna Hobbs. Obviously,
13 eyewitness identification is a type of testimony that is
14 fraught with potential for mistakes and anybody who practices
15 criminal law is aware of that. The State of North Carolina
16 has really addressed things like that, and so, we, we, we
17 worked hard at trying to attack the eyewitness identification
18 of Mark and Donna Hobbs, and we felt like that if you could do
19 that we had a chance to win the case, but if they believed the
20 Hobbses we didn't have much of a chance to win the case.

21 Q And what kind of experts did you hire in that regard?

22 A We, we retained Elizabeth Loftus, who was a preeminent
23 expert in the field of mistaken eyewitness identification, and
24 she testified, I'm thinking, by video deposition, I believe,
25 and we went over to the motel at night, took pictures, videos,

Morgan Martin - Direct by Mr. Thomas

189

1 tried to recreate as best we could what it was there that
2 night to establish for a jury the difficulty that the Hobbsses
3 would have in seeing what they said they saw at night. I
4 can't remember how much of that got into evidence and how much
5 didn't, but we vigorously attacked the eyewitness
6 identification by the Hobbsses.

7 Q Did you get an opportunity because I -- this was a
8 retrial, obviously.

9 A Right.

10 Q And you were involved with the first trial as well.

11 A Right.

12 Q Did you get to do any of that in the first trial, any of
13 this Dr. Loftus testimony?

14 A Well, we tried. I can't remember. Judge Peeples wasn't
15 very receptive to much of what we put up for John, but I can't
16 remember specifically.

17 Q But was that sort of the appellate issue on that that got
18 it reversed and brought back?

19 A I'll be honest with you I can't remember what the
20 appellate issue was.

21 Q But you did, you did do all the Loftus testimony in the
22 second trial?

23 A We did. We did.

24 Q Is it fair to say, I mean, was the Hobbsses' testimony
25 consistent through every statement they gave and every trial

1 you had or were there inconsistencies?

2 A It was essentially consistent.

3 Q But if there were any inconsistencies you would have,
4 obviously, you would cross examine them on that?

5 A I did my best to, yeah.

6 Q And I'm going to refer you, if you would, to page 717 of
7 the transcript that's in front of you. I think that's in
8 Volume II or, sorry, Volume III.

9 A 717, okay.

10 Q And I'm just looking at -- if you will just read from
11 line 12 to line 17. I'll just ask you if that refreshes your
12 recollection on your cross examination?

13 A You want me to read it out loud?

14 Q No. Just read it to yourself.

15 A Okay.

16 Q And I just ask you if that refreshes your recollection on
17 your strategy on cross examining the Hobbsses.

18 A Okay. I've read it. Yeah. I questioned her, Ms. Hobbs
19 about the fact that she had made inconsistent statements as
20 far as the person's location at the motel that night, and she
21 agreed that she had. She said, "Yes. I think they're all
22 pretty close, but yes, it's fair to say that I placed the
23 person, myself and the person in different places."

24 Q But what was the one thing that was always consistent
25 about their testimony?

Morgan Martin - Direct by Mr. Thomas

191

1 A That they were certain that it was John Frazier they saw
2 there that night.

3 Q What other attempts did you make to sort of impeach their
4 testimony maybe regarding some reward money that they had
5 received?

6 A Yeah. Between the first and the second trial they had
7 received some reward money, and that fact was disclosed to us,
8 and so we brought that up I'm sure to try to establish that,
9 you know, that they had additional reasons to be sure of their
10 testimony and to reassert it, that type thing.

11 Q I believe they also prepared a composite immediately
12 after the incident?

13 A They did.

14 Q Who moved -- did you actually introduce that composite or
15 did the State introduce it?

16 A I don't recall, but I probably did. You got a picture of
17 it anywhere?

18 Q I do. If you'll --

19 A Let me see what it looked like. I can't remember exactly.

20 MR. THOMAS: May I approach the witness?

21 THE COURT: Yes.

22 BY MR. THOMAS:

23 Q I'm going to show you what's been previously marked as
24 Applicant's Number Eight. Does that look familiar?

25 A Yes.

1 Q Is that the composite they did?

2 A I, I guess it is. It says composite completed by
3 Hobbses. So I'm assuming that is it. Seem like I -- there
4 was another one that somebody -- well, somebody, there's a
5 composite that some potential witness did.

6 MR. THOMAS: May I approach, Your Honor?

7 THE COURT: Yes.

8 BY MR. THOMAS:

9 Q I'm going to show you what's also been marked as
10 Applicant's Number One.

11 A Yeah.

12 Q Does that look familiar?

13 A Yeah. Yeah.

14 Q And that's the composite that Clay [sic] Hensley did?

15 A Yes. And I'm -- that's the one I probably introduced if
16 I introduced one.

17 Q And so why would, why would you have introduced that?

18 A Well, it doesn't look a lot like John Frazier.

19 Q So does that help or hurt your argument to the jury?

20 A Well, I thought it helped. Hensley was a -- Hensley was
21 an individual who was down on the beach if I recall that night
22 that was interviewed by the police that said he saw somebody.
23 They got him to do a composite. I don't know whether we
24 called Hensley or not, but I don't think we did. I went to
25 Rock Hill, South Carolina, to meet with Hensley, I believe

Morgan Martin - Direct by Mr. Thomas

193

1 that's the guy, at an Applebee's to try to see what he could
2 do to help us, and I can't remember whether we used him or
3 not, but I remember searching that branch of the tree as far
4 as I could.

5 Q And but you did argue to the jury that neither of those
6 composites looked like Mr. Frazier?

7 A I'm sure I did. Yeah.

8 Q There was also --

9 MR. THOMAS: May I approach, Your Honor?

10 THE COURT: Yes.

11 BY MR. THOMAS:

12 Q There was also a photo lineup that was done in this case?
13 Do you recall that?

14 A Yes.

15 Q Sort of what were the circumstances or what was your
16 trial strategy as far as that photo lineup?

17 A Well, that it was suggestive. I forgot the exact basis I
18 had for that at the time, but once again, once again, what I
19 can tell you is the lineup, the way we attacked it, was it
20 important, did we pay attention to it, did we try to discredit
21 the lineup? Yes. Yes.

22 Q And did you have --

23 A In the best way that I knew how.

24 Q Well, did you have a witness -- you had a witness testify
25 about the lineup, Dr. Cutler?

1 A Elizabeth Loftus did. Yeah. I'm sure.

2 Q And you also had -- let me refer you to page -- in your
3 transcript there, it's going to be Volume IV, page 982.

4 A 982, yeah. I see that.

5 Q Does that refresh your recollection on what kind of
6 testimony you presented to discredit the lineup itself?

7 A Brian Cutler. Well, Tommy Brittain, it looks like,
8 questioned, but we presented Brian Cutler and, and to be
9 truthful with you, I had forgot that, but apparently we did.

10 Q He basically testified to the suggestiveness of the
11 lineup?

12 A Yes.

13 Q And I think you made a motion at one point to try and
14 exclude the entire Hobbses' identification?

15 A Yes.

16 Q Regarding that lineup, do you remember did an officer
17 testify as to how the lineup was compiled?

18 A I think there was an officer whose name was Rowe from
19 North Carolina who testified about how it was compiled and I
20 think presented.

21 Q And did you see any need to call any other officer to
22 testify about how they completed that lineup?

23 A If I did I would have.

24 Q But as far as the lineup went, once it was introduced was
25 that helpful for your defense as far as the experts looking at

Morgan Martin - Direct by Mr. Thomas

195

1 it and testifying about it?

2 A Well, yeah. I mean, my recollection is that we had
3 expert testimony that it was a suggestive lineup. Now,
4 whether, you know, that obviously did not carry the day, but
5 we believed it to be helpful or we wouldn't have entered it.

6 Q You definitely used their testimony to argue to the jury
7 that the lineup was suggestive and shouldn't be given any
8 credit?

9 A Correct.

10 Q Regarding jury sequestration, was the jury sequestered in
11 the first trial?

12 A I don't remember.

13 Q Was it, was it sequestered in the second trial?

14 A I don't remember.

15 Q Let me refer you, if you would, to page 50 in Volume I.

16 A Okay.

17 Q I guess -- I'm sorry. Page 49, starting on line 24, and
18 if you could just read through line or page 50, line 15.

19 A Yes. We requested sequestration I see, and I'm assuming
20 the Judge did that. That indicates we suggested sequestration
21 for the jury, asked for it.

22 Q But the Judge didn't -- the Judge ruled against that?

23 A I don't know. Did she? You know it better than I do.

24 Q If I told you the Judge ruled against that would that be
25 consistent with your recollection?

1 A Yes.

2 Q Why didn't you move for a change of venue in this case?

3 A I don't know. Maybe I did. If I didn't it's because I
4 didn't think we would get one, and/or when we went to pick the
5 jury there wasn't a basis for it because the potential jurors
6 failed to answer the questions in a manner which would give
7 you the basis to change venue.

8 Q So you had some fairly extensive voir dire with the jury
9 panel?

10 A I believe we did. Yeah.

11 Q And do you recall the Judge after every break did she ask
12 the jury as a group if they had had any discussions about it,
13 about the case, if they had heard anything?

14 A Yes. I think the Judge did a good job trying to be sure
15 that there was no outside influence on the jury.

16 Q Ms. Mishler testified in reply for the State. Do you
17 recall that?

18 A Yes.

19 Q You initially objected to that, but you withdrew your
20 objection. Did you see -- did you -- after you withdrew your
21 -- did you withdraw your objection because you saw any
22 problems with her testifying as a reply witness?

23 A Well, if I withdrew the objection it must have been
24 because I knew I didn't have a basis for one or I wouldn't
25 have withdrawn it.

Morgan Martin - Direct by Mr. Thomas

197

1 Q There were some issues with closing argument that you
2 stood up and objected to. Do you remember those?

3 A Not specifically I don't.

4 Q Let me direct you to Volume IV of your transcript.

5 A Okay.

6 Q If you'll look at page 1279, starting at line 11, just 11
7 and 12.

8 A Yes.

9 Q What was your objection there?

10 A I objected to arguments by the Prosecutor that the -- a
11 study we did at Wofford College in connection with the lineup
12 was bought and paid for. I objected and asked that it be
13 stricken from the record that the test was bought and paid
14 for, and the Judge did so.

15 Q And if you'll flip back to page 1266 the very bottom
16 starting at line or sorry.

17 A It would have been suppressed. I objected, said, "It
18 would have been suppressed as it should have been if it
19 illegally obtained." I objected, "That's far afield argument
20 under the fact the issue hasn't been determined whether or not
21 such was legal," and the Court said, "Yes. I'm going to
22 strike that. Disregard it and continue."

23 Q And there's also some mention, Solicitor Hembree goes
24 about, he tells the jury that, you know, Mr. Frazier has
25 committed some sins. Do you recall that? Do you recall why

1 you wouldn't have objected to anything like that?

2 A I don't recall that argument now.

3 Q Have you ever used sort of religious tinged language in a
4 closing of yours?

5 A I probably have.

6 Q Do you see anything wrong? I mean, do you recall
7 anything else in the closing argument you feel like you should
8 have objected to?

9 A Well, I objected to whatever I -- you know, obviously all
10 these years I don't remember the closing argument he made, but
11 I believe I would have objected to anything I felt was
12 objectionable.

13 Q I guess there were a few other witnesses that testified.
14 Mr. Bollow was the person who identified a black Blazer at the
15 -- Mrs. Renee Poole's house. Do you recall him?

16 A Yes.

17 Q Do you think there was anything else you could have done
18 to further impeach his testimony?

19 A No.

20 Q There was also a firearms expert from SLED, Mr. Collins.
21 Do you recall him?

22 A Yes.

23 Q And his -- the gist of his testimony was that any number
24 of guns could have been the gun that fired the fatal bullet?

25 A Yes.

Morgan Martin - Direct by Mr. Thomas

199

1 Q Did that testimony help or hurt your case?

2 A Well, it probably helped us.

3 Q And you argued to the jury that nobody could tie that gun
4 to Mr. Frazier?

5 A I'm sure I did because I believe that to be accurate.

6 Q You also did some investigation of Kahle Schettler's
7 Acura? Do you recall that, sending it off somewhere to be
8 processed for evidence?

9 A Kahle Schettler.

10 Q He was the, the friend who loaned the car?

11 A Yeah. I know who he was. John had borrowed his car. He
12 was working on John's car. Is that not correct?

13 Q That's correct. That was the testimony at trial.

14 A Bug splatter evidence, about whether or not that car had
15 been to Myrtle Beach, South Carolina, and we took the position
16 that it had not because it had insufficient bug splatter and
17 we -- I can't remember how we attempted to demonstrate that,
18 but I know we did what we could in connection with that.

19 Q Regarding -- so basically your, your argument was that
20 there was no physical evidence to tie him to the scene, at
21 least one of your arguments?

22 A That's correct. That's correct. I don't think there
23 was.

24 Q And did you -- you made a motion for directed verdict on
25 all charges?

1 A Yes.

2 Q And you made a post-trial motion to set aside the
3 verdict?

4 A Yes.

5 Q And let's move on, we talked a little bit about third-
6 party guilt. Did you have a discussion with Mr. Frazier about
7 third-party guilt?

8 A Yes.

9 Q What evidence did either your investigator or Mr. Frazier
10 provide to you regarding third-party guilt?

11 A I don't recall.

12 Q Was there ever any discussion about Bruce Wolford
13 possibly being a suspect?

14 A Oh, yeah. Yeah. Yeah. I'm sorry. You said evidence.
15 You know the thought was, "Well, maybe it was Bruce, Bruce
16 Wolford." Bruce had an affair with Renee. Bruce was an
17 interesting character. Bruce had long hair, ponytail. It was
18 a big ponytail issue at one time. Bruce had recorded he and
19 Renee having sex, and I mean, I, I, you know, I can't remember
20 what we introduced or didn't introduce, but we did what we
21 could I thought to create any implication we could that it
22 might have been Bruce instead of John.

23 Q Do you recall trying to introduce evidence of third-party
24 guilt at the first trial?

25 A Well, I'm sure if I did I didn't get it in.

Morgan Martin - Direct by Mr. Thomas

201

1 Q So what was your explanation to Mr. Frazier about why you
2 weren't going to try to do that in the second trial?

3 A I don't remember, but you know, had I thought that there
4 was evidence that would admit -- was admissible of third-party
5 guilt that could have assisted John I know I would have used
6 it.

7 Q Did you at least explain the standard of third-party
8 guilt to him?

9 A Yes.

10 Q And it's your testimony that you don't believe you had
11 sufficient evidence to meet that standard?

12 A That's true.

13 Q Okay.

14 MR. THOMAS: Beg the Court's indulgence.

15 THE COURT: All right.

16 BY MR. THOMAS:

17 Q Do you have any recollection of discussing with Mr.
18 Frazier the fact that Mr. Wolford maybe owed a nine
19 millimeter?

20 A As I sit here today I don't have a recollection of that.

21 Q And just -- you called Ms. Haymaker, Sharon Haymaker as a
22 witness at trial. Do you recall her?

23 A I recall the name. I can't remember exactly who Sharon
24 Haymaker was.

25 Q But safe to say if you called her at trial you would have

1 had -- did you have a conversation about her testimony before
2 you called her as a witness?

3 A Yes. Yes.

4 Q If she had testified to anything different at trial from
5 what she had told you, would you have, would you have tried to
6 get her to testify as to what she told you beforehand?

7 A Yes. Yeah.

8 Q So would it be fair to say that the substance of her
9 testimony at trial was consistent with what she told you
10 beforehand?

11 A I can't recall Sharon, Sharon Haymaker. What'd she
12 testify about?

13 Q I'll direct you to page, in Volume IV of your transcript,
14 direct you to page 1107, starting at line 10, sorry.

15 A Okay. I read that.

16 Q Is there anything in there that's inconsistent with what
17 you would have discussed with her before trial?

18 A No. Not that I can recall. Looks like the State called
19 her and I cross examined her; doesn't it?

20 Q You're right about that. I apologize, and in your
21 investigation did you ever find anybody that could place Bruce
22 Wolford in Myrtle Beach?

23 A No. I would have remembered that if I had.

24 Q I think that's all the questions I have for you, Mr.
25 Martin. If you'd just answer anything Ms. Williams has.

Morgan Martin - Cross by Ms. Williams

203

1 A Thank you.

2 Q Thank you.

3 THE COURT: Cross examination.

4 MS. WILLIAMS: Thank you, Your Honor. May it please the
5 Court?

6 CROSS EXAMINATION

7 BY MS. WILLIAMS:

8 Q Just briefly, Mr. Martin, as one point of clarification
9 with, with Ms. Haymaker, if you could look at Volume IV --

10 A Uh-huh.

11 Q -- page -- it's actually 1101. It's direct examination
12 by you. So you actually did call her?

13 A I did.

14 Q And then when you go to page 1108, page 17 and 18, line
15 17 and 18.

16 A All right. You, you want me to look at 1101?

17 Q Yeah. 1101 all the way at the bottom.

18 A Right. I see that.

19 Q Twenty-five it starts direct examination, go to the top
20 of 1102.

21 A Right.

22 Q So you were the one that actually called her; correct?

23 A I -- it, it looks like I did, yes.

24 Q Okay. Just to make sure we're clear on that. Now, Mr.
25 Martin, I'm going to hand you what's been marked for

1 identification only as Applicant's Four, Five and Six.

2 A Okay.

3 Q All right. Let's look at Number Five first, please.

4 A Okay.

5 Q Do you recognize that?

6 A Yes. I think I do.

7 Q And this is and you recognize this as what?

8 A Well, it says it's a confidential investigative report of
9 Wilson Security Agency.

10 Q And you know who -- and, and by recognizing this, if you
11 flip through it, does it bring back familiarity to you? I
12 want to make sure it's an accurate representation of what you
13 would have received as a report from Investigator Wilson.

14 A Well, you know, it, it looks somewhat familiar. It's
15 been a long time ago. I know that there was a report from
16 Daryl Wilson. He did work. I talked to Daryl many times. I
17 assume this is it.

18 Q Okay. Did you get multiple reports from him or would he
19 have done one big thick one?

20 A I don't know about multiple reports. I -- this is
21 probably the report, but I talked with him at different times
22 about different things.

23 Q Okay. And while we're at it, look at Number Six, please.

24 A Okay.

25 Q All right. And tell me if you recognize this or you can

1 identify this?

2 A Well, again, it's, it's hard to say. I -- but I'm sure
3 that if it was an interview that he did in the John Frazier
4 case, he sent it to me or I got it.

5 Q And let me ask you, is the report he prepared in the John
6 Frazier case, are you sure that it would have been a
7 report that he, he prepared, of course, and sent them to you;
8 correct?

9 A Well, I mean, he was an investigator, and I'm sure he
10 tried to give me what information he discovered.

11 MS. WILLIAMS: At this time I would move Exhibit Five and
12 Exhibit Six into evidence.

13 MR. THOMAS: We'd renew our, our authenticity objection,
14 Your Honor. I don't think he's, under Rule 901, I don't think
15 he's testified sufficiently that he recalls it, either one.

16 THE COURT: All right. Now, the first one he was talking
17 about was that Five or was that Four?

18 MS. WILLIAMS: Five.

19 THE COURT: Oh, okay. All right. Applicant's Exhibits
20 Five and Six are admitted into evidence over the State's
21 objection.

22 MR. THOMAS: Thank you, Your Honor.

23 MS. WILLIAMS: Thank you.

24 (Applicant's Exhibit Five [Investigative Report - Wilson
25 Security] and Applicant's Exhibit Six [Interview of Amy Marie

1 Dudas] admitted into evidence and appropriately marked.)

2 BY MS. WILLIAMS:

3 Q Mr. Martin, let me talk to you for a second about as the
4 Attorney General asked you at that time you, you tried this
5 case twice; basically?

6 A Yes.

7 Q And at the first trial you definitely tried to submit
8 evidence of potential third-party guilt; correct? If I told
9 you you did, you would agree?

10 A I couldn't disagree with that. I'm just telling you it's
11 been a long time ago, and I don't remember exactly what we
12 tried to submit.

13 Q All right. I got you. So but, as he said, if I, if I
14 told you that in reading the transcripts that you tried to
15 submit evidence of third-party guilt that Judge Peeples
16 suppressed, you would not disagree with me; correct?

17 A I would not disagree with that.

18 Q Okay. And then at the second trial was Judge Thomas,
19 which was basically five years later; correct?

20 A Yes.

21 Q Okay. And at that trial, at that time the, the current
22 -- the, the law that was the applicable part on third-party
23 guilt was different than it is today; right?

24 A I don't know.

25 Q Well, Holmes has come out since in the meantime but --

Morgan Martin - Cross by Ms. Williams

207

1 A Okay.

2 Q Okay. And at that time, if I were to ask you about the
3 evidence that you tried to submit, if, if we had evidence and
4 we did not put it in, do you recall why you would have not
5 tried to submit that evidence at that time or even proffer it?
6 And I'll give you specifics.

7 A Okay.

8 Q We're talking about third-party guilt.

9 A Okay.

10 Q Okay. Let's see. You had discussions with Investigator
11 Wilson numerous times, obviously with John, obviously with his
12 mother; correct?

13 A Yes.

14 Q And, and one of your theories was or their theories was
15 potentially that this could have been somebody other than John
16 and namely Bruce Wolford; correct?

17 A Yes.

18 Q All right. Do you recall why you did not submit or call,
19 for instance, let me, let me take it step by step. There was
20 other evidence that you knew and that you investigated that it
21 could have been Bruce Wolford.

22 A I don't know that now.

23 Q You don't know that?

24 A Huh-uh.

25 Q Did you try to call -- you said you went to Chris Hensley

1 on the -- Chris Hensley to Rock Hill and interviewed him;
2 correct?

