

VOLUME TWO OF TWO

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Richland County

L. Casey Manning, Circuit Court Judge

RECEIVED

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S.C. Supreme Court

GARY A. WHITE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

A P P E N D I X

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VOLUME TWO
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INDEX

INDEX	i
TRIAL TRANSCRIPT	1
COURT OF APPEALS OPINION	530
PETITION FOR REHEARING	551
ORDER DENYING PETITION FOR REHEARING	556
PETITION FOR WRIT OF CERTIORARI	557
RETURN TO PETITION FOR WRIT OF CERTIORARI	567
BRIEF OF PETITIONER	575
BRIEF OF RESPONDENT	589
SUPREME COURT OPINION	602
APPLICATION FOR POST-CONVICTION RELIEF	608
RETURN	616
APPLICANT'S PRE-HEARING BRIEF	621
POST-CONVICTION RELIEF HEARING TRANSCRIPT	629
ORDER OF DISMISSAL	678
NOTICE OF APPEAL	696
CLERK OF COURT RECORDS	679

1 DECEITFUL MEANS. KIDNAP IS TO REMOVE A PERSON
2 AGAINST HIS WILL BY UNLAWFUL FORCE OR BY FRAUD.

3 ABDUCT MEANS TO CARRY OFF SECRETLY OR BY FORCE
4 FOR AN ILLEGAL PURPOSE. CARRIED AWAY MEANS TO
5 REMOVE. THE STATE DOES NOT HAVE TO PROVE THAT THE
6 DEFENDANT DID ALL OF THESE THINGS. INSTEAD, IF YOU
7 FIND BEYOND A REASONABLE DOUBT THAT THE DEFENDANT DID
8 ANY OF THESE THINGS, YOU MAY FIND THE DEFENDANT
9 GUILTY OF KIDNAPPING.

10 SOMETHING DONE WITHOUT AUTHORITY OF LAW IS
11 SOMETHING WHICH THE LAW DOES NOT SANCTION, PERMIT,
12 ALLOW, CONDONE, OR PROVIDE JUSTIFICATION FOR.

13 KIDNAPPING DOES NOT HAVE TO BE FOR ANY PERSONAL
14 OR MONETARY GAIN, FOR ANY ILLEGAL PURPOSE, BUT MAY BE
15 FOR ANY REASON WHATSOEVER.

16 NOW, IF THE CRIME IS COMMITTED BY TWO OR MORE
17 PEOPLE WHO ARE ACTING TOGETHER IN COMMITTING A CRIME,
18 THE ACT OF ONE IS THE ACT OF ALL. A PERSON WHO JOINS
19 ANOTHER TO ACCOMPLISH AN ILLEGAL PURPOSE IS
20 CRIMINALLY RESPONSIBLE FOR EVERYTHING DONE BY THE
21 OTHER PERSON WHICH OCCURS AS A NATURAL CONSEQUENCE OF
22 THE ACT DONE IN CARRYING OUT THE COMMON PLAN AND
23 PURPOSE.

24 FOR EXAMPLE, TWO PEOPLE CAN BE GUILTY OF KILLING
25 ANOTHER PERSON WHEN ONLY ONE OF THE TWO HAD A GUN.

1 THERE WAS ONLY ONE BULLET AND ONLY ONE OF THE TWO
2 FIRED THE GUN THAT CAUSED THE DEATH.

3 IF TWO OR MORE PEOPLE ARE TOGETHER, ACTING
4 TOGETHER, ASSISTING EACH OTHER IN COMMITTING THE
5 OFFENSE, THE ACT OF ONE IS THE ACT OF ALL OR AS
6 THE -- AS IS SOMETIMES SAID, THE HAND OF ONE IS THE
7 HAND OF ALL.

8 PRIOR KNOWLEDGE THAT A CRIME IS GOING TO BE
9 COMMITTED WITHOUT MORE IS NOT SUFFICIENT TO MAKE A
10 PERSON GUILTY OF THAT CRIME. MERE KNOWLEDGE THAT
11 ANOTHER COURSE -- ANOTHER PERSON IS GOING TO COMMIT A
12 CRIME, EVEN IF THE DEFENDANT IS PRESENT WHEN THE
13 CRIME IS COMMITTED, IS NOT SUFFICIENT TO CONVICT THE
14 DEFENDANT AS A PRINCIPAL.

15 GUILT AS A PRINCIPAL IS SHOWN BY ACTUAL OR
16 CONSTRUCTIVE PRESENCE AT THE SCENE AS A RESULT OF
17 PRIOR ARRANGEMENT; THEREFORE, A FINDING OF PRIOR
18 ARRANGED PLAN OR COMMON SCHEME IS NECESSARY FOR THE
19 FINDING OF GUILT.

20 A PRINCIPAL IN A CRIME IS ONE WHO EITHER
21 ACTUALLY COMMITS THE CRIME OR WHO IS PRESENT AIDING,
22 ABETTING, OR ASSISTING IN COMMITTING THE CRIME.

23 WHEN A PERSON DOES AN ACT IN THE PRESENCE OF AND
24 WITH THE ASSISTANCE OF ANOTHER, THE ACT IS DONE BY
25 BOTH. WHERE TWO OR MORE ACTING WITH A COMMON PLAN OR

1 INTENT ARE PRESENT AT THE COMMISSION OF THE CRIME, IT
2 DOES NOT MATTER WHO ACTUALLY COMMITS THE CRIME. ALL
3 ARE GUILTY, THE HAND OF ONE IS THE HAND OF ALL.

4 PRESENT AT THE COMMISSION OF A CRIME NEEDS TO BE
5 SUFFICIENTLY NEAR TO AID AND ABET AND ASSIST IN THE
6 COMMISSION OF THE CRIME. HOWEVER, MERE PRESENCE AT
7 THE SCENE OF A CRIME IS NOT SUFFICIENT TO CONVICT --
8 TO CONVICT ONE ON AS A PRINCIPAL ON THE THEORY OF
9 AIDING AND ABETTING.

10 INTENT IS ALSO A NECESSARY ELEMENT, FOR THERE
11 MUST HAVE BEEN A COMMON DESIGN OR INTENT TO COMMIT
12 THE CRIME AND THE CRIME MUST HAVE BEEN COMMITTED
13 PURSUANT THERETO WITH THE PERSON AIDING AND ABETTING
14 BY SOME OVERT ACT.

15 INTENT MEANS INTENDING THE RESULT WHICH IS
16 ACTUALLY OCCURRING, NOT ACCIDENTALLY, NOT
17 INVOLUNTARY. INTENT MAY BE SHOWN BY ACTS AND CONDUCT
18 OF THE DEFENDANT AND OTHER CIRCUMSTANCES FROM WHICH
19 YOU MAY NATURALLY AND REASONABLY INFER INTENT. THE
20 STATE MUST PROVE THESE ELEMENTS BEYOND A REASONABLE
21 DOUBT.

22 AS I SAID, THE STATE MUST PROVE CRIMINAL INTENT.
23 CRIMINAL INTENT MUST BE PROVEN BY THE STATE BEYOND A
24 REASONABLE DOUBT. IT IS ALWAYS A MATTER THAT MUST BE
25 DETERMINED BY THE JURY FROM THE CIRCUMSTANCES

1 SURROUNDING THE SITUATION.

2 THERE IS NO WAY TO PROVE INTENT TO A
3 MATHEMATICAL CERTAINTY. THERE'S NO MEDICAL SCIENCE
4 WHICH CAN DISSECT A PERSON'S BRAIN AND DETERMINE WHAT
5 THE PERSON HAD IN MIND. SO THE LAW SAYS THAT
6 CRIMINAL INTENT MAY BE INFERRED FROM THE
7 CIRCUMSTANCES SHOWN TO HAVE EXISTED. THIS IS HOW YOU
8 MAKE A DETERMINATION OF WHETHER OR NOT THE ELEMENT
9 REQUIRING INTENT WAS PRESENT.

10 IT DID NOT -- NECESSARY TO ESTABLISH INTENT BY
11 DIRECT AND POSITIVE EVIDENCE, BUT INTENT MAY BE
12 ESTABLISHED BY INFERENCE FROM THE SAME WAY AS ANY
13 OTHER FACT BY TAKING INTO CONSIDERATION THE ACTS OF
14 THE PARTY AND ALL OF THE FACTS AND CIRCUMSTANCES OF
15 THE CASE.

16 CRIMINAL INTENT IS A MENTAL STATE, THAT
17 CONSCIOUS WRONGDOING. IT'S UP TO YOU TO DETERMINE
18 WHAT THE DEFENDANT INTENDED TO DO BASED ON THE
19 CIRCUMSTANCES SHOWN TO HAVE EXISTED AT THE TIME.

20 AND YOU HAVE BEEN SELECTED AS FAIR AND IMPARTIAL
21 JURORS SWORN TO IMPARTIALLY TRY AND DETERMINE THE
22 FACTS OF THIS CASE. AND WHEN YOU COMPLY WITH YOUR
23 OATH TO DO SO, THEN NO ONE WILL HAVE A RIGHT TO
24 CRITICIZE YOUR VERDICT AND YOU WILL HAVE FULLY
25 DISCHARGED YOUR DUTY AS JURORS.

1 YOU ARE TO DECIDE THIS CASE ACCORDING TO THE
2 TESTIMONY THAT YOU HAVE HEARD FROM THE LIPS OF THE
3 SWORN WITNESSES ALONG WITH OTHER EVIDENCE INTRODUCED.

4 I CHARGE YOU THAT AS JURORS YOU MUST DECIDE THE
5 ISSUES IN THIS PROCEEDING WITHOUT BIAS AND WITHOUT
6 PREJUDICE TO ANY PARTY. CANNOT ALLOW YOURSELF TO BE
7 GOVERNED BY SYMPATHY, BY PASSION, BY PUBLIC OPINION,
8 OR BY ANY OTHER ARBITRARY FACTOR.

9 BOTH THE STATE AND THE DEFENDANT HAVE A RIGHT TO
10 EXPECT THAT EACH OF YOU WILL CAREFULLY AND
11 IMPARTIALLY CONSIDER ALL OF THE EVIDENCE IN THIS CASE
12 AND THAT YOU WILL FOLLOW THE LAW AS I HAVE EXPLAINED
13 IT TO YOU.

14 AND MR. FOREMAN AND MEMBERS OF THE JURY, I HAVE
15 PREPARED THREE VERDICT FORMS, ONE FOR EACH OF THE
16 CHARGES. EACH VERDICT FORM CONTAINS TWO POSSIBLE
17 VERDICTS.

18 NOW, YOU ARE NOT TO INFER ANYTHING BY WHAT GOES
19 FIRST AND WHAT GOES SECOND ON THESE VERDICT FORMS
20 BECAUSE SOMETHING HAS TO GO FIRST AND SOMETHING HAS
21 TO GO SECOND.

22 EACH VERDICT FORM HAS TWO POSSIBLE VERDICTS AS I
23 HAVE TOLD YOU. THE FIRST IS, WE THE JURY UNANIMOUSLY
24 FIND THE DEFENDANT GUILTY OF THE CRIME OF KIDNAPPING.
25 OR WE THE JURY UNANIMOUSLY FIND THE DEFENDANT NOT

1. GUILTY OF THE CRIME OF KIDNAPPING.

2 THE SECOND VERDICT FORM IS, WE THE JURY
3 UNANIMOUSLY FIND THE DEFENDANT GUILTY OF ARMED
4 ROBBERY, AND IT RELATES TO AT THE TOP THE ARMED
5 ROBBERY OF J GWEN ANTHONY, OR WE THE JURY UNANIMOUSLY
6 FIND THE DEFENDANT NOT GUILTY OF THE CRIME OF ARMED
7 ROBBERY.

8 THE THIRD VERDICT FORM SAYS, WE THE JURY
9 UNANIMOUSLY FIND THE DEFENDANT GUILTY OF ARMED
10 ROBBERY OR WE THE JURY UNANIMOUSLY FIND THE DEFENDANT
11 NOT GUILTY OF THE CRIME OF ARMED ROBBERY. UP AT THE
12 TOP IT RELATES TO THE CIRCLE K ALLEGATION.

13 NOW, AS THIS VERDICT FORM SAYS, YOUR VERDICT
14 MUST BE A UNANIMOUS VERDICT. IT'S GOT TO BE THE
15 VERDICT OF ALL 12 JURORS. CANNOT BE 11-ONE,
16 EIGHT-FOUR. IT HAS TO BE THE UNANIMOUS VERDICT OF
17 EACH JUROR.

18 EACH INDICTMENT MUST BE CONSIDERED SEPARATELY
19 AND YOU MUST REACH A VERDICT AS TO EACH INDICTMENT ON
20 THE EVIDENCE THAT HAS BEEN PRESENTED RELATED TO THAT
21 PARTICULAR INDICTMENT. AND WITH EACH INDICTMENT,
22 AGAIN, IT MUST BE THE UNANIMOUS VERDICT OF ALL 12
23 JURORS.

24 WHAT I'M GOING TO ASK YOU TO DO, MR. FOREMAN, IS
25 WHEN YOU HAVE REACHED A VERDICT WITH RESPECT TO EACH

1 CHARGE, IF YOU WILL CIRCLE THAT VERDICT COMPLETELY,
2 WHATEVER IT IS, WE FIND THE DEFENDANT GUILTY OR WE
3 FIND THE DEFENDANT NOT GUILTY. YOU WILL THEN SIGN IT
4 AS FOREPERSON AND DATE IT.

5 WHEN YOU HAVE REACHED A VERDICT AS TO ALL THREE
6 CHARGES AND ALL YOUR VERDICT FORMS ARE COMPLETED, IF
7 YOU OR SOMEONE WILL KNOCK ON THE DOOR, THERE WILL BE
8 A BAILIFF SEATED OUTSIDE YOUR DOOR. ADVISE THE
9 BAILIFF THAT YOU HAVE REACHED A VERDICT AS TO ALL THE
10 CHARGES. WE WILL THEN BRING YOU BACK INTO THE
11 COURTROOM SO THAT YOUR VERDICT CAN BE PUBLISHED.

12 NOW, I'M GOING TO ASK ALL OF YOU BUT THE
13 ALTERNATE IF YOU WOULD STEP BACK TO THE JURY ROOM,
14 BUT DO NOT BEGIN YOUR DELIBERATIONS. I MUST REVIEW
15 WITH THE ATTORNEYS TO DETERMINE WHETHER THEY BELIEVE
16 I EITHER FAILED TO INSTRUCT YOU SOMETHING THAT I
17 SHOULD HAVE INSTRUCTED YOU OR I INCORRECTLY
18 INSTRUCTED YOU SOMETHING AND THAT IT NEEDS TO BE
19 CORRECTED.

20 IF AN ADDITIONAL INSTRUCTION IS NECESSARY, I
21 WILL BRING YOU RIGHT BACK OUT AND GIVE THAT TO YOU.
22 IF NO ADDITIONAL INSTRUCTIONS ARE NECESSARY, I WILL
23 HAVE THE BAILIFF BRING ALL OF THE VERDICT FORMS ALONG
24 WITH ALL EXHIBITS THAT HAVE BEEN INTRODUCED INTO THIS
25 CASE TO THE JURY ROOM AND YOU CAN BEGIN YOUR

1 DELIBERATIONS AT THAT TIME.

2 STEP BACK TO THE JURY ROOM. DO NOT BEGIN YOUR
3 DELIBERATIONS. MR. ALTERNATE, YOU WILL REMAIN WITH
4 ME MOMENTARILY, I WOULD APPRECIATE IT.

5 (JURY LEFT THE COURTROOM AT 4:41 P.M.)

6 THE COURT: I NORMALLY WOULD TURN YOU LOOSE AT
7 THIS TIME, BUT MRS. LAIRD HAD INDICATED A LITTLE
8 WHILE AGO THAT SHE IS NOT FEELING WELL. AND I'M
9 GOING TO ASK IF YOU WILL STAY WITH US FOR A WHILE. I
10 WILL PUT YOU BACK IN ONE OF THE JURY ROOMS.

11 UNFORTUNATELY YOU HAVE TO BE BY YOURSELF, BUT --
12 AND LET ME SEE WHETHER SHE'S GOING TO BE ABLE TO
13 BEGIN THIS PROCESS OF DELIBERATING. IF SHE'S NOT
14 FEELING WELL, I TOLD HER THAT SHE DIDN'T HAVE TO FEEL
15 OBLIGATED TO STAY HERE BECAUSE I DON'T WANT HER HERE
16 SICK.

17 IF I HAVE TO LET HER GO, THEN I'M GOING TO NEED
18 YOU TO STEP BACK IN AND BEGIN -- BEGIN THE PROCESS OF
19 SERVING ON THAT JURY. I WILL CHECK WITH HER IN A
20 LITTLE WHILE AND SEE HOW SHE'S DOING.

21 IF SHE FEELS LIKE THAT SHE'S DOING OKAY AND
22 SHE'S GOING TO BE ALL RIGHT, THEN I WILL MAKE A
23 DECISION AT THAT TIME, MAYBE WE WILL BE ABLE TO LET
24 YOU GO AT THAT TIME. BUT I'M GOING TO ASK YOU TO
25 STAY A LITTLE BIT AND LET ME SEE HOW SHE DOES.

1 PLEASE DON'T DISCUSS THE CASE BACK WHERE WE PUT
2 YOU. THERE WON'T BE ANYBODY TO TALK TO, BUT IF YOU
3 TALK TO YOURSELF ABOUT IT, TALK QUIETLY. ALL RIGHT.
4 CAN Y'ALL -- SOMEBODY LET HIM GO BACK TO ONE OF THE
5 JURY ROOMS?

6 THE CLERK: YES, SIR.

7 THE COURT: I GUESS JUDGE LLOYD HAS A JURY, TOO,
8 SO HE NEEDS HIS JURY ROOM. IF YOU GO JUST RIGHT OUT
9 HERE, MR. TRUETT WILL MEET YOU.

10 (ALTERNATE OUT OF COURTROOM 4:43 P.M.)

11 THE COURT: ALL RIGHT. ANYTHING FROM THE STATE
12 WITH RESPECT TO THE CHARGE?

13 MS. COOPER: NO, SIR, YOUR HONOR.

14 THE COURT: ANYTHING FROM THE DEFENDANT?

15 MRS. DURANT: NO, YOUR HONOR.

16 THE COURT: ALL RIGHT. IF Y'ALL WILL GET WITH
17 MRS. RICHARDSON AND LET'S MAKE SURE WE HAVE ALL THE
18 VERDICT -- I MEAN ALL THE EXHIBITS. AND HERE ARE THE
19 VERDICT FORMS. WE CAN SEND THAT BACK AND WE WILL LET
20 THEM BEGIN THEIR DELIBERATIONS AND SEE HOW THEY DO.

21 (JURY BEGAN DELIBERATIONS AT 4:50 P.M.)

22 THE COURT: THE JURY WANTS TO KNOW, ARE WE ON A
23 CERTAIN TIME SCHEDULE FOR THE REST OF THE AFTERNOON.
24 THE TIME SCHEDULE IS UNTIL THEY REACH A VERDICT
25 BASICALLY, BUT I'M GOING TO BRING THEM IN -- I'M

1 GOING BRING THE JURY IN AND SORT OF SEE WHAT THEY
2 WANT TO DO AND I -- ALL RIGHT. LET'S BRING THE JURY
3 IN.

4 BAILIFF: ALL RIGHT, SIR.

5 (JURY ENTERED THE COURTROOM AT 5:16 P.M.)

6 THE COURT: OKAY. MR. FOREMAN, I GOT YOUR NOTE
7 WHERE I GUESS BASICALLY YOU'RE ASKING WHAT THE
8 TIMEFRAME IS. YOU KNOW, OUR TIMEFRAME IS WE'RE HERE
9 UNTIL Y'ALL REACH A VERDICT WHICH -- HOWEVER LONG IT
10 TAKES.

11 NOW, IT'S 5:15. I DON'T KNOW WHETHER, YOU KNOW,
12 WE'LL TRY TO ACCOMMODATE YOU IN ANY WAY WE POSSIBLY
13 CAN. AND YOU KNOW, ONE OF THE THINGS WE CAN DO IS
14 DELIBERATE A CERTAIN PERIOD OF TIME.

15 AND WE CERTAINLY DON'T WANT TO RUSH THE JURY TO
16 JUDGMENT. WE WANT YOU TO HAVE AN ADEQUATE AMOUNT OF
17 TIME, YOU BEING THE JURY COLLECTIVELY, TO CONSIDER
18 AND DELIBERATE ALL YOU NEED TO CONSIDER AND
19 DELIBERATE BEFORE YOU REACH A VERDICT.

20 WE HAVE THE OPTION AT SOME POINT IN TIME YOU CAN
21 RECESS FOR THE EVENING AND COME BACK TOMORROW AND --
22 UNDER THE CONDITION THAT YOU MAKE SURE YOU -- NO ONE
23 TALKS ABOUT THIS CASE WHILE YOU'RE GONE.

24 BUT IF -- THERE IS NO SET SCHEDULE. I HAVE SAT
25 IN COURTHOUSES TILL THE WEE HOURS OF THE MORNING

1 WAITING ON JURIES TO REACH VERDICTS. I WAS A LITTLE
2 YOUNGER AND MORE ENERGETIC IN THOSE DAYS, BUT WE'LL
3 ACCOMMODATE YOU WITHIN REASON ANY WAY WE POSSIBLY
4 CAN.

5 Y'ALL WANT TO DELIBERATE FOR A WHILE AND THEN
6 SEE HOW IT GOES AND -- AT SOME POINT IN TIME I MAY
7 TAKE INITIATIVE AND TELL YOU WE'RE GOING TO BREAK FOR
8 THE EVENING OR YOU CAN COME BACK AND LET THE BAILIFFS
9 KNOW AND WE CAN CONSIDER WHAT YOU WANT TO DO. ALL
10 RIGHT.

11 WE DON'T HAVE A TIME, YOU KNOW, AT 5:30 WE ARE
12 OUT OF HERE. I THINK I TOLD ONE OR MORE OF THE
13 JURORS YESTERDAY, I GUESS MRS. WILLIAMS, DON'T LOOK
14 FOR 5:30 TODAY. ALL RIGHT. Y'ALL STEP BACK. OH,
15 MS. LAIRD, HOW YOU DOING?

16 JUROR: I'M FEELING LOTS BETTER. THANK YOU.

17 THE COURT: SHOULD I LET THE ALTERNATE GO OR YOU
18 THINK...

19 JUROR: I'M FINE.

20 THE COURT: YOU SURE?

21 JUROR: YES, SIR.

22 THE COURT: ALL RIGHT. THANK YOU. Y'ALL STEP
23 BACK AND RESUME YOUR DELIBERATIONS.

24 (JURY LEFT COURTROOM AT 5:18.)

25 THE COURT: ALL RIGHT. ANYTHING FROM THE STATE

1 WITH RESPECT TO THE RESPONSE TO THE FOREMAN'S NOTE?

2 MS. COOPER: NO EXCEPTION, YOUR HONOR.

3 THE COURT: ANY EXCEPTION FROM THE DEFENDANT?

4 MRS. DURANT: NO, YOUR HONOR.

5 THE COURT: ALL RIGHT. WITHOUT -- ANYBODY HAVE
6 ANY OBJECTION TO MY LETTING MR. LONG ADJOURN FOR THE
7 WEEK?

8 MS. COOPER: NO OBJECTION FROM THE STATE.

9 MRS. DURANT: NO.

10 THE COURT: ALL RIGHT. MR. HOLLACE, CAN YOU
11 BRING MR. LONG BACK IN?

12 BAILIFF: BE GLAD TO, YOUR HONOR.

13 THE COURT: MAKE THIS COURT EXHIBIT NUMBER 1.

14 (ALTERNATE JUROR ENTERED THE COURTROOM.)

15 THE COURT: MR. LONG, I TALKED TO MRS. LAIRD.
16 SHE SAID SHE'S DOING MUCH BETTER AND SHE BELIEVES
17 THAT SHE'S IN A POSITION THAT WOULD ALLOW HER TO
18 CONTINUE TO DELIBERATE INTO THE EVENING AND MAYBE
19 INTO TOMORROW IF THEY ARE -- FEEL THAT WAY.

20 SO AS A RESULT, I'M GOING TO GO AHEAD AND TURN
21 YOU LOOSE AND YOU ACTUALLY WILL BE TURNED LOOSE FOR
22 THE WEEK. YOU DON'T HAVE TO RETURN TOMORROW. I DO
23 APPRECIATE YOUR WILLINGNESS TO SERVE.

24 I KNOW SOME ALTERNATES LIKE TO BE ABLE TO
25 DELIBERATE AFTER THEY SPENT ALL THE TIME IN THE CASE,

1 AND SOME ALTERNATES ARE GLAD THAT THEY DON'T HAVE TO
2 STICK AROUND AND PARTICIPATE IN THAT PROCESS.

3 BUT I DO APPRECIATE YOUR WILLINGNESS TO DO IT
4 AND YOUR ATTENTIVENESS IN THIS CASE AND I KNOW THE
5 LAWYERS AND PARTIES DO AS WELL, AND HOPE IT WASN'T
6 TOO DIFFICULT FOR YOU, AND NEXT TIME YOU HAVE AN
7 OPPORTUNITY TO COME BACK AND WORK WITH US, IF YOU
8 WILL DO SO.

9 JUROR: WILL DO.

10 THE COURT: YOU HAVE A NICE REMAINING PORTION OF
11 THE WEEK AND YOU'RE FREE TO GO. AND IF YOU NEED AN
12 EXCUSE FROM WORK, MR. TRUETT HERE WILL HANDLE THAT
13 AND--

14 JUROR: NO, I'M GOOD. THANK YOU.

15 THE COURT: THEY WILL GET YOU A CHECK SOMETIME
16 IN THE NEAR FUTURE, AND SPEND IT ON YOUR VACATION.

17 JUROR: THANK YOU, SIR.

18 (ALTERNATE OUT OF COURTROOM).

19 THE COURT: ALL RIGHT. WE WILL CONTINUE TO
20 WAIT.

21 (COURT IN RECESS.)

22 (JURY ENTERED THE COURTROOM AT 6:41 P.M.)

23 THE COURT: ALL RIGHT. THANK YOU. MR. FOREMAN,
24 Y'ALL HAVE INDICATED THAT THE FIRST THING, THAT Y'ALL
25 NEED SOME -- SOME ARTICLES TOMORROW MORNING AND YOU

1 WANT THEM IN THE JURY ROOM AT THE TIME THAT Y'ALL
2 BEGIN YOUR DELIBERATIONS.

3 IF YOU COULD TELL ME WHAT IT IS YOU NEED,
4 MR. TRUETT, OUR CLERK, WILL MAKE SURE THAT THEY ARE
5 AVAILABLE IF WE'VE GOT THEM. SO IF YOU CAN GIVE ME
6 SOME IDEA WHAT THAT IS.

7 FOREMAN: TELEVISION AND A VCR; PLEASE, SIR.

8 THE COURT: OKAY. YOU WANT THE TV AND THE VCR?

9 FOREMAN: YES.

10 THE COURT: MR. TRUETT, I ASSUME YOU KNOW HOW TO
11 WORK THAT THING?

12 THE CLERK: OURS IS THE MOST SIMPLE, YOUR HONOR.

13 THE COURT: OH, YOU GOT A DIFFERENT ONE THAN
14 THIS? ALL RIGHT. IF YOU WOULD MAKE THAT AVAILABLE
15 FOR THEM AND THEN IF YOU CAN LET THE FOREMAN OR
16 SOMEBODY IN THE JURY ROOM KNOW HOW TO OPERATE IT SO
17 THAT THEY CAN DO WHATEVER IT IS THEY NEED TO DO WITH
18 IT.

19 THE CLERK: YES, SIR, YOUR HONOR.

20 THE COURT: NOW MR. FOREMAN, YOU ALSO
21 INDICATED -- WE HAD TALKED EARLIER -- THAT Y'ALL ARE
22 AT A POINT WHERE YOU'D LIKE TO GO AHEAD AND RECESS
23 FOR THE EVENING AND RESUME TOMORROW MORNING; IS THAT
24 CORRECT?

25 FOREMAN: YES, SIR.

1 THE COURT: ALL RIGHT. WHAT TIME DO Y'ALL WANT
2 TO START, NINE OR 9:30? ALL RIGHT. NOW, WE'RE GOING
3 TO -- WHEN YOU FINISH THIS CASE, YOUR SERVICE FOR THE
4 WEEK WILL BE OVER. SO NOT -- YOU WANT TO START AT
5 9:30 .

6 FOREMAN: YES, SIR.

7 THE COURT: ALL RIGHT. Y'ALL BE HERE TOMORROW
8 MORNING AT 9:30. MR. FOREMAN, DO NOT BEGIN ANY OF
9 YOUR DELIBERATIONS UNTIL YOU HAVE ALL 12 JURORS IN
10 THE JURY ROOM. SO WHEN YOU GET 11, NOBODY TALK ABOUT
11 THE CASE UNTIL YOU HAVE EVERYBODY THERE, OKAY?

12 THE OTHER THING IS YOU'VE SPENT TWO HARD DAYS
13 WORKING ON THIS CASE. THE INSTRUCTIONS THAT I GAVE
14 YOU ABOUT DISCUSSING IT WITH EACH OTHER OR ANYONE
15 ELSE, THAT STILL STANDS.

16 DO NOT DISCUSS THIS CASE WITH EACH OTHER IN ANY
17 MANNER UNTIL YOU GET ALL OF YOUR JURORS IN THERE AND
18 THE FOREPERSON THAT -- TELLS YOU YOU CAN BEGIN YOUR
19 DELIBERATIONS AGAIN.

20 DO NOT DISCUSS THE CASE WITH ANYBODY THAT YOU
21 COME IN CONTACT WITH. I KNOW YOU HAVE FAMILY MEMBERS
22 OR FRIENDS AND THEY MAY WANT TO KNOW WHAT IT IS THAT
23 YOU'RE DOING, BUT PLEASE DON'T DO THAT.

24 Y'ALL HAVE WORKED HARD FOR THE LAST COUPLE OF
25 HOURS AND DON'T WANT TO DO ANYTHING TO JEOPARDIZE IT.

1 I DON'T WANT TO JEOPARDIZE THE DEFENDANT OR THE STATE
2 IN THEIR CASE, SO PLEASE DON'T DISCUSS THE CASE.

3 I DOUBT SERIOUSLY WHETHER THERE'S GOING TO BE
4 ANYTHING ON THE TELEVISION OR ON THE RADIO OR IN THE
5 NEWSPAPER. IF THERE IS, DON'T READ IT, LISTEN TO IT
6 OR WATCH IT.

7 AND Y'ALL HAVE A NICE EVENING. WE WILL SEE YOU
8 TOMORROW MORNING. WHENEVER YOU GET YOUR 12, YOU CAN
9 BEGIN YOUR DELIBERATIONS, BUT DON'T ANYBODY BE LATER
10 THAN 9:30. THANK YOU VERY MUCH AND WE WILL SEE YOU
11 TOMORROW MORNING. NOW MR, FOREMAN IF EVERYBODY GETS
12 THERE AT 9:25, YOU CAN START THEN.

13 FOREMAN: MYSELF INCLUDED.

14 THE COURT: YOU DON'T NEED -- IT'S UP TO YOU.
15 YOU DON'T NEED ME TO COME IN AND GIVE YOU ANY
16 INSTRUCTIONS. JUST WHEN YOU GET YOUR 12, YOU GO
17 AHEAD AND BEGIN. AND IF YOU'LL BE HERE A FEW MINUTES
18 EARLY, I WILL HAVE MR. TRUETT GET THAT VCR FOR YOU.

19 FOREMAN: OKAY.

20 (JURY LEFT COURTROOM AT 6:45 P.M.)

21 THE COURT: ALL RIGHT. ANYTHING FROM THE STATE?

22 MS. COOPER: NO, SIR, YOUR HONOR.

23 THE COURT: WITH RESPECT TO THE INSTRUCTIONS?
24 ANYTHING FROM THE DEFENDANT?

25 MRS. DURANT: NO, SIR, YOUR HONOR.

1 THE COURT: ALL RIGHT. MR. TRUETT, IF YOU WILL
2 GET THAT FOR THEM, I WILL APPRECIATE IT. Y'ALL HAVE
3 A NICE EVENING AND WE WILL SEE YOU TOMORROW MORNING.

4 (COURT IN RECESS FOR EVENING.)

5 ***** MAY 16TH, 2005 *****

6 (JURY RESUMED DELIBERATIONS AT 9:30 AM WHILE THE
7 COURT WENT ABOUT OTHER BUSINESS OF THE COURT IN THE
8 COURTROOM.)

9 (WHEREUPON WORD CAME TO THE COURT THAT AT 10:43
10 A.M. A VERDICT HAD BEEN REACHED.)

11 (DEFENDANT IN COURTROOM AT 10:48 A.M.)

12 THE COURT: ANYBODY ELSE DOWN THERE? Y'ALL JUST
13 LOCKED THE DOOR? ALL RIGHT. SENT WORD THE JURY HAS
14 REACHED A VERDICT. THE STATE READY TO RECEIVE THE
15 WORD?

16 MS. COOPER: YES, YOUR HONOR.

17 THE COURT: DEFENSE READY?

18 MRS. DURANT: YES, YOUR HONOR.

19 THE COURT: GOOD. MR. LEWIS, BRING IN THE JURY..

20 (WHEREUPON THE JURY ENTERED THE COURTROOM AT
21 10:51 A.M.)

22 VERDICT

23 THE COURT: ALL RIGHT. THANK YOU. GOOD
24 MORNING, LADIES AND GENTLEMEN, AND I APPRECIATE YOU
25 COMING IN THIS MORNING AND BEGINNING YOUR WORK.

1 BEFORE I GET INTO YOUR VERDICT I NEED TO ASK YOU A
2 COUPLE OF QUESTIONS.

3 DID ANYBODY DISCUSS THIS CASE LAST NIGHT WITH
4 ANYONE WHILE YOU WERE GONE? WERE YOU APPROACHED BY
5 ANYBODY TO DISCUSS THIS CASE WHILE YOU WERE GONE?
6 ALL RIGHT. GOOD. THANK YOU. MR. FOREMAN, IT'S BEEN
7 REPORTED THAT Y'ALL HAVE REACHED A VERDICT?

8 FOREMAN: YES, SIR.

9 THE COURT: AND YOU'VE -- AND THIS IS A
10 UNANIMOUS VERDICT WITH RESPECT TO ALL THREE
11 INDICTMENTS?

12 FOREMAN: YES, YOUR HONOR.

13 THE COURT: ALL RIGHT. IF YOU WOULD HAND THE
14 VERDICT FORMS TO THE CLERK.

15 (CLERK APPROACHED THE FOREMAN THEN APPROACHED
16 THE COURT.)

17 THE CLERK: THE STATE OF SOUTH CAROLINA, COUNTY
18 OF RICHLAND, IN THE COUNT OF GENERAL SESSIONS. THE
19 STATE OF SOUTH CAROLINA VERSUS GARY WHITE, JUNIOR,
20 DEFENDANT.

21 THE VERDICTS ARE: ON INDICTMENT 04-GS-40-3017,
22 INDICTMENT FOR KIDNAPPING, THE VERDICT IS, WE THE
23 JURY UNANIMOUSLY FIND THE DEFENDANT GUILTY OF THE
24 CRIME OF KIDNAPPING. SIGNED DANIEL MCNIFF ON THIS
25 16th DAY OF JUNE, 2005.

1 ON INDICTMENT 04-GS-40-3016, AN INDICTMENT FOR.
2 ARMED ROBBERY, VICTIM J GWEN ANTHONY, THE VERDICT IS,
3 WE THE JURY UNANIMOUSLY FIND THE DEFENDANT GUILTY OF
4 THE CRIME OF ARMED ROBBERY. SIGNED DANIEL MCNIFF ON
5 THIS 16th DAY OF JUNE, 2005.

6 ON THE INDICTMENT 04GS-40-3018, INDICTMENT FOR
7 ARMED ROBBERY AT CIRCLE K, THE VICTIM, THE VERDICT
8 IS, WE THE JURY UNANIMOUSLY FIND THE DEFENDANT GUILTY
9 OF THE CRIME OF ARMED ROBBERY, SIGNED DANIEL MCNIFF
10 ON THIS 16th DAY OF JUNE, 2005.

11 MR. FOREMAN, IS THIS YOUR VERDICT AND THE
12 VERDICT OF THE ENTIRE JURY?

13 FOREMAN: YES, SIR.

14 THE CLERK: THANK YOU.

15 THE COURT: ALL RIGHT. ANYTHING FROM THE STATE
16 WITH RESPECT TO THE JURY?

17 MS. COOPER: NO, SIR, YOUR HONOR.

18 THE COURT: ANYTHING FROM THE DEFENDANT?

19 MRS. DURANT: NO, YOUR HONOR.

20 THE COURT: ALL RIGHT. MR. FOREMAN, LADIES AND
21 GENTLEMEN OF THE JURY, I THANK YOU VERY MUCH FOR YOUR
22 SERVICE. I KNOW YOU'VE WORKED HARD BOTH DURING THE
23 COURSE OF THE TRIAL AND YESTERDAY AFTERNOON AND TODAY
24 YOU HAVE DELIBERATED, AND AS YOU CAN SEE OUR SYSTEM
25 DOESN'T OPERATE WITHOUT THAT PARTICIPATION WITH

1 MEMBERS OF THE COMMUNITY SUCH AS YOURSELF.

2 (JURY DISMISSED.)

3 SENTENCING

4 THE COURT: ALL RIGHT. ANYTHING FROM THE STATE
5 WITH RESPECT TO THE VERDICT?

6 MS. COOPER: NO, SIR, YOUR HONOR.

7 THE COURT: ANYTHING FROM THE DEFENDANT?

8 MRS. DURANT: YOUR HONOR, WE DO MOVE FOR A NEW
9 TRIAL BASED ON OUR PRIOR OBJECTIONS INCLUDING BUT NOT
10 LIMITED TO THE OBJECTIONS OF NOT BEING ALLOWED TO
11 QUESTION THE WITNESS CONCERNING HIS SENTENCE HE MAY
12 BE FACING, THE RELIABILITY OF THE DOG TRACKING
13 ISSUES, AND ALL OUR OTHER OBJECTIONS, YOUR HONOR.

14 THE COURT: ALL RIGHT. ANYTHING THE STATE WANTS
15 TO SAY?

16 MS. COOPER: YOUR HONOR, JUST PURSUANT TO THE
17 CASE LAW THAT WAS PRESENTED BY THE DEFENSE, IT'S THE
18 STATE'S POSITION THAT THE WHATEVER ERROR THAT DID
19 EXIST IS HARMLESS BECAUSE BOTH CO-DEFENDANTS
20 TESTIFIED IN THIS CASE ARE CHARGED WITH EXACT SAME
21 CRIMES THAT THIS DEFENDANT IS CHARGED WITH, AND IT
22 DID COME OUT THROUGH THE TESTIMONY OF ANTHONY MORRIS
23 THAT HE WAS LOOKING AT 90 YEARS.

24 THE COURT: ALL RIGHT. AGAIN, I AM GOING TO
25 DENY THE MOTION. I MEAN, I DETERMINED NOT TO GO INTO

1 A PARTICULAR SENTENCE ON AN INDIVIDUAL BASIS, BUT
2 EACH SENTENCE WAS MORE PREJUDICIAL TO YOUR CLIENT
3 THAN PROBATIVE AND YOUR -- SO FOR THOSE REASONS I
4 MUST DENY IT.

5 I THINK THE ADMISSION OF THE DOG HANDLER AS AN
6 EXPERT WAS APPROPRIATE BASED UPON THE TESTIMONY THAT
7 HE OFFERED. ALL RIGHT. Y'ALL READY TO ENTER THIS --
8 I MEAN, DO THE SENTENCING? YOU NEED A FEW MINUTES,
9 MADAM SOLICITOR?

10 MS. COOPER: YES, SIR. IF WE COULD JUST GET A
11 MOMENT TO FINISH THE PAPERWORK, YOUR HONOR.

12 THE COURT: ALL RIGHT.

13 MRS. DURANT: YOUR HONOR, WE DO HAVE A MOTION.

14 THE COURT: OH, I'M SORRY. GO AHEAD.

15 MRS. DURANT: OKAY. OPPOSING THE LIFE WITHOUT
16 POSSIBILITY OF PAROLE SENTENCE, IF YOU'D LIKE A COPY
17 OF THAT AT THIS POINT.

18 THE COURT: SURE.

19 (PAUSE.)

20 THE COURT: ALL RIGHT. IS THERE ANYTHING THAT
21 YOU WISH TO SAY IN ADDITION TO THE MEMORANDUM?

22 MRS. DURANT: JUST THAT IT BE MADE A PART OF THE
23 RECORD AND MARKED AS A COURT EXHIBIT, YOUR HONOR.

24 THE COURT: I'M SORRY. MADE A PART OF THE
25 RECORD?

1 MRS. DURANT: YES, SIR. MARKED AS A COURT
2 EXHIBIT.

3 THE COURT: ALL RIGHT. ANYTHING Y'ALL WANT TO
4 SAY IN RESPONSE? I DON'T KNOW IF YOU READ THEIR
5 MEMORANDUM OR SOMETHING YOU WANT TO SAY IN RESPONSE
6 TO IT.

7 MS. COOPER: NO, YOUR HONOR. WE ARE JUST
8 PURSUING THE STATUTE SECTION 17-25-45 WHICH IS
9 EXPLICIT THAT ANYONE CONVICTED TWICE OF A CRIME, MOST
10 SERIOUS VIOLENT CRIMES, IS SUBJECT TO LIFE WITHOUT
11 PAROLE..

12 THE COURT: ALL RIGHT. I HAVE READ YOUR MEMO,
13 MRS. DURANT, AND I'M -- WELL, I MAY HAVE A PERSONAL
14 OPINION AS TO THIS STATUTE. I DO THINK THAT THE
15 COURT IS OBLIGATED TO FOLLOW THE STATUTE, THAT...

16 MRS. DURANT: YOUR HONOR, IF I MAY JUST READ IF
17 HEADLINE, I WON'T READ THE ENTIRE--

18 THE COURT: WELL, WE ARE GOING TO MAKE IT A PART
19 OF THE RECORD, SO...

20 MRS. DURANT: YES, SIR.

21 THE COURT: I BELIEVE MANDATORY SENTENCES ARE
22 APPROPRIATE AND THAT'S -- AT LEAST IT'S BEEN HELD TO
23 BE APPROPRIATE AND CLEARLY TO EFFECTIVE DISCRETION OF
24 THE COURT, BUT THE COURT'S DETERMINED THAT THAT IS
25 SOMETHING THAT CAN BE DONE, MANDATORY LIFE SENTENCES

1 ARE NOT DETERMINED TO BE CRUEL AND UNUSUAL
2 PUNISHMENT, I DON'T THINK IT DOES SHIFT BURDEN.

3 I MEAN, THE BURDEN STILL IS UPON THE STATE TO
4 PROVE THE DEFENDANT GUILTY BEYOND A REASONABLE DOUBT.
5 ON THIS INSTANCE I WISH THERE HAD BEEN SOME WAY THAT
6 YOUR CLIENT MIGHT HAVE BEEN ABLE TO COME TO GRIPS
7 WITH HIS CHARGE WITHOUT HAVING TO LOOK AT GOING TO
8 JAIL FOR THE REST OF HIS NATURAL LIFE, ESPECIALLY IN
9 LIGHT OF HIS BEING 23 YEARS OF AGE, AND IT HAS BEEN
10 POINTED OUT BY THE CORRECTION OFFICIALS, IMPOSES
11 THEIR OWN PROBLEM BY VIRTUE OF THESE MANDATORY LIFE
12 SENTENCES.

13 BUT I DO THINK THAT THEY ARE WITHIN THE
14 DISCRETION OF THE GENERAL ASSEMBLY AND THEY HAVE --
15 THE LAW AND COMPELLED AND BOUND TO COMPLY WITH IT.
16 SO IF YOU WILL BRING YOUR CLIENT UP HERE. ANYTHING
17 Y'ALL WANT TO TELL ME?

18 MRS. DURANT: WELL, YOUR HONOR--

19 THE COURT: I DON'T KNOW THERE IS ANYTHING I CAN
20 DO, BUT STILL...

21 MRS. DURANT: JUST FOR THE RECORD, YOUR HONOR,
22 IN RESPONSE TO YOUR SAYING THAT YOU WISH THERE HAD
23 BEEN SOMETHING ELSE, THERE WAS NEVER AN OPPORTUNITY
24 FOR--

25 THE COURT: AND I UNDERSTAND THE SOLICITOR'S

1 POSITION.

2 MRS. DURANT: YES, SIR.

3 THE COURT: IT'S MANDATORY. IT'S NOT
4 DISCRETIONARY ON THEIR PART. IT'S JUST A VERY
5 DIFFICULT SITUATION. AND HOPEFULLY PEOPLE WILL
6 REALIZE THAT WHEN THEY DO SOMETHING BAD ONCE, THAT
7 THEY WON'T DO SOMETHING BAD TWICE AND YOU KNOW WHAT
8 THE RAMIFICATIONS ARE. ANYTHING YOU WANT TO SAY,
9 MR. WHITE?

10 THE DEFENDANT: STILL MAINTAIN MY INNOCENCE.

11 THE COURT: WELL, THE JURY SPOKE TO THAT AND
12 THAT WAS THEIR FUNCTION, AND I UNDERSTAND THAT.

13 MS. COOPER: YOUR HONOR, MAY I PUT ONE MATTER ON
14 THE RECORD?

15 THE COURT: ALL RIGHT.

16 MS. COOPER: THANK YOU, YOUR HONOR. I JUST
17 WANTED TO PUT ON THE RECORD THAT THE DEFENDANT WAS
18 SERVED WITH NOTICE BY THE STATE OF ITS INTENTION TO
19 SEEK A SENTENCE OF LIFE WITHOUT PAROLE PURSUANT TO
20 SECTION 17-25-45 AND THAT WAS SERVED ON THE DEFENDANT
21 AND HIS ATTORNEY, MRS. DURANT, ON MAY 25th OF 2005.

22 HE HAS SEVEN PRIOR CONVICTIONS FOR ARMED ROBBERY
23 STEMMING FROM A TWO MONTH ARMED ROBBERY SPREE IN
24 JEFFERSON COUNTY, KENTUCKY, WHERE HE WAS CONVICTED OF
25 ALL SEVEN COUNTS ON MAY FOURTH OF 2000.

1 HE'S RECEIVED A 13 YEAR SENTENCE. HOWEVER, HE
2 WAS ALREADY OUT ON PAROLE IN THE YEAR 2003 AND CAME
3 IMMEDIATELY TO SOUTH CAROLINA. AND I WOULD LIKE TO
4 MAKE THIS DOCUMENT PART OF -- THE CERTIFIED
5 CONVICTIONS PART OF THE RECORD.

6 THE COURT: ALL RIGHT. YOU WANT TO GIVE IT TO
7 THE COURT REPORTER? SHE WILL MAKE IT A COURT'S
8 EXHIBIT.

9 MS. COOPER: THANK YOU, YOUR HONOR.

10 MRS. DURANT: YOUR HONOR, MAY I ADD JUST A
11 LITTLE BIT ABOUT HIM?

12 THE COURT: SURE.

13 MRS. DURANT: THANK YOU, YOUR HONOR. GARY IS
14 23. HE WAS A STUDENT AT ALLEN UNIVERSITY HERE IN
15 COLUMBIA WHEN THIS INCIDENT OCCURRED. HE IS
16 REPRESENTED -- HERE OF HIS FAMILY. HIS MOTHER IS IN
17 KENTUCKY NOW.

18 HIS FATHER WAS HERE AND RECENTLY MOVED TO
19 ARIZONA AND HAS CALLED CONCERNING HIS SON. I THINK
20 GARY WAS YOUNG WHEN THE FIRST OFFENSES OCCURRED IN
21 KENTUCKY, I THINK 17 OR 18 YEARS OLD, AND IS ONLY 23
22 AT THIS TIME. I JUST WANT TO PUT THAT ON THE RECORD,
23 YOUR HONOR.

24 THE COURT: ALL RIGHT. ANYTHING YOU WANT TO
25 SAY?

1 MRS. OWINGS: NO, SIR.

2 THE COURT: ALL RIGHT. 04-GS-40-3016, THE
3 SENTENCE OF THIS COURT THE DEFENDANT BE COMMITTED THE
4 DEPARTMENT OF CORRECTIONS FOR A TERM OF LIFE WITHOUT
5 PAROLE PURSUANT TO 17-25-45 STATUTE OF SOUTH
6 CAROLINA, COSTS AND ASSESSMENTS AS APPLICABLE.

7 AS TO INDICTMENT 04-GS-40-3017 WHICH IS THE
8 KIDNAPPING CHARGE, THE SENTENCE OF THIS COURT THE
9 DEFENDANT BE COMMITTED TO THE DEPARTMENT OF
10 CORRECTIONS FOR A TERM OF LIFE WITHOUT PAROLE
11 PURSUANT TO 17-25-45 PLUS COSTS AND ASSESSMENTS AS
12 APPLICABLE.

13 AND THE ARMED ROBBERY, 04-GS-40-3018, THE
14 SENTENCE OF THIS COURT THE DEFENDANT BE COMMITTED TO
15 THE DEPARTMENT OF CORRECTIONS FOR AN INDETERMINATE
16 TERM OF LIFE WITHOUT PAROLE PURSUANT TO 17-25-45 PLUS
17 COSTS AND ASSESSMENTS AS APPLICABLE. ALL OF THEM
18 WILL RUN CONCURRENT. GOOD LUCK TO YOU.

19 MRS. DURANT: THANK YOU, YOUR HONOR.

20 MS. COOPER: THANK YOU, YOUR HONOR.

21 THE COURT: MRS. OWINGS AND MRS. DURANT, DID
22 Y'ALL NEED TO SEE HIM? I NEED TO TALK -- GOT A
23 PRE-SENTENCE REPORT ON THE OTHER FELLOW AND WE NEED
24 TO... WHO WAS THE.

25 (OFF THE RECORD DISCUSSION WAS HAD CONCERNING

1 ANOTHER CASE.)

2 MS. COOPER: YOUR HONOR? IT'S ABOUT GARY WHITE
3 AND THE EVIDENCE THAT WE ADMITTED IN HIS TRIAL. I
4 WANTED TO ASK THE COURT TO PERMIT THE STATE TO OBTAIN
5 THE VICTIM'S PERSONAL ITEMS THAT WERE ADMITTED INTO
6 EVIDENCE AND SUBSTITUTE THEM WITH PHOTOCOPIES, NAMELY
7 OF HER -- HER PERSONAL FAMILY PHOTOGRAPHS IN HER
8 WALLET, HER SOCIAL SECURITY CARD, OTHER PERSONAL
9 IDENTIFICATION CARDS THAT ARE IN THAT WALLET AS WELL
10 AS THE CERTIFIED 1 DOLLAR BILL AND 2-DOLLAR BILLS
11 THAT SHE COLLECTS AND SUBSTITUTE THOSE WITH
12 PHOTOGRAPHS OR PHOTOCOPIES.

13 ACCORDING TO MR. TRUETT THAT I SPOKE TO, HE
14 REQUIRES A ORDER, AND I WANTED MRS. DURANT TO.

15 THE COURT: HAVE YOU TALKED -- DO Y'ALL HAVE ANY
16 OBJECTION TO THAT?

17 MRS. DURANT: YOUR HONOR, OUR ONLY CONCERN WOULD
18 BE PRESERVING THE RECORD FOR APPEAL, YOU KNOW, IF
19 PHOTOCOPIES--

20 THE COURT: WELL, THOSE THINGS ARE NOT -- I
21 MEAN, ARE THEY ANY ISSUE IN THE--

22 MRS. DURANT: I DON'T THINK SO. I THINK
23 PHOTOCOPIES WOULD BE FINE.

24 THE COURT: YOUR CHANCES OF SUCCESS ON APPEAL
25 ARE BASED ON ME, NOT HER; RIGHT?

1 MRS. DURANT: YES, SIR.

2 THE COURT: I DON'T HAVE A PROBLEM WITH THAT.

3 MS. COOPER: THANK YOU, YOUR HONOR. I WILL
4 PREPARE AN ORDER.

5 THE COURT: ALL RIGHT.

6 END OF REQUESTED TRANSCRIPT OF RECORD
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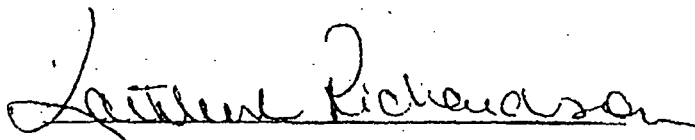
CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

I, KATHLEEN RICHARDSON, RPR, OFFICIAL COURT
REPORTER FOR THE FIFTH JUDICIAL CIRCUIT OF THE STATE OF
SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A
TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF RECORD OF THE
PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE TRIAL OF
THE CAPTIONED CASE, RELATIVE TO APPEAL, IN THE COURT OF
GENERAL SESSIONS FOR RICHLAND COUNTY, SOUTH CAROLINA, ON
THE SIXTEENTH DAY OF JUNE, 2005.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN,
COUNSEL NOR INTEREST TO ANY PARTY HERETO.