3 A I believe that was Chris Hensley. Now, again, I went --
4 I know this. I went to Rock Hill to a restaurant and met
5 somebody there, and I'm thinking it was the guy that had done
6 this composite and who might be able to give testimony of
7 another person on the beach.

8 Q Okay. But that person was not called to trial, if he was
9 not listed in the transcripts, then he didn't come to testify;
10 correct?

11 A No. He didn't.

12 Q Do you recall why you did not call him?

13 A Because I didn't think he would do me any good. I
14 thought he would hurt me or I would have called him.

15 Q Okay. Do you recall that if it had anything to do with
16 trying to point to third-party guilt and you could not
17 actually direct third-party guilt at that time?

18 A I don't know how to answer that question. You know, what
19 happens is with, with the numerous witnesses that may -- that
20 you may want to call at trial, you go talk to them, you
21 evaluate their testimony, and I think you have to figure out
22 if you think they're going to help you at the end of the day
23 or not, and I can't specifically -- I remember -- I mean, for
24 example, the boy that I went to interview in Rock Hill, I wish
25 very badly that he would have been a witness that I could have

Morgan Martin - Cross by Ms. Williams

209

1 put up to say something that would have helped John because I
2 would have done that, but it had to be my conclusion at the
3 end of the day that that didn't help us. Now, I can't
4 remember why I came to that conclusion, but clearly, I put a
5 lot of effort into trying to defend him the best I could.

6 Q And there is no doubt that you didn't proffer Chris
7 Hensley's testimony at the trial because he did not testify;
8 correct?

9 A True.

10 Q Okay. So anything he could have said or would have said
11 was not proffered at the second trial?

12 A It was not.

13 Q Okay. And for instance, Number Six that was just
14 admitted into evidence, Amy Marie Dudas --

15 A Uh-huh.

16 Q -- she was not called as a witness at the second trial;
17 correct? To tell you, let me, let me say this, if she's not
18 in the transcript and her testimony is not in the transcript
19 of the second trial, it'd be safe to say she wasn't called;
20 correct?

21 A Yes. That's correct.

22 Q Okay. And if she wasn't called, then it's also safe to
23 say you didn't call and proffer any of the testimony she could
24 have potentially given; correct?

25 A That's correct.

1 Q All right.

2 MS. WILLIAMS: Beg the Court's indulgence.

3 THE COURT: All right.

4 BY MS. WILLIAMS:

5 Q Let's change gears for a minute and let's talk about SLED
6 Agent Collins. You recall as the Attorney General pointed out
7 to you, his testimony was about the gun; correct, the gun that
8 was used --

9 A Yes.

10 Q -- at the --

11 A Yeah.

12 Q -- scene?

13 A There was a SLED agent that testified about the gun.
14 Yes.

15 Q All right. And if I'll show you in the transcript page
16 818, highlighted 16 through 18 to 20, if you'll read those out
17 loud that I highlighted.

18 A "But that TZ75 is one of the weapons that could have
19 fired these nine millimeter rounds?" "Yes. I would not
20 exclude a TZ75 at all being possible, as a possible source for
21 these rounds."

22 Q So in -- to your recollection the TZ75 was what could
23 have been the murder weapon; correct?

24 A It was one of several weapons that could have fired those
25 shots I think.

Morgan Martin - Cross by Ms. Williams

211

1 Q But it was not -- and -- but it was a Glock could not
2 have been; is that your recollection from the testimony? Let
3 me point you to page 826.

4 A Yeah. "Okay. So in this case whatever you examined here
5 you were able to determine that the cartridges that were fired
6 were not from a Glock pistol?" "That is correct," is the
7 answer.

8 Q All right. So we knew it wasn't a Glock, but it could
9 have been a TZ75, possibly.

10 A Right.

11 Q All right. Now, let me point you to page 828 where I
12 highlighted.

13 A You want me to read it?

14 Q Yes, sir.

15 A The question is, "All right. And there are literally how
16 many guns out there that could have fired?" Answer,
17 "Thousands." Question, "Maybe millions?" Answer, "I would.
18 It could be as high as millions. I would hesitate to say
19 without having the information."

20 Q So that was Agent Collins's testimony that it could have
21 been millions of possible guns?

22 A Yeah.

23 Q And instead of objecting to that testimony as highly
24 prejudicial, not probative, you actually thought it was -- I
25 think your testimony was you thought it would be helpful?

1 A Yeah. I think so.

2 Q Because at that point Mr. Frazier did definitely own a
3 Glock; correct?

4 A That's correct.

5 Q Okay. So that was more of your trial strategy, and
6 that's what I'm asking, as opposed to trying to keep it out,
7 you thought it would be helpful in letting it in.

8 A Well, I don't remember whether I tried to keep it out,
9 couldn't keep it out and didn't think I could keep it out or
10 not, but I do know that at the end of the day the thought or
11 the strategy was that they can't establish that John Frazier's
12 gun or a gun like he once owned is the gun that shot and
13 killed Brent Poole. There was some testimony, I think, that
14 he one time owned the pistol that -- type pistol we were
15 talking about, but they couldn't establish that that's the
16 type pistol that shot him.

17 Q Okay. And -- okay. So that was your -- that's why you
18 -- that's what you thought at the end of the day --

19 A Yeah.

20 Q -- that it was more helpful than harmful?

21 A Yes.

22 Q All right. Now, when the Attorney General was asking you
23 about objecting to the reply testimony of Dee Mishler, as he
24 pointed out in the transcript, you actually withdrew your
25 objection?

1 A Yes.

2 Q All right. Do you recall having a conversation with John
3 or talking that that as it transpired, as that testimony came
4 down, you had called John's sister to testify that he was not
5 in love with Renee Poole. The prior testimony was basically
6 yes he was. Correct?

7 A I think that's true. Yes.

8 Q All right. And you objected at first, and they were
9 like, "Well, we just learned about it," and then it came up
10 that, "Well, no, really we had it and we had given it to them
11 in the Poole family interviews"; correct?

12 A You know, I've saw some of that in the transcript, but I
13 -- the independent recollection of it, I don't have.
14 Whatever's in the transcript is in there.

15 Q Page 1162, you start looking at it, conversation outside
16 the presence of the jury, you start looking at about number,
17 where number 16 is.

18 A You want me to read it?

19 Q No, sir. If that'll refresh your memory.

20 A Yeah. Looks like I withdrew my -- "I will withdraw my
21 objection, the proffer, the whole thing. Let's go." So I
22 withdrew my objection to that testimony it looks like.

23 Q All right. You withdrew it. All right. And 1162 I want
24 you to see this -- so you'll understand the argument.

25 A Just read this so I can understand. Is that what you're

1 saying?

2 Q Yes, sir. When you read like through nine through 15.

3 A Okay. I've, I've read that.

4 Q All right. So you initially objected and then you
5 withdrew your objection. Can you tell me why you withdrew
6 your objection?

7 A I cannot. The only thing that -- I can only surmise it's
8 because I, I felt like I didn't have a valid objection, but I
9 don't recall for certain.

10 Q Do you recall having them discuss with you that they had
11 actually provided her some testimony and her statements to you
12 in the Poole Family interviews?

13 A I don't recall. I mean, I just don't have any
14 recollection of that.

15 Q That's fine.

16 A Today.

17 Q Okay. And, and let me ask you this specifically, do you
18 recall discussing those Poole Family interviews with Mr.
19 Frazier and/or his mother at any time during the --

20 A No.

21 Q -- preparation for the trial?

22 A No.

23 Q All right. I want to show you in the transcript page
24 1286, part of Mr. Hembree's closing argument, and I've
25 highlighted some of the words to refresh your memory when he

Morgan Martin - Cross by Ms. Williams

215

1 talked about sins of John Frazier, and he, he did and he
2 called it a diabolical evil; correct?

3 A Right.

4 Q All right. And then when you go to the next page on page
5 1287 you can see where you actually did object; correct?

6 A Yes.

7 Q And what was your objection and what, what did you ask
8 the Court to do based on his repeated use of sins?

9 A "I object. I object, and ask that this entire line of
10 argument be stricken from the record." "Whereupon, a bench
11 conference was held in the presence," and then the Court came
12 back, "All right. Ladies and gentlemen, if you will disregard
13 the last argument and that is about the impact that it may or
14 may not have on the daughter in this case. That is not for
15 your consideration. I'll tell you more about it later."
16 Well, it doesn't say what the basis for my objection was.

17 Q Did you move for a mistrial?

18 A I don't think I did. Did I?

19 Q If I were to tell you it wasn't in the transcript
20 anywhere that you moved for a mistrial would you -- that you
21 did not move for a mistrial would you disagree with me?

22 A I would not disagree with you.

23 MS. WILLIAMS: Beg the Court's indulgence just another
24 moment.

25 THE COURT: All right.

1 BY MS. WILLIAMS:

2 Q When the Attorney General asked you when you did make an
3 objection about the Solicitor arguing that your defense was
4 bought and paid for, in looking at that, did that refresh your
5 memory about that?

6 A Yes.

7 Q All right. And you did object to that and ask that part
8 of that be stricken; correct?

9 A Yes.

10 Q Did you move for a mistrial at that point?

11 A No. I don't recall and nor do I think I did.

12 Q Do you recall at any time as the statements were made,
13 and let me ask you this, is it fair to say that you did object
14 more than once during Solicitor Hembree's closing arguments?

15 A Well, I know of twice at least. Yes.

16 Q Okay. And if, and if I were to tell there were actually
17 other objections to various things that he said, you would not
18 disagree with me; correct?

19 A I would not.

20 Q All right. And do you recall at any point going through
21 those and as you continually made objections and asked that
22 things be stricken, did you ever make a motion for a mistrial?

23 A Not that I recall.

24 Q Do you know why you didn't make that motion?

25 A I didn't feel it was appropriate, I guess, or I don't

Morgan Martin - Cross by Ms. Williams

217

1 know.

2 Q Okay. Mr. Martin, I'm going to hand you what's entered
3 into evidence as Applicant's Number 12 and Applicant's Number
4 16, ask you to look at those for a minute.

5 A Okay.

6 Q Both of those are -- it is taped -- it's transcribed
7 interviews of Mark Hobbs; correct?

8 A Yes.

9 Q And they're both dated for the same day as in they're
10 two transcriptions of the same interview; correct?

11 A Yes.

12 Q Do you recall those interviews and those transcriptions
13 there?

14 A Yeah. Uh-huh.

15 Q And you recall that there is a discrepancy in those
16 transcriptions; correct?

17 A Yes.

18 Q And it's fair to say that you actually, at the first
19 trial with Judge Peeples, those were entered into and you made
20 a large argument about those different transcriptions;
21 correct? If I were to tell you that was in the, in the
22 transcript you would not disagree with me; right?

23 A I would not disagree with you.

24 Q All right. And, and I'm correct in saying both of those
25 were provided for you guys from the -- as part of discovery;

1 right?

2 A There was audiotape -- if I recall correctly, there was
3 an audiotape that was provided. Yes.

4 Q And then the -- normally the transcriptions the Solicitor
5 transcribes them? You don't recall -- you guys didn't
6 transcribe them; correct?

7 A Yes. We did. This one's my office.

8 Q One's from your office and one's from the other?

9 A I'm pretty sure that's right. Yes.

10 Q Okay.

11 A I can look at it to -- typing and tell.

12 Q All right.

13 MR. THOMAS: Could he just -- Your Honor, could I just
14 have him identify for the record which ones he's identified as
15 his office's.

16 A Applicant's 16 looks to me to be -- to have been typed in
17 my office, and then Applicant's 12 is an apparent
18 transcription of the same thing that was produced by the
19 Solicitor's Office.

20 Q And they say different things; correct?

21 A They do.

22 Q All right. And do you recall in your attempts to
23 suppress the Hobbses' identification and the whole Hobbses'
24 testimony using those two variations of what Mark Hobbs's
25 initial statements were in the motions?

1 A I don't know whether I did or not. You mean did I use
2 the fact of what was said at the or purported had been said in
3 this in order to suppress the lineup and identification?

4 Q Correct.

5 A I'm not sure.

6 Q All right. And the argument about the ponytail versus
7 non-ponytail, light hair versus non-light hair, distances,
8 those are the discrepancies in those different transcriptions;
9 correct?

10 A Yes.

11 Q All right. And if the transcript did not include those
12 variations or doesn't include the arguments about that then
13 it's safe to say you didn't make arguments about those;
14 right?

15 A Right.

16 MS. WILLIAMS: Beg the Court's indulgence for just one
17 moment.

18 THE COURT: All right.

19 BY MS. WILLIAMS:

20 Q Mr. Martin, do you recall this crime happened in early
21 June and then the Hobbses eventually did, as you said, they
22 did that initial composite a couple of days after the murder;
23 correct? And then they did a lineup probably a month or so
24 later.

25 A That seems correct.

1 Q Okay. And do you recall in conversations with John and
2 reviewing the evidence that, that it's standard Myrtle Beach
3 Police procedure to record every interview, every description,
4 you know, every time that they interview potential witnesses;
5 right?

6 A Ask me that again.

7 Q Well, let me ask you this, if there's testimony that
8 Lieutenant -- Detective Frontz gave about it's standard police
9 policy to record interviews that would -- you would assume
10 that's Myrtle Beach Police policy; correct?

11 A If he said that I'm assuming it was.

12 Q All right. And if you -- every piece of evidence that
13 was given to you was in your discovery box and you shared with
14 the Defendant and his -- and/or his mother and/or the
15 investigator; correct?

16 A Yes.

17 Q All right. So if the police had given you something you
18 would have given it to them; right?

19 A I believe I would have. Well, I don't know about giving
20 it to them. We would have gone over, talked about it.

21 Q Reviewed it and made them aware of it.

22 A Right.

23 Q I'll be correct. All right. So if, if there was
24 evidence that was not provided to you, then they would have
25 not seen it as well?

Morgan Martin - Cross by Ms. Williams

221

1 A That is true.

2 Q All right. So if evidence was not given to you,
3 interviews, other interviews, written, documentations, things
4 of that nature, if you didn't have it, they wouldn't have seen
5 it; correct?

6 A That's true.

7 Q All right. My client in filing his PCR alleges that
8 Detective -- that Detective Frontz in part of his testimony
9 says that it's standard Myrtle Beach Police procedure for all
10 interviews to be recorded. Okay. The Hobbses obviously came
11 to Myrtle Beach and did that composite two or three or four
12 days after the murder.

13 A If my recollection's right, they were still in Myrtle
14 Beach.

15 Q Correct. And my client alleges that there was no
16 written statements, no recording of that whole interview
17 wherein they created the composite.

18 A Okay.

19 Q All right. Do you recall making motions at trial about
20 why you weren't provided those particular tapes?

21 A I don't recall that.

22 Q All right. Do you recall or is it safe to say that if my
23 client alleges that he's never seen them then you wouldn't
24 have gotten them to give them to him; correct?

25 A Correct.

1 Q All right. So if it wasn't provided, you don't recall
2 making motions, and if it's not in this transcript, you didn't
3 make motions about it?

4 A Well, I don't -- no. I mean, I file motions as I go
5 along in a case about produce this, produce that. Now, that
6 wouldn't be in a transcript of this trial. I don't have an
7 independent recollection of whether I -- but generally I, I
8 file a motion to give me a copy of any recorded interviews of
9 any and all witnesses. Now, I can't, you know, specifically
10 today on the stand did I do that in that case? I don't know.

11 Q Okay.

12 MS. WILLIAMS: Beg the Court's indulgence.

13 BY MS. WILLIAMS:

14 Q Mr. Martin, let me ask you this, and I don't -- you've
15 been practicing law for a while, and you've been a criminal
16 defense prosecutor and a criminal defense lawyer; correct?

17 A Yes.

18 Q And there is no doubt that you tried and I think in your
19 opinion it's safe to say you tried to put a good defense on
20 for Mr. Frazier?

21 A Yes.

22 Q And you got experts and, and tried to under what you
23 considered to be the law at that time to present the best
24 defense you could present; correct?

25 A I did.

1 Q Is it a fair question to ask you that in hindsight there
2 would have been things you would have done differently?

3 A Usually there is. I don't know that I've ever tried a
4 case that hindsight if I was doing it again I might do
5 something a little differently. I can't remember anything
6 particular in John's case that I wish I'd done differently,
7 but then I don't remember a lot of it.

8 Q Is it fair to say that as a lawyer you know that while
9 you may have tried a good case it's fair to say you maybe
10 didn't try a perfect case?

11 A Absolutely.

12 Q Okay. And as we say that there may have been the best
13 intentions, there certainly could have been mistakes made, and
14 even if they weren't intentional they were still mistakes?

15 A Absolutely.

16 MS. WILLIAMS: Your Honor, that's all the questions that
17 I have.

18 THE COURT: All right. Redirect?

19 MR. THOMAS: May it please the Court?

20 THE COURT: Yes, sir.

21 REDIRECT EXAMINATION

22 BY MR. THOMAS:

23 Q There were a lot of times that you objected to things and
24 the Judge issued curative instructions?

25 A Yes.

1 Q Generally, if you're -- what's your practice -- is it
2 your practice to move for a mistrial in the face of a curative
3 instruction if you don't feel like it's not warranted?

4 A It is not.

5 Q Regarding the jury you had, do you think you could have
6 gotten a more fair, a more impartial jury?

7 MS. WILLIAMS: Your Honor, I'm going to call for
8 speculation on that. Object.

9 MR. THOMAS: I mean, Your Honor, we --

10 THE COURT: Well, he's arguing about the sequestration
11 and that it was not an objective. So I'm -- overruled. I'll
12 allow it.

13 BY MR. THOMAS:

14 Q You feel like you got an objective jury, an impartial
15 jury?

16 A Well, I feel like we got as good a jury as we could get,
17 I guess, and if I wasn't moving for a mistrial it's either
18 because I didn't want a mistrial or I didn't feel like I had
19 grounds for a mistrial or I guess I made a mistake and should
20 have and I didn't, one of the three.

21 Q You ever tried a perfect case?

22 A No, sir. I don't think so.

23 Q Have you ever seen one tried?

24 A I don't know that I have. It's difficult to try a
25 perfect case.

1 Q Regarding this case, you tried it twice?

2 A Yes.

3 Q You think your second one was better than your first one?

4 A You know, it's, it's, it's hard to answer that question.

5 Yeah, I think we -- I think yes because the first trial was

6 extremely difficult with Judge Peeples, and I think the second

7 trial was a better trial for John.

8 Q Is there anything you could have done to be more prepared
9 for this second trial?

10 A No.

11 Q That's all I have. Thank you, Mr. Martin.

12 THE COURT: All right. You may step down. All right.

13 A I'm assuming I can leave, Judge?

14 THE COURT: Any objection?

15 MS. WILLIAMS: No objection from us.

16 MR. THOMAS: No objection, Your Honor.

17 THE COURT: You're free to go. Thank you very much.

18 The State can call their next witness or do we recess

19 until --

20 MR. THOMAS: Your Honor, I would, I would request we
21 maybe take our lunch break now. Mr. Hembree or Mr. Humphries
22 is going to be here at one.

23 THE COURT: One. All right. We'll be in recess until
24 1:00 o'clock.

25 MR. THOMAS: Thank you, Your Honor.

1 THE COURT: Thank you.

2 MS. WILLIAMS: Thank you, Your Honor.

3 ***** OFF THE RECORD *****

4 (On the record.)

5 THE COURT: All right. Mr. Thomas, we ready to proceed?

6 MR. THOMAS: At this time, Your Honor, the State would
7 call Mr. Fran Humphries to the stand.

8 THE COURT: All right, sir.

9 Whereupon, Francis Allen Humphries, Jr., was called to
10 the stand, duly sworn by the clerk and testified as follows:

11 THE CLERK: Please have a seat. State your name for the
12 court and spell your last name.

13 MR. HUMPHRIES: Francis Allen Humphries, Jr., H-U-M-P-H-
14 R-I-E-S.

15 MR. THOMAS: May it please the Court?

16 THE COURT: Yes, sir.

17 DIRECT EXAMINATION

18 BY MR. THOMAS:

19 Q Thank you, Mr. Humphries, for being here today. I guess
20 some background information. How long you been practicing
21 law?

22 A Twenty-six years.

23 Q And sort of what's your experience, in what capacity have
24 you been practicing?

25 A I law clerked for Judge Bell at the Court of Appeals for

Francis Humphries, Jr. - Direct by Mr. Thomas

227

1 a year, prosecuted in the Ninth Circuit for three years,
2 prosecuted in the 11th Circuit as an assistant solicitor and
3 the chief deputy for seven years, and then the chief deputy
4 solicitor in Horry County for 12 years before I retired. I've
5 been in private practice since January of 2010 I think.

6 Q So I feel like you're probably not getting a whole lot of
7 time off in your retirement then.

8 A I'm, I'm getting more time off now than I did as a
9 prosecutor. I'll say that.

10 Q You've had an opportunity to be familiar with -- to be
11 involved in the cases involving the murder of Mr. Poole?

12 A I tried both of them.

13 Q When did you first become involved with Mr. Frazier, the
14 case against Mr. Frazier?

15 A I actually became involved with Mr. Frazier's case and
16 the companion case shortly after I came to work for Solicitor
17 Hembree in the 15th Circuit, which would have been in '99. Was
18 it '99 -- '99.

19 Q And regarding your, I guess, procedures in your office,
20 did you all generally have an open-file policy or did you turn
21 over everything that was requested in discovery? What was
22 your sort of policy on disclosure?

23 A We did not have an open file policy. We did, however,
24 disclose everything that -- not only that was requested, but
25 it was compelled by Brady and its progeny, and we had a very

1 liberal discovery policy, particularly in the cases I was
2 involved in and major cases. There were no close calls.