SEPTEMBER 22, 2005



KATHLEEN RICHARDSON, RPR

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Gary A. White.

Appellant.

Appeal from Richland County
James R. Barber, III, Circuit Court Judge

Opinion No. 4196
Submitted January 1, 2007 – Filed January 16, 2007

AFFIRMED

Assistant Appellant Defender Aileen P. Clare, of
Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief
Deputy Attorney General John W. McIntosh,
~~Assistant Deputy Attorney General Salley W.~~
Elliott, Senior Assistant Attorney General Harold
M. Coombs, Jr., and Solicitor Warren B. Giese, of
Columbia, for Respondent.

ANDERSON, J.: Gary A. White appeals his convictions for kidnapping and two counts of armed robbery on the grounds: (1) the trial court erred in admitting the testimony of State's expert witness, a dog handler, without establishing the underlying scientific reliability of dog tracking; and (2) newly discovered evidence entitles White to a new trial. We affirm.¹

FACTUAL/PROCEDURAL BACKGROUND

In the early morning hours of April 19, 2004, two men entered the Circle K Convenience Store on the corner of Garners Ferry Road and Old Woodlands Road in Columbia, South Carolina, where the store manager, Gwen Anthony (Anthony), was working the night shift. One of the men, Gary White (White), wore a mask and carried a gun. White approached Anthony, grasped her around her neck with his arm, and held the gun to her head. The other man removed items from Anthony's purse, emptied cash out of the register, and took lottery tickets along with an eighteen (18)-count case of beer. White held Anthony with the gun to her head the entire time the other man moved through the store taking items. However, at one point, Anthony suspected White had passed out for a few seconds, because his head fell onto her shoulder and the gun dropped. She smelled alcohol on his breath. While White dozed, Anthony had an opportunity to observe his clothes and to see the gun. The other man shouted at him and White awoke. As they exited the store, White forced Anthony outside, still holding her in his grip with the gun to her head.

White released Anthony and fled toward the east side of the store, following the other perpetrator in the direction of Old Woodlands Road. At the same time, Officer Rouppasong drove into the Circle K parking lot, and Anthony alerted him to the fleeing robbers. Officer Rouppasong saw one suspect running from the parking lot, pursued him, and called for back up. Following the suspect around the corner of the store, Rouppasong observed a parked vehicle with the headlights on. The suspect he had seen running from

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

the parking lot exited the car from the passenger side and ran into the neighborhood; the driver remained in the vehicle. When his backup arrived Rouppasong approached the vehicle, apprehended the driver, and secured the car. Items that were stolen from Anthony and the Circle K were found in the vehicle.

Back-up officers, including Officer Gunter of the K9 unit, arrived within several minutes. Gunter began tracking with his dog approximately thirty minutes after the officers set up the perimeter. The tracking started from the location where the suspect ran from the passenger side of the vehicle and ended with the discovery of the suspect lying on the ground under some bushes. The suspect was holding a gun but appeared to be asleep.

The State moved to have Gunter qualified as an expert in K9 tracking. Gunter testified he was a Senior Master K9 Handler, which is the highest level of K9 handling that can be acquired. Aurie, Gunter's dog, is a German shepherd descended from a working bloodline of known police and military dogs. Gunter stated he trained with Aurie weekly, and they had probably run a total of 750 tracks throughout the dog's career. Yearly, they met the standards to qualify with the American Association of K9 Trainers. Gunter had been with the K9 unit for approximately fourteen years, and Aurie had been with Gunter for eight years, since he was a six-month-old puppy. The dog's training was primarily for tracking lost or missing people, rather than for sniffing for drugs or other contraband.

Gunter confirmed he had been qualified previously as an expert witness in Richland County. He professed that Aurie was very reliable. The trial court found Gunter qualified as an expert in the field of K9 tracking and handling and instructed the jury that Gunter could offer opinions in his areas of expertise. White objected to admission of dog tracking evidence on the ground it did not meet standards set forth in State v. Jones concerning scientific evidence, and it was not reliable, relevant, and helpful to the jury.

The jury found White guilty of the kidnapping and two armed robbery charges. White then moved for a new trial on the ground the dog tracking testimony did not meet the reliability standard required. The court denied the

motion, finding Gunter's testimony admissible. White was sentenced to concurrent terms of life imprisonment without parole.

During the pendency of this appeal, witness Anthony Morris issued a written statement retracting his trial testimony. Subsequently, White moved for a new trial or, alternatively, for remand to the trial court for a hearing on newly discovered evidence. This court denied White's motion.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Baccus, 367 S.C. 41, 625 S.E.2d 216 (2006); State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001); State v. Wood, 362 S.C. 520, 608 S.E.2d 435 (Ct. App. 2004). We are bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (2000); State v. Patterson, 367 S.C. 219, 625 S.E.2d 239 (Ct. App. 2006); State v. Landis, 362 S.C. 97, 606 S.E.2d 503 (Ct. App. 2004). This Court does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge's ruling is supported by any evidence. Wilson, 345 S.C. at 1, 545 S.E.2d at 827; State v. Mattison, 352 S.C. 577, 575 S.E.2d 852 (Ct. App. 2003).

On appeal, we are limited to determining whether the trial judge abused his discretion. State v. Reed, 332 S.C. 35, 503 S.E.2d 747 (1998); State v. Douglas, 367 S.C. 498, 626 S.E.2d 59 (Ct. App. 2006) cert. pending; State v. Walker, 366 S.C. 643, 623 S.E.2d 122 (Ct. App. 2005). An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support. Fields v. Regional Med. Ctr. Orangeburg, 363 S.C. 19, 609 S.E.2d 506 (2005); Renney v. Dobbs House, Inc., 275 S.C. 562, 274 S.E.2d 290 (1981); see also Simon v. Flowers, 231 S.C. 545, 550, 99 S.E.2d 391, 393-94 (1957) (" '[E]rror at law' exists: (1) when the circuit judge, in issuing [the order], was controlled by some error of law . . . or (2) where the order, based upon factual, as distinguished from legal, considerations, is without adequate evidentiary support."); McSween v.

Windham, 77 S.C. 223, 226, 57 S.E. 847, 848 (1907) (“[T]he determination of the court will not be interfered with, unless there is an abuse of discretion, or unless the exercise of discretion was controlled by some error of law.”). A trial court’s ruling on the admissibility of an expert’s testimony constitutes an abuse of discretion when the ruling is manifestly arbitrary, unreasonable, or unfair. Fields, 363 S.C. at 26, 609 S.E.2d at 509; Means v. Gates, 348 S.C. 161, 558 S.E.2d 921 (Ct. App. 2001).

LAW/ANALYSIS

I. Admission of Expert Testimony

White contends the trial court erred in admitting the State’s expert witness testimony about dog tracking without requiring the State to establish the underlying reliability of dog tracking as a scientific or technical field. We disagree.

A. Qualification of Expert Witness

The qualification of an expert witness and the admissibility of the expert’s testimony are matters within the trial court’s sound discretion. Fields v. Regional Med. Ctr. Orangeburg, 363 S.C. 19, 609 S.E.2d 506 (2005); State v. Myers, 301 S.C. 251, 391 S.E.2d 551 (1990); State v. Douglas, 367 S.C. 498, 626 S.E.2d 59 (Ct. App. 2006) cert. pending; State v. Harris, 318 S.C. 178, 456 S.E.2d 433 (Ct. App. 1995); see also Prince v. Associated Petroleum Carriers, 262 S.C. 358, 365, 204 S.E.2d 575, 579 (1974) (“Whether a witness has qualified as an expert, and whether his opinion is admissible on a fact in issue, are matters resting largely in the discretion of the trial judge.”). The trial court’s decision to admit expert testimony will not be reversed on appeal absent an abuse of discretion. State v. Myers, 359 S.C. 40, 596 S.E.2d 488 (2004); Mizell v. Glover, 351 S.C. 392, 570 S.E.2d 176 (2002); State v. Grubbs, 353 S.C. 374, 577 S.E.2d 493 (Ct. App. 2003); State v. Henry, 329 S.C. 266, 495 S.E.2d 463 (Ct. App. 1997); see also Jenkins v. E.L. Long Motor Lines, Inc., 233 S.C. 87, 94, 103

S.E.2d 523, 527 (1958) ("It was for the trial [c]ourt to say whether the inquiry was one upon which expert testimony was proper, and its ruling thereon will not be disturbed unless its [sic] appears that there has been an abuse of discretion.").

To warrant reversal based on the admission or exclusion of evidence, the complaining party must prove both the error of the ruling and the resulting prejudice. Vaught v. A.O. Hardee & Sons, Inc., 366 S.C. 475, 623 S.E.2d 373 (2005); Fields, 363 S.C. at 26, 609 S.E.2d at 509; Hanahan v. Simpson, 326 S.C. 140, 485 S.E.2d 903 (1997); Ellis v. Davidson, 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004). To show prejudice, there must be a reasonable probability that the jury's verdict was influenced by the challenged evidence or the lack thereof. Fields, 363 S.C. at 26, 609 S.E.2d at 509.

State v. Council inculcates the Bench and Bar as to the law extant in regard to admission of scientific evidence and expert testimony. 335 S.C. 1, 515 S.E.2d 508 (1999). In 1993, the United States Supreme Court adopted new parameters for admissibility of expert testimony under Rules 702 and 703 in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L.Ed.2d 469 (1993). The Daubert court declared:

Before scientific evidence is admitted, the trial judge must determine the evidence is relevant, reliable and helpful to the jury. The Court suggested four factors to consider in deciding reliability in scientific evidence cases: (1) scientific methodology; (2) peer review; (3) consideration of general acceptance; and (4) the rate of error of a particular technique.

Council, 335 S.C. at 19, 515 S.E.2d at 518 (citing Daubert, 509 U.S. at 579, 113 S. Ct. at 2786, 125 L.Ed.2d at 469). If the evidence is reliable and relevant, the trial judge should determine if the probative value of the evidence is outweighed by its prejudicial effect. Id. Accordingly, the South Carolina Supreme Court instructed that "[w]hile this Court does not adopt Daubert, we find the proper analysis for determining admissibility of scientific evidence is now under the SCRE." Council, 335 S.C. at 20, 515 S.E.2d at 518.

Rule 702, SCRE, articulates the guidelines for admissibility of expert testimony in South Carolina. "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Rule 702, SCRE. There is no abuse of discretion as long as the witness has acquired by study or practical experience such knowledge of the subject matter of his testimony as would enable him to give guidance and assistance to the jury in resolving a factual issue which is beyond the scope of the jury's good judgment and common knowledge. State v. Henry, 329 S.C. 266, 495 S.E.2d 463 (Ct. App. 1997); State v. Goode, 305 S.C. 176, 406 S.E.2d 391 (Ct. App. 1991). The test for qualification of an expert is a relative one that is dependent on the particular witness's reference to the subject. Wilson v. Rivers, 357 S.C. 447, 593 S.E.2d 603 (2004). For a court to find a witness competent to testify as an expert, the witness must be better qualified than the fact finder to form an opinion on the particular subject of the testimony. Ellis, 358 S.C. at 525, 595 S.E.2d at 825; Mizell v. Glover, 351 S.C. 392, 570 S.E.2d 176 (2002); Crawford v. Henderson, 356 S.C. 389, 589 S.E.2d 204 (Ct. App. 2003); see also Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 252-53, 487 S.E.2d 596, 598 (1997) ("To be considered competent to testify as an expert, 'a witness must have acquired by reason of study or experience or both such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony.' "). An expert is not limited to any class of persons acting professionally. Gooding, 326 S.C. at 253, 487 S.E.2d at 598; Thomas Sand Co. v. Colonial Pipeline Co., 349 S.C. 402, 563 S.E.2d 109 (Ct. App. 2002). There is no exact requirement concerning how knowledge or skill must be acquired. Honea v. Prior, 295 S.C. 526, 369 S.E.2d 846 (Ct. App. 1988).

The party offering the expert testimony has the burden of showing the witness possesses the necessary learning, skill, or practical experience to enable the witness to give opinion testimony. State v. Von Dohlen, 322 S.C. 234, 471 S.E.2d 689 (1996); State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993); Henry, 329 S.C. at 274, 495 S.E.2d at 466. Generally, however, defects in the amount and quality of the expert's education or experience go

to the weight to be accorded the expert's testimony and not to its admissibility. Id.; see also Brown v. Carolina Emergency Physicians, P.A., 348 S.C. 569, 580, 560 S.E.2d 624, 629 (Ct. App. 2001) ("Any defect in the education or experience of an expert affects the weight and not the admissibility of the expert's testimony.").

The admissibility of scientific evidence is dependent on "the degree to which the trier of fact must accept, on faith, scientific hypotheses not capable of proof or disproof in court and not even generally accepted outside the courtroom." State v. Jones, 273 S.C. 723, 731, 259 S.E.2d 120, 124 (1979) (citing People v. Marx, 54 Cal. App. 3d 100 (1975)). This standard is designed to prevent the fact finders from being misled by the aura of infallibility surrounding unproven scientific methods. State v. Morgan, 326 S.C. 503, 485 S.E.2d 112 (Ct. App. 1997). In considering the admissibility of scientific evidence under the Jones standard, the court looks at several factors, including: (1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures. Council, 335 S.C. at 19, 515 S.E.2d at 517 (citing State v. Ford, 301 S.C. 485, 392 S.E.2d 781 (1990)).

However, not all expert testimony is subject to a Jones analysis. State v. Douglas, 367 S.C. 498, 510, 626 S.E.2d 59, 65 (Ct. App. 2006) (citing State v. Whaley, 305 S.C. 138, 406 S.E.2d 369 (1991)). In Whaley, the court distinguished an expert's testimony that explained certain human behaviors from "scientific" evidence, such as DNA test results, blood spatter interpretation, and bite mark comparisons." Whaley, 305 S.C. at 142, 406 S.E.2d at 371. The expert's testimony in Whaley was not based on a scientific technique, but on his knowledge, skill, experience, and training as a psychologist. The court emphasized: "[w]here the witness is a qualified psychologist who simply explains how certain aspects of every day experience shown by the record can affect human perception and memory, and through them, the accuracy of eyewitness identification, we see no reason to require a greater foundation." Id. at 142, 406 S.E.2d at 371-72. Therefore, "[i]f the expert's opinion does not fall within Jones, questions about the reliability of an expert's methods go only to the weight, but not admissibility,

of the testimony.” Morgan, 326 S.C. at 513, 485 S.E.2d at 118. A trial court’s threshold inquiry is whether the expert’s methods and techniques even fall within Jones’ central purpose: to prevent the aura of infallibility which surrounds “scientific hypotheses not capable of proof or disproof in court and not even generally accepted outside the courtroom” from misleading the fact finders. Id. (citing Jones, 273 S.C. at 731, 259 S.E.2d at 124).

B. Recognized Areas of Expertise in South Carolina

South Carolina recognizes many areas in which an expert “has acquired by study or practical experience such knowledge of the subject matter of his testimony as would enable him to give guidance and assistance to the jury in resolving a factual issue which is beyond the scope of the jury’s good judgment and common knowledge.” Douglas, 367 S.C. at 510-11, 626 S.E.2d at 65 (quoting State v. Henry, 329 S.C. 266, 273, 495 S.E.2d 463, 466 (Ct. App. 1997) and citing Fields v. Regional Med. Ctr. Orangeburg, 363 S.C. 19, 609 S.E.2d 506 (2005); Ellis v. Davidson, 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004); Burroughs v. Worsham, 352 S.C. 382, 574 S.E.2d 215 (Ct. App. 2002); Means v. Gates, 348 S.C. 161, 558 S.E.2d 921 (Ct. App. 2001); Small v. Pioneer Mach., Inc., 329 S.C. 448, 494 S.E.2d 835 (Ct. App. 1997)).

The significance of expert testimony in assisting or guiding the trier of fact in criminal cases is well established. See, e.g., Douglas, 367 S.C. at 511, 626 S.E.2d at 66 (citing State v. Ellis, 345 S.C. 175, 547 S.E.2d 490 (2001) (clarifying that while police officer may testify as expert in crime scene processing and fingerprint identification, he may not testify to ultimate issue as to whether defendant acted in self-defense); State v. Von Dohlen, 322 S.C. 234, 471 S.E.2d 689 (1996) (upholding trial court’s decision to allow forensic pathologist to testify, during sentencing, about the amount of pain victim suffered); State v. Whaley, 305 S.C. 138, 406 S.E.2d 369 (1991) (finding eyewitness identification expert qualified); State v. Myers, 301 S.C. 251, 391 S.E.2d 551 (1990) (allowing expert in blood spatter interpretation to testify).

South Carolina courts have repeatedly acknowledged dog handling as an area of expertise in the criminal context. "Testimony of a dog handler based upon his observation of a tracking dog may be properly admitted into evidence." State v. Johnson, 306 S.C. 119, 127, 410 S.E.2d 547, 552 (1991). A foundation for the admission of dog tracking evidence is sufficient if it provides evidence as to (1) the extent of the handler's experience and training; (2) the dog's characteristics of scent acuity and power to discriminate between human and other scents; and (3) the handler's assessment of the dog's reliability. See State v. Childs, 299 S.C. 471, 477, 385 S.E.2d 839, 843 (1989) (qualifying a bloodhound handler as an expert witness based on the handler's experience and the scent dog's ability and reliability); see also State v. Jordan, 258 S.C. 340, 346, 188 S.E.2d 780, 784 (1972) ("[A] ppellant concedes that the action of bloodhounds which were placed on the supposed track of the offender is admissible as evidence provided that the dogs are allowed to follow their instincts free and untrampled by their handlers."); State v. Bostick, 253 S.C. 205, 207-08, 169 S.E.2d 608, 609 (1969) (finding challenge to dog handler's testimony on bloodhounds' conduct on the ground it "violated appellant's right to be confronted by the witnesses against him" was without merit; the handler was the witness, not the dog.); State v. Brown, 103 S.C. 437, 88 S.E. 21, (1916) (instructing that the conduct of dogs is only a circumstance to be weighed with other circumstances).

C. Other Jurisdictions

1. Admissibility of Dog Tracking Evidence

The North Carolina Supreme Court articulated the foundational requirements adopted in majority of jurisdictions for the admission of dog tracking evidence in State v. Taylor, 337 N.C. 597 (1994). The court announced evidence of bloodhounds' actions was admissible when:

- (1) they are of pure blood, and of a stock characterized by acuteness of scent and power of discrimination; (2) . . . they possess these qualities, and have been accustomed and trained to pursue the human track; (3) . . . they have been found by

experience reliable in such pursuit; [and] (4) . . . they were put on the trail of the guilty party, which was pursued and followed under such circumstances and in such way as to afford substantial assurance, or permit a reasonable inference, of identification.

Id. at 609. Though foundational requirements vary somewhat among jurisdictions, an overwhelming number allow admission of dog tracking evidence in a criminal case to prove identity. State v. Cole, 695 A.2d 1180 (Me. 1997); accord Gavin v. State, 891 So. 2d 907 (Ala. Crim. App. 2003); Wilkie v. State, 715 P.2d 1199 (Alaska Ct. App. 1986); State v. Coleman, 593 P.2d 684 (Ariz. Ct. App. 1978), aff'd in part, reversed in part by State v. Coleman, 593 P.2d 653 (Ariz. 1979); Fox v. State, 246 S.W. 863 (Ark. 1923); People v. Malgren, 139 Cal. App. 3d 234 (Cal. Ct. App. 1983); Brooks v. People, 975 P.2d 1105 (Colo. 1999), as modified on denial of reh'g. (Apr. 12, 1999); State v. Esposito, 670 A.2d 301 (Conn. 1996); Cook v. State, 374 A.2d 264 (Del. 1977); Starkes v. United States, 427 A.2d 437 (D.C. 1981); McCray v. State, 915 So. 2d 239, (Fla. Dist. Ct. App. 2005); Bogan v. State, 303 S.E.2d 48 (Ga. Ct. App. 1983); State v. Streeper, 747 P.2d 71 (Idaho 1987); State v. Buller, 517 N.W.2d 711 (Iowa 1994); State v. Brown, 973 P.2d 773 (Kan. 1999); Brummett v. Commonwealth, 92 S.W.2d 787 (Ky. 1936); State v. King, 80 So. 615 (La. 1919); Roberts v. State, 469 A.2d 442 (Md. 1983); Com. v. Hill, 147, 751 N.E.2d 446 (Mass. App. Ct. 2001); People v. Harper, 204 N.W.2d 263 (Mich. Ct. App. 1972); McDuffie v. State, 482 N.W.2d 234 (Minn. Ct. App. 1992); Byrom v. State, 863 So. 2d 836 (Miss. 2003); State v. Thomas, 536 S.W.2d 529 (Mo. Ct. App. 1976); State v. Taylor, 395 A.2d 505 (N.H. 1978); State v. Parton, 597 A.2d 1088 (N.J. Super. Ct. App. Div. 1991); People v. Roraback, 662 N.Y.S.2d 327 (N.Y. App. Div. 1997); State v. Iverson, 187 N.W.2d 1 (N.D. 1971); State v. Neeley, 758 N.E.2d 745 (Ohio Ct. App. 2001); Buck v. State, 138 P.2d 115 (Okla. Crim. App. 1943); State v. Harris, 547 P.2d 1394 (Or. Ct. App. 1976) overruled on other grounds; Com. v. Patterson, 572 A.2d 1258 (Pa. Super. Ct. 1990); State v. Shepherd, 902 S.W.2d 895 (Tenn. 1995); Johnson v. State, 673 S.W.2d 203 (Tex. App. 1984); State v. Bourassa, 399 A.2d 507 (Vt. 1979); Pelletier v. Com., 592 S.E.2d 382 (Va. Ct. App. 2004); State v. Nicholas, 663 P.2d 1356 (Wash. Ct. App. 1983); State v. Broughton, 470 S.E.2d 413 (W. Va. 1996).

Most jurisdictions find a sufficient foundation for the admission of dog-tracking evidence is established if (1) the evidence shows the dog was of a breed characterized by an acute power of scent; (2) the dog was trained to follow a trail by scent; (3) by experience the dog was found to be reliable; (4) the dog was placed on the trail where the defendant was known to have been within a reasonable time; and (5) the trail was not otherwise contaminated. See Jay M. Zitter, Annotation, Evidence of Trailing by Dogs in Criminal Cases, 81 A.L.R.5th 563 (2006). However, many jurisdictions regard dog tracking evidence alone as legally insufficient and require corroborating evidence to prove identification. See, e.g., People v. Gonzales, 267 Cal. Rptr. 138, 142 (Cal. Ct. App. 1990) ("a conviction cannot rest on dog tracking evidence alone"); People v. Stone, 491 N.W.2d 628, 630 (Mich. Ct. App. 1992) ("Tracking-dog evidence is admissible only after certain foundational requirements are met. In addition, there must be other corroborating evidence presented before identification based on tracking-dog evidence is sufficient to support a guilty verdict."); State v. Loucks, 656 P.2d 480, 482 (Wash. 1983) ("The dangers inherent in the use of dog tracking evidence can only be alleviated by the presence of corroborating evidence identifying the accused as the perpetrator of the crime."). Additionally, a number of jurisdictions require the trial court to instruct the jury to view dog tracking evidence with caution. See People v. Gangler, 643 N.Y.S.2d 839, 840 (N.Y. App. Div. 1996) ("[T]racking evidence is admissible on the issue of identity if the proper foundation is laid and if the jury is given cautionary instructions."); accord Wilkie v. State, 715 P.2d 1199, n. 3 (Alaska Ct. App. 1986); People v. McMillen, 336 N.W.2d 895 (Mich. 1983); State v. Taylor, 395 A.2d 505 (N.H. 1978).

Several jurisdictions find dog tracking evidence inadmissible under any circumstances. See People v. McDonald, 749 N.E.2d 1066 (Ill. App. Ct. 2001); Brafford v. State, 516 N.E.2d 45 (Ind. 1987); State v. Storm, 238 P.2d 1161 (Mont. 1951); Brott v. State, 97 N.W. 593 (Neb. 1903). These courts object to dog tracking evidence on the following grounds: (1) the actions of the bloodhounds are unreliable; (2) the evidence constitutes hearsay; (3) the defendant is deprived of his constitutional right to confront the witnesses against him; (4) the defendant should not be placed in jeopardy by the actions of an animal; (5) a defendant cannot cross-examine the dogs; and (6) a jury might be awed by such testimony and give it much greater weight and

importance than warranted. People v. Centolella, 305 N.Y.S.2d 279, 281-82 (N.Y. Cty. Cl. 1969). In response to these arguments, the Centolella court explained:

[S]uch evidence falls into the category of opinion evidence rather than hearsay . . . the animals are not witnesses against a defendant any more than is a microscope or a spectrograph . . . these machines are not subject to cross-examination any more than the animal, and . . . a person is no more placed in jeopardy by the action of an animal than he or she is by a breath analyzer or a blood test.

Id. The court added the alleged undue importance a jury might attribute to the animal evidence can be minimized by cautionary instructions from the trial judge. Id.

2. Scientific Evidence versus Experience-Based Knowledge

In applying standards for admissibility, a number of courts differentiate between a dog handler's expert opinion based on experience-based knowledge and an expert opinion based on scientific evidence that requires a Daubert analysis. The Virginia Appellate Court held empirical evidence provided by a K9 officer sufficiently established a dog's reliability without requiring evidence of a scientific basis for the dog's ability to track a scent. Pelletier v. Com., 592 S.E.2d 382, 388 (Va. Ct. App. 2004). The court emphasized: "An expert's testimony is admissible not only when scientific knowledge is required, but when experience and observation in a special calling give the expert knowledge of a subject beyond common intelligence and ordinary experience." Id. For instance, "the typical police officer qualifies as an expert based on his experience with narcotics, not on his ability to explain the scientific theory behind his opinion." Id.

The Colorado Supreme Court ruled "dog scent trailing evidence" was admissible" if foundational requirements were satisfied, and "neither the Frye nor Daubert standards of general acceptance or scientific reliability applied." Brooks v. People, 975 P.2d 1105, 1111 (Colo. 1999). Distinguishing between scientific knowledge based on the scientific method and experience-

based, specialized knowledge, the court declined to apply factors designed to ascertain scientific validity in analyzing dog tracking evidence. *Id.* at 1113. “[W]e hold that testimony pertaining to scent tracking by a trained police dog is not readily subjected to standards which were not designed with experience-based specialized knowledge in mind.” *Id.* at 1115. The court further reasoned the proper analysis of reliability in dog tracking cases was based on Rule 702 of the Colorado Rules of Evidence (CRE) admissibility standards.

In *State v. Bourassa*, 399 A.2d 507 (Vt. 1979), the Vermont Supreme Court dismissed a defendant’s contention that dog tracking testimony was inadmissible because the scientific principles underlying such testimony were not established in the record. The court held evidence in the record was sufficient to find that a “well trained dog, supervised by an experienced handler and working under reasonable conditions, is capable of trailing a human being accurately.” *Id.* at 510. Agreeing with the majority of jurisdictions, the court concluded the foundation sufficiently established that: (1) the handler was qualified to use the dog; (2) the dog was trained and accurate in tracking humans; (3) the dog was placed on the trail where circumstances indicate that the accused had been; and (4) the trail had not become so stale or contaminated that it was beyond the dog’s tracking capabilities. *Id.* at 511; accord *Reisch v. State*, 628 A.2d 84 (Del. 1993) (deciding scientific testing not required to support evidence obtained by a dog if foundational requirements are met); *People v. Roraback*, 662 N.Y.S.2d 327 (N.Y. App. Div. 1997) (holding the use of a trained dog is an investigative rather than scientific procedure); *Winston v. State*, 78 S.W.3d 522, 526 (Tex. Ct. App. 2002) (finding interpretation of a dog’s reaction to a scent lineup is based upon training and experience, and not on scientific methodology).

D. The Extant Factual Record

The underlying rationale in *Pelletier*, *Brooks*, and *Bourassa* comports with our Supreme Court’s analysis in *State v. Whaley*, 305 S.C. 138, 406 S.E.2d 369 (1991). The *Whaley* court’s distinction between scientific evidence requiring a *Jones* analysis and expert testimony based on specialized knowledge and experience is equally applicable in the instant case.

Gunter's testimony established the proper foundation under State v. Childs, 299 S.C. 471, 477, 385 S.E.2d 839, 843 (1989) for admitting his opinion as to the reliability of dog tracking evidence. The officer had been with the Columbia Police Department for nearly fourteen years, working as a K9 handler and trainer. He had attained the rank of Senior Master K9 Handler and assisted with the training of other K9 handlers and dogs in the department. Initially, Gunter trained with the Columbia Police Department in 1991. He holds a membership in the American Association of K9 Trainers and maintains his certification by attending week-long training sessions annually. Additionally, while his dog, Aurie, was in service, he trained weekly with the K9 unit of the Columbia Police Department. Gunter's partnership with Aurie lasted over seven years, the entire duration of the dog's career. During that time the team engaged in approximately 750 tracking excursions.

Gunter opined that Aurie was "very reliable." The dog was a German shepherd, who had descended from a bloodline of known police and military working dogs. He was certified in tracking, article searches, building searches, protection, and obedience. However, Gunter emphasized Aurie's strongest skill was tracking people.

White advanced his objection to the admission of the dog tracking evidence on the ground it was not scientifically reliable and did not meet the standards set forth in State v. Jones, 273 S.C. 723, 259 S.E.2d 120, (1979) concerning scientific evidence. Addressing White's challenge outside of the jury's presence, the trial judge explained:

The Court: Well, you know, not all expert testimony deals with scientific evidence.

White's Counsel: Yes, sir. We do understand but we do feel that if they are using it, they are qualifying his as an expert if he—the evidence should meet the standards of scientific evidence, your honor.

The Court: Well, even if it's not a scientific evidence that they are offering?

White's Counsel: Your Honor, any evidence he is offering as an expert—

The Court: Well, expert is scientific, technical, or other specialized knowledge. Doesn't have to be scientific or technical.

Accordingly, the trial court ruled Gunter could offer his opinion testimony as to the reliability of what tracking dogs do provided the State laid the proper foundation. Based on testimony about the extent of Gunter's training and experience, Aurie's acuity and skill in tracking human scent, and Gunter's assessment of Aurie's reliability, the trial court instructed the jury:

I'm going to find the officer qualified as an expert in the field of K9 tracking and handling with respect to his dog and the dogs in general. Ladies and gentlemen, if scientific, technical, or other specialized knowledge will assist you, the trier of fact, in understanding any issue that is—any fact that's in issue or any evidence that may be an issue, then a person who is qualified by virtue of his or her knowledge, skill, experience, training or education may be qualified as an expert in that particular field.

I'm going to find the officer to be qualified as I said in the area of animal or dog tracking and handling, and as such he can offer opinions in his area of expertise.

Now, you are to give his testimony such weight and credibility as you deem appropriate as you will with any and all witnesses that will testify in this trial.

Gunter's testimony verified he had acquired, by training and experience, such knowledge and skill in the area of dog handling and tracking that rendered him better qualified than the jury to form an opinion on the particular subject of dog tracking. Furthermore, Gunter's testimony was

based on his specialized knowledge, skill, and experience in the use of a scent-tracking dog, rather than on the validity of dog tracking as a scientific procedure. The nature of Gunter's testimony is analogous to that offered by a typical police officer who qualifies as an expert based on his experience with narcotics, not on his ability to explain the scientific theory behind his opinion. As such, the evidence Gunter provided complies with Rule 702, SCRE by helping the jury understand the evidence or resolve a factual issue. As the Whaley court indicated, when a proper foundation is established, a Jones analysis is not warranted if expert testimony is based on specialized skill or knowledge rather than on scientific techniques. See State v. Whaley, 305 S.C. 138, 406 S.E.2d 369 (1991). Furthermore, the trial court cautioned the jury that questions about the reliability of Gunter's methods go only to the weight of his testimony, not the admissibility. See State v. Morgan, 326 S.C. 503, 485 S.E.2d 112 (Ct. App. 1997).

E. Harmless Error

Though we discern no error in the trial court's qualification of Gunter as an expert witness, the admission of his opinion testimony, if error, was harmless. Pursuant to Rule 103, SCRE, "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected"

No definite rule of law governs finding an error harmless; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. State v. Gillian, 360 S.C. 433, 454-55, 602 S.E.2d 62, 73 (Ct. App. 2004) (citing State v. Reeves, 301 S.C. 191, 391 S.E.2d 241 (1990); State v. Mitchell, 286 S.C. 572, 336 S.E.2d 150 (1985); State v. Curry, 370 S.C. 674, 636 S.E.2d 649 (Ct. App. 2006); State v. Pagan, 357 S.C. 132, 591 S.E.2d 646 (Ct. App. 2004)). Whether an error is harmless depends on the particular facts of each case, including:

the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination

otherwise permitted, and of course the overall strength of the prosecution's case.

State v. Mizzell, 349 S.C. 326, 333, 563 S.E.2d 315, 318-19 (2002) (quoting Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L.Ed.2d 674 (1986)).

"Harmless beyond a reasonable doubt" means the reviewing court can conclude the error did not contribute to the verdict beyond a reasonable doubt. Mizzell, 349 S.C. at 334, 563 S.E.2d at 319; Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992). "In determining whether an error is harmless, the reviewing court must review the entire record to determine what effect the error had on the verdict." Mizzell, 349 S.C. at 334, 563 S.E.2d at 319 (internal quotations omitted).

Error is harmless where it could not reasonably have affected the result of the trial. In re Harvey, 355 S.C. 53, 584 S.E.2d 893 (2003); Mitchell, 286 S.C. at 573, 336 S.E.2d at 151; State v. Burton, 326 S.C. 605, 486 S.E.2d 762 (Ct. App. 1997). Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 399 S.E.2d 595 (1991); State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003). Thus, an insubstantial error not affecting the result of the trial is harmless where guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached. State v. Bailey, 298 S.C. 1, 377 S.E.2d 581 (1989); Adams, 354 S.C. at 381, 580 S.E.2d at 795; see also State v. Primus, 349 S.C. 576, 564 S.E.2d 103 (2002) (holding assistant solicitor's improper comment, during closing argument was harmless error, where evidence of guilt was overwhelming) overruled on other grounds; State v. Kelley, 319 S.C. 173, 460 S.E.2d 368 (1995) (noting that when guilt is conclusively proven by competent evidence, such that no other rational conclusion could be reached, this court will not set aside conviction for insubstantial errors not affecting result).

Ample evidence linked White to the crimes charged. The testimonies of the victim, Gwen Anthony, and co-defendant, Anthony Morris, were corroborated by a surveillance videotape that recorded the crime as it unfolded. In addition, Roy Wiggins, the driver of the escape car, testified

against White. Items taken from the crime scene were located in the escape vehicle. Officer Rouppasong witnessed a man carrying something in his hand and wearing dark jeans and a white shirt run from the Circle K parking lot. In pursuit, the officer lost sight of the man briefly and then came upon the escape car. The same man wearing the dark jeans and white shirt ran from the escape car toward the yard of the residence where White was eventually found. Gunter put his tracking dog on the scent at the location where the man exited the vehicle. The area in which the dog began tracking had been secured in order to preserve evidence. The dog's tracks led to the location where White was discovered. He appeared to be asleep and was clutching a gun in his hand. The gun matched Anthony's description of the weapon the robber carried, and both Morris and Wiggins positively identified it as the gun White had in his possession immediately prior to the robbery.

The evidentiary record reflects other substantial evidence of White's guilt without the inclusion of Gunter's testimony. Consequently, the admission of the dog tracking evidence was cumulative and harmless.

II. Newly Discovered Evidence

White claims newly discovered evidence entitles him to a new trial. We disagree.

After White served his notice of appeal, co-defendant Anthony Morris issued a written statement retracting his trial testimony against White. Morris claimed he was not at the scene of the crime. In a motion to this court, White urged that we either remand the case for a new trial or remand the case to the trial court for a hearing on the purported new evidence. The State opposed and this court denied the motion. The State argues this court should not consider Morris' statement because it has not been raised to and ruled on by the trial court and is not properly before this court. We agree.

Rule 29(b), SCRCrimP, governs post trial motions on after discovered evidence. A motion for a new trial based on after discovered evidence may not be made while the case is on appeal unless the appellate court exercises its discretionary authority, suspends the appeal, and grants leave to proceed in

the circuit court. The lack of a ruling from the trial court presents nothing for this court's review.

Furthermore, a brief must reference the Record on Appeal to support the facts alleged. Rule 207(b)(4), SCACR. "The Record shall not, however, include matter which was not presented to the lower court or tribunal." Rule 210(c), SCACR. Morris' statement was not presented to the lower court and cannot be properly included in the Record on Appeal.

CONCLUSION

We rule that dog tracking evidence is recognized in South Carolina. We hold that dog tracking evidence is not required to meet the scientific evidence standard articulated in State v. Jones, 273 S.C. 723, 259 S.E.2d 120, (1979). We conclude that dog tracking evidence is admissible provided the dog handler's knowledge, skill, experience, and training qualifies the handler in the area of dog handling and dog tracking. In the case sub judice, Gunter's specialized knowledge, skill, experience, and training qualified him to offer his opinion in the area of dog handling and dog tracking. Luculently, the testimony of Gunter complies with expert testimony law extant in South Carolina.

There is no error in the trial court's qualification of Gunter as an expert witness and the admission of his opinion testimony. Assumptively concluding that error exists, the error is harmless beyond a reasonable doubt. There is overwhelming evidence in the trial record without the inclusion or consideration of Gunter's testimony to support the convictions of the Appellant.

The Appellant's claim as to the right to a new trial based on newly discovered evidence is dismissed based on procedural grounds.

Accordingly, the trial court's ruling is

AFFIRMED.

HUFF and BEATTY, JJ., concur.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

COPY

THE STATE,

RESPONDENT,

V.

GARY A. WHITE,

APPELLANT

Appeal from Richland County

James R. Barber, III, Circuit Court Judge

Opinion No. 4196

RECEIVED

JAN 29 2007

SC Court of Appeals

PETITION FOR REHEARING

The Court of Appeals affirmed the above named appellant's conviction and sentence on January 16, 2007. In support of this petition for rehearing, which is being submitted on today's date pursuant to Rules 221 and 224 of the South Carolina Appellate Court Rules, appellant submits the following:

Appellant argued on appeal that the lower court erred by not requiring the state to demonstrate the underlying reliability of dog tracking before admitting a police dog-handler's testimony into evidence, under Rule 702, SCRE, and State v. Jones, 273 S.E. 723, 259 S.E.2d 120 (1979). Appellant *did not* challenge the handler's expertise in the field, but only the underlying reliability of the field itself.

52

As noted in the brief of the appellant, State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999), required the lower court "find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable." Id. at 335 S.C. 20, 515 S.E.2d 518. To determine reliability, the court should have applied the factors from Jones, above: (1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures. Council, 335 S.C. 1, 19, 515 S.E.2d 508, 517, citing Jones and State v. Ford, 301 S.C. 485, 392 S.E.2d 781 (1990).

Respectfully, appellant submits that dog-tracking, although it has a long history of use, has never been proved reliable under modern standards in a South Carolina Court of Law. In its opinion, the Court cited several cases involving disputes over the handler's expertise. White, p. 5-13, citing State v. Childs, 299 S.C. 471, 385 S.E.2d 839 (1989); State v. Jordan, 258 S.C. 340, 188 S.E.2d 780 (1972). It cited one case issuing a jury instruction on dog-handling, State v. Brown, 103 S.C. 103 S.C. 437, 88 S.E. 21 (1916), and one case holding that dog-handling identification testimony is not a confrontation-clause violation. State v. Bostick, 253 S.C. 205, 169 S.E.2d 608 (1969). Appellant respectfully submits that none of these cases addressed the issue he presented on appeal. He did not challenge the handler's expertise but the underlying validity of the field itself, and not on the basis that identification by a dog violates his confrontation rights. Rather, he moved to compel the state to demonstrate the reliability of the underlying field of expertise, as he was permitted to do under Jones.

The Court cited State v. Johnson, 306 S.C. 199, 127, 410 S.E.2d 547, 552 (1991), for the proposition that dog-handling testimony is *per se* admissible in South Carolina. Johnson, however, relied on a 1913 case, State v. Brown, 103 S.C. 437, 88 S.E.2d 1 (1916), for the same proposition.

A nearly hundred-year-old case may demonstrate the second Jones factor (prior application of method), but it does not prove the remaining factors. Moreover, given the constant and rapid advancements in scientific and technical knowledge, a case as old as Brown could not sufficiently prove the remaining Jones factors.

The Court cited a number of foreign cases in reaching the conclusion that dog-tracking evidence is reliable *per se*. White at p. 7-8 (citations omitted). Appellant respectfully submits that, by appearances at least, the litigants in those jurisdictions were permitted to fully examine the issue. Appellant was denied even a hearing into the reliability of dog-tracking. No evidence on the underlying reliability of dog-tracking has been placed on the record in this case because appellant did not receive a hearing under Jones.

Finally, the Court proposed that dog-tracking was not scientifically based but is an "experienced-based" field which does not require Jones analysis under State v. Whaley, 305 S.C. 138, 406 S.E.2d 369 (1991). White at p. 9-10. In Whaley, the trial court granted the state's motion to suppress the testimony of an expert in memory retention on the basis that the defendant had failed to demonstrate the expert's acceptance in the field. The Supreme Court reversed, holding that the disputed testimony was akin to that of other medical experts, who draw conclusions from their specialized knowledge and experience. Appellant's case is distinguishable. As noted, appellant did not dispute the handler's qualifications. Appellant challenged the scientific foundation and basis of the field, which (to undersigned counsel's knowledge) has never been demonstrated in a trial in South Carolina. Dog-tracking is not and does not resemble a medical field. Appellant properly challenged the underlying reliability of the field of dog-tracking and was entitled to a hearing under Jones. He respectfully urges the Court to reconsider its ruling.

2

Appellant also argued on appeal, by motion and brief, that new evidence entitles him to a new trial. He asked the Court to order a new trial based on an exculpatory affidavit attached to his motion, or, in the alternative, to remand for a hearing on the motion. The Court denied the motion and affirmed on the basis that the issue had not been presented the trial court and was not preserved for appellate review. White at p. 12-13. Appellant respectfully submits that the issue was not addressed below because, as noted in the pleadings, it involves new evidence that was not discovered until after the appeal was underway. He respectfully asks the Court to reconsider its ruling.

Respectfully submitted,


Aileen P. Clare
Appellate Defender

This 29th day of January, 2007.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County

James R. Barber, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

GARY A. WHITE,

APPELLANT

CERTIFICATE OF SERVICE

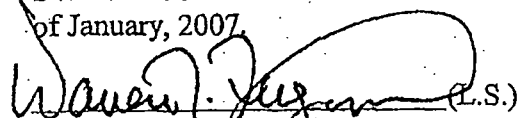
The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Harold M. Coombs, Jr., Esquire, and Gary White, #309726, McCormick Correctional Institution, 386 Redemption Way, McCormick, SC, this 29th day of January, 2007.



Aileen P. Clare
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 29th day
of January, 2007.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: Sept. 22, 2008.

556

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

The State,

Respondent,

v.

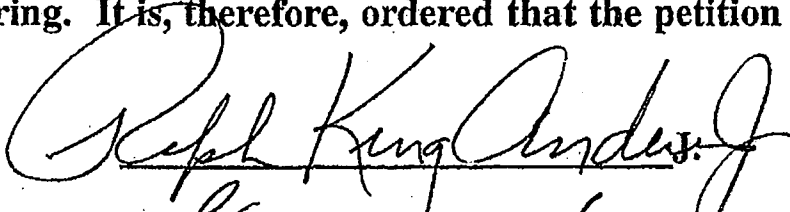
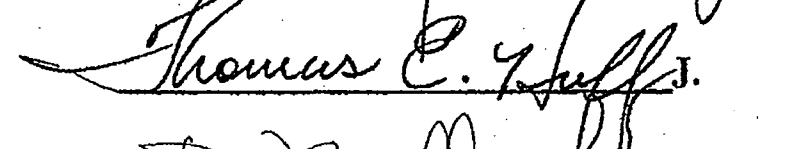
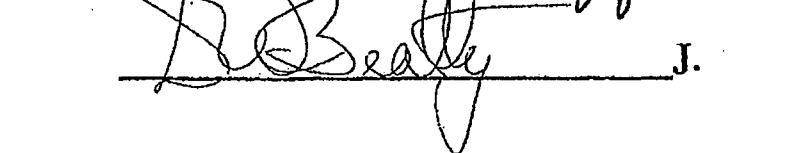
Gary A. White,

Appellant.

**Appeal from Richland County
James R. Barber, III, Circuit Court Judge**

**ORDER DENYING PETITION FOR
REHEARING**

PER CURIAM: After a careful consideration of the Petition for Rehearing, this court is unable to discover any material fact or principle of law that has been overlooked or disregarded, and hence, there is no basis for granting a rehearing. It is, therefore, ordered that the petition for rehearing be denied.

**Columbia, South Carolina
March ²², 2007**

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

James R. Barber, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

GARY A. WHITE,

PETITIONER

PETITION FOR WRIT OF CERTIORARI

LANELLE C. DURANT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER

INDEX

INDEX.....	1
ISSUES PRESENTED	2
STATEMENT OF CASE.....	3
ARGUMENT.....	4
CONCLUSION	8

ISSUES PRESENTED

1. The Court of Appeals incorrectly held that the dog tracking evidence was admissible without requiring the state to demonstrate the underlying reliability of dog tracking before admitting the police dog-handler's testimony into evidence.
2. The Court of Appeals incorrectly held that petitioner was not entitled to a new trial or in the alternative to remand for a hearing on the motion based on newly-discovered evidence when his co-defendant, who testified against him at trial, has retracted his testimony.

STATEMENT OF CASE

Richland County grand jurors indicted petitioner for kidnapping, two counts of armed robbery, and possession of a weapon during the commission of a violent crime. Petitioner stood trial during the June 2005 term of the Richland County Court of General Sessions before the Honorable James R. Barber and a jury. The jury found petitioner guilty as charged, and he was sentenced to life confinement without the possibility of parole under to S.C. Code § 17-25-45.

On direct appeal to the Court of Appeals, White argued:

1. The trial court erred by denying petitioner's objection to the state's expert witness, a dog-handler, without requiring the state to establish the underlying reliability of dog-tracking as a scientific or technical field.
2. Petitioner is entitled to a new trial based on newly-discovered evidence because his co-defendant, who testified against him at trial, has retracted his testimony.

Brief of Appellant, p. 3. The Court affirmed. State v. White, Op. no. 4196, filed January 16, 2007 (Ct.App. 2007). It wrote that dog tracking evidence is not required to meet the scientific evidence standard articulated in State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979) and that dog tracking evidence is admissible provided the dog handler's knowledge, skill, experience, and training qualifies the handler in the area of dog tracking. The Court also wrote that the Petitioner's claim as to the right to a new trial based on newly-discovered evidence is dismissed based on procedural grounds that the trial court did not rule on the issue so there was nothing for the appellate court's review. Counsel for White filed a timely petition for rehearing pursuant to *South Carolina Appellate Court Rule 221(a)*. The Court denied rehearing by order dated March 22, 2007.

This petition for writ of certiorari follows.

ARGUMENT

1.

The Court of Appeals incorrectly held that the dog tracking evidence was admissible without requiring the state to demonstrate the underlying reliability of dog tracking before admitting the police dog-handler's testimony into evidence.

Petitioner argued on appeal that the lower court erred by not requiring the state to demonstrate the underlying reliability of dog tracking before admitting a police dog-handler's testimony into evidence, under Rule 702, SCRE, and State v. Jones, 273 S.E. 723, 259 S.E.2d 120 (1979). Petitioner *did not* challenge the handler's expertise in the field, but only the underlying reliability of the field itself.

As noted in the brief of the appellant, State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999), required the lower court "find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable." Id. at 335 S.C. 20, 515 S.E.2d 518. To determine reliability, the court should have applied the factors from Jones, above: (1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures. Council, 335 S.C. 1, 19; 515 S.E.2d 508, 517, citing Jones and State v. Ford, 301 S.C. 485, 392 S.E.2d 781 (1990).

Respectfully, petitioner submits that dog-tracking, although it has a long history of use has never been proved reliable under modern standards in a South Carolina Court of Law. In its opinion, the Court cited several cases involving disputes over the handler's expertise. White, p. 5-13, citing State v. Childs, 299 S.C. 471, 385 S.E.2d 839 (1989); State v. Jordan, 258 S.C. 340, 188

S.E.2d 780 (1972). It cited one case issuing a jury instruction on dog-handling, State v. Brown, 103 S.C. 103 S.C. 437, 88 S.E. 21 (1916), and one case holding that dog-handling identification testimony is not a confrontation-clause violation. State v. Bostick, 253 S.C. 205, 169 S.E.2d 608 (1969). Petitioner respectfully submits that none of these cases addressed the issue he presented on appeal. He did not challenge the handler's expertise but the underlying validity of the field itself, and not on the basis that identification by a dog violates his confrontation rights. Rather, he moved to compel the state to demonstrate the reliability of the underlying field of expertise, as he was permitted to do under Jones.

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The Court cited a number of foreign cases in reaching the conclusion that dog-tracking evidence is reliable *per se*. White at p. 7-8 (citations omitted). Petitioner respectfully submits that, by appearances at least, the litigants in those jurisdictions were permitted to fully examine the issue. Petitioner was denied even a hearing into the reliability of dog-tracking. No evidence on the underlying reliability of dog-tracking has been placed on the record in this case because petitioner did not receive a hearing under Jones.

Finally, the Court proposed that dog-tracking was not scientifically based but is an "experienced-based" field which does not require Jones analysis under State v. Whaley, 305 S.C. 138, 406 S.E.2d 369 (1991). White at p. 9-10. In Whaley, the trial court granted the state's motion to suppress the testimony of an expert in memory retention on the basis that the defendant had failed to demonstrate the expert's acceptance in the field. The Supreme Court reversed, holding that the disputed testimony was akin to that of other medical experts, who draw conclusions from their specialized knowledge and experience.

Petitioner's case is distinguishable. As noted, petitioner did not dispute the handler's qualifications. Petitioner challenged the scientific foundation and basis of the field, which (to undersigned counsel's knowledge) has never been demonstrated in a trial in South Carolina. The foundational requirements for the field must be met and they were not met in White's case. The Court wrote that the dog handler's testimony was analogous to that of the typical police officer who qualifies as an expert based on his experience with narcotics. This is in error. The typical police officer does not testify as an expert in narcotics; the dog-handler testified as an expert. Dog-tracking is not and does not resemble a medical field. Petitioner properly challenged the underlying reliability of the field of dog-tracking and was entitled to a hearing under Jones. He respectfully urges the Court to reconsider its ruling.

2.

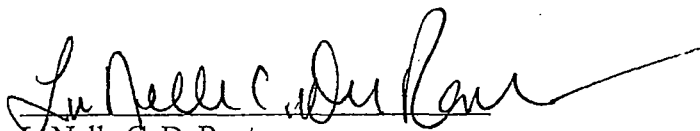
The Court of Appeals incorrectly held that petitioner was not entitled to a new trial or in the alternative to remand for a hearing on the motion based on newly-discovered evidence when his co-defendant, who testified against him at trial, has retracted his testimony.

Petitioner also argued on appeal, by motion and brief, that new evidence entitles him to a new trial. He asked the Court to order a new trial based on an exculpatory affidavit attached to his motion, or, in the alternative, to remand for a hearing on the motion. The Court denied the motion and affirmed on the basis that the issue had not been presented the trial court and was not preserved for appellate review. White at p. 12-13. Petitioner respectfully submits that the issue was not addressed below because, as noted in the pleadings, it involves new evidence that was not discovered until after the appeal was underway. He respectfully asks the Court to reconsider its ruling.

CONCLUSION

For the above reasons, the Court should grant certiorari, reverse White's convictions, and remand for further proceedings.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'LaNelle C. DuRant', written over a horizontal line.

LaNelle C. DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 23rd day of April, 2007.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County

James R. Barber, III, Circuit Court Judge

THE STATE,

RESPONDENT,

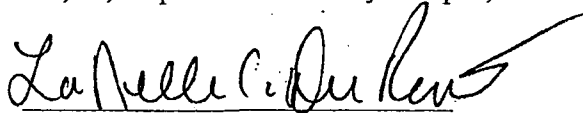
V.

GARY A. WHITE,

PETITIONER

CERTIFICATE OF SERVICE

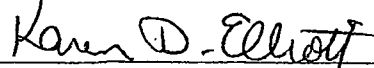
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Harold M. Coombs, Jr., Esquire this 23rd day of April, 2007.



LaNelle C. DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 23rd day
of April, 2007.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: March 19, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County
Honorable James R. Barber, III, Circuit Court Judge

THE STATE,

Respondent,

vs.