3 Q Specifically regarding this case, is there anything you
4 didn't turn over?

5 A No.

6 Q There were -- I believe there were several statements
7 provided by the Hobbses. What was their sort of role in this
8 case?

9 A I believe it's Mark and Donna Hobbs. They were a couple
10 from Goodview, Virginia, who were vacationing at the same time
11 Brent was murdered down here at the beach, staying at a, at a
12 local high-rise hotel. I think they were on their anniversary
13 as well, had come down with their children, and they were on
14 the beach the night of the murder. They, they ultimately
15 were, particularly Mr. Hobbs, but both were identification
16 witnesses that established the identity of John Boyd Frazier
17 as the killer.

18 Q And did they ever waiver in their identification?

19 A No, sir. Not once.

20 Q But were there some, I guess, in terms of the different
21 statements they had given at various times and the testimony
22 they gave, were there some, I guess you could say,
23 differences, minor differences in there?

24 A I don't recall specifically. It would, it would surprise
25 me, especially given the length of time that transpired from

Francis Humphries, Jr. - Direct by Mr. Thomas

229

1 the investigation to the second trial, if there weren't some
2 minor immaterial inconsistencies, but in terms of anything
3 that was material to the case, there were no inconsistencies
4 that I can recall.

5 Q As far as all of their statements and all of their
6 testimony and everything you had from them, you turned all
7 that over to the Defense?

8 A I did.

9 Q They had an opportunity to make a composite of the person
10 they thought they saw as well; didn't they?

11 A They did.

12 Q What was their opinion of that composite?

13 A That it was not, it was not very reflective of, of whom
14 they saw.

15 Q They also identified Mr. Frazier out of a photo lineup?

16 A They did.

17 Q And did you have the officer who prepared that photo
18 lineup come to testify?

19 A I did.

20 Q I believe the Hobbses received some reward money after
21 the first trial?

22 A My recollection is they did. I don't know, quite
23 frankly, if they sought it or not, and I don't remember how
24 much it was.

25 Q But you do remember having a discussion about that at the

1 second trial?

2 A I think so. Yes.

3 Q Regarding their testimony on the stands, their testimony
4 on the stand, do you believe that the Hobbses, or for that
5 matter, do you believe any of the witnesses you called
6 perjured themselves?

7 A No, sir.

8 Q You also called Ms. Mishler as a reply witness. Why'd
9 you do that?

10 A It was responsive to the Defense case. I don't recall
11 the specific reason, may have had something to do with the
12 relationship, but it wasn't something that was fairly
13 anticipated at the time, but she was available. She was the
14 -- she was in the victim's family. She was present, and she
15 had testimony that bore on that issue that was raised in their
16 case.

17 Q There were some objections made during Solicitor
18 Hembree's closing arguments. Do you remember those?

19 A I recall that there were objections. I don't recall as
20 to what. I don't recall the Court's ruling on them
21 specifically. They're closing arguments in a, in a death
22 case. That -- it would not be unusual to have objections both
23 from the State and the Defense in that kind of case.

24 Q And I believe there were some, some discussion in those
25 closing arguments about Mr. Frazier's sins. I guess, was it,

1 was it a common practice for you to discuss things like
2 someone's sins in a closing argument or was that sort of --

3 MS. WILLIAMS: Your Honor, I'll object to the
4 materiality. It was Mr. Hembree's closing, not Mr. Humphries'
5 closing actually that we're objecting to and that was at issue
6 in this case.

7 THE COURT: Overruled. I'll allow it. Go ahead.

8 A Obviously a closing argument is intended to be
9 persuasive, and it's common practice among trial lawyers that
10 try these kinds of cases in particular to, to try and portray
11 the case in, you know, in a way that's persuasive. I don't
12 know that I ever used that example, but I'm certainly I've,
13 I've used similar.

14 Q And just everything that Mr. Hembree did at trial you
15 discussed it with him before he would have done it? You all
16 tried the case together?

17 A We, we did. We tried it both times together, and we
18 tried many other cases, many other death cases together, and
19 it was our practice to discuss every aspect of the case in
20 trial preparation and during the trial.

21 Q I believe you said you were also involved in the Co-
22 Defendant's trial?

23 A I was. That was the first of the two cases we tried.

24 Q And sort of what was the State's evidence against the Co-
25 Defendant?

1 MS. WILLIAMS: Your Honor, I'll object to that. I don't
2 think that is relevant as to why we're here today.

3 THE COURT: What's the relevancy?

4 MR. THOMAS: Your Honor, I'm trying to establish the
5 evidence they gathered for -- honestly, they used third-party
6 guilt as a defense in the Co-Defendant's case, and so I want
7 to get into that discussion with him about what happened to
8 that, how it was developed in the Co-Defendant's trial.

9 THE COURT: Overruled. I'll allow it.

10 A The Defense -- well, it was complex in that we had a
11 series of statements from that Co-Defendant, each becoming
12 more inculpatory as the, as the statements progressed and each
13 as they progressed pointing more directly at John Boyd Frazier
14 as the shooter. That combined with a substantial, in my
15 opinion, amount of circumstantial evidence and other evidence
16 that would have corroborated her statement I think ultimately
17 led to the, to the conviction.

18 Q And so just kind of getting back to what I'm getting at
19 here, what were her defenses?

20 A You know, I don't recall specifically exactly what her
21 defenses were. I know there was a suggestion that, that she
22 was less involved or that at some point she was involved but
23 withdrew from this, this conspiracy, if you will, and that
24 someone else may have done it. She initially identified, I
25 believe, a black man as the shooter, and that ultimately

Francis Humphries, Jr. - Direct by Mr. Thomas

233

1 evolved it could have been John Boyd Frazier and that was
2 after the State learned of that relationship, and then after
3 the Myrtle Beach Police Department made contact with him, very
4 shortly after, and there were obviously there were some
5 suspicious things about that contact that gave rise to further
6 investigation of him as a suspect. That then led to, to
7 ultimately her testifying or giving a statement that indicated
8 that he was the shooter. I think that was about the time she
9 indicated that, you know, there, there had been such a plan to
10 murder her husband, but the suggestion was that she had
11 withdrawn or didn't believe he would do it.

12 Q And you said something about she also raised the issue of
13 somebody else may have done it?

14 A I believe there was the -- if I -- if I recall correctly,
15 and, and that there was a former co-worker perhaps. I think
16 his name was Bruce -- I'll get the last name wrong, Wolford
17 maybe. I'm not sure, and there was a suggestion based on I
18 think that first composite that, that he may have been a
19 potential suspect. Throughout the -- through the
20 investigation I believe that we were able to establish that,
21 that he was not. There was a concern in or there was an issue
22 raised in Ms. Poole's case concerning a transcript of the
23 Hobbses, which we later learned was not the State's
24 transcript. It was Morgan Martin's transcript where they were
25 talking -- where he had -- I'm not -- certainly not suggesting

1 intentionally, but whoever transcribed that statement
2 indicated that, that I believe Mark Hobbs said something about
3 a ponytail. Ultimately, that, that issue was resolved by
4 providing those tapes to a certified stenographer, and it was
5 clear from that transcription that it, it was "hard to tell"
6 and not "a ponytail", but that was an issue, and that -- and
7 Bruce I think at one time may have had a ponytail.

8 Q And so just so I'm clear, the Hobbses never stated that
9 they saw someone with a ponytail on the beach?

10 A No. No.

11 Q And you never -- did you ever tell them to change their
12 testimony in any way?

13 A No.

14 Q Regarding that third-party evidence that Mr., Mr. Diggs
15 -- back up. Strike that. Mr. Diggs represented --

16 A Ms. Poole.

17 Q -- the Co-Defendant?

18 A Yes.

19 Q Regarding his motion to introduce third-party guilt
20 evidence, how did Judge Cottingham rule on that?

21 A He ruled that it was inadmissible, that it failed to meet
22 the threshold requirements. Simply, that it raised -- it
23 simply raised a mere suspicion and didn't rise to the level
24 necessary for admission into evidence due to its lack of
25 reliability.

Francis Humphries, Jr. - Direct by Mr. Thomas

235

1 Q Did you ever try to pressure Kahle Schettler to testify
2 that the handgun misfired instead of jammed?

3 A Did I pressure him? No. No. I did not pressure him.

4 Q And just if you could briefly -- well, no, I think you've
5 already done that, but just walk through this with me, the
6 evidence against Mr. Frazier at trial. It all started with
7 the confession from the Co-Defendant?

8 A It did.

9 Q But that wasn't produced at trial?

10 A It -- well, it wasn't admissible under the circumstances.
11 She still had her -- well, honestly, on the second trial, I
12 don't know if she had her Fifth Amendment privilege intact or
13 not, but she was an unwilling witness, and so that was not
14 available, but that, that statement obviously led to further
15 investigation of John Boyd Frazier. There were a number of,
16 number of pieces or items of evidence both physical through
17 photographs and through witnesses which I believe established
18 that, that he stayed home from work during the, during the
19 critical time, feigning that he was sick, that he borrowed a
20 vehicle from another person. There was the handgun, which was
21 similar in caliber and was a -- and the make of the handgun
22 was, was among a list of handguns that could have fired the --
23 the fatal projectiles, that it did have the or it had in the
24 past malfunctioned by -- in the, in the fashion that it
25 occurred at the murder scene. The vehicle that was used was,

1 if I recall correctly, was cleaned. I don't recall whether it
2 was cleaned meticulously. Either the car was clean and that
3 was not the way it usually was or the car was not clean and
4 that's not the way it was. In any event, there was something
5 about the vehicle that would suggest that there had been some
6 attempt to cover up some evidence. The identification of the
7 Hobbses of Mr. Frazier I thought was particularly compelling,
8 and of course then the, the long established relationship
9 between Renee Poole, who was the wife of Brent at the time,
10 and Mr. Frazier, which was -- we established I think through a
11 number of sources.

12 Q Thank you, Mr. Humphries. I'll ask you to answer any
13 questions Ms. Williams has.

14 A Be glad to.

15 THE COURT: Cross examination.

16 MS. WILLIAMS: May I approach the witness?

17 THE COURT: Yes, ma'am.

18 CROSS EXAMINATION

19 BY MS. WILLIAMS:

20 Q Mr. Humphries, I'm going to hand you Applicant's Number
21 14, which is Mr. Hobbses' testimony from the 2005 trial, page
22 729. Ask you to please read what's highlighted from 11 to 20.
23 If you would, read it aloud.

24 A I will. Line 11, question, "All right. So my question
25 to you, Mr. Hobbs, and I don't want to belabor it again, but

Francis Humphries, Jr. - Cross by Ms. Williams

237

1 did you -- could you tell whether it was a hood or a
2 ponytail?" "No, sir." "Could it have been either one?
3 Couldn't it?" "Yes, sir." "All right, sir. But in spite of
4 the fact that you couldn't tell whether it was a hood or a
5 ponytail, you're saying you could pick his eyes out in the
6 dark; am I right?" "Yes, sir."

7 Q All right. So there was obviously a question and it was
8 an issue of whether or not it was a ponytail or not; correct?

9 A No. Let me, let me be clear that the issue was in regard
10 to the ponytail there was a transcript from an initial
11 statement to law enforcement by the Hobbises where Mr. Martin's
12 transcript indicated that he said ponytail. That was
13 clarified when a certified stenographer went through that
14 taped statement and those words did not appear. They were --
15 that was a mis-transcription.

16 Q In fact, so let me ask you, so did -- to your
17 recollection did that certified transcript get entered at
18 trial?

19 A That certified transcript was required by Judge Peeples
20 to, to decide that issue. I don't recall as to whether or not
21 it was entered at trial or not. I know that there was some
22 confusion because Mr. Diggs was working off of the transcript
23 that Mr. Martin's office had prepared. The State was working
24 off of ours, and they were two different transcripts, at least
25 in that particular.

1 Q Okay. So what you're saying is that the stenographer
2 said that that's what they heard, and that was their certified
3 version of the transcript?

4 A I'm saying that the certified stenographer in her
5 transcript indicated that the words were as I recall, "it's
6 hard to tell", and it was not "ponytail".

7 Q Okay.

8 A And that resolved the issue as it relates to that.

9 Q Okay. All right. A couple of parts of the transcript
10 I'd like for you to read out loud. This is Applicant's Number
11 14, Mark Hobbs's testimony from the 2005 trial, page 737,
12 lines four through 14.

13 A Question, "Now, did you -- after you went back to
14 Virginia did you have any conversation with anybody from the
15 Myrtle Beach Police Department yourself?" Answer, "I don't
16 recall it. No, sir." Question, "Did your wife?" Answer,
17 "May have. Yes." Question, "To your knowledge?" "Yes, sir.
18 Could my wife to my knowledge?" Question, "Have a
19 conversation with somebody from the Myrtle Beach Police
20 Department?" Answer, "One of us did. Yes, sir."

21 Q Okay. Applicant's Number 17, Donna Hobbs's transcript of
22 the 2000 trial, bottom of page 1129, number 20 through 25 and
23 then just to the very top of the next page of 1130 to like
24 number six. Start right now.

25 A Question, "And did you have any conversation with Myrtle

Francis Humphries, Jr. - Cross by Ms. Williams

239

1 Beach Police Department between the 9th and the 28th?" Answer,
2 "I can't remember if I did." Question, "Do you -- you do not
3 recall talking to Detective Terry Altman?" Answer, "I may
4 have. I talked to him several times on different occasions."
5 Question, "Which occasions did you talk with Terry Altman?"
6 Answer, "I can't tell you exactly. I didn't write them down."
7 Question, "All right. You don't know whether it was before or
8 after the 28th?" Answer, "I can't. I can't remember."

9 Q And then Applicant's Number 11, Mark Hobbs's testimony
10 from the 2000 trial, page 1068, number 21, 25 and just the
11 first three lines on the top of the next page.

12 A Question, "Did they take a taped statement of what you
13 had to say there?" Answer, "I think so." Question, "Okay."
14 Answer, "I'm, I'm -- I think I -- I don't remember exactly. I
15 think maybe they did." Question, "You think they did?"
16 Answer, "Yes, sir."

17 Q So the Hobbses testified that or at least Mr. Hobbs in
18 the 2005 trial testified that he thought there was taped
19 interviews; correct?

20 A Yes.

21 Q All right.

22 A He said he thinks so. He's not sure.

23 Q Okay. And then from the transcript of the 2005 trial I
24 would ask you to, if you'll look at this, it's just page 385,
25 386 to refresh your memory, and then what I want to do is have

1 you read the bottom of 386.

2 A Sorry. And you want me to read from line 17?

3 Q Yeah. Detective -- what Detective Frontz says about
4 recording the interviews.

5 A In answer to Mr. Martin's question, Captain Frontz, or
6 probably lieutenant at that time said, "And I'm not, I'm not
7 sure which detective would have that. I am -- to my knowledge
8 the Hobbses were interviewed while here in Myrtle Beach, and
9 as general protocol for our section, we generally most always
10 tape those interviews and we taped all of them. There are
11 some people who refuse to be taped that we don't have those
12 taped, but to my knowledge I thought, I thought we had a taped
13 statement, and if we don't it's another mistake I've made in
14 my life," which is a touch prophetic, but --

15 Q All right. And the top of the very next page, 387.

16 A And we'll -- let me see 386.

17 Q Okay.

18 A Oh, okay. "Well, would you," question, "Well, would you
19 agree with -- okay, but would you agree with me that it should
20 have been taped?" Answer, "Under most, under most conditions,
21 yes, sir."

22 Q So.

23 A Sorry.

24 Q Sorry. So Detective Frontz testified that it's protocol
25 to record interviews; correct?

Francis Humphries, Jr. - Cross by Ms. Williams

241

1 A Yes.

2 Q All right. Do you recall if there was ever a tape
3 provided of that interview of that protocol?

4 A I do not have any specific recollection as to whether or
5 not there was a tape. I can tell you that if there was such a
6 tape, and, and, and just to be clear, in, in major cases, and
7 I would consider this a major case, as a, as a practice I did
8 not just send a request to law enforcement to "provide
9 whatever you have." I physically went to each department
10 involved. I went through their case files. I went through
11 the evidence to make sure that in that case full discovery had
12 been made. I would have done that in this case. I would have
13 done it -- quite frankly, I would have done it during the
14 second trial to make sure there hadn't been anything
15 overlooked, and had I found an item that we had not previously
16 been provided I would have provided it, but that was my
17 practice in virtually every case that I tried.

18 Q So anything you had your testimony is you gave it to the
19 Defense?

20 A Correct.

21 Q Okay. But obviously if you didn't find it or didn't have
22 it then you wouldn't have relayed it?

23 A Well, obviously.

24 Q Okay. Now, let me ask you, you said that you thought
25 that the Hobbses' testimony was consistent and had minor

1 immaterial variances; correct?

2 A I believe that as to the material elements of their
3 statement they were 100 percent consistent.

4 Q All right. And so if their testimony was that, that when
5 they, they -- let me ask you this. You recall though that
6 their testimony did somewhat change throughout the, the trials
7 and the hearings.

8 A I did. Let me say this about that. Number one, we're
9 talking about an expansive period of time. These are not
10 professional witnesses. These are people who are living their
11 life every day and then are drawn back into this much like the
12 family was drawn back into it, the family of Brent. So would
13 I expect some minor inconsistencies or primarily the kind of
14 things that you pointed out are, "I don't remember." "It
15 could have been." "I'm not sure." Those things I would
16 expect. In terms of their identification of John Boyd
17 Frazier, they were 100 percent, and under the circumstances
18 that they made that identification, considering the factors
19 that the Court looks at in determining whether or not it's
20 admissible, I have rarely seen a stronger identification from
21 witnesses.

22 Q So you think that the fact that they -- if they moved
23 where the person was originally standing and relocated them 50
24 feet away would be immaterial or, or minor?

25 A The, the Defendant, according to their testimony, moved

Francis Humphries, Jr. - Cross by Ms. Williams

243

1 to a number of places while they observed him. So if, you
2 know, if they placed him in one position at one point and one
3 at another, yeah, that's immaterial to me.

4 Q And if the suspect that they saw was in one place and
5 throughout the testimony they saw him somewhere else, you
6 would think that would be material and minor?

7 A I really don't -- I'm, I'm not clear. I'd, I'd hate to
8 answer that question because I'm not --

9 Q Okay.

10 A That's not very clear to me. I recall their testimony.
11 I'll say that.

12 Q All right. And you testified that in the initial
13 investigation there might have been a possible 'nother suspect
14 in Mr. Bruce Wolford?

15 A One, one of -- and you know this, but one of the things
16 that, that I do as a Prosecutor is I don't just take a cold
17 file and try it. I was heavily involved in the pretrial
18 preparation of this case. One of the, one of the jobs I
19 believe that I was ethically bound to do is to look at all
20 potential suspects and either include them or exclude them to
21 the extent that I could, and I did that in this case, and
22 based on the investigation and my work in connection with law
23 enforcement, I was able to exclude Bruce Wolford for one as a
24 potential suspect in this case.

25 Q So from the Prosecutor's point of view he was not a

1 suspect, eventually was marked off the --

2 A No. Very -- no. Very early he was not a suspect, and I
3 was -- and understand this, had, had he been a suspect to the
4 extent that I would have been concerned that that would have
5 been a third-party guilt issue, you would have heard that
6 testimony in a courtroom, but I was confident based on the
7 investigation, my investigation in particular, that, that the
8 only thing about Bruce Welford that made him a potential
9 suspect was the merest of suggestions, and it certainly --
10 from an ethical standpoint I never had any doubt that he was
11 not the killer in this case, but just from a legal standpoint
12 I knew or felt very confident that anything relating -- any
13 evidence related to him as potential suspect would never meet
14 the threshold requirements required in order to get that in
15 front of a jury.

16 Q So let me make sure I understand, and I get it, and that
17 was your role as a prosecutor is to decide, for instance,
18 would you have a -- would you as a prosecutor charged --
19 here's how I guess I want to phrase that. In your
20 investigation based on what you found the evidence to be you
21 thought John Boyd Frazier was the appropriate person to charge
22 and have as the Defendant in this case. Correct?

23 A I was absolutely confident of that.

24 Q Okay. And but if there was in your opinion as a
25 prosecutor, which is different than as a defense lawyer, there

Francis Humphries, Jr. - Cross by Ms. Williams

245

1 was a possibility, even more of a possibility, some certain
2 other factors that could have pointed at Bruce Welford, you
3 know, you've got seven or eight things that point at him, nine
4 or ten things that point at John Boyd Frazier, what do you as
5 a prosecutor do then? Charge both of them?

6 A Everything that I -- no. No. You don't. Everything
7 that I was provided through the investigation, whether I
8 gleaned it or law enforcement did or we did it in combination,
9 all that information, my obligation as a prosecutor is to make
10 sure defense counsel has all the information. They then can
11 do whatever they want with that information to the extent that
12 the law allows them. No. My -- but I was absolutely
13 confident beyond a shadow of a doubt that John Boyd Frazier
14 was the killer of Brent Poole. That's why he was charged.
15 That's why he was tried twice.

16 MS. WILLIAMS: Beg the Court's indulgence for just one
17 moment.

18 BY MS. WILLIAMS:

19 Q Mr. Humphries, I just want to make sure I'm plain. I
20 have no doubt that you proceeded as a prosecutor against Mr.
21 Frazier because you determined that it wasn't Bruce Welford
22 based on the evidence that was provided to you; correct?

23 A Yes. I guess.

24 Q Well, whatever you saw you thought didn't rise to the
25 level and what you saw pointed at him, not at Bruce Welford.

1 A The evidence was, was more than sufficient to me to
2 indicate that John Boyd Frazier was the one who killed Brent
3 Poole.