GARY A. WHITE,

Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

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ATTORNEYS FOR RESPONDENT

INDEX

QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	3
ARGUMENT	
I. The court of appeals correctly found that dog tracking evidence is admissible provided the dog handler's knowledge, skill, experience, and training qualifies the handler. (Questions Presented 1).	4
II. The court of appeals soundly declined to consider a matter that had not been ruled upon by the circuit court. (Questions Presented 2)	5
CONCLUSION	6

QUESTIONS PRESENTED

1. The petitioner says that the South Carolina Court of Appeals incorrectly held that the dog tracking evidence was admissible without requiring the state to demonstrate the underlying reliability of dog tracking before admitting the dog handler's testimony. (Petitioner's Issues Presented 1).
2. The petitioner says that the South Carolina Court of Appeals "incorrectly held that petitioner was not entitled to a new trial or in the alternative to remand for a hearing on the motion based on newly discovered evidence when his co-defendant, who testified against him at trial" recanted. (Petitioner's Issues Presented 2).

STATEMENT OF THE CASE

Petitioner asks the Supreme Court of South Carolina to review State v. White, 372 S.C. 364, 642 S.E.2d 607 (Ct. App. 2007).

ARGUMENT

I.

The court of appeals correctly found that dog tracking evidence is admissible provided the dog handler's knowledge, skill, experience, and training qualifies the handler. (Questions Presented 1).

Petitioner says the court of appeals failed to address his complaint about the underlying validity or reliability of the field itself [dog tracking] and his not receiving a hearing under State v. Jones.

To the contrary, the court of appeals specified: "White advanced his objection to the admission of the dog tracking evidence on the ground it was not scientifically reliable and did not meet the standards set forth in State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979) concerning scientific evidence." State v. White, 372 S.C. 364, 642 S.E.2d 607 (Ct. App. 2007). The court recognized the admissibility of a dog handler's expert opinion grounded upon knowledge gained from experience and distinguished other expert opinion based upon scientific knowledge derived from experimentation and scientific method. "An expert's testimony is admissible not only when scientific knowledge is required, but when experience and observation in a special calling give the expert knowledge of a subject beyond common intelligence and ordinary experience." State v. White (citation omitted). Further, the court observed that the unique facts of the present case independently verified the reliability of the expert testimony.

II.

The court of appeals soundly declined to consider a matter that had not been ruled upon by the circuit court. (Questions Presented 2).

The substance of Petitioner's issue is that the court of appeals should have considered a witness' purported recantation of testimony since it was newly discovered evidence. The want of a ruling from the trial court leaves the appellate court with nothing to review, and Petitioner advances no meaningful reason to depart from this maxim.

CONCLUSION

The South Carolina Court of Appeals ably selected and applied the correct law, resolved the questions presented, and its resolution is supported by the record. This Court should decline to exercise its discretionary review.

Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

HAROLD M. COOMBS, JR.
Senior Assistant Attorney General

WARREN B. GIESE
Solicitor, Fifth Judicial Circuit

BY: Harold M. Coombs, Jr.
Harold M. Coombs, Jr.

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ATTORNEYS FOR RESPONDENT

May 23, 2007

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County
Honorable James R. Barber, III, Circuit Court Judge

THE STATE,

Respondent,

vs.

GARY A. WHITE,

Petitioner.

PROOF OF SERVICE

I, Harold M. Coombs, Jr., certify that I have served the Return to Petition for Writ of Certiorari by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, LaNelle C. DuRant, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, Post Office Box 11589, Columbia, South Carolina 29211.

I further certify that all parties required by Rule to be served have been served.

This 23rd day of May, 2007.

Harold M. Coombs, Jr.
HAROLD M. COOMBS, JR.
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEY FOR RESPONDENT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

James R. Barber, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

GARY A. WHITE,

APPELLANT

BRIEF OF PETITIONER

LANELLE C. DURANT

Appellate Defender

South Carolina Commission on Indigent Defense

Division of Appellate Defense

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ATTORNEY FOR PETITIONER

INDEX

INDEX.....	1
TABLE OF AUTHORITIES.....	2
ISSUE PRESENTED	3
STATEMENT	4
ARGUMENT	6
CONCLUSION	13

TABLE OF AUTHORITIES

Cases

<u>Hayden v. State</u> , 278 S.C. 610, 299 S.E.2d 854 (1983)	11
<u>State v. Bostick</u> , 253 S.C. 205, 169 S.E.2d 608 (1969)	7
<u>State v. Brown</u> , ~~402 S.C. 103~~ S.C. 437, 88 S.E. 21 (1916)	7, 8
<u>State v. Childs</u> , 299 S.C. 471, 385 S.E.2d 839 (1989)	6
<u>State v. Council</u> , 335 S.C. 1, 515 S.E.2d 508 (1999)	6
<u>State v. Ford</u> , 301 S.C. 485, 392 S.E.2d 781 (1990)	6
<u>State v. Johnson</u> , 306 S.C. ~~199~~ , 127, 410 S.E.2d 547 (1991)	8
<u>State v. Jones</u> , 273 S.C. 723, 259 S.E.2d 120 (1979)	passim
<u>State v. Jordan</u> , 258 S.C. 340, 188 S.E.2d 780 (1972)	6
<u>State v. Kelly</u> , 285 S.C. 373, 329 S.E.2d 442 (1985)	11
<u>State v. Spann</u> , 334 S.C. 618, 513 S.E.2d 98 (1999)	11
<u>State v. Whaley</u> , 305 S.C. 138, 406 S.E.2d 369 (1991)	8
<u>State v. White</u> , 372 S.C. 364, 642 S.E.2d 607 (Ct. App. 2007)	4, 6, 8, 11

Statutes

S.C. Code § 17-25-45	4
----------------------------	---

Other Authorities

<u>The Mythic Infallibility of the Dog</u> , in Andrew E. Taslitz, <u>Does the Cold Nose Know? The Unscientific Myth of the Dog Scent Lineup</u> , 42 Hastings L.J. 15 (November 1990)	9
--	---

Rules

Rule 702, SCORE	6
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ISSUES PRESENTED

1. The Court of Appeals incorrectly held that the dog tracking evidence was admissible without requiring the state to demonstrate the underlying reliability of dog tracking before admitting the police dog-handler's testimony into evidence.

2. The Court of Appeals incorrectly held that petitioner was not entitled to a new trial or in the alternative to remand for a hearing on the motion based on newly-discovered evidence when his co-defendant, who testified against him at trial, has retracted his testimony.

STATEMENT

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On direct appeal to the Court of Appeals, White argued:

1. The trial court erred by denying petitioner's objection to the state's expert witness, a dog-handler, without requiring the state to establish the underlying reliability of dog-tracking as a scientific or technical field.
2. Petitioner is entitled to a new trial based on newly-discovered evidence because his co-defendant, who testified against him at trial, has retracted his testimony.

Brief of Appellant, p. 3. The Court affirmed. App. p. 1-21: State v. White, 372 S.C. 364, 642 S.E.2d 607 (Ct. App. 2007). It wrote that dog tracking evidence is not required to meet the scientific evidence standard articulated in State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979) and that dog tracking evidence is admissible provided the dog handler's knowledge, skill, experience, and training qualifies the handler in the area of dog tracking.

On October 19, 2005, White's appellate attorney filed a Motion to Remand for a New Trial or in the Alternative, For a Hearing Into New Evidence. On December 9, 2005 the Court of Appeals denied this motion. In their opinion, the Court wrote that the Petitioner's claim as to the right to a new trial based on newly-discovered evidence was dismissed based on procedural grounds that the trial court did not rule on the issue so there was nothing for the appellate court's

review. Counsel for White filed a timely petition for rehearing pursuant to *South Carolina Appellate Court Rule 221(a)*. The Court denied rehearing by order dated March 22, 2007.

Appellate counsel filed a petition for writ of certiorari to the Supreme Court on April 23, 2007. The Court issued an order on November 19, 2007 granting the petition for a writ of certiorari.

ARGUMENT

1.

The Court of Appeals incorrectly held that the dog tracking evidence was admissible without requiring the state to demonstrate the underlying reliability of dog tracking before admitting the police dog-handler's testimony into evidence.

Petitioner argued on appeal that the lower court erred by not requiring the state to demonstrate the underlying reliability of dog tracking before admitting a police dog-handler's testimony into evidence, under Rule 702, SCRE, and State v. Jones, 273 S.E. 723, 259 S.E.2d 120 (1979). Petitioner *did not* challenge the handler's expertise in the field, but only the underlying reliability of the field itself.

As noted in the brief of the appellant, State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999), required the lower court "find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable." Id. at 335 S.C. 20, 515 S.E.2d 518. To determine reliability, the court should have applied the factors from Jones, above: (1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures. Council, 335 S.C. 1, 19, 515 S.E.2d 508, 517, citing Jones and State v. Ford, 301 S.C. 485, 392 S.E.2d 781 (1990).

Respectfully, petitioner submits that dog-tracking, although it has a long history of use has never been proved reliable under modern standards in a South Carolina Court of Law. In its opinion, the Court cited several cases involving disputes over the handler's expertise. App. p. 5 – 10: White citing State v. Childs, 299 S.C. 471, 385 S.E.2d 839 (1989); State v. Jordan, 258 S.C. 340, 188 S.E.2d 780 (1972). It cited one case issuing a jury instruction on dog-handling, State v.

Brown, 103 S.C. 103 S.C. 437, 88 S.E. 21 (1916), and one case holding that dog-handling identification testimony is not a confrontation-clause violation. State v. Bostick, 253 S.C. 205, 169 S.E.2d 608 (1969). Petitioner respectfully submits that none of these cases addressed the issue he presented on appeal. He did not challenge the handler's expertise but the underlying validity of the field itself, and not on the basis that identification by a dog violates his confrontation rights. Rather, he moved to compel the state to demonstrate the reliability of the underlying field of expertise, as he was permitted to do under Jones.

The Court cited State v. Johnson, 306 S.C. 199, 127, 410 S.E.2d 547, 552 (1991), for the proposition that dog-handling testimony is *per se* admissible in South Carolina. Johnson, however, relied on a 1913 case, State v. Brown, 103 S.C. 437, 88 S.E.2d 1 (1916), for the same proposition. A nearly hundred-year-old case may demonstrate the second Jones factor (prior application of method), but it does not prove the remaining factors. Moreover, given the constant and rapid advancements in scientific and technical knowledge, a case as old as Brown could not sufficiently prove the remaining Jones factors.

The Court cited a number of foreign cases in reaching the conclusion that dog-tracking evidence is reliable *per se*. App. p. 10 – 13.(citations omitted). Petitioner respectfully submits that, by appearances at least, the litigants in those jurisdictions were permitted to fully examine the issue. Petitioner was denied even a hearing into the reliability of dog-tracking. No evidence on the underlying reliability of dog-tracking has been placed on the record in this case because petitioner did not receive a hearing under Jones.

Finally, the Court proposed that dog-tracking was not scientifically based but is an "experienced-based" field which does not require Jones analysis under State v. Whaley, 305 S.C. 138, 406 S.E.2d 369 (1991). App. p. 13 – 17. In Whaley, the trial court granted the state's

motion to suppress the testimony of an expert (Ph.D. in psychology) in memory retention related to eyewitness reliability on the basis that the defendant had failed to demonstrate the expert's acceptance in the field. The Supreme Court reversed, holding that the disputed testimony was akin to that of other medical experts, who draw conclusions from their specialized knowledge and experience. However, the Supreme Court also ruled that the expert's testimony would have been admissible under Jones as the expert's testimony was based on established techniques and authorities. Whaley at 142.

Petitioner's case is distinguishable. As noted, petitioner did not dispute the handler's qualifications. Petitioner challenged the scientific foundation and basis of the field, which (to undersigned counsel's knowledge) has never been demonstrated in a trial in South Carolina.

The court should have applied the Jones factors and required the state to demonstrate the reliability of dog-tracking. While dog-tracking has been used for centuries, the reliability of many applications has not been widely or rigorously studied. See The Mythic Infallibility of the Dog, in Andrew E. Taslitz, Does the Cold Nose Know? The Unscientific Myth of the Dog Scent Lineup, 42 Hastings L.J. 15 (November 1990). And, historical use, alone, should not create a presumption of reliability. If challenged, the scientific basis of an "old" but untested technique should be subjected to the same scrutiny as a new technique.

The foundational requirements for the field must be met and they were not met in White's case. The Court wrote that the dog handler's testimony was analogous to that of the typical police officer who qualifies as an expert based on his experience with narcotics. This is in error. The typical police officer does not testify as an expert in narcotics; the dog-handler testified as an expert. Dog-tracking is not and does not resemble a medical field. Petitioner

properly challenged the underlying reliability of the field of dog-tracking and was entitled to a hearing under Jones. He respectfully urges the Supreme Court to reconsider this ruling.

2.

The Court of Appeals incorrectly held that petitioner was not entitled to a new trial or in the alternative to remand for a hearing on the motion based on newly-discovered evidence when his co-defendant, who testified against him at trial, has retracted his testimony.

Petitioner also argued on appeal, by motion and brief, that new evidence entitles him to a new trial. Appellant's co-defendant, Anthony Morris, testified against him at trial. On October 12, 2005, trial counsel of the Richland County Public Defender's Office contacted the appellate attorney and informed her that Mr. Morris had retracted his testimony. Trial attorney provided the attached sworn statement by Mr. Morris, which reads as follows:

My name is Anthony Terrell Morris, and I'm claiming this to be a true statement that I'm about to write. On June 15, 2005, I gave a statement to the Court house, which was a lie, but the reason why, was because I was told that if I testify on my co-defendant, I would plea to a lesser charge than what they wanted me to plea to. So being that I had [illegible] of my motion, and saw the videotape, I put parts together, and come up with a story. I also was able to see Roy['s] statements. To be truthful I wasn't on the scene of the crime. My lawyer just told me that I was now in the middle of all this, and either way it went I was gonna face some time. But if I wanted the minimum I would have to testify on a person, and a crime that I don't know anything about. This is my first time ever being in trouble with the law, so whatever my lawyer told me, I beleived [sic] him. On the day it was time for me to plea, he came to the county and told me that, they were not gonna drop my charges, so I told him that I didn't wanted [sic]to testify, and I wasn't ready to plea. In return he told me that I would have to testify, and I would either have to plea, or either go to trail [sic] with my co-defendant, and would get 90 years. So being that I didn't know what was going on, I did what I was told, and in return, I received 13 years for something I didn't do, and also got my co-defendant time, and really don't know him, or if he was on the crime scene either.

7/15/05

Anthony Morris

Petitioner, by motion, asked the Court of Appeals to order a new trial based on the exculpatory affidavit, or, in the alternative, to remand for a hearing on the motion. The Court of Appeals denied the motion on December 9, 2005 and affirmed on the basis that the issue had not been presented to the trial court and was not preserved for appellate review. App. p. 19 – 21.

Mr. Morris' new statement entitles appellant to a new trial. A motion for a new trial based on after-discovered evidence should be granted if the appellant shows that the evidence (1) probably would have changed the trial's result; (2) has been discovered since the trial; (3) could not have been discovered through the exercise of due diligence before trial; (4) is material; and (5) is not merely cumulative or impeaching. State v. Spann, 334 S.C. 618, 513 S.E.2d 98 (1999); State v. Kelly, 285 S.C. 373, 329 S.E.2d 442 (1985); Hayden v. State, 278 S.C. 610, 299 S.E.2d 854 (1983).

Petitioner submits that the issue was not addressed below because it involves new evidence that was not discovered until after the appeal was underway. Rule 29(b), SCRCP provides that a motion for a new trial based on after discovered evidence may not be made while the case is on appeal unless the appellate court, upon motion, has suspended the appeal and granted leave to make the motion.

The new statement exonerates appellant, where Mr. Morris' retracted testimony had incriminated appellant. The new statement was sworn on July 15, 2005, after appellant's trial, and could not have been discovered before it was made. Mr. Morris' testimony was critical to the prosecution and bore directly on the issue of guilt and innocence, as does its retraction. It cannot be characterized as cumulative or impeaching, since it repeats no other evidence presented at trial and concerns facts at issue, and not just witness credibility.

Petitioner has been convicted of very serious offenses and is serving a life sentence without the possibility of parole. In the interest of due process and fundamental fairness, this Court should

grant him a new trial based on Mr. Morris' affidavit. At the very least, he should receive a hearing with the opportunity to subpoena Mr. Morris to determine if his retraction warrants a new trial. He respectfully asks the Supreme Court to reconsider this issue.

CONCLUSION

Based on the foregoing reasons, the Court of Appeals should be reversed and the case remanded.

Respectfully submitted,

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 19th day of December, 2007

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County
James R. Barber, III, Circuit Court Judge

State v. White, 372 S.C. 364, 642 S.E.2d 607 (Ct.App.2007)

THE STATE,

RESPONDENT,

V.

GARY A. WHITE,

APPELLANT

BRIEF OF RESPONDENT

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INDEX

TABLE OF AUTHORITIES ii

ISSUES PRESENTED 1

STATEMENT OF THE CASE 2

ARGUMENT

 I. The trial court recognized that the officer’s tracking dog testimony
 was based upon specialized training, experience, and observation
 of the working scent dog. The testimony about the dog’s scenting
 and seeing the defendant was not about the methods and
 procedures of science 3

 II. Witness Morris’ recantation was soundly excluded from the
 appellate record, and the defendant’s claim that the recantation
 entitles him to a new trial wants substance 8

CONCLUSION 9

TABLE OF AUTHORITIES

Cases:

<u>Brooks v. People</u> , 975 P.2d 1105 (Colo. 1999)	7
<u>Debruler v. Commonwealth</u> , 231 S.W.3d 752 (Ky. 2007)	7
<u>Illinois v. Caballes</u> , 543 U.S. 405, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005)	6
<u>State v. Brown</u> , 103 S.C. 437, 88 S.E. 21 (1916)	7
<u>State v. Childs</u> , 299 S.C. 471, 385 S.E.2d 839 (1989)	7
<u>State v. Council</u> , 335 S.C. 1, 515 S.E.2d 508 (1999)	6
<u>State v. Ford</u> , 301 S.C. 485, 392 S.E.2d 781 (1990)	6
<u>State v. Johnson</u> , 306 S.C. 119, 410 S.E.2d 547 (1991)	6
<u>State v. White</u> , 372 S.C. 364, 642 S.E.2d 607 (Ct.App. 2007)	8

Other Authorities:

42 HASTINGS L. J. 15 (1990)	6
Rule 29, SCRCrimP	8
Rule 403, SCORE	7
Rule 702, SCORE	6, 7

ISSUES PRESENTED

1. The trial court did not require the state to demonstrate the scientific reliability of the tracking dog testimony, and there was no error.
2. The South Carolina Court of Appeals did not include the post-trial statement of witness Morris in the appellate record, and there was no error. If the statement is ever presented to the circuit court, it would not reasonably warrant a new trial.

STATEMENT OF THE CASE

Indictments 04-GS-40-3016, 04-GS-40-3017, and 04-GS-40-3018 charged the defendant with kidnaping and two counts of armed robbery at a Circle K store in Richland County on April 19, 2004. The defendant and his counsel came to trial June 14, 2005 before the Honorable James R. Barber, Judge, and a jury. The jury found the defendant guilty. The state had served notice to seek a sentence of life without parole, and the court sentenced the defendant to concurrent terms of life without parole. The defendant served opposing counsel a timely notice of appeal. July 15, 2005 witness Anthony Morris made a written statement. October 19, 2005 the defendant made Motion to Remand for a New Trial, or, in the Alternative, for a Hearing into New Evidence, and the South Carolina Court of Appeals denied the motion. The appellate court affirmed the judgment of the trial court. State v. White, 372 S.C. 364, 642 S.E.2d 607 (Ct.App. 2007). By Order dated November 19, 2007 the Supreme Court of South Carolina granted discretionary review of the decision.

ARGUMENT

I.

The trial court recognized that the officer's tracking dog testimony was based upon specialized training, experience, and observation of the working scent dog. The testimony about the dog's scenting and seeing the defendant was not about the methods and procedures of science.

Summary Facts

In the early hours of April 19 two robbers confronted the clerk (Gwen) in the Circle K. The taller held a gun to her head. The other took property from her purse, register and store. Meanwhile, the taller robber with the gun appeared either to pass out or to sleep for a few seconds. The robber with the loot left. The taller robber with the gun held Gwen and pushed her out the door. Coincidentally, a police officer (Rouppasong) drove in, Gwen signaled him, and the officer give chase. (R. pp. 80-100).

Officer Rouppasong arrived at the Circle K for refreshment and observed a store employee (Gwen) signaling him and the defendant running. The defendant first ran to a Civic parked around the store and then fled. Rouppasong arrested the driver of the Civic (Roy Wiggins) and called dispatch. Officer Gunter brought the K9 unit. Rouppasong showed Gunter where the defendant ran from the Civic. Gunter put the dog there and began tracking. The dog found an area with a lot of scent. Rouppasong saw the defendant, apparently sleeping with a pistol in his hand, lying under a bush before either the dog or Gunter. The dog alerted by both barking and trying to get to the suspect [defendant]. Gunter thought the search area was ideal, and the time lapse of about thirty minutes was good. (R. pp. 150-155; pp. 160-179; pp. 227-235; p. 237 - p. 238, line 3).

Roy Wiggins (Wiggins) knew Anthony "Amp" Morris (Morris) for years and met the defendant the evening of the armed robbery. When Wiggins drove his mother's Civic to a club, he learned the defendant had a gun. Later, the defendant instigated the Circle K armed robbery. The defendant went to the store with his gun and a ski mask but left his driver's license and other articles in the passenger seat. Morris accompanied the defendant. Wiggins stayed in the Civic. When the police came, Morris was the first back to the car. Seconds later, the defendant returned. Morris and the defendant fled when Wiggins refused to help with any escape. (R. pp. 306-325; pp. 339-340; p. 352). Later, in jail, Wiggins thought the defendant "looked pretty messed up . . . They had to carry him in, so it wasn't like he was walking on his own." (R. pp. 350-351).

Anthony Morris (Morris) acknowledged volunteering to go into the store with the defendant. (R. pp. 382-383). Wiggins got clothes for him (Morris) to wear (e.g., shirt to cover tattoo). (R. pp. 384-385). The defendant is taller than Morris, and the defendant had the only gun. (R. pp. 388-389; p. 405). Morris successfully fled but was arrested about a month after the robbery. (R. pp. 395 and 397). At trial he had pled guilty to two counts armed robbery and one count kidnaping and was awaiting sentencing. (R. pp. 399-400).

How the Issue was Raised at Trial

The state wanted to show that a tracking dog followed the scent that led to the suspect. (R. p. 201, lines 10-12). The defendant objected on the ground that dog tracking evidence was not scientifically reliable and did not meet the standard for scientific evidence. The court found that expert testimony did not have to be scientific or technical. Rather, it might involve specialized knowledge. (R. p. 191, line 25 - p. 193,

line 9).

The state offered Gunter, an assistant trainer and a senior master K9 handler - the highest level of dog handler with his national association. Aurie was a German Shepherd from a known bloodline of working dogs, a human scent dog and reliable. Together they had followed some seven hundred fifty tracks, and Gunter had been qualified as an expert witness one time before. (R. pp. 194-198; p. 212). To track a suspect, they typically used the last point where a suspect was seen, and the dog stayed on that one scent until he found a suspect. When the dog finds the suspect or the person he is tracking, the dog will alert. Officer Gunter allowed that it is possible for a dog - and everybody else - to make a mistake. (R. p. 199, line 8 - p. 200, line 16). The court found the officer was qualified as an expert in the field of canine tracking and charged the jury that he could offer opinions in his area of expertise. However, as with the testimony of any witness, the weight and credibility of his testimony was for the jury's determination. (Tr. p. 201, lines 19-22; p. 218 - p. 219, line 11).

The defendant feels that the trial court erred in admitting the testimony of an officer working with a scent dog since the court did not compel the state to demonstrate its scientific reliability. (Brief of Petitioner Issues Presented 1 and pp. 6 and 8).

Law and Discussion

The defendant cites an article critical of dog scent lineups. In a dog scent lineup, a dog sniffs the scent of something connected with a crime and then sniffs a lineup of people or an object with the scent of a suspect; an alert is admitted to prove that the identified person committed the crime. One complaint is that courts admit evidence from dog scent lineups but apply foundation required for tracking dogs to the, arguably,

different circumstances of the dog scent lineup. After observing that the Supreme Court of the United States contributes to other courts' considering a dog's alert to narcotics inherently reliable, the article believes, not surprisingly, that "neither the alleged failure of dogs in scent lineup cases nor the weaknesses in the courts' analyses necessarily require wholesale rejection of scent lineup evidence." 42 HASTINGS L. J. 15 (1990).

The present case is not a dog scent lineup. The Court's respect for the scent dog's work is unabated. Illinois v. Caballes, 543 U.S. 405, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005)(dog's vehicle sniff during traffic stop infringes no constitutional right, and alert supports probable cause for search).

Rule 702, SCRE requires the court to find that scientific evidence "will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable." State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999)(addressing mitochondrial DNA).

Admissibility of scientific testimony depends upon "the degree that the trier of fact must accept, on faith, scientific hypotheses not capable of proof or disproof in court and not even generally accepted outside the courtroom." State v. Ford, 301 S.C. 485, 392 S.E.2d 781 (1990). DNA fingerprinting is an example of scientific evidence. In finding that DNA fingerprinting is recognized and reliable and generally accepted in the scientific community, this Court found that the "experts did not rely on untested methods, unproven hypotheses, intuition or revelation, but rather applied scientifically and professionally established techniques to the solution of a particular problem." Id.

Scent dog tracking testimony is about the dog handler's investigation through observation of a trained tracking dog following a scent. State v. Johnson, 306 S.C. 119, 410 S.E.2d 547 (1991) ("Testimony of a dog handler based upon his observation of a

tracking dog may be properly admitted into evidence.”)(emphasis added); State v. Childs, 299 S.C. 471, 385 S.E.2d 839 (1989)(in determining the sufficiency of the foundation for expert witness in bloodhound handling “to testify about his work with the bloodhounds during the investigation” the handler’s experience and the scent dog’s ability and reliability could be considered in determining the sufficiency of the foundation)(emphasis added). The dog handler’s testimony is the result of an investigative technique rather than a scientific procedure. “[T]he practice of using trained dogs to track a human scent lacks the hallmark of scientific knowledge identified by the Supreme Court, i.e., ‘a grounding in the methods and procedures of science.’ . . . [C]anine scent tracking is not a technique amenable to peer review or scientific standards and testing. Rather, it concerns the behaviors of the dog and the meanings of those behaviors, a knowledge acquired through experience and training.” Debruler v. Commonwealth, 231 S.W.3d 752 (Ky. 2007). Accord, State v. Brown, 103 S.C. 437, 88 S.E. 21 (1916)(dog’s instinct must be free and untrammelled; the handler, not the dog, is the witness)(emphasis added); Brooks v. People, 975 P.2d 1105 (Colo. 1999)(dog scent tracking evidence is not subject to scientific validation factors, and conventional Rule 702 and Rule 403 analysis is appropriate).