4 Q And you just testified that Bruce Wolford was eliminated
5 very early on; correct?

6 A He was -- well, let me be clear. When I -- this murder
7 occurred prior to me even working --

8 Q Okay.

9 A -- here. Okay. I was still in the 11th Circuit
10 prosecuting. This was one case, like when I got here I
11 believe actually then Solicitor Wilson had noticed Renee Poole
12 for the death penalty. One of, one of the reasons I came to
13 work here was to assist Solicitor Hembree in capital cases
14 because I've got fairly extensive history in capital cases.
15 One of the first things we did was to pull back the death
16 notice with Renee Poole, and I began to prepare that case for
17 trial. So my involvement was not at the inception. However,
18 you know, I had the benefit of the prior investigation and
19 then the pretrial investigation. I was confident very early
20 on at least in terms of my involvement that, that John Boyd
21 Frazier was the killer.

22 Q And I understand that, but my question to you is do you
23 think that there was a very thorough investigation into the
24 possibility of Bruce Wolford or basically once you really get
25 more at John Boyd Frazier you quit looking at him, so you go

Francis Humphries, Jr. - Cross by Ms. Williams

247

1 toward Bruce Wolford?

2 A No. I reviewed that -- I revisited that issue as a part
3 of my pretrial preparation because as a prosecutor if you're
4 doing your job right you try to anticipate any potential
5 defense the Defendant may have because you want to answer
6 those questions not only to be able to prepare a good case but
7 because you're also ethically bound to look at any other
8 option. So I revisited that issue as it relates to Bruce
9 Wolford, and based on my review, and I can't tell you
10 everything that I did at that point, but I can tell you that
11 based on my review of both law enforcement's investigation
12 prior to my coming here and my pretrial investigation I was
13 more than confident that Bruce Wolford was not a viable
14 suspect, did not kill Brent Poole and that John Boyd Frazier
15 did.

16 Q Okay.

17 MS. WILLIAMS: Beg the Court's indulgence.

18 BY MS. WILLIAMS:

19 Q Protocol, and I want to ask you this, anything that the
20 police would have done in their investigations of John Boyd
21 Frazier in the investigation of the murder of Brent Poole --

22 A Uh-huh.

23 Q -- even if, for instance, you've got five separate
24 suspects and you investigate them, when you eventually charge
25 someone and provide them the investigation they're provided

1 with the full scope of investigation, not just as it pertains
2 to them; correct?

3 A That's correct.

4 Q So everything the police would have done with regards to
5 Bruce Wolford or were there for other folks since Mr. Frazier
6 was charged, Mr. Frazier would have been provided with copies
7 of that.

8 A To the extent that it was documented I can tell you the
9 -- and I can't tell you the state of documentation. I mean,
10 you, you see that in the -- in relation to the Hobbses'
11 testimony where they say, "I'm not sure. I don't know." You
12 saw that with Lieutenant Frontz. It's what we usually do. I
13 can't tell you because I didn't do it in this case. I can't
14 tell you what they did before I got here. I can tell you what
15 they did afterwards and everything was documented, but to
16 answer your question directly, if they gathered it and it bore
17 any connection to John Boyd Frazier's case, it would have been
18 provided. It's not a situation where you just give the
19 evidence over that relates to John Boyd Frazier. He got the
20 entire case as it relates to Renee Poole and, and here's the
21 deal about Renee Poole, you know, if, if we were going with,
22 you know, potential suspects who were former lovers of Renee
23 Poole, the list would have been going on and on and on, but I
24 can tell you that anybody that we knew about we investigated
25 and we dismissed based on that investigation, but for John

1 Boyd Frazier.

2 Q I understand, and anything you did on that investigation
3 would have been provided to him.

4 A Yes. To the extent that it was documented. Yes.

5 Q That's what I mean.

6 A Yes.

7 Q I mean, if you had it and you did it he would have gotten
8 it.

9 A Yes.

10 Q Okay.

11 MS. WILLIAMS: Beg the Court's indulgence for just one
12 moment.

13 BY MS. WILLIAMS:

14 Q Mr. Humphries, I'm going to hand you it's a portion of
15 the transcript, the second testimony of Mark Hobbs from 1999
16 in Renee Poole's trial.

17 A Okay.

18 Q Okay. Direct examination by Mr. Diggs, page five, but
19 can I ask you to read from 14 to 22?

20 A Question, and if you don't mind I'd like to, to go up two
21 subsequent questions just for context if that's all right with
22 you.

23 Q It's fine so the Court'll understand what exactly is
24 you're reading. Apparently, they were -- they were -- he was
25 crossing him about his identification, Mr. Hobbs.

1 A This is Mr. -- that's right, Mr. Diggs, and Mr. Diggs'
2 question, "Okay, was it your intent to change your statement
3 from what it was in September of 1998?" Answer, "I'm not
4 intending to change anything. No, sir." Question, "All
5 right." Answer, "It's just." Question, "So let me ask it
6 this way, do you stand by the statement that you made in
7 September of 1998?" Answer, "There was something behind,
8 definitely behind his head that was flopping when he was
9 running." Question, "All right. And what it appeared to be
10 you was a ponytail," and the answer was, "Yes, sir." And I
11 recall that specifically because that's when Diggs, Mr. Diggs
12 had handed to Mr. Hobbs the inaccurate transcript from which
13 he, he had asked him to refresh his memory. He had previously
14 said, "I didn't say anything about a ponytail," but then Diggs
15 kept putting it in his face, "Well, what about this? What
16 about this?" And so, yeah, ultimately he, he said, "Yeah.
17 Okay. Ponytail," but the truth of the matter is he never said
18 ponytail.

19 Q Well, but he just said he said ponytail.

20 A In the context of what I just told you. He was
21 testifying with Diggs handing him the transcript, which was
22 inaccurate as to the, the reference to the ponytail.

23 Q And I understand you're saying it's inaccurate because --

24 A I'm saying it's inaccurate because a certified
25 stenographer listened to the tape. We had a State's

Francis Humphries, Jr. - Cross by Ms. Williams

251

1 transcript. Morgan Martin had a transcript. We gave it to a
2 certified stenographer. It wasn't inaudible. She didn't
3 write inaudible. She wrote, "It's hard to tell," which is, by
4 the way, consistent with what the State's transcript was. So
5 and that was by order of Judge Peeples. So in my mind and in
6 the Court's mind, it cleared up that issue, but at the time
7 that Mark Hobbs testified anything about a ponytail it was
8 when Mr. Diggs was presenting him with an inaccurate
9 transcript, which he said, "These are your words. You had --
10 you gave this statement." So, you know, you -- I think you
11 need to look at it in that context.

12 Q But we have --

13 A I mean, that's the context.

14 Q Okay.

15 MS. WILLIAMS: Beg the Court's indulgence.

16 BY MS. WILLIAMS:

17 Q Just briefly I just want to be sure. So you're telling
18 me that Mark Hobbs admitted that he said it because the only
19 reason he admitted it is because Mr. Diggs gave him an
20 inaccurate transcript and he kept saying it and kept saying
21 it, denying it and then he put it in his head. So he had the
22 transcript in front of him --

23 A That's --

24 Q -- which was inaccurate and that's why he said it.

25 A That's my recollection. There was a tremendous amount of

1 confusion, and in fairness, we didn't know what transcript he
2 was using. We thought he was using the ones that we had
3 provided him. He didn't. He used Mr. Martin's, and so while
4 that examination was going on -- in fact, I think if you look
5 at the reply from the State, you know, we cleared it up with
6 our -- with the transcript that we had.

7 Q And so the reality of it is are you telling me that the
8 witnesses would just kind of change it around depending on who
9 was asking the questions?

10 A I'm, I'm, I'm saying that he was put upon being shown a
11 statement which says, "See right here," not in these words,
12 but, "See right here. You said ponytail. Did you say
13 ponytail?" "Well, I guess I said ponytail," because he was
14 told, "These are your words. This is a transcript. This is
15 an accurate transcription of your words. This is what you
16 said." Confronted like that, a citizen witness, that doesn't
17 surprise me that he goes, "I guess I said it."

18 Q So if, so if when the questioning of him and the
19 Solicitor says, "Well, I know you originally said it was going
20 on 12, but it really must have been more like 11:30 or it
21 really must have been more like this" --

22 A Who said that?

23 Q -- and he modified it.

24 A Who said that?

25 Q In, in Mr. Hobbs's testimonies.

Francis Humphries, Jr. - Cross by Ms. Williams

253

1 A When?

2 Q At the second trial he changed his time. I mean, you
3 just said, you told me earlier that there were, there were
4 inconsistencies.

5 A I didn't say anything about that inconsistency. When --
6 I mean, who -- under whose questioning?

7 Q Between the State's questioning and between his
8 questioning, I mean, then the cross.

9 A That -- I mean, you got me at a disadvantage because I
10 haven't seen either of those.

11 Q Well, whether -- well, here's, here's my point. Let me
12 do this rather than argue about what's in the transcript or
13 what's not in the transcript.

14 A Well, I think that's pretty important, but okay.

15 Q Well, the thing is you admitted that there were details
16 that the Hobbses changed in various testimonies.

17 A Not details. I admitted that there were, in my opinion,
18 immaterial inconsistencies which are consistent with two
19 trials over five or six years which in, you know, was -- when
20 you go back to the date of the statement was seven to eight
21 years. Yeah. Did I, you know, are those to be fairly
22 anticipated? Yes. Were they material to his identification?
23 No. Not in my opinion.

24 Q In your opinion.

25 A That's right.

1 Q Okay.

2 MS. WILLIAMS: That's all the questions that I have on
3 cross, Your Honor.

4 THE COURT: All right. Redirect?

5 MR. THOMAS: Beg the Court's indulgence for just one
6 second. May I approach the witness?

7 THE COURT: Yes.

8 REDIRECT EXAMINATION

9 BY MR. THOMAS:

10 Q Mr. Humphries, I'm going to show you Volume III of the
11 transcript from the 2005 trial. We're on page 679, line --
12 starting at line 11.

13 A Okay.

14 Q If you would just read that briefly.

15 A Question, I guess this would have been my question, "All
16 right. Do you know approximately what time that might have
17 been?" Answer, "Somewhere around midnight. It was after, you
18 know, after 11 for sure. Yes, sir." Question, "Okay. And do
19 you recall how you made your way out of the hotel towards the
20 beach?" Answer, "Yes, sir. We came out the elevator doors
21 right beside the pool." Question, "And if you will point on
22 State's 35 where those doors in the area in which those doors
23 were located."

24 Q I think I can stop you.

25 A All right.

1 Q I just -- my question was -- sorry. What about the
2 Hobbses' testimony regarding the timeframe that they saw --
3 they were out there on the beach --

4 A Did he --

5 Q -- what about that is inconsistent with all their prior
6 testimony?

7 A Nothing that's material in my mind, "somewhere around
8 midnight." I mean, this is -- this is a couple who were
9 having some quiet time away from the kids on their anniversary
10 watching the waves. You know, that's -- I'm sure Mr. Hobbs in
11 particular wasn't looking at his watch.

12 Q Thank you very much, Mr. Humphries.

13 THE COURT: All right. You may step down.

14 A Thank you, Your Honor.

15 THE COURT: Thank you.

16 MR. THOMAS: And Your Honor, I'd ask that Mr. Humphries
17 be excused.

18 THE COURT: Any objection?

19 MS. WILLIAMS: No objection, Your Honor.

20 THE COURT: He's free to go. Thank you very much.

21 All right. The State can call their next witness.

22 MR. THOMAS: That's all the witnesses at this time from
23 the State, Your Honor.

24 THE COURT: All right.

25 MR. THOMAS: I don't know how you would like to proceed

1 from here, but the State is finished.

2 THE COURT: Well, thank you.

3 MR. THOMAS: The State rests.

4 THE COURT: Anything in reply?

5 MS. WILLIAMS: If I can take a few minutes to talk to my
6 client.

7 THE COURT: All right. Let's take about a 10-minute
8 break.

9 MS. WILLIAMS: Thank you, Your Honor.

10 THE COURT: Then we'll come back and check and see if
11 there's any reply.

12 MS. WILLIAMS: Thank you, Your Honor.

13 *****OFF THE RECORD*****

14 (On the record.)

15 THE COURT: All right. Ms. Williams, anything in reply?

16 MS. WILLIAMS: Yes, sir. Briefly I would recall my
17 client, John Boyd Frazier to the stand.

18 THE COURT: All right.

19 MR. THOMAS: Your Honor, I would object to his being
20 recalled. I don't believe that there was any new matter
21 brought out in the State's case that wasn't addressed already
22 in his.

23 THE COURT: Okay. Well, I'm going to let him take the
24 stand. Voice your objection when the question's asked and
25 I'll deem whether or not it was addressed in, in the State's

John Frazier - Direct by Ms. Williams

257

1 case without being addressed in the Applicant's initial case
2 in chief; okay? All right. Thank you.

3 Yeah. Let's place him under oath again.

4 Whereupon, John Boyd Frazier was called to the stand,
5 duly sworn by the clerk and testified as follows:

6 THE CLERK: Please have a seat and state your name for
7 the Court.

8 MR. FRAZIER: John Frazier, F-R-A-Z-I-E-R.

9 THE COURT: All right.

10 MS. WILLIAMS: Thank you, Your Honor.

11 DIRECT EXAMINATION

12 BY MS. WILLIAMS:

13 Q Mr. Frazier, you heard the testimony that anything the
14 State had was provided to Mr. Morgan, Mr. Martin as your
15 Defense counsel; correct?

16 A Yes, ma'am.

17 Q And then anything he had he provided it to you and your
18 family to go through; correct?

19 A Yes, ma'am.

20 Q Were you provided with any information from the Myrtle
21 Beach Police Department regarding an investigation of Bruce
22 Wolford?

23 A No, ma'am.

24 MR. THOMAS: Objection, Your Honor. He's already
25 testified to that in his --

1 THE COURT: Sustained.

2 MS. WILLIAMS: Your Honor, I don't --

3 THE COURT: He's already testified that nothing was
4 provided to him in that regard.

5 MS. WILLIAMS: Okay.

6 THE COURT: So he can't go back and testify as to what
7 he's already testified to, only as to new matters brought up
8 in the State's case that he did not address in his case in
9 chief.

10 MS. WILLIAMS: I understand, Your Honor. I'm sorry. I
11 did not think he had actually testified to that particular
12 item, but if it's there it's there. That's fine.

13 THE COURT: All right.

14 BY MS. WILLIAMS:

15 Q When they were talking and, and, and when Solicitor
16 Humphries was -- it's Mr. Humphries now, former Solicitor
17 Humphries, was discussing the theory with numerous of Renee
18 Poole's statements --

19 A Yes, ma'am.

20 Q -- at your trial the only evidence presented -- Renee
21 Poole -- did she or did she or did she not testify?

22 A She did not testify. She pled the Fifth.

23 Q Okay. Was any of her testimony allowed at your trial,
24 anything that she said?

25 A No. The only thing that was allowed was, "My husband has

John Frazier - Direct by Ms. Williams

259

1 been shot."

2 Q Okay.

3 A Your Honor.

4 MS. WILLIAMS: That's all that I have on redirect.

5 THE COURT: Cross examination.

6 MR. THOMAS: No, Your Honor.

7 THE COURT: All right. You may step down. Any other
8 witnesses?

9 MS. WILLIAMS: Nothing on redirect, Your Honor, on reply.

10 THE COURT: All right. All right. Now, any motions at
11 this point in time?

12 MR. THOMAS: I mean, Your Honor, we would just -- the
13 State would just submit that unless you want to hear arguments
14 from counsel on any of his issues, the State would just submit
15 that the petitioner hasn't met his or Applicant hasn't met his
16 burden on the issues he's raised.

17 THE COURT: Well, the only thing I need to ask you is you
18 all have handed up a transcript of the trial. Portions of
19 that transcript have been referenced during the trial of this
20 PCR action. Do I need to review the transcript, trial
21 transcript in full or has everybody gotten in that portion
22 that they want in evidence?

23 MR. THOMAS: I believe that's your discretion, Judge. I
24 mean, I would submit that everything I -- any reference I made
25 to the trial transcript is on the record already and I --

1 THE COURT: Okay.

2 MR. THOMAS: -- obviously you're welcome to go outside of
3 it, but I don't think it's necessary.

4 MS. WILLIAMS: Your Honor, I think I agree with the
5 Attorney General. I think that the majority of what was --
6 the things that my client was focusing on I submitted. Now,
7 Your Honor, I will submit that, quite frankly, a good portion
8 of our argument were things that weren't done, which naturally
9 I can't submit as a transcript because it's not in the
10 transcript.

11 THE COURT: Right. Well, I mean, there were a number of
12 witnesses in this case just looking at the, the table of
13 contents on the trial transcript that were never mentioned in
14 this PCR action, their questioning, their cross examination.
15 Is it the Applicant's position and/or the State's position
16 that those witnesses who were not mentioned, not brought out
17 in this PCR action that nothing with regard to them has any
18 application or relevancy to this PCR action or do I need to
19 look -- I mean, I'll do whatever you want me to do.

20 MS. WILLIAMS: One moment, Your Honor.

21 THE COURT: All right.

22 MR. THOMAS: And while they're discussing, Your Honor, I
23 would just submit that it -- anything he didn't raise
24 regarding issues of witnesses that hasn't been discussed I
25 would submit that that's waived as an issue for review in

1 post-conviction relief, and I don't think the Court would need
2 to review that.

3 THE COURT: Well, and that's -- are the transcripts
4 exhibits or not?

5 (Court reporter and Court confer.)

6 MR. THOMAS: We, we filed them with the court when we
7 file our return.

8 THE COURT: Okay. All right.

9 MR. THOMAS: And when it goes up on appeal obviously
10 those are part of the record.

11 THE COURT: Okay. Well, see that -- that's my question.
12 The transcripts have been filed with the Clerk of Court;
13 correct?

14 MR. THOMAS: Yes, sir.

15 THE COURT: All right. And they've been handed to the
16 Court. If it's like an exhibit at a trial then I need to
17 review it in full as evidence in this case. If, however, the
18 parties do not consider exhibits are evidence, but simply
19 submitted an entire transcript but only wants the Court, even
20 on appeal, to review those portions that were identified in
21 this PCR case, then I'll just review those portions, but if
22 the whole transcript is subject to review on any appeal then I
23 think I need to review the whole transcript.

24 MR. THOMAS: The way the appeals work here is the, the
25 Supreme Court when Applicant or the State files its petition

1 they ask for a copy of the complete trial transcript and all
2 the pleadings that are filed, and all of the Clerk's records,
3 so like indictments, things of that nature. So all of that
4 will be in the appendix on appeal.

5 THE COURT: Okay.

6 MR. THOMAS: No matter the outcome.

7 THE COURT: Okay.

8 MS. WILLIAMS: Your Honor, my position on that in talking
9 to my client is that while I understand it is a voluminous
10 transcript we think that it would be better if the Court did
11 review it so that the Court can get the full view --

12 THE COURT: Okay.

13 MS. WILLIAMS: -- of what's going on, and, and the
14 particulars with particular witnesses. The majority of the
15 witnesses you heard, we referenced to. Those are the, the,
16 the real major issues as we've tried to address, but, but we
17 do believe that it would be better if the Court is so inclined
18 as to review all of it.

19 THE COURT: All right. All right. Well, then I'll take
20 it under advisement and I'll let you all know.

21 MR. THOMAS: Thank you very much, Your Honor.

22 THE COURT: All right. Thank you.

23 MR. THOMAS: Beg the Court's indulgence.

24 MS. WILLIAMS: May we approach?

25 THE COURT: Yeah.

1 (Whereupon, a bench conference is held.)

2 THE COURT: All right. Yeah. I've, as the trial judge,
3 and I know how PCRs work, so I can review the evidence, review
4 the exhibits, review the transcript or that portion. Granted,
5 I probably -- well, I'll review the transcript, trial
6 transcript and I'll let you know my decision. All right?

7 MS. WILLIAMS: Your Honor, the only other thing I would
8 ask is if when the Court is reviewing it if the Court would
9 also review -- the code section is 17-27-80, which allows the
10 Court, and as the Court is well aware, not -- if, if the Court
11 is so inclined to grant the PCR that, that there are a couple
12 of forms of relief that the Court is allowed to award.

13 THE COURT: Uh-huh.

14 MS. WILLIAMS: And we would ask that the -- just to make
15 sure that the Court reviews that statute --

16 THE COURT: All right.

17 MS. WILLIAMS: -- as well.

18 THE COURT: Will do.

19 MS. WILLIAMS: Thank you, Your Honor.

20 THE COURT: Thank you very much.

21 MR. THOMAS: Thank you, Your Honor.

22 (Adjourned.)

23

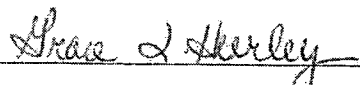
24

25

C E R T I F I C A T E

I, the undersigned, Grace L. Hurley, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the post-conviction relief hearing held in the case of John Boyd Frazier versus the State, held in the Court of Common Pleas for Horry County, Horry County Courthouse, Conway, South Carolina, on June 16-17, 2014.

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


Grace L. Hurley, CVR-CM-M
Official Reporter

April 3, 2015.

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT

John B. Frazier, #264488,)

Case No. 2011-CP-26-8038

Applicant,)

v.)

State of South Carolina,)

Respondent.)

ORDER OF DISMISSAL

HORRY COUNTY
14 NOV -6 PM 1:23
MELANIE HUGGINS-WARD
CLERK OF COURT

This matter comes before the Court by way of an Application for Post-Conviction Relief filed September 26, 2011. Respondent made a timely Return on or about December 1, 2011, and an amended return on or about December 9, 2011. The Court convened an evidentiary hearing into the matter on June 16, 2014, at the Horry County Courthouse. Applicant was present at the hearing and represented by Brana J. Williams, Esquire. Joshua L. Thomas, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant also presented testimony from the following witnesses: Christopher Hensley, Kahle Schettler, Courtney Fox, Sharron Aldridge, and Jane Lovett. Respondent presented testimony from Applicant's trial counsel, L. Morgan Martin, Esquire, and former Deputy Solicitor Francis A. Humphries, Jr., Esquire. The Court had before it a copy of the trial transcript, the records of the Horry County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief and amendments, Respondent's return and amended return, records from Applicant's direct appeals, and the exhibits introduced at the evidentiary hearing. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. In August 1999, the Horry County Grand Jury indicted Applicant for murder, armed robbery, and criminal conspiracy (1999-GS-26-2249). These charges arose out of the murder of Brent Poole ("the victim"), which the State alleged was perpetrated by Applicant and the victim's wife, Renee Poole ("Renee"). L. Morgan Martin, Esquire ("trial counsel"), represented Applicant along with Thomas C. Brittain, Esquire, Peter L. Hearn, Sr., Esquire, and Natasha M. Hanna, Esquire. Fifteenth Circuit Solicitor J. Gregory Hembree and Deputy Solicitor Francis A. Humphries, Jr., prosecuted the case for the State.

On February 14, 2000, Applicant proceeded to trial before the Honorable Rodney C. Peebles and a jury. The jury found Applicant guilty as indicted, and Judge Peebles sentenced Applicant to life imprisonment for murder, thirty (30) years for armed robbery, and five (5) years for criminal conspiracy. However, the South Carolina Court of Appeals reversed Applicant's conviction on January 5, 2004. State v. Frazier, 357 S.C. 161, 592 S.E.2d 621 (Ct. App. 2004).

Applicant proceeded to a second trial on May 16, 2005, before the Honorable Paula H. Thomas and a jury. On May 20, 2005 the jury again found Applicant guilty as indicted. Judge Thomas sentenced Applicant to concurrent terms of thirty (30) years for murder, thirty (30) years for armed robbery, and five (5) years for criminal conspiracy.

Applicant filed a timely notice of appeal. Aileen P. Cläre, Esquire, and Kathrine H. Hudgins, Esquire, of the Office of Appellate Defense, perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's murder conviction and reversed Applicant's armed

robbery conviction on November 8, 2007. State v. Frazier, 375 S.C. 575, 654 S.E.2d 280 (Ct. App. 2007). Applicant and the State filed petitions for writ of certiorari to the South Carolina Supreme Court and the Supreme Court granted both petitions. The Supreme Court affirmed the Court of Appeals as to the murder conviction; however, the Supreme Court reversed the Court of Appeals as to the armed robbery conviction and reinstated Applicant's conviction on that charge. State v. Frazier, 386 S.C. 526, 689 S.E.2d 610 (2010). The remittitur was returned to the circuit court on March 4, 2010.

II. ALLEGATIONS

In his application, Applicant alleged he is being held in custody unlawfully for the following reasons:

1. "Ineffective assistance of counsel at trial (2005)"
 - a. "Hearsay evidence presented during trial (2005) and defense attorney did not preserve Crawford objection"

On March 13, 2014, Applicant filed a "Corrected Amended Motion to Supplement PCR Application." In that amendment, Applicant raised the following grounds for relief:

1. Ineffective assistance of trial counsel for failing to move to sequester the jury or request a change of venue.
2. Prosecutorial misconduct for presenting a reply witness and ineffective assistance of trial counsel for failing to object to the State's reply witness.
3. Ineffective assistance of trial counsel for failing to challenge the introduction of the photo lineup and composite.
4. Ineffective assistance of trial counsel for failing to object to the Solicitor's closing arguments.
5. Ineffective assistance of trial counsel for failing to challenge the sufficiency of the evidence supporting the criminal conspiracy charge.
6. Ineffective assistance of trial counsel for failing to object to the testimony of two witnesses.
7. Prosecutorial misconduct for presenting false testimony from the eye-witnesses and an investigating officer and ineffective assistance of trial counsel for failing to object to this testimony.
8. Ineffective assistance of trial counsel for failing to challenge forensic

evidence.

9. Ineffective assistance of trial counsel for failing to explore a third-party guilt defense.

At the evidentiary hearing, Applicant proceeded on the allegations contained in both the original and amended applications.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

As required by S.C. Code Ann. § 17-27-80 (2003), the Court has reviewed pertinent portions of the record and has heard the testimony and arguments presented at the evidentiary hearing in arriving at the following findings of fact and conclusions of law. The Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. The Court has weighed the testimony accordingly. The Court finds very credible the testimony of trial counsel and Mr. Humphries, and gives it great weight. Correspondingly, the Court finds Applicant's testimony self-serving and not credible. Regarding Applicant's specific allegations, the Court finds as follows:

A. Summary of Testimony

Christopher Hensley testified he was questioned about a person he may have seen the night of the murder. He recalled assisting in making a composite sketch, but remembered the end result did not resemble the person he saw that night. He identified Applicant's exhibit two as a picture he was shown by Applicant's investigator. Hensley testified he had never seen the person identified in the picture as Bruce Wolford.

Kahle Schettler recalled testifying at both of Applicant's trials. He recalled letting Applicant borrow his car the night of the murders. He testified he traded cars with Applicant because Applicant wanted him to fix a noise the car was making. However, he did not recall

Applicant inquiring about the noise when he picked the car up the next day. Schettler also testified there was no sand in his car when Applicant returned it to him. He recalled Applicant wanted to know how many miles he put on the car overnight. Schletter also recalled Applicant owning a TZ-75 model handgun that frequently failed to cycle, but he could not recall if Applicant still owned the gun at the time of the murder.

Courtney Fox is Wolford's ex-wife. She identified Applicant's exhibit two as a picture of how Wolford looked at the time of the murder. She candidly admitted she is afraid of Wolford. She did not have much memory of the events surrounding the murder because of injuries suffered in a car accident shortly thereafter. She could not recall whether Wolford was home the night of the murders. She did recall Wolford only owning a single firearm, which she purchased for him. She described this firearm as a "belt buckle" gun that resembled a double barrel shotgun.

Sharon Aldridge testified she frequently stayed with Applicant around the time of the murder. She knew Renee had affairs with Applicant and Wolford. Aldridge alleged she informed trial counsel of a conversation she overheard between Renee and Wolford, wherein they claimed they "could get away with murder." She testified Applicant only owned a single gun at the time of the murder.

Jane Lovett is Applicant's mother. She testified she retained an investigator soon after Applicant's arrest. Lovett recalled she was in constant communication with trial counsel, and they shared all information about the case. She testified Renee lived with Applicant for a time but eventually moved out. She also testified Renee and Applicant had relationships with other people. She admitted she informed trial counsel about all other men Renee had relationships

with. Lovett recalled Applicant owned a TZ-75 handgun, but sold it in July 1997 at a gun show to get money to buy a new gun. She recalled giving the gun Applicant did own to the investigator to perform a forensic test.

Applicant testified trial counsel did not prepare the case and did not properly argue for his innocence. He also alleged the solicitor's office and the police withheld evidence and threatened witnesses. Applicant testified he asked trial counsel to move for jury sequestration, but trial counsel did not. He also testified trial counsel failed to move for a change of venue. Applicant claimed the pre-trial publicity prevented him from getting a fair trial in Horry County. Applicant testified the solicitor improperly called Dee Mishler as a reply witness. He testified her testimony that he was in love with Renee was not disclosed in response to the trial counsel's Rule 5/Brady motions. He also testified trial counsel could have known about such testimony and objected to it if he had listened to some interview tapes the solicitor did provide.

Applicant further testified the eye-witness testimony of Mark and Donna Hobbs ("the Hobbses") was inconsistent. He testified he was never provided with copies of the Hobbses' original statements given to Detective Bill Frontz. He also testified trial counsel did not fully challenge the inconsistencies in the Hobbses' testimony in various trials and proceedings. He also testified trial counsel did not effectively impeach the Hobbses with information about reward money the victim's family gave them. Applicant alleged trial counsel did not challenge the preparation of the composite and photo lineups. He testified the officers who prepared these documents were not called to testify to their conversations with the Hobbses.

Applicant testified trial counsel should have objected to the Solicitor's closing argument that accused him of committing "sins." He also stated trial counsel should have objected to the

use of Renee's statements from the time of the murder. Applicant testified trial counsel should have asked for a mistrial based on the Solicitor's closing argument.

Applicant further testified trial counsel should have objected to the submission of the criminal conspiracy charge to the jury. He believes the lack of direct evidence of communications between him and Renee indicates there was no conspiracy. Applicant also testified the email requesting time off from work was not relevant to a plan to murder the victim. He also believes trial counsel should have cross-examined witnesses about the distinctive license plate on his vehicle to show his vehicle was never at Renee's house.

Applicant testified trial counsel should have presented forensic evidence indicating the fatal bullet did not come from his TZ-75. He testified trial counsel should have had his vehicle tested for evidence. He also testified trial counsel should have interviewed everyone in the vicinity of the murder scene that night.

Applicant testified trial counsel failed to pursue a third-party guilt theory. Specifically, Applicant alleged Wolford owned a weapon on the list of possible murder weapons. He also believed Wolford had similar mannerisms as the person alleged to have been seen near the scene. He believes he was named as a suspect because the victim's family was aware of Renee's affair with him, but not her affair with Wolford. He believes trial counsel should have proffered testimony regarding Wolford's relationship with Renee and his behavior after the murder.

Trial counsel testified he has been practicing primarily criminal law since 1978. He was retained shortly after Applicant's arrest in 1998. Thomas Brittain and various other attorneys worked on the case through the years, but he had the best working relationship with Applicant and his family. Trial counsel testified Applicant and his family were very involved in the

preparation of his defense. He recalled regular communication with the investigator hired by the family. He stated he tried the case twice, and both times he took seriously every concern Applicant ever brought to his attention. He recalled filing discovery motions and receiving a voluminous response from the State. Trial counsel testified he went over all the State's evidence with Applicant. The State's primary case was the eye-witness testimony of the Hobbses placing Applicant at the scene of the crime. Accordingly, trial counsel testified his primary trial strategy was to discredit the Hobbses' testimony. In that vein, he retained an expert in mistaken identifications and suggestive lineups. He recalled having videos and pictures taken of the crime scene at night to demonstrate how difficult it would have been for the Hobbses to identify Applicant. He recalled the Hobbses' testimony varied slightly between statements and trials, but was consistent in the fact they were certain Applicant was the person they saw that night. However, he recalled making every effort to impeach them with prior inconsistencies. He also recalled attempting to impeach the Hobbses with the fact they received reward money for identifying Applicant.

Trial counsel recalled moving to exclude the Hobbses' identification and having that motion denied by the trial judge. Regarding the composite, he recalled introducing it as an exhibit because it did not look like Applicant. He also recalled meeting with Hensley prior to trial and not uncovering anything from him to help discredit the State's case. Trial counsel testified he would have called the person who created the composite if he believed it would have further helped his case. Regarding the lineup, he recalled Officer Rowe testifying as to how it was created. Trial counsel also testified he retained Dr. Loftus to prove the photo lineup was suggestive.

Trial counsel testified he moved for jury sequestration but the trial judge denied that motion. He also recalled engaging in extensive voir dire to exclude any jurors who were exposed to pre-trial publicity. In light of that voir dire, trial counsel testified he had no valid reason to ask for a change of venue. He testified he objected to everything in the Solicitor's closing argument he found objectionable. He also testified he withdrew his objection to the State's reply testimony because it was proper reply. Regarding the testimony of Bruce Bollow, trial counsel testified he cross-examined the witness and got him to admit he had not seen a distinctive license plate on the vehicle he saw at Renee's house, and there was no need to further question him.

Trial counsel testified he did not object to the firearms expert's testimony because it was helpful to the case. He could not determine how further inquiry into the type of gun used in the murder would have been helpful because the only gun police found in Applicant's home was not on the expert's list of potential murder weapons. He also recalled having Schletter's car tested for bug splatter, and arguing to the jury the lack of bug splatter indicated it had not been to the beach. Trial counsel testified he moved for directed verdicts as to all charges, and renewed those motions at appropriate times.

Regarding third-party guilt, trial counsel recalled extensively discussing this theory with Applicant. He testified there simply was not sufficient evidence to ask the judge to allow a third-party guilt argument. He recalled attempting to raise the argument in the first trial and being told he could not. He was also aware Renee was not allowed to make a similar argument in her trial. He recalled discussing Haymaker's testimony with her prior to trial, and admitted her trial testimony was consistent with those conversations. Trial counsel also admitted he could not

locate anyone to place Wolford in Myrtle Beach the night of the murder. Regardless, trial counsel attempted to create the implication Wolford was the real killer. Trial counsel candidly admitted he could not have done anything to be more prepared for Applicant's trial, especially considering the fact he also tried the case the first time.

Fran Humphries testified he has been practicing law for twenty-six (26) years, mostly as a prosecutor. He became involved in Applicant's case when he began working for the Fifteenth Circuit Solicitor's Office in 1999. He testified he independently prepared this case without utilizing the work of the previous prosecutor, interviewing all the witnesses and reviewing all the evidence. Humphries testified he had a liberal policy of disclosure and personally went to each agency involved to ensure all evidence was turned over to the defense. Humphries adamantly maintained he turned over every recording the police made of interviews with witnesses. He testified the Hobbsses' testimony was entirely consistent throughout the process. They always maintained the composite did not accurately reflect who they saw the night of the murders. They also always maintained Applicant was the person they did see. He recalled the Hobbsses asking the Solicitor about the propriety of receiving the reward money after the first trial. He also recalled the Hobbsses being hesitant to accept the reward.

Humphries testified he was intimately involved with the Solicitor's preparation and presentation of the case during both trials. He was also involved in Renee's trial. Although not revealed in Applicant's trial, Renee was convicted based upon a confession she gave detailing her part in planning the murder with Applicant. Humphries recalled the State's reply witness was necessary to rebut the claims Applicant ended his relationship with Renee prior to the murder.

Humphries testified his investigation led him to believe Applicant was the proper person to charge with the victim's murder. He recalled investigating the possibility Wolford may have been the shooter. However, Wolford had a pony-tail and the Hobbsses were certain the person they saw did not have a pony-tail. Humphries clarified there was a discrepancy in one transcript of a conversation with the Hobbsses where it sounded like they said the person they saw had a pony-tail, but upon review of the tape they actually said they "couldn't tell." He recalled Renee had several paramours he investigated as suspects. However, he maintained the Hobbsses were consistent in their assertion Applicant was the person on the beach that night. He also maintained he would not have prosecuted Applicant a second time if he was not absolutely certain Applicant was the murderer.

B. Standard of Review

1. Ineffective Assistance of Counsel

In a post-conviction relief action, the applicant bears the burden of proving the allegations in the application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of trial counsel as a ground for relief, the applicant must prove "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." Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir.

1977)). The court strongly presumes trial counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove trial counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, trial 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." Id. at 117-18, 386 S.E.2d at 625.

2. Prosecutorial Misconduct

An applicant also bears the burden to prove actual prosecutorial misconduct. Alabama v. Smith, 490 U.S. 794, 799-899 (1989) (citing Wasman v. United States, 468 U.S. 559 (1984)). Generally, prosecutorial misconduct involves a solicitor's improper efforts to collect evidence or unfair trial tactics. State v. Needs, 333 S.C. 134, 145, 508 S.E.2d 857, 862 (1998) (citations omitted). Where an applicant alleges the solicitor presented untruthful testimony,¹ he bears the burden of proving the testimony was untruthful. United States v. Griley, 814 F.2d 967, 971 (4th Cir. 1987) (citing Dansby v. United States, 291 F.Supp. 790 (S.D.N.Y. 1968)). "Mere inconsistencies in testimony by government witnesses do not establish the government's knowing

¹ See Napue v. Illinois, 360 U.S. 264, 269 (1959) (Fourteenth Amendment prohibits "conviction obtained through use of false evidence").

use of false testimony." Id. (citing Overton v. United States, 450 F.2d 919 (5th Cir. 1971)). Furthermore, the applicant must also show, in addition to the impropriety of the testimony, a reasonable likelihood the testimony affected the judgment of the jury. See Giglio v. United States, 405 U.S. 150, 154 (1972) ("We do not, however, automatically require a new trial whenever 'a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict'" (citations omitted)).

C. Ineffective Assistance of Trial Counsel for Failure to Preserve an Objection to Hearsay Testimony Admitted in Violation of the Confrontation Clause

The Court finds Applicant failed to meet his burden of proving trial counsel ineffective for failing to preserve an objection to Renee's statements. The record demonstrates trial counsel was not deficient because he moved to strike all of Renee's statements to Officer Brown. (Trial Tr. 189:2-9). Judge Thomas granted this motion and gave a curative instruction to the jury to disregard Renee's statements. (Trial Tr. 242:21-243:11). Accordingly, the majority of Renee's hearsay statements were not before the jury in this trial. State v. White, 371 S.C. 439, 445, 639 S.E.2d 160, 163 (Ct. App. 2006) ("A curative instruction to disregard incompetent evidence and not to consider it during deliberation is deemed to have cured any alleged error in its admission." (quoting State v. Walker, 366 S.C. 643, 623 S.E.2d 122 (Ct. App. 2005))).

With regard to the portion of Renee's statement Judge Thomas allowed into evidence, that her "husband has been shot," Applicant has not shown trial counsel should have further objected to that statement. Normally, testimonial statements by a witness who is unavailable to be cross-examined are not admissible at trial unless the defendant had a prior opportunity to cross-examine the witness. Crawford v. Washington, 541 U.S. 36, 59 (2004). However,

statements are not testimonial simply because they are given to a police officer. See Davis v. Washington, 547 U.S. 813, 822 (2006) ("Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency."). Factors to be considered in determining whether a statement is testimonial include (1) whether the speaker is describing events as they are happening or if they are describing past events; (2) the existence of an ongoing emergency; (3) whether the officer's questions were intended to resolve the present emergency or to learn what had happened in the past; and (4) the level of formality inherent in the statement. Id. at 827. Here, the statement was not in response to any questions from Officer Brown. Instead, Renee approached Officer Brown and initiated the conversation with the statement her "husband had been shot." Furthermore, the very nature of this statement indicates it is intended to relay information about an ongoing emergency. Therefore, the statement was admissible as a nontestimonial statement that does not implicate the Confrontation Clause.

Furthermore, the non-hearsay use of a statement does not raise Confrontation Clause concerns. Tennessee v. Street, 471 U.S. 409, 414 (1985). Here, Renee's statement was not hearsay because it was a statement of a co-conspirator. Rule 801(d)(2)(E), SCRCP ("A statement is not hearsay if [t]he statement is offered against a party and is [...] a statement by a coconspirator of a party during the course and in furtherance of the conspiracy."); see also State v. Mikell, 257 S.C. 315, 324, 185 S.E.2d 814, 817-18 (1971) (statements of one conspirator are admissible against co-conspirator (citing State v. Ferguson, 221 S.C. 300, 70 S.E.2d 355 (1952))). Because Renee's statements were those of a co-conspirator, they were not hearsay and did not implicate the Confrontation Clause. Accordingly, the Court finds trial counsel was not

deficient in failing to further object to the introduction of Renee's statement. Furthermore, Applicant has not shown he was prejudiced by the lack of a further objection because the statement was admissible.

D. Ineffective Assistance of Trial Counsel for Failing to Move to Sequester the Jury or Change Venue

The Court finds Applicant failed to meet his burden of proving ineffective assistance of counsel regarding his allegation trial counsel failed to seek sequestration of the jury or a change of venue. The record reflects trial counsel moved for and was denied sequestration of the jury. (Trial Tr. 49:1-50:15). Trial counsel was not ineffective for failing to seek sequestration because he did, in fact, seek sequestration.

The parties engaged in extensive voir dire of the jury panel. A review of the record indicates fifteen (15) jurors disclosed they had been exposed to pre-trial publicity regarding Applicant's case. None of those jurors made it onto the jury presiding over Applicant's case. Furthermore, of the three (3) jurors who recalled facts of that case once trial began, one (1) was excused and the other two (2) were extensively questioned regarding their ability to remain fair and impartial. (Trial Tr. 185:22-186:5; 212:25-215:24; 239:11-22). Trial counsel testified he had no grounds for a motion to change venue in light of the extensive voir dire in this case. Accordingly, trial counsel has articulated a valid reason for not moving for a change of venue. See Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) ("Where, as here, counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." (citing Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992))). Furthermore, the Court agrees a motion to change venue would have been futile. Sheppard v. State, 357 S.C. 646, 655, 594 S.E.2d 462, 468 (2004) (even intense pretrial media

coverage not sufficient to warrant change of venue where there is no indication voir dire failed to produce an impartial jury (citing State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998))). Therefore, Applicant has shown neither a deficiency nor prejudice from trial counsel's decision to not request a change of venue.

E. The State's Reply Witness

The Court finds Applicant has not shown prosecutorial misconduct or ineffective assistance of counsel arising from Dee Mishler's reply testimony. Regarding the allegation of prosecutorial misconduct, Applicant has not met his burden of showing the State intentionally withheld any information disclosed in the witness's testimony. The Court notes trial counsel objected to the witness testifying to any statement of Applicant because such a statement was not disclosed in discovery. (Trial Tr. 1144:18-1145:2). Judge Thomas ruled no disclosure was required because it was not a statement in the possession of the State, but rather in possession of a third party. (Trial Tr. 1158:11-14). The Court agrees with the analysis of Judge Thomas. See Rule 5(a)(1)(A), SCRCrimP; see also Clark v. State, 311 S.C. 314, 315, 428 S.E.2d 870, 871 (1993) ("However, where a defendant does not make an oral statement in response to interrogation, the State is not required to disclose the statement, and no error is committed by allowing testimony regarding it." (citing State v. Hoffman, 285 S.C. 130, 328 S.E.2d 631 (1985))). Furthermore, the parties later discovered the substance of Mishler's testimony was provided in discovery as part of a taped interview with various family members. (Trial Tr. 1162:19-21). Accordingly, no prosecutorial misconduct occurred by the State's failure to disclose the substance of the testimony. See Hyman v. State, 397 S.C. 35, 46, 723 S.E.2d 375,

381 (2012) ("Tantamount to any Brady claim is the withholding of evidence. Under the present facts, it is undisputed that the solicitor disclosed the videotape to defense counsel.").