The trial court did not err in declining to require the state to demonstrate the scientific reliability of scent dog, tracking testimony.

II.

Witness Morris' recantation was soundly excluded from the appellate record, and the defendant's claim that the recantation entitles him to a new trial wants substance.

The Supplemental Appendix contains Anthony Morris' July 15, 2005 statement. In substance Morris says that he was not at the scene and wants knowledge of the crime. Purportedly on the advice of counsel, he testified at trial to get a light sentence after pleading guilty to two counts armed robbery and one count kidnaping. (Supplemental Appendix p. 5; R. pp. 399-400).

The defendant (White) feels that the statement exonerates him. (Supplemental Appendix p. 3; Brief of Petitioner p. 11). Since Morris' July 15 statement claims to exonerate himself (Morris) in that he was not at the scene and wants knowledge of the crime, it is difficult to understand how the statement exonerates Gary White: Roy Wiggins testified that Gary White instigated the Circle K armed robbery and went to the store with the gun. Officer Rouppasong found Gary White holding the gun, apparently sleeping under a bush about thirty minutes after the armed robbery, and testified he was the man who fled the Circle K. (Please see Summary Facts, Argument I, supra).

The Court of Appeals excluded the statement from the record on appeal since it had not been ruled upon in the circuit court. The Court of Appeals exercised sound discretion in declining to remand the case for a hearing in the circuit court since that would have required the court, on its own motion, to suspend the appeal. Rule 29, SCRCrimP. State v. White, 372 S.C. 364, 642 S.E.2d 607 (Ct.App. 2007). The defendant's claim that the statement warrants a new trial wants substance.

CONCLUSION

The judgment of the trial court should be affirmed.

Respectfully submitted,

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April 17, 2008

STATE OF SOUTH CAROLINA

In the Supreme Court

Appeal from Richland County
Honorable James R. Barber, III, Circuit Court Judge

State v. White, 372 S.C. 364, 642 S.E.2d 607 (Ct.App. 2007)

THE STATE,

Respondent,

vs.

GARY A. WHITE,

Petitioner.

PROOF OF SERVICE

I, Harold M. Coombs, Jr., certify that I have served the Brief of Respondent by depositing three copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, LaNelle C. DuRant, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, Post Office Box 11589, Columbia, South Carolina 29211.

I further certify that all parties required by Rule to be served have been served.

This 17th day of April, 2008.

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ATTORNEY FOR RESPONDENT

382 S.C. 265

The STATE, Respondent,

v.

Gary A. WHITE, Petitioner.

No. 26642.

Supreme Court of South Carolina.

Heard Feb. 4, 2009.

Decided April 27, 2009.

Rehearing Denied May 28, 2009.

Background: Defendant was convicted in the Circuit Court, Richland County, James R. Barber, III, J., of kidnapping and armed robbery. Defendant appealed. The Court of Appeals, 372 S.C. 364, 642 S.E.2d 607, affirmed. Defendant sought certiorari review.

Holdings: The Supreme Court, Kittredge, J., held that:

- (1) expert testimony related to dog tracking evidence was reliable, and
- (2) trial court's gatekeeping function in assuring reliability of expert testimony applies to nonscientific evidence, overruling *State v. Morgan*, 326 S.C. 503, 485 S.E.2d 112.

Affirmed in result.

1. Criminal Law ⇨1153.12(3), 1169.9, 1170(1)

A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion. Rules of Evid., Rule 702.

2. Criminal Law ⇨469

All expert testimony must satisfy criteria of rule of evidence governing testimony of experts, and that includes the trial court's gatekeeping function in ensuring the proposed expert testimony meets a reliability threshold for the jury's ultimate consideration. Rules of Evid., Rule 702.

3. Criminal Law ⇨386

Dog tracking evidence must be reliable to be admissible. Rules of Evid., Rule 702.

4. Criminal Law ⇨488

Expert testimony related to dog tracking evidence was reliable, thus supporting admissibility in prosecution for robbery that followed defendant's arrest after fleeing crime scene and being found by tracking dog; beyond dog handler's extensive training and experience, there was ample evidence concerning the training and reliability of the dog, namely that dog, a German shepherd, was descended from a bloodline of known police and military working dogs, that dog had been certified in several areas of tracking and was particularly skilled in tracking people, and that dog and handler had been "partners" in excess of seven years and had accomplished approximately 750 tracks together. Rules of Evid., Rule 702.

5. Criminal Law ⇨785(7)

Upon admitting expert testimony after discharging its gatekeeping role in assessing the reliability of expert testimony related to dog tracking evidence, trial court properly instructed jury that it was to give expert's testimony such weight and credibility as it deemed appropriate, just as with any other witness. Rules of Evid., Rule 702.

6. Criminal Law ⇨386

A sufficient foundation for the admission of dog tracking evidence is established if (1) the evidence shows the dog handler satisfies the qualifications of an expert witness, (2) the evidence shows the dog is of a breed characterized by an acute power of scent, (3) the dog has been trained to follow a trail by scent, (4) by experience the dog is found to be reliable, (5) the dog was placed on the trail where the suspect was known to have been within a reasonable time, and (6) the trail was not otherwise contaminated. Rules of Evid., Rule 702.

7. Criminal Law ⇨469, 478(1)

Nonscientific expert testimony must satisfy criteria of rule of evidence governing testimony of experts, both in terms of expert qualifications and reliability of the subject matter; overruling *State v. Morgan*, 326 S.C. 503, 485 S.E.2d 112. Rules of Evid., Rule 702.

STATE v. WHITE

S. C. 685

Cite as 676 S.E.2d 684 (S.C. 2009)

Appellate Defender LaNelle C. DuRant, of South Carolina Commission on Indigent Defense, of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Harold M. Coombs, Jr., all of Columbia, and Solicitor Warren Blair Giese, of Columbia, for Respondent.

Justice KITTREDGE:

We granted a writ of certiorari to review a court of appeals opinion upholding the admissibility of Rule 702, SCRE, expert testimony related to dog tracking evidence. *State v. White*, 372 S.C. 364, 642 S.E.2d 607 (Ct.App. 2007). We affirm the court of appeals in result.

I.

This case arises from an armed robbery of a convenience store in Columbia, South Carolina. After midnight on April 19, 2004, Gary White and Anthony Morris were riding in a car driven by Roy Wiggins. As Wiggins drove past a convenience store, White told Wiggins to turn around and go back to the store. Wiggins complied. Wiggins drove to the store and parked behind it. White and Morris exited the car, with Wiggins staying behind in the driver's seat. White was carrying a gun.

White and Morris entered the convenience store. Gwen Anthony, the store manager, was restocking the grill area when White and Morris entered suddenly. Anthony described the robbers' entry as a "flash."

White, armed with the gun, grabbed Anthony, put his arm around her, and pointed the gun to her neck. Morris moved through the store stealing cash, lottery tickets and an 18-pack of beer while White continued to hold Anthony at gunpoint. While Morris was at the beer cooler, White, while standing up, apparently lost consciousness.

Anthony testified that White's head fell to her shoulder, and the gun dropped from her neck. Although he was unconscious for only a few seconds, Anthony observed that White's breath smelled like alcohol, his gun

was black with a silver top, and his jeans were baggy and dark in color. With the 18-pack of beer in hand, Morris ran up the aisle toward the door and screamed at White, waking him. White, still holding Anthony, returned the gun to her neck and began to move toward the door, forcing her to accompany him. As they exited the store, White pushed Anthony away and ran in the opposite direction. At that very moment, Officer Rouppasong of the Columbia Police Department pulled into the store parking lot on a routine break.

Upon his arrival on the scene, Officer Rouppasong saw two people: Anthony, waving and flagging him down and another person running away from the store. Rouppasong described the man he saw running as a black male, wearing a white t-shirt and dark colored pants, holding or carrying something in one of his hands. Rouppasong remained in his vehicle and followed White. As he followed him around the corner of the store, Rouppasong saw a car parked on the street. Rouppasong saw a black male (later identified as White) exit the car on the passenger side and flee. Rouppasong did not give chase; instead, he stayed with the vehicle and Wiggins. Officer Gunter, with the K9 unit, was called to the scene to search for the suspect.

Officer Gunter arrived on the scene approximately thirty minutes after the robbery. Once there, Rouppasong relayed the necessary information that allowed Gunter to know where to initiate the track. Gunter and his tracking dog, Aurie, began tracking and soon found White nearby sleeping next to some bushes, gun in hand. Rouppasong testified that the man he saw lying by the bushes, asleep, was the same man he saw exiting the store and fleeing the crime scene. There were two other in-court eyewitness identifications of White. Wiggins testified that White left his car with a gun, returned to his car a short time later, and then fled when police arrived. The second identification came from Morris.

White was convicted of two counts of armed robbery and kidnapping; he was sen-

tenced to life without parole.¹ The court of appeals affirmed, rejecting the contention that dog tracking evidence must satisfy the standard for "scientific based" expert testimony under *State v. Jones*, 273 S.C. 723, 259 S.E.2d 120 (1979). The court of appeals noted a distinction between two types of expert testimony, "scientific evidence versus experience-based knowledge." *White*, 372 S.C. at 381, 642 S.E.2d at 615. With regard to nonscientific expert testimony (which includes dog tracking evidence), the court of appeals found that "questions about the reliability of [the dog handler] go only to the weight [of his testimony], but not admissibility." *Id.* at 376, 642 S.E.2d at 613. Because of the suggestion that an initial determination of reliability is not part of the trial court's gatekeeping role, we granted White's petition for a writ of certiorari.²

II.

A.

[1] A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion. *State v. Price*, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006).

White concedes the dog handler met the Rule 702, SCRE, qualifications due to his experience and training.³ White contends the trial court failed in its gatekeeping role to vet the reliability of the dog's tracking skills, thus leaving the jury to speculate about the dog's reliability. We agree with White's premise that all expert testimony under Rule 702, SCRE, imposes on the trial

courts an affirmative and meaningful gatekeeping duty. To the extent the court of appeals opinion may be construed as excluding a gatekeeping role for trial courts in connection with nonscientific (or experienced based)⁴ expert testimony, such construction is rejected.

[2] All expert testimony must satisfy the Rule 702 criteria, and that includes the trial court's gatekeeping function in ensuring the proposed expert testimony meets a reliability threshold for the jury's ultimate consideration. Rule 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

"This language makes no relevant distinction between 'scientific' knowledge and 'technical' or 'other specialized' knowledge. It makes clear that any such knowledge might become the subject of expert testimony.... Hence, as a matter of language, the Rule applies its reliability standard to all 'scientific,' 'technical,' or 'other specialized' matters within its scope." *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 147, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999). Reliability is a central feature of Rule 702 admissibility, and our jurisprudence is in complete accord. *State v. Jones*, 343 S.C. 562, 572, 541 S.E.2d 813, 818 (2001) (finding error in the trial court's decision to admit "unreliable" expert evidence); *State v. Council*, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999) (noting that before expert

1. White's criminal history triggered a life without parole sentence pursuant to S.C.Code Ann. § 17-25-45 (2003).

2. White also asked the court of appeals to grant him a new trial based on newly discovered evidence. It appears the new trial motion was not presented to the trial court. Moreover, White did not ask the court of appeals to remand the new trial motion to the trial court. See *State v. Mercer*, 381 S.C. 149, 165-66, 672 S.E.2d 556, 564-65 (2009) (recognizing that a motion for a new trial based upon after discovered evidence must be presented to the trial court in the first instance). The court of appeals declined to address the issue "because it ha[d] not been raised to and ruled on by the trial court and [wa]s not

properly before th[e] court." *White*, 372 S.C. at 387, 642 S.E.2d at 619. We affirm the court of appeals on this issue. Rule 220(b)(1), SCACR. The disposition of this issue is without prejudice to White seeking such relief in the trial court.

3. There is likewise no challenge to the Rule 702 criteria that the evidence "will assist the trier of fact to understand the evidence or to determine a fact in issue."

4. We note that case law uses the terms nonscientific expert testimony and experienced based expert testimony interchangeably. For consistency, we will use the term nonscientific expert testimony.

STATE v. WHITE

S. C. 687

Cite as 676 S.E.2d 684 (S.C. 2009)

evidence is admitted the trial court must determine it is reliable).

[3] With regard to dog tracking evidence, this Court's jurisprudence (even prior to the adoption of the South Carolina Rules of Evidence in 1995) speaks to the reliability foundational requirement of such evidence. *State v. Childs*, 299 S.C. 471, 476-77, 385 S.E.2d 839, 842-43 (1989) (finding no abuse of discretion in trial court's admission of dog tracking testimony where a deputy sheriff had "run" bloodhounds for eleven years and finding of reliability supported by "dogs ... characteristics of acuteness in scent as well as the power of discrimination between human and other scents"); *State v. Brown*, 103 S.C. 437, 444, 88 S.E. 21, 23 (1916) (finding trial court's admission of dog tracking evidence constituted an abuse of discretion where evidence established that the dog tracking occurred outside the "period of efficiency" and was therefore unreliable).

[4] While we agree with White concerning the important gatekeeping role of the trial court in determining the admissibility of expert testimony under Rule 702, the trial court properly discharged its duty in this case. As noted, White concedes the qualifications of Officer Gunter as a dog handler. White's argument is that the dog tracking evidence is unreliable. The trial court permitted a thorough examination of all matters relating to admissibility, including reliability.

Beyond Officer Gunter's extensive training and experience, there was ample evidence concerning the training and reliability of the dog, Aurie. Aurie is a German shepherd that descended from a bloodline of known police and military working dogs. Through testing, Aurie has been certified in several areas of tracking, yet Aurie's strongest skill is tracking people. Officer Gunter and Aurie, as of the trial, had been "partners" in excess of seven years and had accomplished approximately 750 tracks together. The finding of reliability is well supported by the record, and we find no abuse of discretion in the admission of the dog tracking evidence.

[5] In addition to the trial court's discharge of its gatekeeping role in assessing the admissibility of the dog tracking evi-

dence, the court properly instructed the jury that "you are to give his testimony such weight and credibility as you deem appropriate as you will with any and all witnesses that will testify in this trial."

B.

[6] The court of appeals is commended for its thorough analysis of our country's jurisprudence concerning dog tracking evidence. While foundational requirements vary, "an overwhelming number [of jurisdictions] allow admission of dog tracking evidence in a criminal case to prove identity." *White*, 372 S.C. at 378, 642 S.E.2d at 614. To provide uniformity, we think it advisable to adopt the following evidentiary framework to guide our bench and bar concerning dog tracking evidence. By extrapolating from our case law and other authorities, we conclude a sufficient foundation for the admission of dog tracking evidence is established if (1) the evidence shows the dog handler satisfies the qualifications of an expert under Rule 702; (2) the evidence shows the dog is of a breed characterized by an acute power of scent; (3) the dog has been trained to follow a trail by scent; (4) by experience the dog is found to be reliable; (5) the dog was placed on the trail where the suspect was known to have been within a reasonable time; and (6) the trail was not otherwise contaminated. See *State v. Childs*, 299 S.C. at 476-77, 385 S.E.2d at 842-43; *State v. Brown*, 103 S.C. at 443-45, 88 S.E. at 22-23; see also *State v. Taylor*, 337 N.C. 597, 447 S.E.2d 360, 368-69 (1994); Jay M. Zitter, Annotation, *Evidence of Trailing by Dogs in Criminal Cases*, 81 A.L.R. 5th 563 (2000).

C.

[7] The case before us may appear straightforward, especially in light of the overwhelming evidence of guilt. Yet on appeal the State has persisted with the argument that reliability need not be shown for the admission of nonscientific expert testimony. Because the court of appeals in this case has approvingly cited *State v. Morgan*, 326 S.C. 503, 485 S.E.2d 112 (Ct.App.1997) in support of the State's position, we believe clarification of the analytical framework for

the admissibility of nonscientific expert testimony is warranted.

At oral argument, the State argued this Court need not concern itself with the issue of reliability because the case *only* involves nonscientific expert testimony. Presumably, the State relies on the court of appeals' decision in *State v. Morgan*, which held "[i]f the expert's opinion does not fall within [the] *Jones*⁵ [standard for scientific expert testimony], questions about the reliability of an expert's methods go only to the weight, but not admissibility, of the testimony." *Morgan*, 326 S.C. at 513, 485 S.E.2d at 118. This is an incorrect statement of law.

We overrule *Morgan* to the extent it suggests that only scientific expert testimony must pass a threshold reliability determination by the trial court prior to its admission in evidence.⁶ The familiar tenet of evidence law that a continuing challenge to evidence goes to "weight, not admissibility" has never been intended to supplant the gatekeeping role of the trial court in the first instance in assessing the admissibility of expert testimony, including the threshold determination of reliability. Nonscientific expert testimony must satisfy Rule 702, both in terms of expert qualifications and reliability of the subject matter.

Courts are often presented with challenges on both fronts—qualifications and reliability. The party offering the expert must establish that his witness has the necessary qualifications in terms of "knowledge, skill, experi-

ence, training or education." Rule 702, SCRE. With respect to qualifications, a witness may satisfy the Rule 702 threshold yet the opponent may still challenge the amount or quality of the qualifications. It is in this latter context that the trial court properly concludes that "defects in the amount and quality of education or experience go to the weight to be accorded the expert's testimony and not its admissibility." *State v. Myers*, 301 S.C. 251, 256, 391 S.E.2d 551, 554 (1990). Turning to the reliability factor, a trial court may ultimately take the same approach, but only after making a threshold determination for purposes of admissibility.

State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999) is often cited for the gatekeeping role of the trial court with regard to expert testimony under Rule 702, as well as the standard reliability factors for scientific evidence.⁷ The foundational reliability requirement for expert testimony does not lend itself to a one-size-fits-all approach, for the *Council* factors for scientific evidence serve no useful analytical purpose when evaluating nonscientific expert testimony. We have set forth above foundational requirements for Rule 702 expert testimony concerning dog tracking evidence.

We do not pretend to know the myriad of Rule 702 qualification and reliability challenges that could arise with respect to nonscientific expert evidence. Consequently, we offer no formulaic approach that will apply in the generality of cases. Yet the trial court in

5. *State v. Jones*, 273 S.C. 723, 259 S.E.2d 120 (1979).

6. *Morgan* relies on this Court's opinions in *State v. Schumpert*, 312 S.C. 502, 435 S.E.2d 859 (1993) and *State v. Whaley*, 305 S.C. 138, 406 S.E.2d 369 (1991) to support its finding that only scientific expert testimony includes reliability as part of the foundation for admission in evidence. *Schumpert* and *Whaley* stand for no such proposition. *Schumpert* addressed the qualifications of a proposed mental health professional and her ability to give expert testimony on rape trauma syndrome. *Whaley* dealt with the admissibility of a proposed expert in eyewitness identifications. Because the area of expertise was "distinguishable from 'scientific' evidence," the *State v. Jones* scientific framework was not appropriate. *Whaley*, 305 S.C. at 142, 406 S.E.2d at 371–72. The *Whaley* Court further observed, "[a]lthough we are of the opinion that this type of testimony

need not be subjected to the *Jones* test, we reject any contention that it does not comport with *Jones*." *Id.* at 142 n. 2, 406 S.E.2d at 372 n. 2. *Whaley* then proceeded to analyze the matter of reliability and held, in the factual context presented, the trial court abused its discretion by excluding the expert's testimony. *Id.* at 143, 406 S.E.2d at 372. In short, neither *Schumpert* nor *Whaley* contains the slightest hint that a trial court may ignore the question of reliability when considering the admissibility of nonscientific expert testimony.

7. The *State v. Council* factors for scientific expert testimony are: (1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures.

IN RE ELTZROTH

S. C. 689

Cite as 676 S.E.2d 689 (S.C. 2009)

the discharge of its gatekeeping role in determining admissibility must initially answer the always present threshold questions of qualification and reliability.

John E. Parker, of Peters Murdaugh Parker Eltzroth & Derrick, PA, of Hampton, for respondent.

PER CURIAM.

III.

We hold that the trial courts of this state have a gatekeeping role with respect to all evidence sought to be admitted under Rule 702, whether the evidence is scientific or nonscientific. In the discharge of its gatekeeping role, a trial court must assess the threshold foundational requirements of qualifications and reliability and further find that the proposed evidence will assist the trier of fact. The familiar evidentiary mantra that a challenge to evidence goes to "weight, not admissibility" may be invoked only after the trial court has vetted the matters of qualifications and reliability and admitted the evidence.

We affirm the court of appeals in result. The trial court properly discharged its gatekeeping role in assessing the dog tracking evidence under Rule 702, as to qualifications and reliability.

AFFIRMED IN RESULT.

TOAL, C.J., WALLER, PLEICONES, JJ., and Acting Justice E.C. BURNETT, III, concur.



382 S.C. 275

In the Matter of Clyde A. ELTZROTH,
Jr., Respondent.

No. 26643.

Supreme Court of South Carolina.

Submitted April 3, 2009.

Decided April 27, 2009.

Lesley M. Coggiola, Disciplinary Counsel,
and Barbara M. Seymour, Deputy Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

FACTS

Respondent self-reported to ODC that he failed to file his state and federal income tax returns from 2000 to 2007. Respondent represents that no criminal charges are pending or anticipated.

LAW

Respondent admits that his misconduct constitutes grounds for discipline pursuant to Rule 7, RLDE, Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be a ground for discipline for a lawyer to violate the Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers). Further, he admits he has violated Rule 8.4(b) of the Rules of Professional Conduct, Rule 407, SCACR (it is professional misconduct for lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects).

CONCLUSION

We accept the Agreement for Discipline by Consent and definitely suspend respondent from the practice of law for a ninety (90) day period. Within fifteen days of the date of this opinion, respondent shall file an affidavit

2009 C P 400554

STATE OF SOUTH CAROLINA)
County of RICHLAND)

In the Court of Common Pleas

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

v. #309726)

GARY A. WHITE JR.)
Name of Respondent)

APPLICATION FOR
POST-CONVICTION RELIEF

RICHLAND COUNTY
FILED
2009 AUG -5 AM 11:15
JEANETTE W. McBRIDE
C.C.P. & G.S.

INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention McCormick C.I. 386 Redemption Way
McCormick S.C. 29899
2. Name and location of Court which imposed sentence RICHLAND COUNTY GENERAL
SESSION COURT, Columbia S.C.
3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:
(a) 2004-45-3016
(b) 2004-45-3017
(c) 2004-45-3018
4. The date upon which sentence was imposed and the terms of the sentence:
(a) JUNE 16th 2005 (3) CONCURRENT LIFE W/O PAROLE SENTENCES
(b) _____
(c) _____

5. Check whether a finding of guilty was made

(a) after a plea of guilty _____

(b) after a plea of not guilty ✓

(c) after a plea of nolo contendere _____

6. Did you appeal from the judgment of conviction or the imposition of sentence? YES

7. If you answered "yes" to (6), list

(a) the name of each Court to which you appealed:

i. S.C. Appellate Court (Direct Appeal)

ii. S.C. Supreme Court

iii. S.C. Court of Appeals

(b) the result in each such Court to which you appealed:

i. Affirmed JAN 16, 2007

ii. DENIED DEC 9, 2005

iii. DENIED MARCH, 22, 2007

(c) the date of each such result:

i. JANUARY 16th 2007

ii. DECEMBER 9th 2005

iii. MARCH 22nd 2007

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. _____

ii. _____

iii. _____

8. If you answered "no" to (6), state your reasons for not so appealing:

(a) _____

(b) _____

(c) _____

9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) NEW DISCOVERED EVIDENCE

(b) INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

(c) INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

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

(a) SEE ATTACHED SHEET

(b) _____

(c) _____

11. Prior to this application have you filed with respect to this conviction

(a) any petition in a State Court under South Carolina Law ?

YES

(b) any petitions in State or Federal Courts for habeas corpus or post-conviction relief?

NO

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

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

YES

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

(a) the specific nature thereof:

i. DIRECT APPEAL

ii. PETITION FOR REHEARING

iii. WRIT OF CERTIORARI

iv. MOTION TO REMAND FOR A NEW TRIAL OR IN THE ALTERNATIVE FOR A HEARING INTO NEW EVIDENCE.

(b) the name and location of the Court in which each was filed:

i. RICHLAND COUNTY, Columbia S.C.

ii. RICHLAND COUNTY, Columbia S.C.

iii. RICHLAND COUNTY, Columbia S.C.

iv. RICHLAND COUNTY, Columbia S.C.

(c) the disposition thereof:

i. AFFIRMED

ii. DENIED

iii. AFFIRMED

iv. DENIED

(d) the date of each such disposition:

- i. JANUARY 16, 2007
- ii. MARCH 22, 2007
- iii. April 27, 2009
- iv. DECEMBER 9, 2008

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

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

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

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

(a) which grounds have been presented:

- i. NEWLY DISCOVERED EVIDENCE
- ii. _____
- iii. _____

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

- i. BY MOTION TO REMAND FOR NEW TRIAL OR IN THE ALTERNATIVE FOR A HEARING INTO NEW EVIDENCE.
- ii. _____
- iii. _____

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

(a) CERTAIN ISSUES WERE NOT PRESERVED AT TRIAL AND COULD NOT BE RAISED ON DIRECT APPEAL.

(b) _____

(c) _____

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

(a) your arraignment and plea? YES

(b) your trial, if any? YES

(c) your sentencing? YES

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence?

YES

(e) preparation, presentation or consideration of any petitions, motions, or application with respect to this conviction, which you filed? YES

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

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

- i. CANELLE DURANT, STACY OWINGS - RICHLAND COUNTY PUBLIC DEFENSE
- ii. AILEEN P. CLARE APPELLATE DEFENSE
- iii. CANELLE DURANT APPELLATE DEFENSE

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

- i. TRIAL, TRIAL SENTENCING
- ii. APPELLATE COUNSEL
- iii. APPELLATE COUNSEL

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

TO HAVE SENTENCE VACATED OR IN THE ALTERNATIVE, TO HAVE
A NEW TRIAL.

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

YES

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

VERIFICATION

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

Gary A. White Jr

Sworn to and subscribed before me

This 29 day of July, 2009

Jennifer C. Franklin L.S.

Notary Public for South Carolina

My Commission Expires 01/31/2010

JEANETTE W. HEBRIDE
C.C.P. & G.S.