Furthermore, no prosecutorial misconduct occurred by the simple fact the State called Mishler to testify. Mishler specifically testified she had a phone conversation with Applicant where he told her he would not allow Renee to leave his home. (Trial Tr. 1167:2-4). This testimony is proper reply testimony to Applicant's witnesses who testified he no longer had a relationship with Renee. See State v. Todd, 290 S.C. 212, 214, 349 S.E.2d 339, 340 (1986) ("The admission of reply testimony is within the sound discretion of the trial judge, and there is no abuse of discretion if the testimony is arguably contradictory of and in reply to earlier testimony." (citing State v. Stewart, 283 S.C. 104, 320 S.E.2d 447 (1984))).

The Court also notes trial counsel objected to the testimony as improper reply and as not relevant. (Trial Tr. 1155:16-18). Thus, the proper avenue to challenge this testimony would have been on direct appeal. S.C. Code Ann. § 17-27-20(b) (post-conviction relief "is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction."); see also Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975) ("It is uniformly held that an application for post-conviction relief is not a substitute for an appeal.").

Applicant also has not demonstrated trial counsel was ineffective in failing to review the contents of the family interviews prior to trial. Judge Thomas gave trial counsel an opportunity to review the substance of the statement before proceeding with trial. (Trial Tr. 1158:24-1159:13). Applicant has presented no evidence of how a further investigation into this statement would have produced any information beneficial to his case. See Moorehead v. State, 329 S.C.

329, 334, 496 S.E.2d 415, 417 (1998) (failure to conduct an independent investigation is not *per se* ineffective assistance of counsel, especially where an investigation would not have uncovered any helpful information). Likewise, as stated above, the testimony was a proper rebuttal to Applicant's witnesses' testimony. Although Mishler's testimony was harmful to Applicant's case, trial counsel was fully aware the State's theory of the case involved an affair between Applicant and Renee. Trial counsel also thoroughly cross-examined Mishler on her testimony. In light of the entire record before this Court, Applicant has not demonstrated trial counsel's performance was ineffective in this regard.

F. Ineffective Assistance of Trial Counsel for Failing to Challenge the Introduction of the Photo Lineup and Composite

The Court finds Applicant failed to demonstrate trial counsel was ineffective for failing to challenge the introduction of the composite and photo lineups. As to the composite, trial counsel testified he moved to introduce the composite because it did not look like his client. Because this composite helped in his attempts to discredit the Hobbses' testimony, the Court finds trial counsel articulated a valid strategic reason for seeking introduction of the composite. Stokes, 308 S.C. at 548, 419 S.E.2d at 779. Furthermore, the Court can discern no prejudice from the failure to require the testimony of the person who produced the composite because that person did not testify at the evidentiary hearing. See Dempsey v. State, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005) ("A PCR applicant cannot show that he was prejudiced by counsel's failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence." (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995))).

Similarly, trial counsel testified the introduction of the photo lineups was vital to his mistaken identity defense. Stokes, 308 S.C. at 548, 419 S.E.2d at 779. Again, Applicant did not present any testimony at the evidentiary hearing from any other person involved in preparation of the lineup. Dempsey, 363 S.C. at 369, 610 S.E.2d at 814. Regardless, Applicant has not proven the lineup should have been excluded even if trial counsel had objected that the preparer was not present. Applicant cites Bullcoming v. New Mexico, ___ U.S. ___, 131 S.Ct. 2705 (2011), for the proposition that Detective Rowe provided improper surrogate testimony about the preparation of the photo lineup. In Bullcoming, the United States Supreme Court held a report containing a testimonial certification could not be introduced through the testimony of an analyst who did not personally perform or observe the performance of the test reported in the certification. Bullcoming, 131 S. Ct. at 2713. However, Bullcoming was not decided until almost six (6) years after Applicant's trial. Accordingly, trial counsel could not have been expected to rely on that decision. See Gilmore v. State, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994) (citations omitted), overruled on other grounds by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999) (attorney is not required to be clairvoyant or prophetic in anticipating changes in law).

Regardless, Detective Rowe did testify as to the method by which the lineup was generated. (Trial Tr. 622:8-21). That testimony demonstrates he simply filled out a form, someone input the information on the form into a computer, and the computer generated a lineup. The Confrontation Clause only prohibits evidence when the testifying witness did not observe the performance of the test. The mere fact someone else may have input the information into the computer does not implicate the Confrontation Clause issues raised in Bullcoming. See

United States v. Washington, 498 F.3d 225, 230 (4th Cir. 2007) ("We reject the characterization of the raw data generated by the lab's machines as statements of the lab technicians who operated the machines."); State v. Brockmeyer, 406 S.C. 324, 352, 751 S.E.2d 645, 660 (2013) ("[T]he custodians who did not testify were in no manner involved in the testing or analysis of the recovered items[.]"); see also Bullcoming, 131 S. Ct. at 2715 ("We have already explained that Caylor certified to more than a machine-generated number."). Here, Detective Rowe explained he was the person responsible for final approval of the lineup. (Trial Tr. 621:18-19). Thus, he was the individual who actually supervised the creation of the lineup. Because he was intimately involved in the preparation of the lineup, he was not a "surrogate" as envisioned by Bullcoming. Accordingly, the Court finds Applicant failed to demonstrate trial counsel was ineffective for failing to object to the lineup on Confrontation Clause grounds.

G. Ineffective Assistance of Trial Counsel for Failing to Object to the Solicitor's Closing Arguments

The Court finds Applicant failed to meet his burden of proof to show trial counsel was ineffective in failing to object to the Solicitor's closing arguments. The record indicates trial counsel objected to numerous parts of the Solicitor's closing. He objected to statements about the legality of a search (Trial Tr. 1266:25-1267:4); testimony of a witness (Trial Tr. 1267:17-1268:3; 1268:18); Applicant's conversations with police (Trial Tr. 1272:25); experts' testimony (Trial Tr. 1279:11-19); and the impact on the victim's daughter (Trial Tr. 1287:11-23). Trial counsel's multiple objections to these statements indicate he understood the boundaries between proper and improper jury arguments. Furthermore, both trial counsel and Humphries testified the use of religious language was not objectionable in this case. The Court is inclined to agree with trial counsel's testimony that he did not object to the Solicitor's statements about

Applicant's "sins" because he had no valid strategic reason to object. Stokes, 308 S.C. at 548, 419 S.E.2d at 779.

Regardless, Applicant has also failed to prove he was prejudiced by the Solicitor's reference to his "sins." The Solicitor's use of religiously tinged language was not an attempt to interject moral authority behind the State's theory of the case. See, e.g., Gilchrest v. State, 250 S.C. 221, 228, 565 S.E.2d 281, 285 (2002) ("The repeated reference to Ethridge's soul and his expected testimony as his opportunity to cleanse his soul rise to the level of an assurance of Ethridge's credibility"). Instead, it was used as a reference to explain the gravity of Applicant's crimes. See People v. Harrison, 106 P.3d 895 (Cal. 2005) ("Here, a reasonable juror likely would understand the prosecutor's biblical references merely as a powerfully dramatic illustration of the gravity and enormity of defendant's crimes. The prosecutor did not argue that biblical law or doctrine required defendant's conviction of the charges against him."). Furthermore, the propriety of a closing argument must be reviewed "in the context of the entire record, including whether the trial judge's instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant's guilt." Brown v. State, 383 S.C. 506, 516, 680 S.E.2d 909, 914-15 (2009) (citing Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998)). Judge Thomas repeatedly admonished jurors that arguments by counsel were not to be considered as evidence. (Trial Tr. 105:15-22; 1186:10-16; 1269:25-1286:1; 1291:5-8; 1303:15-17). See State v. Dawkins, 297 S.C. 386, 393, 377 S.E.2d 298, 302 (1989) (judge's instruction sufficient to cure error from improper arguments). As outlined below, the evidence overwhelming indicates Applicant's guilt. Accordingly, the Court finds

/s/ [signature]

Applicant has not shown he was prejudiced by trial counsel's decision to not object to this portion of the Solicitor's closing argument.

H. Ineffective Assistance of Trial Counsel for Failing to Challenge the Sufficiency of the Evidence Supporting the Criminal Conspiracy Charge

The Court finds Applicant failed to show counsel ineffective in challenging the criminal conspiracy charge. Initially trial counsel challenged the facts of the conspiracy in his attempts to keep Renee's statements out of evidence. (Trial Tr. 90:15). Next, he raised a directed verdict motion challenging the sufficiency of the evidence for the conspiracy charge. (Trial Tr. 935:1-15). He renewed this motion at the close of the evidentiary portion of trial. (Trial Tr. 1176:21). Trial counsel also made a motion for a new trial based on the insufficiency of the evidence. (Trial Tr. 1321:8). In light of trial counsel's extensive efforts to argue there was not sufficient evidence of guilt, the Court concludes Applicant has failed to demonstrate trial counsel was deficient in this regard.

Regardless, the Court finds the State presented sufficient evidence to support the criminal conspiracy conviction. Applicant and Renee were engaged in an adulterous relationship. A neighbor saw a vehicle matching the description of Applicant's vehicle at Renee's house the evening she reserved a hotel room for the night of the murder. Applicant's day planner included a notation about Renee and the victim on the day of the murder. This evidence, coupled with the evidence pointing towards Applicant as the shooter, supports a jury finding that Applicant conspired with Renee to commit the murder.

Furthermore, the Court notes this challenge to the sufficiency of the evidence was preserved for appellate review. Therefore, this allegation should have been raised in Applicant's direct appeal and is not properly raised in a collateral attack. Simmons, 264 S.C. at 423, 215

S.E.2d at 885 ("[T]he Uniform Post-conviction Procedure Act 'shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction.'" (citing Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973))).

I. Ineffective assistance of trial counsel for failing to object to the testimony of two witnesses

The Court finds Applicant failed to demonstrate trial counsel was ineffective for not objecting to the testimony of Karole Jenson and James Bollow. The Court finds no basis for an objection to this testimony. Applicant argues Jenson's testimony was irrelevant and immaterial because of its inconsistencies. He also argues Bollow's testimony should have been objected to for failing to connect him to the conspiracy. The Court finds neither of these rationales persuasive. Jenson's testimony was relevant to the timeline the night of the murder. Bollow's testimony was relevant circumstantial evidence of the existence of a conspiracy between Renee and Applicant. Furthermore, trial counsel cross-examined each of these witnesses. Accordingly, the Court finds Applicant has not shown trial counsel should have objected to this testimony.

J. Testimony of the Hobbses and Detective Frontz

Regarding the testimony of the Hobbses and Detective Frontz, the Court finds Applicant has not met his burden of proof on either an allegation the State committed prosecutorial misconduct or that trial counsel was ineffective in his handling of these two witnesses. Applicant has provided no evidence Detective Frontz committed perjury during his testimony. Griley, 814 F.2d at 971. His testimony is entirely consistent with the facts of the case and the testimony presented at this evidentiary hearing by trial counsel and Humphries. Thus, Applicant has not demonstrated the State presented perjured testimony from Detective Frontz. Furthermore, trial counsel thoroughly cross-examined Detective Frontz and argued his testimony

/BKC

did not prove Applicant's guilt. Thus, Applicant has not demonstrated trial counsel was ineffective in his handling of Detective Frontz.

The Court further finds meritless Applicant's allegations the Hobbsses lied in their trial testimony. A review of the whole record before this Court indicates the Hobbsses' testimony was consistent in all material respects throughout the proceedings against Applicant. Id. Because the Hobbsses' testimony was consistent in all significant regards, the Court finds Applicant failed to demonstrate the State presented perjured or untruthful testimony from them.

Again, trial counsel also thoroughly cross-examined the Hobbsses. Trial counsel directly addressed the inconsistencies in the Hobbsses' prior statements. He also questioned them about their identification of Applicant. In an effort to discredit their identification, trial counsel presented the expert testimony of Dr. Cutler and Dr. Loftus. Trial counsel also specifically questioned the Hobbsses about their receipt of reward money from the victim's family. A review of trial counsel's examination of the Hobbsses reveals no ineffectiveness in his performance.

K. Ineffective Assistance of Trial Counsel for Failing to Challenge Forensic Evidence

The Court finds Applicant failed to meet his burden of proof that trial counsel should have moved to exclude the forensic and ballistic evidence. Trial counsel testified the introduction of the SLED expert's report supported his argument that Applicant's gun was not the murder weapon. Accordingly, the Court finds trial counsel presented a valid reason for not lodging an objection. Stokes, 308 S.C. at 548, 419 S.E.2d at 779. For those same reasons, the Court also finds Applicant was not prejudiced by the introduction of the evidence. Furthermore, the Court again notes trial counsel made appropriate motions challenging the sufficiency of the evidence against Applicant. Thus, any allegation regarding the sufficiency of the forensic

evidence should have been raised on direct appeal. Simmons, 264 S.C. at 423, 215 S.E.2d at 885.

L. Ineffective Assistance of Trial Counsel for Failing to Explore a Third-Party Guilt Defense

Finally, the Court finds Applicant has not demonstrated trial counsel was ineffective in failing to present evidence of third-party guilt. A party may only present evidence of third-party guilt in the form of

“such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible ... [B]efore such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party.”

State v. Swafford, 375 S.C. 637, 641, 654 S.E.2d 297, 299 (Ct. App. 2007) (citing State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941)). The Court finds trial counsel was not deficient in this regard because he thoroughly explored the possibility of a third-party guilt defense. He testified the trial judge in Applicant's first trial refused to allow argument on third-party guilt. He found no evidence in his investigation linking Welford to the crime scene. The Court finds Haymaker's testimony that she informed trial counsel about conversations she overheard between Renee and Welford to be less credible than trial counsel's testimony. Trial counsel and Humphries both testified none of the eye-witnesses could place Welford in Myrtle Beach the night of the shooting. In light of trial counsel's thorough investigation, the Court finds Applicant has not shown trial counsel was deficient in failing to explore a third-party guilt defense.

In addition, Applicant has not shown he was prejudiced by trial counsel's performance in this regard because he has not presented any evidence to support a third-party guilt theory. At

the time of Applicant's trial, a court was allowed to include a consideration of the strength of the prosecution's case in determining whether to admit evidence of third-party guilt. Id. (citing Holmes v. South Carolina, 547 U.S. 319 (2006)). However, the United States Supreme Court later eliminated this type of consideration as circumscribing a defendant's ability to present a complete defense. Holmes, 547 U.S. at 331. The Supreme Court did approve of the third-party guilt evidence standard enunciated in Gregory that does not include a consideration of the strength of the State's case. Id. at 328. To the extent Applicant avers trial counsel was ineffective for failing to present evidence of third-party guilt because of reliance on the pre-Holmes standard, the Court finds trial counsel was under no duty to predict the United States Supreme Court's decision. Gilmore, 314 S.C. at 457, 445 S.E.2d at 456. Accordingly, the law in place at the time of trial – allowing a consideration of the strength of the State's case – controls here. In light of the overwhelming evidence of Applicant's guilt, the Court finds Applicant would not have been allowed to present a third-party guilt defense at trial. The Court also finds compelling the denial of trial counsel's attempt to present a third-party guilt defense during Applicant's first trial.

Applicant argues his evidence of third-party guilt, while not admissible under the pre-Holmes standard, is admissible under the Gregory standard. The Court disagrees and finds Applicant has not demonstrated a sufficient basis for third-party guilt under Gregory. Applicant has merely presented evidence Renee was having an affair with Wolford. Such testimony is not sufficient to point to Wolford's guilt to the exclusion of Applicant, especially in light of testimony that Renee had multiple affairs. Applicant provided no witnesses placing Wolford in the area of the crime. The Court finds very credible Hensley's testimony Wolford was not the

person he saw the night of the shooting. Applicant also provided no proof, aside from his self-serving testimony, that Wolford possessed a weapon that could have been used in the crime. In short, the Court finds Applicant has merely provided testimony which is "so nebulous that it would have had no other effect than to 'cast a bare suspicion'" on Wolford. Lorenzen v. State, 376 S.C. 521, 533, 657 S.E.2d 771, 778 (2008).

The Court's finding in this regard is bolstered by the decision of the United States District Court for the District of South Carolina in Renee's federal habeas corpus action. There, Renee challenged the trial judge's ruling in her case forbidding the presentation of third-party guilt evidence. Poole v. Warden of Leath Corr. Inst., C/A 0:03-CV-03499-RB, 2007 WL 397286, at *6 (D.S.C. Jan. 31, 2007). The Honorable R. Bryan Harwell found the alleged third-party guilt evidence merely "casts bare suspicion on another and does nothing more than raise a conjectural inference as to the commission of the crime by someone other than Frazier." Id. at *9. Although not binding in this case, the Court finds persuasive Judge Harwell's analysis of the proffered evidence of Wolford's guilt. Much like Renee, Applicant here has failed to meet his burden of proving the jury should have been presented any evidence about Wolford's guilt.

M. Overwhelming Evidence of Guilt

The evidence at trial overwhelmingly indicates Applicant plotted and executed a plan with Renee to murder the victim. The victim was murdered by a nine-millimeter firearm, and Applicant owned a firearm at one point in time that could have been the murder weapon. Applicant was seen in the immediate vicinity of the murder scene almost immediately after the murder. When questioned the next morning, Applicant denied being in Myrtle Beach. Applicant loaned his car to a friend to make repairs, but failed to follow up on the repairs. He also made

incriminating statements to the same friend as well as another, asking both to help him essentially establish an alibi. Applicant also told investigators he took time off from work because of illness, but email records establish he requested time off much earlier. Applicant and Renee were engaged in an adulterous relationship, and Applicant had made prior attempts to engage the victim in physical violence. A neighbor saw a vehicle matching the description of Applicant's vehicle at Renee's house the night she reserved a hotel room for the night of the murder. Applicant's day planner included a notation about Renee and the victim on the day of the murder.

Furthermore, Renee gave police a full confession inculcating herself and Applicant in the plot to murder the victim.² Renee's statement, along with the certainty of the Hobbses' identification, leads this Court to find overwhelming evidence of Applicant's guilt. See Brown v. State, 383 S.C. 506, 518, 680 S.E.2d 909, 916 (2009) (no prejudice where there exists overwhelming evidence of guilt); Franklin v. Catoe, 346 S.C. 563, 574, 552 S.E.2d 718, 724 (2001) (same). Accordingly, the Court finds Applicant has failed to demonstrate he is entitled to a new trial based on any of the allegations raised to this Court.

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

² The Court also notes Judge Harwell found Renee's statements implicating herself and Applicant were knowingly and voluntarily made. Pool, 2007 WL 397286 at *6.

/s/ [signature]

IV. CONCLUSION

Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant him a new trial. Regarding his allegations of ineffective assistance of trial counsel, Applicant failed to demonstrate trial counsel's performance was not reasonable under prevailing professional norms. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Regarding Applicant's allegations of prosecutorial misconduct, he failed to demonstrate the State presented any untruthful evidence. Griley, 814 F.2d at 971. Furthermore, overwhelming evidence of Applicant's guilt militates against a finding he was prejudiced by the actions of trial counsel or agents of the State. Brown, 383 S.C. at 518, 680 S.E.2d at 916; Giglio, 405 U.S. at 154. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from his attorney's receipt 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, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, his attorney must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and

2. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 28th day of October, 2014.

Benjamin H. Culbertson
THE HONORABLE BENJAMIN H. CULBERTSON
Resident Judge
Fifteenth Judicial Circuit

Georgetown, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

John Boyd Frazier,

Petitioner,

vs.

State of South Carolina,

Respondent.

FILED

COUNTY IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
DOCKET NO.: 2011-CP-26-8038

2014 DEC 22

PM 3:07

**ADDENDUM TO PETITIONER'S
MOTION TO RECONSIDER/ALTER
OR AMEND THE FINDINGS OF THE
COURT AND THE ORDER OF DISMISSAL**

You will please take notice that the Petitioner, by and through the undersigned attorney, moves the Court to reconsider, alter or amend the findings of the Court and for an Order Reconsidering Its Order of Dismissal, signed by the Honorable Benjamin H. Culbertson on October 28, 2014, filed on November 6, 2013, and received by the Petitioner on December 10, 2014. This Motion is made pursuant to Rule 59(e), South Carolina Rules of Civil Procedure. In support of his motion, and in addition to the original motion filed on December 19, 2014 the Petitioner would request that the Court reconsider the following:

H. Ineffective Assistance of Trial Counsel for Failing to Challenge the Sufficiency of the Evidence Supporting the Criminal Conspiracy Charge.

In its order, the Court contends that Applicant failed to show counsel ineffective in challenging the criminal conspiracy charge.

Applicant asserts that trial counsels objections and motions without proper arguments are worthless. Trial counsel failed in this effectiveness for not presenting Applicant's arguments against the Criminal Conspiracy Charge. Applicant would direct this Courts attention to the Amendment Book - Inappropriate Charge of Criminal Conspiracy (attached to Petitioner's Motion filed on December 19, 2014 as Exhibit A and incorporated herein by reference).

This court contends that Applicant and Renee were in an adulterous relationship.