2009 AUG -5 AM 11:49

FILED
-RICHLAND COUNTY

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

I, GARY A. WHITE JR, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of proceeding or give security therefor.

Gary A. White Jr
Applicant

Sworn to and subscribed before me

This 29 day of July, 2009

Jennifer C. Franklin L.S.

Notary Public for South Carolina

My Commission Expires: 01/31/2010

7. If you answered "yes" to (6), list

(A) THE NAME OF EACH COURT TO WHICH YOU APPEALED:

IV. WRIT OF HABEAS CORPUS TO SUPREME COURT (S.C.)

V. PETITION FOR REHEARING TO SUPREME COURT (S.C.)

(B) THE RESULT IN EACH SUCH COURT TO WHICH YOU APPEALED:

IV. GRANTED NOV. 19, 2007 Affirmed April 27, 2009

V. DENIED MAY 28, 2009

(C) THE DATE OF SUCH RESULT:

IV. April 27, 2009

V. MAY 28, 2009

10. STATE CONCISELY AND IN THE SAME ORDER THE FACTS WHICH SUPPORT EACH OF THE GROUNDS SET OUT IN (9)

(A) CO-DEFENDANT ANTHONY MORRIS RETRACTED HIS TRIAL TESTIMONY BY WAY OF A SWORN STATEMENT. THE STATEMENT ITSELF WEAKENS THE STATES CASE AGAINST MR. WHITE.

(B) TRIAL COUNSEL WAS INEFFECTIVE BY ALLOWING THE STATE TO PRESENT EVIDENCE IN CASE ON A ~~CHARGED~~ CHARGE THAT WAS DISMISSED AT THE START OF TRIAL.

(C) TRIAL COUNSEL WAS INEFFECTIVE BY FAILING TO PURSUE OBJECTION OF JURY CHARGE HAND OF ONE HAND OF ALL. BY FAIL TO PURSUE OBJECTION, COUNSEL ALLOWED THE JUDGE TO GIVE THE CHARGE WITHOUT MAKING A RULING ON OBJECTED CHARGED.

CONTINUED ON BACK SIDE →

12. IF YOU ANSWERED "YES" TO ANY PART OF (11), LIST WITH RESPECT TO EACH PETITION, MOTION OR APPLICATION:

(A) THE SPECIFIC NATURE THEREOF:

IV. PETITION FOR REHEARING TO SUPREME COURT (S.C.)

(B) THE NAME AND LOCATION OF THE COURT IN WHICH EACH WAS FILED:

IV RICHLAND COUNTY, COLUMBIA S.C.

STATE OF SOUTH CAROLINA)	
COUNTY OF RICHLAND)	IN THE COURT OF COMMON PLEAS
WHITE Gary A , #309726)	2009-CP-400-5549
Applicant,)	
v.)	RETURN
State of South Carolina,)	
Respondent.)	
_____)	

The Respondent, making its Return to the Application for Post-Conviction Relief filed August 5 2009, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Richland County. The Applicant was represented by Stacy Owings, Esquire. The Applicant was convicted following a jury trial on on June 16 2005, with the Honorable James R. Barber, III. The Applicant was indicted for and/or convicted of: Armed Robbery (2 counts), and Kidnapping, - 2004-GS-40-3016;3017;18;. According to the South Carolina Department of Corrections (SCDC), the Applicant is serving a Life sentence for "Kidnapping."

Attached herewith and incorporated herein by reference are the records of the Richland County Clerk of Court regarding the subject conviction(s), the Applicant's records from the Department of Corrections, the Applicant's trial transcript, and [if applicable] the Applicant's appellate records.

II.

The Applicant interprets each of the Applicant's allegations as a claim of ineffective assistance of counsel.

III.

The Respondent interprets each of the Applicant's allegations to be claims that he received ineffective assistance of counsel. The Respondent contends that the Applicant's counsel rendered adequate assistance and provided representation within the range of competence required by attorneys in criminal cases. See Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

In a post-conviction relief proceeding, the Applicant bears the burden of proving the allegations in their application. Id. Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 80

L.Ed.2d 674. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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

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

IV.

The Respondent therefore requests that this Court convene an evidentiary hearing solely on the issue of ineffective assistance of counsel. As to all other allegations, the Respondent moves for summary dismissal pursuant to S.C. Code Ann. § 17-27-70 on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

V.

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

VI.

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

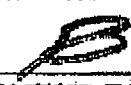
The Respondent will coordinate with the Applicant's attorney who is, according to the Respondent's file, Charlie Jay Johnson, Jr., Esquire regarding when the hearing should be set.¹

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

BRIAN T. PETRANO
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

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

May 10, 2010

¹ See: <http://www.scattorneygeneral.com/inside/pcr.html> for current and archived PCR rosters.

2009CP4005549 - 59(e) motion

PCR AMENDED ISSUE ONE

Trial Counsel was ineffective for failure to protest Applicant's Fifth and Sixth Amendment rights. See U.S.C.A. 14th amendment.

ARGUMENT

The Applicant contends that his conviction is in violation of the Fifth amendment, U.S. Constitution. Applicant was convicted on a non-charged offense, which violated his substantial rights to be convicted, if convicted at all on a presentment of a indictment by the Grand Jury.

The State, in its opening statement and through the evidence presented, attempted to establish that Applicant participated in indicted offenses, aiding and abetting codefendants in accomplishing crimes. The Applicant was eventually convicted on the theory of accomplice liability, by indictments charging him only with the principal offenses. This was a denial of Due Process, where as in order for the State to sufficiently obtain a conviction and find Applicant guilty of aiding and abetting beyond a reasonable doubt on indictments charging him with the principal offenses. Under the theory of the "hand of one is the hand of all" the State first must inform Applicant of codefendants within the indictment.

The Applicant was eventually convicted on the theory of accomplice liability by indictments charging him with the principals offenses of armed robbery and kidnapping. The Fifth amendment guarantees that an individuals cannot be prosecuted for a capital or infamous offense except on presentment or indictment by a Grand Jury. The Sixth amendment provides that a defendant must be informed of the nature and cause of the accusation against him. This was a denial of Due Process, where as in order for the State to sufficiently obtain a conviction and find Applicant guilty of the above offenses beyond a reasonable doubt on an indictment charging him with the principal offenses under the theory of the "hand of one is the hand of all", the State must first charge him with knowledge of his

codefendants criminal conduct within the indictments. The alleged fatal omission was the failure to charge that the Applicant had knowledge of codefendants, this was an essential element of the offenses that needed to be established to properly inform Applicant of charges called upon to answer. The body of these indictments do not expressly set forth any of the facts regarding the participation of Applicants codefendants. The indictments only apprised Applicant of being charged as the one actually committing these crimes. Therefore, Applicant contends that the cryptic form of indictments required Applicant to proceed to trial with his alleged criminal activity undefined. An indictment must contain all of the elements of the charged offenses and fairly inform a defendant of the charges against him. In South Carolina, [i]t is a rule of universal observance in administering the criminal law that a defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment." State v. Gunn, 437 S.E.2d 75, 82 (1993) (Quoting State v. Cody, 186 S.E. 165 (1936)). The Supreme Court of South Carolina has held that a defendant may not ignore the plain language of an indictment merely because its caption does not precisely conform with the wording on its face. Cody v. State, 151 S.E.2d 670 (1966), by the same token, the State may not support a conviction for a offense intended to be charged by relying upon a caption to the exclusion of the language contained in the body of the indictment. State v. Tobory, 202 S.E.2d 852. A defendant's understanding of the offense is not aided by repetition of this statutory language when the statute, or even recitation of the statutory language, is not an adequate allegation for every element of an offense, for some elements require grater detail or description of the alleged conduct of a defendant. In the case at bar, look alone at the body of these indictments. It is evident that the Applicants convictions are merely being supported by the caption of these three (3) indictments, where as these indictments mention not a shed of the events regarding the involvement of any indictments therein. "The very purpose of the requirement that the Applicant

be indicted by an Grand Jury is to limit his jeopardy to offenses charged by a group of his fellow citizens, acting independently of either prosecuting Attorney or Judge." Stirone v. United States, 361 U.S. at 218, 80 S.Ct. 273. A mere citation to the applicable statute does not give the defendant notice of the nature of the offense. An indictment that must rely on a statutory citation does not "Fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished." See, Hamling v. United States, 418 U.S. 87, 117, 94 S.Ct. 2887, 2907-08, 41 L.Ed.2d 590 (1974). Furthermore, a statutory citation does not ensure that the Grand Jury has considered and found all essential elements of the offense charged. Therefore the indictments fails to satisfy the Fifth amendment guarantee that no person shall be held to answer for an infamous crime unless on a presentment or indictment of Grand Jury, see Article I § II. Fairness and Due Process of law requires Applicant receives sufficient notice of the charges against him to enable him to properly prepare a defense. See U.S. Const. Amend. 5, S.C. Const. Art. 1, § 3. Furthermore, it is held that an indictment not framed to apprise the defendant "with reasonable certainty of the nature of the accusation against him is defective, although it may follow the language of the statute." United States v. Simmons, 96, U.S. 360, 362. It is irrefutable the defectiveness of these indictments, for its failure to plainly set forth the expressed elements intended to be charged. The indictments, noneless failed to fulfil its purpose. More importantly, the Supreme Court has held that a later jury instruction or a petit jury verdict cannot satisfy Applicants Fifth amendment right to be tried upon charges considered and found by a Grand Jury. Stirone, supra; also see, United States v. Campi, 541 F.2d 737, 740 (6th Cir. 1976).

CONCLUSION

Applicant was denied the right to a fair trial, because the indictments were not framed to inform Applicant of the ALLEGATIONS AGAINST HIM TO ENSURE THAT THE GRAND JURY HAD CONSIDERED AND FOUND FACTS REGARDING THE INDICTED OFFENSES. THEREFORE COUNSEL WAS INEFFECTIVE FOR FAILING TO PROTECT APPLICANTS CIVIL RIGHTS.

PCR AMENDED ISSUE TWO

On Ground 10 (a) of my PCR Application, I amend that assertion to state my Trial Counsel provided "Deficient Performance" in failing to pursue a ruling on the clear objection to the "Hand of One Hand of All" instruction to be given to the jury. I move for Trial Transcript page 407, line 16-page 408, line 7, to be entered as Applicants Evidence one (1) as proof within this record that my Trial Counsel did not move for ruling on an important objection to a burden - shifting instruction.

ARGUMENT

"All other reasonable attorneys here in South Carolina are aware of the law relating to contemporaneous objections and laws concerning aggrieved parties only allowed to appeal a "order, judgement, ...or decision" under SCACR Rule 201 (b). Even South Carolina Rule of Criminal Procedure 18 (a) highlights that a ruling of the court will be pronounced on an objection.

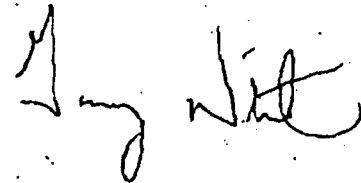
"Here, you Honor, the Deficient Performance waived any opposition to the instruction which I could have raised on Direct Appeal concerning the Trial Judge giving a burden - shifting instruction to the jury at Trial Transcript page 501, line 16-page 503, line 3. And it is the nature of the evidence which the State used in support of the "Hand of One Hand of All" instruction which turned that otherwise legal instruction into a burden - shifting instruction.

For example, the only evidence which the State submitted to support that jury instruction was the testimony of Anthony Morris. Morris committed perjury as defined by State law [§ 16-9-10, S.C. Code of Laws] where he made a statement to police implication no one, then contradicted that sworn statement by testifying to it being a lie at my trial - my proof is at Transcript Page 374, line 11-page 376, line 20, which I want entered into this record as Applicant's Evidence two (2), to prove perjured evidence was, in fact, used against me. I also want to come back to this evidence in my next Ground.

"Your honor, Strickland v. Washington, says my Trial Counsel was supposed to advocate my cause (in being free from imprisonment except upon proof beyond a reasonable doubt of every element supporting the State's charges against me). Counsel didn't do this in her failure to pursue a ruling on her objection to the "Hand of One Hand of All" instruction, so as to meet the legal requirements for appealing the Court's use of an otherwise burden - shifting jury instruction.

"Also on this point, your Honor, Counsel's deficient performance 'prejudiced' my most plausible defense to the State's charges where the 'Hand of One Hand of All' instruction is the only possible means used before the jury, and had Counsel press the Judge for a ruling on the objection, there is a chance that the Court would've reconsidered charging 'Hand of One Hand of All' to the jury or, there is a reasonable probability that if a ruling on Counsel's objection was made, that the Court of Appeals could've reversed my conviction on the burden - shifting instruction alone - because it would've been proper before them.

"Finally, your Honor, that is why I claim my Trial Counsel was ineffective for failing to pursue a ruling on the objection to that burden - shifting instruction."



#2009CP4005549 - 5912) MOTION

PCR AMENDED ISSUE THREE

On Ground 10. (b) of my PCR Application, I amend that assertion to state that my Trial Counsel provided 'Deficient Performance' in failing to object to a material State witness committing perjury before the jury. Again, your Honor, Applicant's Evidence two (2) is State witness Anthony Morris admitting to the Court that his initial statement to police was a complete lie; here, the record shows Trial Counsel Stacey Owings did not object to Morris commission of perjury when it surfaced, nor did Owings object in her Cross Examination at Trial Transcript page 397, line 14-page 403, line 18, which I'd move to have admitted into this record as Applicant's Evidence three (3) as proof of Counsel not objecting to very damaging and prejudicial evidence against Applicant.

ARGUMENT

"Your Honor, the law is clear a statement to police becomes an official document once the officer receives it from the declarant on a "document or report required by the laws of this State" [§ 16-9-10 (A) (2), S.C. Code]; and a declarant commits perjury if they either give a false statement to the police on such 'document or report' or if they've given a truthful statement to police then contradict it under oath while testifying into a Court record - that is how our Court of Appeals interpreted § 16-9-10 in State v. Stanley, 365 S.C. 24, 615 S.E.2d 455 (S.C. App. 2005).

Further, the U.S. Supreme Court has clearly stated that the "Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence" [Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed.2d 791 (1935); Miller v. Pate, 386 U.S. 1, 87 S.Ct. 785, 17 L.Ed.2d 690 (1967)].

"Where my Trial Counsel is presumed to have conducted a factual and legal investigation into my case, I assert that my Counsel rendered Deficient Performance in not objecting to the State's material witness committing perjury.

"I also assert that Counsel's deficient performance

'Prejudiced' my defense where the State's witness was the only reason for the 'Hand of One Hand of All' being used against me. If Counsel would've objected to that witness commission of perjury, there is a reasonable probability that the Court would've suppressed the perjured testimony, and the jury could've acquitted me where nothing else 'sufficiently' connected me to the charges I am convicted of."

Ray White

Colo, SC. 29211-1549
P.O. Box 11549

Brian T. Petrano

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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND) 2009-CP-40-5549

Gary A. White, Jr.,)
Plaintiff/Applicant,)
vs.) TRANSCRIPT OF RECORD
The State of South Carolina,)
Defendant.)

October 18, 2010
Columbia, South Carolina

B E F O R E:

HONORABLE L. CASEY MANNING, JUDGE.

A P P E A R A N C E S:

MARK E. SCHNEE, ESQUIRE
Attorney for Plaintiff/Applicant

BRIAN T. PETRANO, ESQUIRE
Attorney for the State

Crystal Holmes
Official Court Reporter

EXHIBITS

<u>NO.</u>	<u>DESCRIPTION</u>	<u>I.D.</u>	<u>EVD.</u>
1	(REPORTER'S NOTE: NO EXHIBITS WERE INTRODUCED AT THE		
2	HEARING.)		
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I N D E X

2	WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
3	Gary A. White, Jr.				
4	By Mr. Schnee	6		20	
5	By Mr. Petrano		15		
6	Stacey Owings				
7	By Mr. Schnee	21		35	
8	By Mr. Petrano		25		
9					
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1 THE COURT: Yes, sir.

2 MR. PETRANO: Thank you, Your Honor. This is
3 2009-CP-40-05549, Mr. Gary White, Jr. There was a P-
4 C-R application filed August 5th, 2009.

5 This was a jury trial in front of Judge
6 Barber on June 16th, 2005. At that time he was
7 represented by Ms. -- the Public Defender's office,
8 Ms. LaNelle DuRant and Ms. Stacey Owings. There was a
9 direct appeal. That was affirmed. The remittiture
10 date is May 28, 2009.

11 It's kind of a lengthy -- a pretty lengthy
12 opinion on average. It had gone through the Court of
13 Appeals and then the Supreme Court. Basically was
14 that big dog tracking case that we all heard about a
15 few years ago.

16 Anyway, the Applicant had been indicted by
17 the July 2004 term of the Richland County Grand Jury,
18 three charges. 2004-GS-40-03016, that was an armed
19 robbery, 3017 a kidnapping and 3018 is another armed
20 robbery. The armed robbery -- the two armed robberies
21 is a situation where he robbed a person individually
22 and then that clerk, the same person, of the store
23 goods. Ultimately there was life without the
24 possibility of parole because of strikes.
25

1 And then there was a charge -- there was a
2 weapons charge and I really couldn't figure out what
3 happened to it. But if you notice -- are wondering,
4 it's on page 12, there was a problem with that
5 indictment. I think it was the wrong code. The
6 Solicitor just basically abandoned that weapons
7 charge.

8 On that, I will turn it over to Mr. Mark
9 Schnee, counsel of record. Thank you, Judge

10 MR. SCHNEE: Thank you, Your Honor. I call
11 Gary White to the stand.

12 THE COURT: Come around, Mr. White.

13 MR. SCHNEE: And, Your Honor, I believe that
14 my client also submitted a brief in this case which I
15 believe Your Honor has.

16 (GARY A. WHITE, JR., Applicant, having first
17 been duly sworn, testified as follows:)

18 THE COURT: All right, please take a seat.
19 Tell us your full name and spell your last name for
20 the record.

21 THE APPLICANT: Gary White, W-h-i-t-e.

22 MR. SCHNEE: Your Honor, do you have a copy
23 of the brief and the supplemental appendix from the
24 Office of Appellate Defense?
25

GARY A. WHITE, JR. -- DIRECT BY MR. SCHNEE:

6

1 THE COURT: I beg your pardon?

2 MR. SCHNEE: Do you have a copy of the brief
3 that was submitted to the Court of Appeals along with
4 the appendix?

5 THE COURT: Oh, yes.

6 MR. SCHNEE: Okay.

7 DIRECT EXAMINATION

8 BY MR. SCHNEE:

9 Q Mr. White, I want to address first and foremost,
10 the testimony of your Co-Defendant, Anthony
11 Morris.

12 A Yes, sir.

13 Q Do you remember that testimony?

14 A Yes, I do.

15 Q Okay. Now, at trial, did he implicate you as
16 participating in the crime?

17 A Yes, he did.

18 Q Okay. And he testified on the stand in front of
19 the jury?

20 A Yes, sir.

21 Q Flat out saying, you're the one that did this?

22 A Yes, sir.

23 Q Okay. Ran away and then got caught later?

24 A Yes, sir.

25
WHITE VERSUS THE STATE

GARY A. WHITE, JR. -- DIRECT BY MR. SCHNEE:

7

1 Q Okay. Now, is it your understanding that that
2 was a major piece of evidence against you?

3 A That was the direct testimony that put me at the
4 crime scene, the only thing that put me at the
5 crime scene.

6 Q Okay. Was there any DNA or fingerprints or
7 anything else that put you at the crime scene?

8 A No, sir.

9 Q Okay. Were there any other eyewitnesses that put
10 you at the crime scene?

11 A No, sir.

12 Q Okay. Now, part of the testimony involved a dog
13 tracking after the offense occurred?

14 A Yes, sir.

15 Q Okay. And that's ---

16 A The dog track ---

17 Q --- got to you?

18 A Yeah, the dog tracked from the car -- they
19 tracked from the place of the robbery where it
20 happened, they tracked to where I was at.

21 Q Now, you always maintained your innocence in
22 terms of committing this crime, right?

23 A Yes, sir.

24 Q Okay. Now, once your trial was over and you were
25

1 convicted, you had counsel, I believe it was also

2 ---

3 A First it was ---

4 Q --- on direct appeal ---

5 A Yes, sir.

6 Q --- the same as one of your trial attorneys?

7 A Yes, sir.

8 Q Okay. And she received a letter from Anthony
9 Morris?

10 A (Affirmative response.)

11 Q And you've seen that letter?

12 A Yes, I've seen it.

13 MR. SCHNEE: Your Honor, there is a -- in the
14 supplemental appendix, there is the handwritten
15 version of a letter, it is notarized, as an admission
16 against his own interest and admission by the party-
17 opponent. I would request that that be part of the
18 record as evidence.
19

20 THE COURT: All right.

21 MR. PETRANO: I do object to it as hearsay
22 and it's not actually part of the record properly. If
23 you the -- part of the reply brief are that it's
24 merely offered as a proffer. The appellate rules are
25 very specific, it's only what the lower court had. By

GARY A. WHITE, JR. -- DIRECT BY MR. SCHNEE:

9

1 definition this was newly discovered without -- not
2 part of the lower court. So it wasn't actually part
3 of the appellate record, it was offered as a proffer,
4 it wasn't actually admitted when they rejected the
5 argument.

6 THE COURT: Okay.

7 MR. PETRANO: But I still submit to you it's
8 hearsay.

9 THE COURT: Well, this is non-jury. You can
10 proffer it ---

11 MR. PETRANO: Thank you, Judge.

12 THE COURT: On that basis, I have to take a
13 look at it whether I want to or not.

14 MR. SCHNEE: Thank you. Your Honor. In the
15 initial -- I guess, final brief, there is a typed out
16 version, that LaNelle DuRant made. And if I may
17 approach, I want to ask my client to read that.

18 THE COURT: All right.

19 THE APPLICANT: All right.

20 Reading: My name is Anthony Terrell
21 (phonetic) Morris. I am claiming this to be a true
22 statement that I'm about to write. On June 15th,
23 2005, I gave a statement to the courthouse which was a
24 lie but the reason why was because I was told that if
25

GARY A. WHITE, JR. -- DIRECT BY MR. SCHNEE:

10

1 I testify on my Co-Defendant, I would plea to a lesser
2 charge than what they wanted me to plead to. So being
3 that I had illegible (phonetic) of my motion, and saw
4 the videotape, I put parts together, and come up with
5 a story. I also was able to see Roy's statement. To
6 be truthful I wasn't on the scene of the crime. My
7 lawyer just told me that I was now in the middle of
8 all this, and either way it went I was going to face
9 some time. But if I wanted the minimum I would have
10 to testify on a person and a crime that I don't know
11 anything about. This is my first time ever being in
12 trouble with the law, so whatever my lawyer told me, I
13 believed him. On the day that it was time for me to
14 plea, he came to the county and told me that they were
15 not gonna drop my charges, so I told him that I didn't
16 want to plead -- want to testify and I wasn't ready to
17 plea. In return, he told me that I would have to
18 testify, and I would either have to plea, or either go
19 to trial with my Co-Defendant, and would get 90 years.
20 So being that I didn't know what was going on, I did
21 what I was told, and in return, I received 13 years
22 for something I didn't do, and also got my Co-
23 Defendant time, and really don't know him, or if he
24 was on the crime scene either.
25

WHITE VERSUS THE STATE

GARY A. WHITE, JR. -- DIRECT BY MR. SCHNEE:

11

1 Signed -- dated 7/15/05 by Anthony Morris..

2 Q Okay. I would like to show you the original
3 handwritten version, if I could. Is this what
4 you've seen before?

5 A Yes, sir.

6 Q Okay. Now, at the bottom left corner, that's a
7 notary signature?

8 A Yes, it is.

9 Q Okay. Now, during your trial, Mr. Wiggins also
10 testified?

11 A Yes, he did.

12 Q Okay. And according to Mr. Wiggins, Anthony
13 Morris was there and you were there?

14 A Yes, sir.

15 Q Okay. Had you had this letter or this statement
16 or any version of the facts by Mr. Morris, you
17 would have used that or your attorney would have
18 used that against Mr. Wiggins as well, would you
19 not?
20

21 A Yes. There actually was a statement that he gave
22 to the police when he got arrested and he didn't
23 implicate nobody in no robbery or doing the
24 robberies.

25 Q Did ---

1 A In his initial statement, his initial statement
2 to the police.

3 Q Okay. And -- but it's your assertion that had
4 you had this at the time of trial, it drastically
5 would have affected ---

6 A It would have changed the outcome of the trial.

7 Q It also would have affected how you cross-
8 examined Mr. Wiggins?

9 A Yes, it would have.

10 Q In fact, had you had this, you would probably
11 would have called Anthony Morris to the stand in
12 your own defense?

13 A Yes, I would have, definitely.

14 Q Okay. Now, you also submitted a brief to the
15 court raising a number of issues, if you would
16 just explain to the Judge generally what those
17 issues entail.

18 A Well, my first -- my first issue is that counsel
19 was ineffective for basically failing to protect
20 my Fifth and Sixth Amendment rights of the
21 Constitution. There was a -- the indictments in
22 my case, they never alleged any Co-Defendants
23 within these indictments. I was the only one
24 they alleged to have committed these crimes. So
25

GARY A. WHITE, JR. -- DIRECT BY MR. SCHNEE:

13

1 when I proceeded to trial, I was going into trial
2 thinking that basically I was going to have to
3 prove my innocence from what's on these
4 indictments. But when I got to trial, they
5 attempted to establish the hand of one-the hand
6 of all, and I'm not saying that it is an illegal
7 charge but being that I didn't have no knowledge
8 of no Co-Defendants in these indictments, that's
9 what made the hand of one-hand of all charge
10 illegal against me and shifts the burden. That's
11 what I'm saying but ---

12 Q Okay.

13 A But I'm saying that I had to have actual
14 knowledge of my Co-Defendants being in the
15 indictments the first one -- the first time.

16 Q What's your second issue in the brief?

17 A My second issue is failure to object to a --
18 failure to object to -- failure to pursue an
19 objection. We objected to the hand of one-hand
20 of all jury charge but Judge Barber never made a
21 ruling on it. He said he would come back to it.
22 And as the trial proceeded on, he went ahead and
23 charged the jury under the jury charge of hand of
24 one-hand of all without making a ruling on it.
25

1 I feel that if we would have -- if my lawyer
2 would have been persistent and maintained --
3 maintained -- got a ruling on the objection, that
4 there's a reasonable possibility that charge
5 wouldn't have been listed as the hand of one -- I
6 mean, we wouldn't -- that jury charge wouldn't
7 have been submitted to the jury. And there's a
8 possibility without that jury charge, I wouldn't
9 have been convicted of this charge. Because they
10 say that one took while the other one pointed and
11 presented the firearm. And the elements of armed
12 robbery say that you have to take something to
13 commit armed robbery, you've got to take
14 something from this person. But they combined
15 the act of hand of one-hand of all to get a
16 conviction.