Page 1 of 14

Frazier vs. State of South Carolina

Addendum to Petitioner's Motion and Motion To Reconsider/Alter or Amend the Findings of the Court and the Order of Dismissal
2011-CP-26-8038

Applicant asserts that this is not sufficient inference for criminal conspiracy or even criminal activity. It only admits to an affair, not illegal activities. If an affair were all that's required for criminal conspiracy and illegal activities then Applicants assertion of Third-Party Guilt suspect, Bruce Wolford, had even more reasons to commit these crimes, considering that he was in "an adulterous relationship" for over a year with Renee, whereas Applicant's affair was only two months beginning to end (March 13 to May 12). However, trial counsel did not try to bring this issue to the trial courts attention, rendering him ineffective in his assistance.

This court contends that a neighbor saw a vehicle matching the description of Applicant's vehicle at Renee's house the evening she reserved a hotel room for the night of the murder.

Applicant asserts that trial testimony negated the claim by this court. One - Applicant's time cards from Champion, Defense Exhibit 7, show that he was at work on the above night in question. Two - the neighbor, James Bollow, never identified Applicant as being at Renee's house anytime, let alone on this date. Three - Bollow could not identify the personalized license tag "NERVUS" on Applicants vehicle. *State v. Martin*, 533 SE2d 572 [2000] trp.430 and *State v. Schrock*, 322 SE 2d 450 [1985]. Four - Bollow also made statements to the police that he had seen a small red car driven by a blonde man with a ponytail at Renee's house. Where this description is consistent with Bruce Wolford at the time according to his ex-wife Courtney Fox's testimony at PCR hearing, and Courtney Fox's vehicle was a small red Mazda Miata. *Schrock*, supra.

Applicant also asserts that further statements to police from the neighbor, Bollow, was that Renee talked to him about communicating with her boyfriend "John" on her computer, yet no such evidence was presented at trial by the State to continue the conspiracy theory. Trial counsel did nothing to try to present to the trial court any of these statements and arguments with their related evidence to disprove the Criminal Conspiracy Charge against Applicant, thus denying him effective assistance of counsel, due process, and a fair trial.

I. Ineffective Assistance of Trial Counsel for failing to object to the Testimony of Two Witnesses.

In its order, the Court contends that Applicant failed to demonstrate trial counsel was ineffective for not objecting to the testimony of Karole Jensen and James Bollow, and Jensen's testimony as relevant to the timeline the night of the murder.

Applicant asserts that trial counsel should have objected to both of these witnesses due to their irrelevant and immaterial nature and waste of the Courts time.

Jensen (trp.153) testified that she had fallen asleep and three firecracker pops at 11:45pm had awakened her. She then drifted on back to sleep and did not awaken again until the next morning to find out there had been "a lot of activity out there that night." This would have been directly outside her house on 82nd Avenue North beach access - the "point of access" for all police and emergency personnel and activities - yet Jensen did not awaken from all of the lights, sirens, and a lot of activity right outside her house. So, the likelihood that she heard three firecracker pops on the beach outside her house, to awaken her at precisely 11:45pm seems extremely unlikely. Especially since the Police and Emergency personnel activity did not awaken her from right outside her door at 82nd Avenue North beach access.

Due to trial counsels ineffectiveness to argue this point, Jensen's irrelevant testimony was allowed to waste the Courts time and muddy the juror's with irrelevant information.

Blair James Bollow's testimony (trp.429) was not relevant circumstantial evidence of the existence of a conspiracy between Renee and Applicant. As stated before, Bollow never identified the Applicant or his vehicle with the personalized license tag "NERVUS" at Renee's house. *State v. Martin*, 533 SE2d 572 [2000] "there is no evidence [such as a license tag number] that the black car was actually [the car]."

Yet again, Bollow has stated, Defense Exhibit 28, that he had seen a blonde man with a ponytail in a small red car at Renee's house on numerous occasions, which trial counsel failed

to present to the trial court and jury in this case. Applicant would direct this courts attention to the Amendment Book - Irrelevant and Immaterial Testimony (attached to Petitioner's Motion filed on December 19, 2014 as Exhibit A and incorporated herein by reference), for further proof of proffer of Bollow's waste of the courts time. Again, due to trial counsel's failure to properly prepare a defense, he did not object to these testimonies or have them excused from the proceedings, thus denying applicant effective assistance of counsel; due process, and a fair trial.

J. Testimony of the Hobbes and Detective Frontz.

In its order, the Court contends that Applicant has not met his burden of proof on either allegation that the State committed prosecutorial misconduct or that trial counsel was ineffective in his handling of these witnesses.

Applicant asserts that Detective Frontz (trp.375) suborned perjury the testimony of the Hobbs's. By Frontz's own admission, all of the Hobbs's statements to Myrtle Beach Police Department while still in Myrtle Beach, from June 10-12, were all recorded - including the all-important suspect description for the Composite Drawing with Officer Beaty. However, none of these interviews were provided to the Solicitor's Office nor subsequently to the Applicant. *Kyles v. Whitley*, 514 US 419 [1995].

Then by the Hobbs's own admission at Applicant's first trial, trp.1129;25-1130'1 Frazier [2004], they were contacted by telephone several times by Myrtle Beach Police Department Detective Terry Altman. However, none of these phone conversations were provided to Applicant. All of these interviews and phone conversations between police personnel and the State's "key eyewitnesses" were before the Hobbs's were shown the Photo Lineup. Also see Bill Frontz's Memorandum dated June 25, 1998, Defense Exhibit 26, "Our detective Terry Altman will have talked with the Hobbs prior to your visit...", *Dove v. State*, 523 SE2d 459 [1999], "Prejudice was found because the records could have been used to impeach [the witnesses]...

and could have created doubt where the evidence was all circumstantial." Before the Hobbs's provided statements from September of 1998, the only description given by them was, "White Male, Dark Clothes," not the ever present trial testimony of "big round eyes" and "high forehead." With this discrepancy in description given and the absence of the recorded statements from June 10-12, 1998, including the critical suspect description for the composite drawing, then the question of subornation of perjury arises from the critical circumstances of omission. Myrtle Beach Police Department Detective Bill Frontz's excuse was "I thought we had a taped statement, and if we don't it's another mistake I've made in my life." trp.386;17-24.

Applicant asserts that the mistakes Myrtle Beach Police Department Detective Bill Frontz makes in his job as an officer of the law has fully affected his Constitutional right to Due Process of the law. These mistakes have prevented Applicant from a full, meaningful, and complete defense with all of the evidence, along with trial counsel's ineffectiveness for not making these arguments or the ones in the Applicant's Amendment Book - Impeachment 1, "Impeachment Supplement Attachment," and Impeachment 2, "Impeachment of Mark and Donna Hobbs," (attached to Petitioner's Motion filed on December 19, 2014 as Exhibit A and incorporated herein by reference), that he would direct this courts attention to. Trial counsel thus denied Applicant effective assistance of counsel, due process, and a fair trial.

K. Ineffective Assistance of Trial Counsel for Failing to Challenge Forensic Evidence.

In its order, the Court contends that Applicant failed to meet his burden of proof that trial counsel should have moved to exclude the forensic and ballistic evidence.

Applicant asserts that the introduction of the SLED expert's report supported his argument that Applicant's gun was not the murder weapon; therefore, all mention of any other guns or ballistic evidence should have been argued for exclusion by trial counsel. Especially considering that the SLED experts testimony was that according to the list of guns he compiled

that could have fired the fatal rounds, the number of guns in circulation could very possibly be in the millions, *trp.823*. Applicant also asserts that the inference by the Solicitor that he once owned a TZ-75 that "could have" fired the bullets was unfair and detrimental to his case. Yet trial counsel failed in his arguments that any mention of a TZ-75 or any other gun should have been allowed; similar to *State v. Schrock*, 283 SE 2d 450 [1984] where neither the ballistics nor the firearm testimony could generate any evidence to connect Applicant to the crime scene.

This court also contends that Applicant was not prejudiced by the introduction of the evidence.

Applicant asserts that there is no physical evidence or forensic evidence to place him in the state of South Carolina, let alone at the actual crime scene at 82nd Avenue North beach access at approximately 11:40pm on June 9, 1998. There was no witness testimony from the actual scene of the crime or the immediate vicinity [50 yards] to place him at the scene during these crimes. "The State assumes the burden of proving that the accused was at the scene of the crime when it happened and that he committed the criminal act." See, *State v. Schrock*, *supra*; *State v. Arnold*, 605 SE 2d 529 [2004]; *State v. Irvin*, 243 SE 2d 195 [1978]; *State v. Mayfield*, 364 US 857 [1959]; *State v. Bealin*, 23 SE 2d 746 [1943]; *State v. Williams*, 468 SE 2d 626 [1996]. Applicant would direct this courts attention to the Donald Clayton Smith Video, Defense Exhibit 12 "Carolina Winds Video" and *trp.962*; as well as the Amendment Book - Failure by the State to Present Competent Evidence of Guilt (attached to Petitioner's Motion filed on December 19, 2014 as Exhibit A and incorporated herein by reference). If trial counsel had introduced these arguments on behalf of the Applicant, the outcome of the trial would have been very different, thus denying applicant effective assistance of counsel, due process, and a fair trial.

L. Ineffective Assistance of Trial Counsel for Failing to Explore Third-Party Guilt Defense.

In its order, the Court contends that Applicant has not demonstrated that trial counsel was ineffective in failing to present evidence of Third-Party Guilt.

Applicant asserts that there were a set of facts that were inconsistent with his own guilt that cast more than a bare suspicion upon Bruce Wolford. Yet due to trial counsel's incompetence, he opposed the proffer by Applicant that fully met the requirements set forth in *Gregory v. State*, 165 SE2d 532 [1941], *State v. Gay*, 541 SE2d 541 [2001], and *State v. Swaford*, 654 SE2d 297 [2007], even though these rules call for little, if any, examination of the credibility of the prosecutions witness's or their reliability of its evidence. Here, the prosecutions forensic evidence was so unreliable that the evidence should not have been admitted. Due process of the Fourteenth Amendment or in the Compulsory Process Clause of the Sixth Amendment, the Constitution "guarantees criminal defendant's a meaningful opportunity to present a complete defense"; *California v. Trombetta*, 467 US 479, 486 [1984]. Yet due to trial counsel's lack of foresight and proper research into Third-Party Guilt defenses, he failed to present the evidence of another suspect, Wolford, in the commission of these crimes. "...A criminal defendant's federal constitutional rights are violated by an evidence rule under which the defendant may not introduce proof of third-party guilt if the prosecution has introduced forensic evidence that, if believed, strongly supports a guilty verdict." *Holmes v. South Carolina*, 547 US 319 [2006]. Applicant argues that while the Holmes case might have been decided after his trial, the principles were already in place for trial counsel to argue. The strength of the prosecutions proof cannot be assessed without considering challenges to the reliability of the prosecution's evidence. Just because the prosecution's evidence, if believed, would provide a strong support for a guilty verdict, it does not follow that evidence of third-party guilt has only a weak logical connection to the central issues in the case. By evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the defense to rebut or cast doubt. *Rock v. Arkansas*, 483 US 44,58, 56

Page 7 of 14

[1987]; *Washington v. Texas*, 388 US 14 [1967]; *Crane v. Kentucky*, 476 US 683 [1986], *Due Process*, *Chambers v. Mississippi*, 410 US 284 [1973].

Where trial counsel and Solicitor Humphries contend that there is no evidence to link Wolford to the crime scene, applicant asserts that there is also no evidence to link him to the crime scene, or the immediate vicinity surrounding 82nd Avenue North beach access. The Hobbs's were over half a mile away [3168 feet] at 76th Avenue North and did not follow the suspect dressed in black that they saw.

Applicant also asserts that Sharon Haymaker-Alridge's testimony was that she witnessed the continued relationship between Renee and Wolford in the dressing room of the club, after Applicant and Renee's affair ended on May 12, 1998. Wolford's testimony, trp.592 and 615, confirmed that his and Renee's relationship had begun over a year before these crimes and continued until Renee's husband was killed.

Here Applicant asserts that the composite completed by Chris Hensley looks remarkably like Wolford at the time of these crimes - as confirmed by his ex-wife Courtney Fox, at this hearing. *Crane v. Kentucky*, 476 US 683, 690 [1986], "Where Rice attempted to introduce evidence implicating Tiki by showing that a composite sketch of the suspect identified as Rice looked remarkably like Tiki." At the same time, the composite completed by the Hobbs's, the State's "key eye witnesses", completed just days after the murder looks nothing like Applicant - nothing even similar, ie., eyes, forehead, nose, mouth, hair, etc.

Applicant has offered evidence to support a third-party guilt theory in the form of his proffer. He would direct the courts attention to the Amendment Book - Third-Party Guilt (attached to Petitioner's Motion filed on December 19, 2014 as Exhibit A and incorporated herein by reference) as proof of his theory of Wolford's guilt as well as the fact that he and Renee had mutual friends who lived in Myrtle Beach and worked at a local club where Wolford could have "hidden out" until such a time later to dispose of the wallet near the crime scene and

return home without suspicion. Renee was implicating Applicant for a crime he did not commit, in her attempts to cover Wolford's participation and flight. This theory could not apply to Applicant because he was found at home and asleep at around five a.m. by Winston Salem Police Department Officer Darrell Mills (trp.285). Applicant could not provide any witnesses due to the fact that trial counsel did not interview anyone associate with Wolford or from the beach access at 82nd Avenue North. Nor did trial counsel attempt to proffer at trial that one of these people could have identified Wolford in the vicinity of the crime scene. Applicant would direct this courts attention to the Wilson Investigative Report and the Amy Marie Dudas interview (attached to Petitioner's Motion filed on December 19, 2014 as Exhibit B and Exhibit C and incorporated herein by reference) for witness information pertaining to Applicant's theory of Wolford's guilt of these crimes.

Christopher Hensley testified at this evidentiary hearing that he never saw the picture of Wolford before Private Investigator Darrell Wilson showed it to him. He could not be sure about the man dressed in black he saw on the beach. Hensley did not identify Applicant as the man he saw that night approximately halfway between 76th and 82nd Avenues North.

Applicant asserts that due to the continued ineffectiveness of trial counsel, he failed to follow-up on Private Investigator Wilson's findings concerning Amy Marie Dudas. Please see witness interview (attached to Petitioner's Motion filed on December 19, 2014 as Exhibit C and incorporated herein by reference) were she states that she saw Wolford with two semi-automatic handguns. Trial counsel was in possession of this interview, as well as Darrell Wilson's Investigative Report (attached to Petitioner's Motion filed on December 19, 2014 as Exhibit B and incorporated herein by reference) that encompasses his investigation into these crimes where he also found out that Wolford lied to Myrtle Beach Police Department about his alibi on the night of these crimes. This report provided other potential witnesses that trial counsel failed to follow-up on in his preparation to defend Applicant.

Applicant would also direct this courts attention to the Amendment Book - Third-Party Guilt (attached to Petitioner's Motion filed on December 19, 2014 as Exhibit A and incorporated herein by reference). Applicant asserts that due to trial counsels inability to properly prepare and argue this case to the jury, he denied him the right to a complete defense; thus denying applicant effective assistance of counsel, due process, and a fair trial.

M. Overwhelming Evidence of Guilt.

In its order, the Court contends that the evidence at trial overwhelmingly indicates Applicant plotted and executed a plan with Renee to murder the victim.

Applicant asserts that the TZ-75 once owned by him was sold in 1997, a year before he ever met Renee, as testified to by Kahle Schettler trp.893, Todd Fain, trp.875, Sharon Alridge, trp.1102, and Jane Lovette at this hearing. Applicant would also direct this courts attention to Defense Exhibit 13 "Glock Stipulation" and 14 "Glock Receipt." Additionally, as stated earlier, the SLED expert, David Collins, trp.811, testified that Applicant's gun could not have been used in this crime.

Applicant further asserts that over half a mile, 3168 feet, is not now nor ever was "in the immediate vicinity of the murder scene almost immediately after the murder." Applicant would direct this courts attention to Defense Exhibit 12 "Carolina Winds Video" by Donald Clayton Smith, trp.962, as well as the aerial photos in the back of the Amendment Book. Besides the over half a mile distance between the Hotel and the actual crime scene, the State's theory has always been that the Hobbs's saw Applicant walking North, towards the murder scene - before the murder - which is why they had the Hobbs's change their testimony to reflect an earlier time when they came out of the Hotel. Yet, the Hobbs's statements of "It was going on 12 o'clock" as when they saw a suspect dressed in black actually makes the Applicant's alibi for not being at the crime scene at the time of these crimes, given the distance between the Hotel at 76th Avenue North and the actual crime scene at 82nd Avenue North, as seen in the aerial photo in

the back of the Amendment Book (attached to Petitioner's Motion filed on December 19, 2014 as Exhibit A and incorporated herein by reference) So, if the Hobbs's actually had seen Applicant at around midnight walking north towards the actual scene of these crimes, then he would have been walking directly into the Myrtle Beach Police Department's secured area on the beach and would have subsequently been arrested at that time by Myrtle Beach Police Officers - not found at home in North Carolina asleep. Given these circumstances, then the Hobbs's are Applicant's alibi for not being able to be at the crime scene at 11:40pm when these crimes happened - or Applicant was at home in the bed asleep, as he has claimed from the beginning, and awoken by Winston Salem Police Department's Officer Mills, as he testified to at, trp.296.

Either scenario does not place Applicant at the actual scene of these crimes and therefore not guilty of any of these crimes. State v. Schrock, 322 SE2d 450 [1984]; State v. Martin, 533 SE2d 572 [2000]; State v. Arnold, 605 SE2d 529 [2004]. "...directed verdict should have been granted where there was no substantial evidence establishing defendant's presence at scene of murder... trial judge should grant a directed verdict, however, when the evidence merely raises a suspicion that accused is guilty."

Applicant loaned his vehicle to a friend to find out what the noise was; however, Schettler did not get a chance to find out. Christine Michelotti, trp.1109, subsequently had the noise (the front brakes) fixed after Applicant's arrest, as per her testimony.

Applicant points out trial testimony that Thomas Pedersen, trp.402, was the person who told Applicant about the victim being shot and Schettler, trp.893, testified that it was "later that afternoon" when Applicant informed him of this information. Applicant also asserts that there is no testimony in the record where he asked anyone to help him with an alibi. State v. Manis, 51 SE2d 370, 371 [1949]. "It is not incumbent upon an accused person to prove that he was somewhere else at the time and place of the crime."

Applicant asserts that he took time off work to recuperate from working eight nights in a row and became sick during the time off due to him working so many days in a row.

Renee was engaged in numerous adulterous relationships, most notably the longest with Bruce Wolford. The only testimony concerning engaging in physical violence with the victim came from Wolford who, on cross, recanted this claim because he did not witness any attempts to engage in physical violence.

Applicant asserts the same argument as before, the neighbor – Bollow – admitted in his testimony, trp.448, that he never saw Applicant at Renee's house nor could he identify the personalized license tag, "NERVUS", on Applicant's vehicle. *State v. Martin*, supra. Additionally, Applicant's time cards from Champion, Defense Exhibit 7, clearly place him at work on the night Renee made the reservations at the beach.

Applicant maintains that the notation in his day planner calendar about Renee and the victim was their anniversary, as well as Renee and Dan on November 9th, John and Christine on November 16th, Donald and Christy on July 11th, and Mom and Ed on May 7th. This clearly indicates a theme of keeping up with numerous couple's anniversaries.

Furthermore, Applicant asserts that Renee's confession and inculcating of Applicant were ruled inadmissible by Trial Judge Thomas and the trial.

Yet due to trial counsel's inability to fully prepare a defense for all of these arguments he deprived applicant of effective assistance of counsel, due process, and a fair trial. Therefore, Applicant is entitled to a new trial based on all of the forgoing arguments.

N. All Other Allegations.

Applicant was denied effective assistance of counsel by trial counsel's failure to investigate the charge of Armed Robbery.

In its order, the Court contends that Applicant has abandoned any and all allegations that were not raised in this order.

Applicant asserts that there was no evidence or testimony in the record to maintain the charge of Armed Robbery. There is no evidence that Applicant was at the actual scene of the crime let alone took anything from the victim. *State v. Schrock, supra*, *State v. Martin, supra*, and *State v. Arnold*. The victim's wallet, State's Exhibit 17, was found a few blocks away with all of its contents intact, State's Exhibit 18. There was a partial fingerprint found and it was used for exclusionary purposes only, as NOT belonging to Applicant. Trial counsel never brought out the fact that Myrtle Beach Police Department tested Applicant's fingerprints to the partial and was eliminated as being his. Applicant maintains that the Myrtle Beach Police Department did not test this partial fingerprint against Bruce Wolford. Trial counsel did not present this fact either. Anything else that was claimed to have been taken, State's Exhibit 25, was not found in any of the searches of Applicant's residence. Therefore, the State's case for Armed Robbery against Applicant should have been ruled on with a Directed Verdict due to a complete lack of any physical or forensic evidence to connect Applicant to anything taken from the victim or Renee.

As once reversed by the SC Appellate Court, *State v. Frazier*, 375 SE2d 280 [2007], Applicant would also direct this courts attention to the Amendment Book - Failure of Competent Evidence of Guilt (attached to Petitioner's Motion filed on December 19, 2014 as Exhibit A and incorporated herein by reference). Yet due to trial counsels complete disregard of Applicant's rights, he failed in his duties as prescribed by the Sixth Amendment's right to a competent defense, thus denying Applicant effective assistance of counsel, due process, and a fair trial.

For all of the forgoing reasons, Applicant prays that this Honorable Court amends its judgment and grant relief.

This motion will be further supported by the transcripts, argument, memoranda, stipulations of fact, the pleadings, discovery responses, and/or other materials as may be filed and served upon the parties in accordance with the South Carolina Rules of Civil Procedure, along with the attached Exhibits A, B and C.

I SO MOVE.



Brana J. Williams
Attorney for Petitioner

December 22, 2014

Williams Law Firm, LLC
1500 Highway 17 North Ste 102
Surfside Beach, SC 29575
843-357-5100 Fax: 843-357-5102

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

John B. Frazier, #264488,

Applicant,

v.

State of South Carolina,

Respondent.

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

) Case No. 2011-CP-26-8038

) **RETURN TO APPLICANT'S**
) **MOTION FOR RECONSIDERATION**

) **AND**

) **RESPONDENT'S MOTION TO STRIKE**

HORRY COUNTY
2015 JAN -8 PM 1:41
MELANIE JUDGINS-ARND
CLERK OF COURT

In response to Applicant's "Notice of Motion and Motion to Reconsider/Alter or Amend the Findings of the Court and the Order of Dismissal" filed December 19, 2014, and Applicant's "Addendum to Petitioner's Motion to Reconsider/Alter or Amend the Findings of the Court and the Order of Dismissal" filed December 22, 2014, Respondent would show this Court:

I.

This matter comes before the Court by way of an Application for Post-Conviction Relief filed September 26, 2011. The Court convened an evidentiary hearing into the matter on June 16, 2014, at the Horry County Courthouse. Applicant was present at the hearing and represented by Brana J. Williams, Esquire. The Court denied relief by an order dated October 28, 2014, and filed November 6, 2014. The present motion asks the Court to reconsider the findings of fact and conclusions of law contained in the order of dismissal.

II.

Applicant argues the Court was inconsistent in its summary of the testimony at the evidentiary hearing. Respondent submits the Court's order accurately summarizes the relevant portions of the testimony of each witness from the hearing. Furthermore, Applicant does not appear to be alleging the Court's recitation was incomplete or inaccurate.

III.

Applicant alleges the Court erred in finding he failed to meet his burden of proving ineffective assistance of counsel and prosecutorial misconduct. Respondent submits the Court's order properly addressed the appropriate standards of review and properly found Applicant failed to meet his burden. Furthermore, it appears Applicant is asking the Court to reverse its decision and grant post-conviction relief. Such a request is more properly addressed through the appellate process. See Wilder Corp. v. Wilke, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) ("Post-trial motions are not necessary to preserve issues that have been ruled upon at trial; they are used to preserve those that have been raised to the trial court but not yet ruled upon by it." (citing Hubbard v. Rowe, 192 S.C. 12, 5 S.E.2d 187 (1939))).

IV.

Applicant alleges the Court misconstrued his allegation regarding a challenge to his co-defendant's statement. Instead, he argues his challenge was to the lack of testimony from the police officers who prepared a composite from the eye-witness identification. Respondent submits the allegation of "Hearsay evidence presented during trial (2005) and defense attorney did not preserve Crawford objection" in Applicant's initial application clearly refers to the testimony of the co-defendant. This issue was raised in his direct appeal, where the Court of Appeals initially found unpreserved an objection to the only admitted portion of the co-defendant's statement. State v. Frazier, 375 S.C. 575, 581, 654 S.E.2d 280, 283 (Ct. App. 2007) aff'd in part, rev'd in part, 386 S.C. 526, 689 S.E.2d 610 (2010). Regardless, the Confrontation Clause issues related to the preparation of the composite and photo lineup were adequately addressed in Section III.F of the Court's order. (Order p. 18-20).

V.

Applicant argues the Court erred in finding trial counsel not ineffective in failing to move for jury sequestration or a change of venue. Respondent submits the Court's order properly addresses these

issues. Trial counsel's arguments for jury sequestration were not "lackluster," but were reasonable under the circumstances. Trial counsel did articulate a valid reason for not moving for a change of venue when he testified there were no viable grounds to make such a motion. Trial counsel was not required to make frivolous arguments simply because Applicant wanted such arguments made. See Palacio v. State, 333 S.C. 506, 514, 511 S.E.2d 62, 67 (1999) (no deficiency for failing to make arguments where "it would have been futile for Attorney to have made such arguments"). Respondent also submits a motion for reconsideration is not the proper vehicle to challenge the Court's findings in this regard. Wilder Corp., 330 S.C. 77, 497 S.E.2d 734.

Furthermore, Respondent submits Applicant's statements about the conduct of the jury do not appear anywhere in the trial record, and were not presented as evidence at the evidentiary hearing. Applicant cannot use a motion to reconsider to present evidence that was not presented at the evidentiary hearing. Stevens & Wilkinson of S. Carolina, Inc. v. City of Columbia, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014) ("[A] party cannot use a Rule 59(e) motion to advance an issue the party could have raised to the circuit court prior to judgment, but did not." (citing Hickman v. Hickman, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990))). Accordingly, Respondent would move to strike any such statements in Applicant's motion as it is not properly presented for the Court's consideration.

VI.

Respondent argues the Court erred in finding no constitutional errors in the presentation of reply testimony by the State. Respondent submits the Court's order properly addresses these issues. Applicant failed to meet his burden to prove prosecutorial misconduct or ineffective assistance of counsel in this regard. Respondent also submits a motion for reconsideration is not the proper vehicle to challenge the Court's findings in this regard. Wilder Corp., 330 S.C. 77, 497 S.E.2d 734.

Furthermore, Respondent submits Applicant's statements about alternative testimony from the State's reply witness was not presented to the Court in either the trial record or at the evidentiary hearing. Applicant cannot use a motion to reconsider to present evidence that was not presented at the evidentiary hearing. Stevens & Wilkinson, 409 S.C. at 567, 762 S.E.2d at 695 (2014). Accordingly, Respondent would move to strike any such statements in Applicant's motion as it is not properly presented for the Court's consideration.

VII.

Applicant argues the Court erred in finding Applicant failed to demonstrate ineffective assistance of counsel for failing to call certain witnesses to testify to the construction of the photo lineup. Respondent submits the Court's order thoroughly addresses this issue. No Confrontation Clause violation arose from the introduction of the photo lineup. Thus, a motion for reconsideration is not the proper vehicle to challenge the Court's findings in this regard. Wilder Corp., 330 S.C. 77, 497 S.E.2d 734.

VIII.

Applicant argues the Court erred in finding trial counsel was not ineffective for failing to object to portions of the State's closing argument. Respondent submits the Court's order thoroughly addresses this issue. Trial counsel objected to the portions of the State's closing argument that contained objectionable material. Thus, a motion for reconsideration is not the proper vehicle to challenge the Court's findings in this regard. Wilder Corp., 330 S.C. 77, 497 S.E.2d 734.

IX.

Applicant argues the Court erred in finding trial counsel effectively challenged the criminal conspiracy charge. Respondent submits the Court's order thoroughly addresses this issue. Trial counsel moved for a directed verdict on this charge, and this issue was addressed on direct appeal. Trial counsel

thoroughly investigated and challenged this charge. Thus, a motion for reconsideration is not the proper vehicle to challenge the Court's findings in this regard. Wilder Corp., 330 S.C. 77, 497 S.E.2d 734.

Furthermore, Respondent submits Applicant's allegations regarding certain statements made by James Bollow were not presented to the Court in either the trial record or at the evidentiary hearing. Accordingly, Applicant cannot use a motion to reconsider to present evidence that was not presented at the evidentiary hearing. Stevens & Wilkinson, 409 S.C. at 567, 762 S.E.2d at 695 (2014). Accordingly, Respondent would move to strike any such allegations in Applicant's motion as it is not properly presented for the Court's consideration.

X.

Applicant argues the Court erred in finding trial counsel was not ineffective for failing to object to the testimony of two witnesses. Respondent submits the Court's order properly addressed this issue. Applicant's proposed objections to these witnesses simply are not viable. Thus, a motion for reconsideration is not the proper vehicle to challenge the Court's findings in this regard. Wilder Corp., 330 S.C. 77, 497 S.E.2d 734.

XI.

Applicant argues the Court erred in finding no constitutional violations from the presentation of testimony from Detective Frontz and from Mark and Donna Hobbs. Respondent submits the Court's order properly addressed these issues. Applicant failed to demonstrate either prosecutorial misconduct or ineffective assistance of counsel in these regards. Thus, a motion for reconsideration is not the proper vehicle to challenge the Court's findings in this regard. Wilder Corp., 330 S.C. 77, 497 S.E.2d 734.

XII.

Applicant argues the Court erred in finding trial counsel was not ineffective in failing to move to exclude forensic evidence. Respondent submits the Court's order properly addressed these issues.

Applicant's argument there was no evidence to link him to the scene of the crime is the same challenge to the sufficiency of the eye-witness identification that he has raised *ad infinitum* since his arrest on these charges. Thus, a motion for reconsideration is not the proper vehicle to challenge the Court's findings in this regard. Wilder Corp., 330 S.C. 77, 497 S.E.2d 734.

XIII.

Applicant argues the Court erred in finding he had not presented evidence of third party guilt. Respondent submits the Court's order properly addressed these issues. Applicant has failed to produce any non-speculative evidence this crime was committed by the individual he claims committed the crime. Thus, a motion for reconsideration is not the proper vehicle to challenge the Court's findings in this regard. Wilder Corp., 330 S.C. 77, 497 S.E.2d 734.

XIV.

Applicant argues the Court erred in finding the record demonstrated overwhelming evidence of Applicant's guilt. Respondent submits the Court properly articulated the plethora of evidence indicating Applicant murdered the victim. Accordingly, a motion for reconsideration is not the proper vehicle to challenge the Court's findings in this regard. Wilder Corp., 330 S.C. 77, 497 S.E.2d 734.

XV.

Applicant argues trial counsel was ineffective in failing to investigate the armed robbery charges. Respondent notes Applicant did not plead such an allegation in his original or amended application. Furthermore, although couched as an allegation of ineffective assistance of counsel, this allegation is actually a complaint about the sufficiency of the evidence to support an armed robbery conviction. This issue was addressed in Applicant's direct appeal, and cannot be relitigated at this stage under the auspices of an ineffectiveness claim. Regardless, the record contains sufficient evidence to demonstrate trial counsel was not ineffective in this regard. Trial counsel testified he thoroughly investigated the entire

case against Applicant. Applicant presented no evidence of what a further investigation would have uncovered regarding the armed robbery charge. See Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998) (failure to conduct an independent investigation is not *per se* ineffective assistance of counsel, especially where an investigation would not have uncovered any helpful information). Accordingly, if this issue is properly before the Court despite its absence from any pleadings, Respondent submits Applicant failed to meet his burden to demonstrate counsel was either deficient or that he was prejudiced by any such deficiency.

XVI.

Respondent moves to strike Applicant's Exhibit A, titled "Amendments to PCR Application in Reference to [State v. Frazier]" attached to the motion for reconsideration. This attachment is merely Applicant's *pro se* summary of the allegations in his application. Rule 11, SCRCP, requires every pleading, motion or other paper of a party represented by counsel to be signed by at least one attorney of record who is an active member of the South Carolina Bar. If a pleading, motion or other paper is not signed, "it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant." Rule 11 SCRCP. Furthermore, the South Carolina Supreme Court has stated that counsel cannot serve as a mere conduit for *pro se* documents in an effort to avoid the prohibition against hybrid representation, but must use their professional judgment in reviewing the documents and shall only submit those arguments that are relevant and have been edited by counsel. Jones v. State, 348 S.C. 13, 14, 558 S.E.2d 517, 517 (2002). The above mentioned "Exhibit" is merely an attempt to avoid the prohibition on hybrid representation by submitting Applicant's type written submission as an attachment to his counsel's thorough motion for reconsideration. Therefore, Respondent moves to strike this "Exhibit" because it does not comply with Rule 11, SCRCP, and Jones v. State.

Respondent further moves to strike the "Exhibit" because it contains numerous references to facts that are not part of the trial record or were not presented at the evidentiary hearing. The Court heard a two day hearing on the issues presented in this application. Applicant took the stand for several hours at this hearing. The arguments in this "Exhibit" were presented at that time. If any such arguments were not presented, it is because Applicant failed to take advantage of the Court's generous allotment of time to this case. Accordingly, this "Exhibit" should be stricken from the record as it is not properly presented for the Court's consideration. Stevens & Wilkinson, 409 S.C. at 567, 762 S.E.2d at 695.

XVII.

WHEREFORE, Respondent respectfully asks the Court to deny Applicant's motion for reconsideration. Respondent further asks the Court to strike those portions of the motion that attempt to introduce new information that was not timely presented at the evidentiary hearing or that violates the prohibition against hybrid representation.

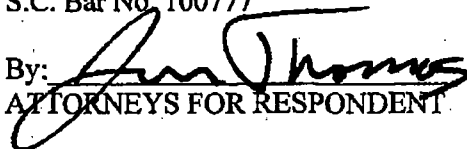
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

JOSHUA L. THOMAS
Assistant Attorney General
S.C. Bar No. 100777

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
Telephone: (803) 734-373

Jan. 6, 2015

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

JOHN B. FRAZIER, #264488)

Applicant,)

vs)

STATE OF SOUTH CAROLINA,)

Respondent.)

IN THE COURT OF COMMON PLEAS

2011-CP-26-8038

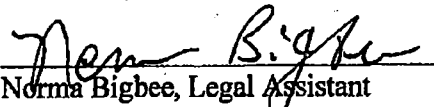
AFFIDAVIT OF SERVICE BY MAIL

HORRY COUNTY
 2015 JAN -8 PM 1:47
 HELEN J. WIGGINS - WARD
 CLERK OF COURT

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

**Brana J. Williams, Esquire
 1500 Hwy. 17 N, Ste., 102
 Surfside Beach, SC 29579**

DATED this 6TH day of January 6, 2015.


 Norma Bigbee, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

John Boyd Frazier,)

Petitioner,)

vs.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
DOCKET NO.:

11 CP 26 8038

PETITIONER'S REPLY TO
RESPONDENT'S MOTION
TO STRIKEHORRY COUNTY
FILED FEB - 9 PM 1:55
CLERK OF COURT

You will please take notice that the Petitioner, by and through the undersigned attorney, in replying to Respondent's Motion to Strike, would request that the Court consider the following:

1. Applicant asserts that Respondent overwhelmingly relies upon *Wilder Corp. v. Wilke*, 497 SE2d 734 [1998] to support his contention that the Applicant should be denied relief for reconsideration in this matter. Applicant contends that this is an error pursuant to SCR Civ. Proc. 59e, Marlar and Bostic, perceptively, regarding issues raised at a PCR evidentiary hearing. In South Carolina, State law requires that all grounds for relief be stated in the PCR application, SC Code Ann. ss17-27-90. If the PCR Court fails to address a claim as required by SC Code Ann. ss17-27-80, counsel for applicant must make a motion to alter or amend the judgment SCR Civ.Proc. 59e. Failure to do so will result in the application of a Procedural Bar to the claim by the South Carolina Supreme Court. All issues raised in the 59e motion are necessary in aiding the PCR Court to fully understand Applicant's position regarding his issues. Therefore Respondent's reliance upon *Wilder Corp.* is not applicable in this instance.

2. Secondly, in section IV, the Respondent has intertwined numerous issues to refute Applicant's original issue of the Confrontation Clause he raised at the PCR evidentiary hearing. [See original issue in section "C" of the 59e motion].

3. In section VI it appears the State argues the Court "erred" in finding "no constitutional errors," thus supporting Applicant's claim.

4. In section VII Respondent asserts that no Confrontation Clause arose from the introduction of the Photo Lineup. Applicant contends that the violation occurred due to counsel's failure to call the police personnel to testify to their own work instead of the Surrogate testimony at the trial. Again Respondent has intertwined issues to refute Applicant's original issues. [See section "C" of the 59e motion].

5. In section XII Respondent asserts that Applicant's argument that there was no evidence to link him to the scene of the crime is the same as the eyewitness identification issue. Applicant contends that these are two separate issues given the testimonial confession of the eyewitnesses that they were not at the scene of the crime and they "went back into the hotel" after the suspect "walked out of view and did not follow him." Where the hotel is over a half a mile distance from the actual scene of the crime. "...where there was no substantial evidence establishing defendant's presence at the scene of the murder." *State v. Schrock*, 322 SE2d 450 [1984]; *State v. Martin*, 533 SE2d 572 [2000]; *State v. Arnold*, 605 SE2d 529 [2004].

6. In section XIII Respondent asserts that Applicant failed to produce any not speculative evidence of third-party guilt. Applicant contends that due to ineffective assistance of counsel this issue was never raised at trial to be properly argued. [See Applicant's "Corrected Amendment Motion to Supplement PCR Application - Ninth Amendment - Third-Party Guilt; section "L" of 59e motion].

7. In section XV Respondent asserts that Applicant did not plead in his original or amended application concerning the Armed Robbery charges. Applicant contends that in his "Corrected Amended Motion to Supplement PCR Application - Eighth Amendment - Failure by the State to present Competent Evidence of Guilt" he addressed the Armed Robbery issue in his lack of any connection to the victim's wallet - found weeks after the murder - and the lack of

a match to a partial fingerprint found within to his own, that the State used as the sole evidence for the Armed Robbery charge against him. Again Applicant relies heavily upon *State v. Schrock*, *supra*.

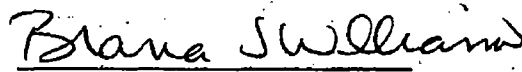
Respondent asserts that Applicant presented no evidence of what a further investigation would have uncovered regarding the armed robbery. Applicant contends that the partial fingerprint found within the wallet was never tested against the Third-Party Guilt suspect - Bruce Welford - due to the ineffectiveness of counsel. [See section "N" All Other Allegations" in Applicant's 59e motion].

8. In section XVI the Respondent asserts that the 59e motion "submitted by counsel" is "thorough." Yet Respondent claims it is hybrid representation. Respondent cannot have it both ways because it cannot be thoroughly submitted by counsel and also hybrid at the same time. The State is relying on SCR Civ.Proc. Rule 11, "If a pleading motion or other paper is not signed it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant." Here it is shown on the cover sheet and signature page of the 59e motion the Applicant's attorney's signature.

For the reasons outlined above, Petitioner asks that Respondent's Motion to Strike be dismissed and the relief requested in his Motion To Reconsider/Alter or Amend The Findings of The Court and The Order of Dismissal be granted.

I SO MOVE.

February 3, 2015


Brana J. Williams
Attorney for Petitioner

Williams Law Firm, LLC
1500 Highway 17 North Ste 102
Surfside Beach, SC 29575
843-357-5100 Fax: 843-357-5102

DOCKET NO. 99-GS-26 2249

WITNESSES

Hendrick/MBPD

The State of South Carolina,

County of Horry

56133

FAHjr

COURT OF GENERAL SESSIONS

AUGUST

TERM

1999

THE STATE

vs.

JOHN BOYD FRAZIER

W/M

DOB:

SSN:

ARREST WARRANT NO. Ct 1: F387464

CDR: 0116 16-03-0010,0020

Ct 2: F387458

CDR: 0139 16-11-0330

Ct 3: CAW199907054

CDR: 0049 16-17-0410

D/A: 7/21/98

ACTION OF GRAND JURY

AUG 26 1999

TRUE BILL

Coleman Doe Jr.

Foreman of Grand Jury

Atty: L. Morgan Martin, Esquire

Indictment for

as to → COUNT 1: MURDER

as to → COUNT 2: ARMED ROBBERY

as to → COUNT 3: CRIMINAL CONSPIRACY

Guilty or Not Guilty

Guilty or Not Guilty

Guilty or Not Guilty

ORIGINAL

J. GREGORY HEMBREE, SOLICITOR

Circle unanimous verdict

Foreman of Petit Jury

Date: 2/18/06

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)
COUNT ONE: MURDER
COUNT TWO: ARMED ROBBERY
COUNT THREE: CRIMINAL CONSPIRACY

At a Court of General Sessions, convened on August 26, 1999, the Grand Jurors of Horry County present upon their oath:

COUNT ONE: MURDER
(CDR: 0116 16-03-0010, 0020)

That JOHN BOYD FRAZIER, along with Kimberly Renee Poole, did in Horry County on or about June 9, 1998, wilfully, feloniously, and intentionally, with malice aforethought, kill the victim, William Brent Poole, by means of shooting the victim twice in the head, and the victim did die as a proximate result thereof in Horry County on or about June 9, 1998, in violation of Section 16-3-10 of the Code of Laws of South Carolina, 1976, as amended, and the Common Law of South Carolina.

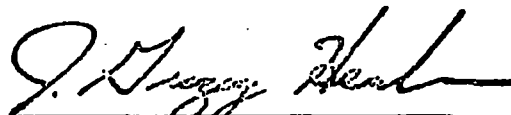
COUNT TWO: ARMED ROBBERY
(CDR: 139 16-11-330)

That JOHN BOYD FRAZIER did in Horry County on or about June 9, 1998, while armed with a deadly weapon, to wit: a handgun, feloniously take from the person or presence of William Brent Poole by means of force or intimidation, goods or monies of William Brent Poole, such goods or monies being described as a wallet and/or good and lawful monies of the United States, in violation of Section 16-11-330(A), Code of Laws of South Carolina, 1976, as amended.

COUNT THREE: CRIMINAL CONSPIRACY
(CDR: 0049 16-17-0410)

That JOHN BOYD FRAZIER did in Horry County on or about June 9, 1998, and dates preceding, unlawfully, knowingly, willfully and feloniously unite, combine, conspire, confederate, agree and have tacit understanding with Kimberly Renee Poole, and/or with other persons whose names are unknown to the Grand Jurors, for the purpose of committing the offense of Murder of William Brent Poole, in violation of Section 16-17-410, Code of Laws of South Carolina, 1976, as amended.

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


SOLICITOR