17
18 And we objected to that jury charge but they
19 never made a ruling on it, they charged it
20 anyway.

21 Q And the third issue in your brief is the one
22 we've already addressed, the new statement by
23 Anthony Morris ---

24 A Yes ---

25 Q --- correct?

GARY A. WHITE, JR. -- DIRECT BY MR. SCHNEE:

15

1 A Yes, the perjury statement, that he committed
2 perjury on the stand.

3 Q Okay. Were there any other issues that we have
4 not addressed that you need to discuss with the
5 Judge at this point?

6 A No, there isn't.

7 Q Okay.

8 A That's about it.

9 MR. SCHNEE: No furtherer questions at this
10 time.

11 THE COURT: Mr. Petrano.

12 CROSS-EXAMINATION

13 BY MR. PETRANO:

14 Q Do you know Morris?

15 A No, I don't.

16 Q Never ---

17 A I mean just acquaintance, maybe five hours at the
18 most.

19 Q When?

20 A April 18th.

21 Q Before the robbery, alleged robbery, whatever you
22 want to call it?

23 A Yeah.

24 Q You did know him before that?

- 1 A Yes, I met him -- I mean, no, did I know him
2 before the robbery -- I mean -- that day -- I met
3 him that day, the first time I ever seen him in
4 my life.
- 5 Q Okay. Y'all got in Wiggins's car, right?
- 6 A Yes.
- 7 Q Who was sitting where?
- 8 A I am in the front seat.
- 9 Q Passenger?
- 10 A Passenger.
- 11 Q Okay. Wiggins' driving?
- 12 A Yes.
- 13 Q And then Morris in the back?
- 14 A I believe so.
- 15 Q What kind of car was it, four door, two door, you
16 don't have to be specific?
- 17 A I believe it was a two door.
- 18 Q Did you ever see Morris after that day?
- 19 A After that day?
- 20 Q Yes.
- 21 A Yes, I seen him.
- 22 Q When?
- 23 A Umm...
- 24 Q You saw him in jail, right?

GARY A. WHITE, JR. -- CROSS BY MR. PETRANO:

17

1 A Yeah, in jail.

2 Q What happened there?

3 A We was going to Court.

4 Q Together?

5 A They -- yeah, the day of my trial he had to come
6 testify.

7 Q He ---

8 A He came, I seen him. When we came out the cells
9 that morning to go to the holding cell, they got
10 -- the put him in line with me.

11 Q And you road together?

12 A No.

13 Q Okay.

14 A No.

15 Q Did you see him again?

16 A Yes, I seen him again.

17 Q And tell us about that.

18 A There's nothing to tell.

19 Q So you've seen him after he testified against you
20 and in the trial where you received life without
21 the possibility of parole?

22 A Yes, I have.

23 Q Did you confront him about that?

24 A I didn't do nothing to him.

1 Q Did ---

2 A I mean, they put him on the same yard as me and
3 he did something and they put him on lock up,
4 then they shipped me to another yard.

5 Q And you being shipped away and him being put on
6 lock up, had nothing to do with it, there was no
7 sort of physical encounter with the two of you?

8 A No, never.

9 Q Oh, okay.

10 A Never.

11 Q And when did the retraction come out, right after
12 that incident?

13 A No, it was before that incident, before -- that
14 retraction came out before that incident. I was
15 already at Lee County.

16 Q Okay. And you didn't talk to him about that?

17 A About what?

18 Q Well, first he testifies against you, you get
19 life without the possibility of parole?
20

21 A Yes.

22 Q Then he issues a retraction saying he lied. And
23 then, according to you, you saw him in the yard
24 after that.

25 A Yes.

GARY A. WHITE, JR. -- CROSS BY MR. PETRANO:

19

1 Q So did you discuss ----

2 A Did I have anything to do with that retraction,
3 no.

4 Q No, not even that. Hey, thanks for issuing a
5 retraction, why did you testify against me to
6 begin with? I don't understand. It seems like a
7 real weird scenario to just kind of brush off.

8 A I mean, he got me a life sentence. He was the
9 cause of me getting the life sentence because he
10 implicated me doing a crime that I didn't do.

11 Q Right.

12 A He put me at a crime scene that I ain't had
13 nothing to do with.

14 Q And did you ---

15 A So, I mean, I guess a guilty mind would want him
16 to do that.

17 Q And did you confront him about it?

18 A Did I confront him as far as telling him that he
19 needed to do something for me?

20 Q Yes.

21 A No, I did not.

22 Q Okay. Did you ever thank him for the retraction,
23 finally coming forward and telling the truth?

24 A No, I did not.

1 Q So you saw each other in the yard after the
2 retraction and that you never mentioned it to
3 him?

4 A When I seen him, I was on my way to chow and it
5 was just passing through. I wouldn't have wanted
6 -- honestly speaking I wouldn't have wanted to be
7 in the dorm with him knowing that I've got to
8 serve this life sentence because of something
9 that he did. So by him doing what he did,
10 whatever he did to get out the dorm, that was on
11 him. I ain't had nothing to do with that.

12 Q Do you know what he did to get out the dorm?

13 A No, I don't.

14 Q All right. Why did you get transferred?

15 A I suppose because he was still on the same yard
16 as me.

17 (Pause.)

18 MR. PETRANO: Nothing further, thank you.

19 REDIRECT EXAMINATION

20 BY MR. SCHNEE:

21 Q Just to clear this up, did you ever ask Anthony
22 Morris to write the retraction?

23 A No, I didn't.

24 Q Did you ever talk to him about his testimony

GARY A. WHITE, JR. -- REDIRECT BY MR. SCHNEE: 21

1 after he testified?

2 A No, I haven't.

3 MR. SCHNEE: Okay. No further questions.

4 THE COURT: Anything further of this witness?

5 MR. PETRANO: Nothing from the State.

6 THE COURT: You may step down, sir, Mr.

7 White.

8 (The witness leaves the witness stand.).

9 MR. SCHNEE: Judge, I call Stacey Owings.

10 (STACEY OWINGS, having first been duly sworn,
11 testified as follows:)

12 THE COURT: Please take a seat. Tell us your
13 full name and spell your last name for the record,
14 assuming it still is Owings.

15 THE WITNESS: It is for now, sir. Stacey
16 Owings, O-w-i-n-g-s.

17 THE COURT: Go ahead, Mr. Schnee.

18 MR. SCHNEE: May it please the Court.

19
20 DIRECT EXAMINATION

21 BY MR. SCHNEE:

22 Q Ms. Owings, you remember a lot about this case?

23 A Yes, I do.

24 Q This is a case you worked on for a very long
25 time?

1 A Yes.

2 Q Would you say that the testimony of Anthony
3 Morris was pivotal in the conviction of Gary
4 White?

5 A It was very important.

6 Q And you didn't have this retraction at the time
7 of the trial?

8 A No, we didn't.

9 Q Okay. In fact, it's dated July 15th of 2005 --
10 do you have copy of it?

11 A I'm looking in LaNelle's file right now. Yes,
12 it's notarized on July 15th of 2005.

13 Q And the trial was June 14th through 16th?

14 A Yes.

15 Q A whole month earlier?

16 A Yes.

17 Q Okay. Had you had this retraction or statement
18 or any version of the facts consistent with this
19 retraction would that have drastically affected
20 how you proceeded with the trial?

21 A It would have gave us some significant cross-
22 examination fodder for Mr. Williams (sic),
23 certainly -- for both Mr. Morris and Mr. Wiggins.

24 Q Okay. Would it also have affected how you
25

1 cross-examined the police officers?

2 A Yes.

3 Q And why is that?

4 A Well, we would have maybe had some issues on
5 whether -- how the confession was brought out,
6 the circumstances of the questioning. I mean we
7 would have had a statement that they gave to him
8 under duress -- that he had done under duress and
9 then something that he gave later after he had
10 had some time to think about it.

11 It just would have given us more -- more to
12 work on. We didn't have a lot here, so it would
13 have given us something more to work on.

14 Q Okay. And is it your belief that the two Co-
15 Defendants, Wiggins and Morris, were essentially
16 the only evidence against Gary White?

17 A No, I don't exactly agree with that.

18 Q Okay. What other ---

19 A Well ---

20 Q --- evidence placed him at the scene of the
21 crime?

22 A Okay, that you're right on. There was other
23 evidence but you needed the two statements from
24 Wiggins and Mr. Morris in order to tie the
25

1 evidence to Gary. So that -- I will agree with
2 you there.

3 Q And would you agree that had the jury not
4 believed Wiggins and Morris or believed that --
5 the second statement, the new statement from
6 Morris, do you believe that a conviction would
7 have been probable at that point?

8 MR. PETRANO: I'm going to have to object as
9 to speculation ---

10 THE COURT: I beg your pardon?

11 MR. PETRANO: Object as to speculation, I'm
12 sorry.

13 THE COURT: Oh, I'm going to let her answer
14 it anyway, go ahead.

15 A I think that if we hadn't had two witnesses with
16 the same testimony testifying against Gary, I
17 think we would have had a much better chance of
18 getting a non-conviction.

19 Q Okay. And in fact, with Mr. Morris's statement
20 you would have drastically had a different direct
21 -- cross-examination of Mr. Wiggins?

22 A Yes, and as I remember, Mr. Wiggins was also a
23 problem too because, you know, Mr. -- Mr. Morris
24 came in in a jumpsuit and he was obviously
25

STACEY OWINGS -- DIRECT BY MR. SCHNEE:

25

1 incarcerated. But Mr. Wiggins came in on bond
2 and was dressed nicely and was such a credible
3 witness and we had nothing to cross him on, this
4 would have helped a lot with beating down Mr.
5 Wiggins' testimony.

6 MR. SCHNEE: I have no further questions.

7 THE COURT: All right, Mr. Petrano.

8 CROSS-EXAMINATION

9 BY MR. PETRANO:

10 Q How does Morris help your case in cross of
11 Wiggins? Morris says he doesn't know anybody and
12 he was nowhere around? But then you have
13 Wiggins, another person coming in and saying,
14 yeah, White and I were here.

15 A I think that if -- I think if -- it would have
16 been something that we could have used to
17 somewhat muddy the testimony of -- I mean, they
18 -- because we had the two witnesses who were
19 testifying and we had the two corroborating
20 witnesses, the two co-conspirators who were
21 testifying against him.

22 I think having anything to kind of throw
23 their stories and pit them against each other
24 would have helped.
25

WHITE VERSUS THE STATE

1 Q Okay. I see what you're saying. So because
2 Wiggins said Morris was in the car with me, and
3 then you've got Morris's coming in.

4 A Right.

5 Q Okay. Now, you did -- now, Morris pled guilty
6 and then came and testified at the trial, right?

7 A I think so -- but I don't really remember, this
8 was several years ago. And at the time the
9 policy the Solicitor's office had is they
10 wouldn't let a Co-Defendant plead until after the
11 trial. He kind of had to earn his plea. But
12 sometimes they would let them plead guilty and
13 reserve sentencing. I'm not sure what they did
14 in the case of Morris and Wiggins here.

15 Q Okay.

16 A I think -- honestly, I don't remember.

17 Q Okay. Now, just generally as kind of background
18 information, you were first chair, second chair?

19 A I was second chair.

20 Q To Ms. DuRant?

21 A Right.

22 Q Okay. And were you involved in the case just as
23 much as her and she just makes the decisions?

24 Just kind of explain how that works?
25

STACEY OWINGS -- CROSS BY MR. PETRANO:

27

1 A The way it works is LaNelle handled the case up
2 to the time she was appointed. I think Mr. White
3 went through a couple of attorneys. He was in
4 jail a long time. I think that he had -- he had
5 a couple of attorneys or maybe one attorney who
6 left and got transferred.

7 So LaNelle actually handled the file.
8 Whenever she was noticed for trial, she was
9 looking for a second seat and she asked me, I was
10 on her team. She asked me to sit with her.

11 So I did not become involved until we came up
12 for trial prep. And I did meet with Gary a few
13 times while we were preparing for trial. But all
14 trial strategy and most of the meetings with Gary
15 were done by LaNelle.

16 Q And by the time -- so based on that scenario, by
17 the time you would come on board, any type of
18 plea negotiations would have just been failed and
19 over with, right, because you're going to trial
20 once you come in?

21 A Right, I don't recall any plea negotiations when I
22 was involved because he was served with LWOP
23 notice. And so once that happens, there's not a
24 lot you can do. But, you know, up -- up until
25

1 the jury came back -- and we didn't know if Gary
2 would accept anything, but up until the jury came
3 back, we were still begging LaNelle -- I mean, we
4 were still begging Vanessa to give us something,
5 so.

6 Q And you had indicated just a few minutes ago that
7 really it was Wiggins and Morris that put him at
8 the scene?

9 A As I remember, yes.

10 Q Okay. But the cop who pulls up, he actually sees
11 him too, right, sees him run off? Not the dog
12 cop, and I'm not trying to put you on the spot, I
13 know the record's old? But ---

14 A Can you reference me to something in the record
15 that would remind me of that? I'm sorry.

16 Q I didn't know how to say his name, Rouppasong?

17 A Yeah, Rouppasong.

18 Q Rouppasong witnessed a man carrying something in
19 his hand, wearing dark jeans and a white shirt,
20 run from the Circle K. He was the one who chased
21 him, lost sight. That's when they preserved the
22 scene and then they get the dog.

23 A (Affirmative response.)

24 Q Then, we can call it a show-up or what not, but
25

STACEY OWINGS -- CROSS BY MR. PETRANO:

29

1 Rouppasong also says, yeah, that's the guy,
2 talking about your client. So that puts him at
3 the scene as well, correct? If I'm getting this
4 correct, but I could be way off here but ---

5 MR. SCHNEE: Judge, I would just ask for a
6 page of the transcript that says that.

7 MR. PETRANO: I reading right from the
8 appellate brief.

9 A I well I would certainly agree at the point that
10 brief was written, the appellate attorney had
11 studied the case closer than I have.

12 MR. PETRANO: Page 6 of the final brief of
13 the Respondent and there are page citations, so page
14 227 to 235 and 237 to 238.

15 THE WITNESS: Okay.

16 THE COURT: What page is this Mr. Petrano?

17 MR. PETRANO: 227, I believe is actually
18 Office Gunter but he's explaining Officer Rouppasong?
19

20 THE WITNESS: Rouppasong.

21 MR. PETRANO: Sorry.

22 Q And if those facts aren't correct, then the
23 record will correct me if my argument is junk.
24 But my point being, there are other people that
25 put him at the scene, it wasn't just Wiggins and

1 Morris?

2 A Right, my understanding was Rouppasong could give
3 a basic description of the person he saw running
4 away. He didn't know it was Gary White but he
5 gave a basic description of the person he saw
6 running from the gas station. I think that's
7 what -- yeah.

8 Q Then the dog?

9 A The dog.

10 Q And we're all laughing but the dog put him at the
11 scene too, right, in its own way?

12 A Yes.

13 THE COURT: This is the dog comes to the
14 scene tracking him.

15 THE WITNESS: Yes, sir, this the big dog
16 appellate tracking case.

17 THE COURT: Ma'am?

18 THE WITNESS: This is was the big dog
19 tracking appellate case. That's why we're laughing,
20 the dog.

21 THE COURT: Oh, yeah, yeah, yeah.

22 A So the dog does, you're right.

23 Q We've also got the vehicle, right?

24 A Yes.

STACEY OWINGS -- CROSS BY MR. PETRANO:

31

1 Q And the Applicant's admitted being in the
2 vehicle, he did here?

3 A The Applicants? Yes, he did.

4 Q And then there's surveillance video that
5 corroborates Ms. Anthony's story?

6 A Yes, there was surveillance video in this case.

7 Q Okay. So we've got Rouppasong, the dog, the
8 video, Ms. Anthony and the car?

9 A Yes.

10 Q And then Wiggins and Morris?

11 A Yes.

12 Q Okay. I have a weird procedural question ---

13 A Yes.

14 Q --- regarding how the Public Defender's office
15 would handle something in this case. So if you
16 don't know, just tell us. Morris's retraction
17 coming in, at that point the case is on appeal,
18 right?

19 A Right.

20 Q Okay. What if it had come to you, would you move
21 for a Rule 29? How would it work? How -- do you
22 ever get retractions, things like that? Do you
23 have a procedure for this? Because up until now
24 we've haven't really talked about real procedure
25

1 here at the Public Defender's office, I'm
2 thinking is there a procedure for this scenario?
3 A This never came -- I've never actually had this
4 come up. I can tell you what LaNelle did. And
5 she, I think at the time, was my team leader so I
6 would have followed LaNelle's procedure.

7 What it looks like she did, from looking at
8 her file -- I mean, the time for filing a motion
9 for a new trial is over, you've -- we've already
10 filed the appeal. So it's removed from our
11 office. And it looks like LaNelle called the
12 appellate defender and told the appellate
13 defender what she had. And she sent it to her
14 and she asked her to let her know if she was
15 going to file a motion for a new trial with the
16 Court of Appeals. And it looks like the appellate
17 defender responded that, yes, she was.

18 And so it looks like that's what I would have
19 been told to do when I was there. This never
20 came up for me.

21
22 Q Okay. And in this case, it's kind of weird that
23 Ms. DuRant, the team leader, the first chair,
24 ultimately ends up leaving the Public Defender's
25 office, goes to Appellate Defense and handles

STACEY OWINGS -- CROSS BY MR. PETRANO:

33

1 this case, right?

2 A Yes, she takes it over.

3 Q Now, one of the arguments that they try to make
4 was -- and they moved to have the case remanded
5 to General Sessions Court to handle this
6 retraction. Would that be something you would
7 have handled, and stop me if you're not sure how
8 all this would have worked or does Appellate
9 Defense drive on down and handle it in General
10 Sessions Court?

11 A That's an interesting question. My understanding
12 is once it's remanded, it's back to the trial
13 level.

14 Q Okay, so you ---

15 A And so it would have been someone -- if not me,
16 it would have been somebody else in our office
17 that the Judge would have assigned.

18 Q Okay, so ---

19 A My understanding it would still be handled by us.

20 Q Okay. And that being said, we walked up to this
21 made up scenario following what we have here in
22 the record and the arguments being made. What
23 would you do in General Sessions Court with this
24 retraction from Mr. Morris? It's been remanded.
25

1 A It's been remanded.

2 Q Just for this issue ---

3 A Remanded for a new trial?

4 Q No, the issue on the appellate motion was to
5 remand it and address this issue of retraction.

6 So what do we do here? I'm not trying to put you
7 on the spot, I just don't see what the prejudice
8 is and I don't understand what the big deal is
9 with the retraction.

10 A Right.

11 Q And I'll tell you where I'm going and if you want
12 to stop me and answer, go ahead but ---

13 A Keep talking, I'm thinking.

14 Q Here's what I'm thinking here. You've got a
15 retraction. Now the appellate court calls it
16 newly created, I think -- that's their words, not
17 mine. But you have an individual who has now
18 admitted to perjury three times, Mr. Morris,
19 that's what his retraction does. He says, I was
20 lying at the plea, I was lying in my statement
21 and I was lying when I testified at the trial.
22 But no, no, no, here's the truth.

23
24 What are you going to do with that? Are you
25 going to call him down and cross-examine him? I

STACEY OWINGS -- CROSS BY MR. PETRANO:

35

1 don't understand.

2 A I understand your question and it's problematic.
3 You have someone you can't believe at all.
4 That's the problem. You have someone who, I lied
5 here, I lied here, I lied here and I think that
6 that's where it's problematic for his defense
7 lawyer because you can't believe anything he says
8 at that point.

9 Q And is something that you might explore as to
10 whether, as far as credibility goes of Mr.
11 Morris, whether there was any undue contact from
12 the Applicant, your client, with Mr. Morris?

13 A The prosecutor would certainly explore that.

14 Q And -- but in this case, the appellate court
15 denied the motion to remand it?

16 A That's my understanding, yes.

17 Q Thanks, nothing further. And I didn't mean to
18 put you on the spot.

19 A That's fine.

20 THE COURT: Mr. Schnee.

21 MR. SCHNEE: Just very briefly.

22 REDIRECT EXAMINATION

23 BY MR. SCHNEE:

24 Q Do you have a copy of the transcript?

25 WHITE VERSUS THE STATE

1 A Yes, I do. I have -- yes, I do.

2 Q Okay. Would you please turn to page 306.

3 A Yes.

4 Q It's where Mr. Wiggins begins to testify.

5 A Okay.

6 Q And at the very beginning, line number 11, could
7 you read the question and the answer for that?

8 3-0-6.

9 A 3-0-6, line 11?

10 Q Yes, ma'am.

11 A Why are you charged with those crimes, for what
12 incident? For the incident with Gary White and
13 Anthony Morris.

14 Q Okay. So one of the very first questions that
15 Mr. Wiggins addresses is that Anthony Morris is a
16 Co-Defendant?

17 A Yes.

18 Q Okay. And that goes back to my earlier
19 questioning in terms of how you would cross-
20 examine Mr. Wiggins with the statement from Mr.
21 Morris?

22 A Right, I could use it to impeach him.

23 Q Okay, or at least the officer ---

24 A At least the officers, right.

1 MR. SCHNEE: Judge, I don't have any further
2 questions of this witness.

3 THE COURT: Mr. Petrano, anything further?

4 MR. PETRANO: No, Your Honor.

5 THE COURT: You can step down, Ms. Owings.

6 THE WITNESS: Thank you.

7 (The witness leaves the witness stand.)

8 MR. SCHNEE: I have no further witnesses. I
9 don't know if the Attorney General does.

10 MR. PETRANO: Nothing, Your Honor, just a
11 brief rebuttable argument after argument is made, no
12 further evidence.

13 THE COURT: Go ahead, Mr. Schnee.

14 MR. SCHNEE: First I would like to address
15 the alleged contact between my client and Mr. Morris.
16 The only testimony that is before Your Honor is they
17 saw each other in passing, they had absolutely no
18 discussions regarding the retraction or anything of
19 that nature. There's no allegation that my client
20 attacked him or anything like that. And there's
21 absolutely no evidence of that.

22 So I just want to put that out there.

23 Secondly, I've reviewed the brief that the
24 State submitted along with the page numbers. The only
25

1 testimony by the officers conducting the dog tracking,
2 they say that a person was seen running. They don't
3 say it was Mr. White, they just say it is a person.
4 There's the 30 minute gap between when that happens
5 and when they track my client to the car to somewhere
6 else.

7 Clearly being somewhere after the fact does
8 not implicate him in the crime itself. The only
9 testimony that I can see in there of identifications
10 of my client participating in the actual armed robbery
11 are from Wiggins and Morris. And none of them has
12 said it's absolutely false, the whole thing was a lie,
13 I wanted to deal.

14 Now in terms of whether it's believable to a
15 jury and credibility, that's something for a jury to
16 determine. The statement certainly is going to be
17 admitted and his testimony would be admitted at trial
18 but it would be up to the jury to decide if it is
19 believable.

20 I think the transcript speaks for itself in
21 terms of how important the testimony of Anthony Morris
22 was along with Mr. Wiggins. I think once you
23 eliminate one of those and you begin to cross-examine
24 the main investigators who took those statements, I
25

1 think that drastically changes how the trial goes and
2 how it is presented to the jury.

3 I would simply argue that it's easy when you
4 discover evidence whether it's created after the fact
5 or not. The Court of Appeals' decision cites a number
6 of cases regarding new evidence. They say it was
7 never considered at the Circuit Court level and that
8 the appropriate forum is for it to be addressed on a
9 P-C-R. The appellate court didn't say they were
10 ignoring this, they're simply saying, this is not the
11 appropriate time, he has a P-C-R.

12 Well, this is his P-C-R and now we're here
13 with this evidence that the Court of Appeals said this
14 is for Your Honor to consider. I think it is a
15 substantial change and I would ask Your Honor to grant
16 him a new trial.

17 THE COURT: All right. Thank you, Mr.
18 Schnee. Mr. Petrano.

19 MR. PETRANO: Yeah, I'm going to kind of go
20 in reverse. The last thing mentioned was that this
21 was -- that the Court of Appeals kind implies that
22 this is P-C-R. I take issue to that. The decision by
23 the Court of Appeals when they reject the newly
24 discovered evidence, they cite Hayden (phonetic).
25

1 Hayden isn't just a nonsense case. Hayden is the
2 case, the standard we all cite for newly discovered
3 evidence. Obviously they flushed out the newly
4 discovered elements and those issues when they decided
5 to reject the motion to remand. They addressed this
6 issue, they thought it was nonsense and that's why
7 they dismissed it. If they thought there was any
8 credibility to it whatsoever and it would have made a
9 difference, I guess they would have to take it as
10 credible. But even they acknowledged there would be
11 no difference when they issued the denial of the
12 motion to remand and they cite Hayden. That's what
13 it's saying, like there is no newly discovered
14 evidence.

15
16 Now, Rouppasong ---

17 THE COURT: Spell that for record.

18 MR. PETRANO: R-o-u-p-p-a-s-o-n-g.

19 THE COURT: All right, sir.

20 MR. PETRANO: He witnesses an individual.

21 Now, according to my notes and the way I read it,
22 there's a show-up and he says, yeah, that's the guy I
23 saw running. Now it may have been a half-hour, an
24 hour. If I'm mistaken on that, the record will
25 reflect that and that kills that argument. But he

1 puts him there at the scene. He doesn't just say --
2 obviously he didn't know his name at that time but he
3 did identify him as the person the dog found. That
4 puts him at the scene.

5 The bottom line here is, if Morris -- even if
6 you say, okay, he's an admitted perjurer, he lied at
7 his plea, he lied at the trial of the Applicant and he
8 lied when he got sentenced a week later. That's three
9 times he perjured himself but now he's telling the
10 truth, Morris. It was just window-dressing. Morris
11 doesn't really make an effect here.

12 You have the victim, you have the
13 surveillance, you've got the dog. We've all joked
14 about the dog but the dog's good evidence and the
15 Supreme Court upheld that. You've got the dog,
16 you've got Rouppasong, you've got Wiggins. And then
17 if you look at Morris's statement, if you look at it
18 at the very end, Morris says, I don't know anybody, I
19 was nowhere near him. Well, then he doesn't know if
20 he was involved or not because he doesn't know him, he
21 was nowhere near him.

22 That all being said, Your Honor -- well, the
23 first thing in the Applicant's final argument here
24 was, there's no evidence of any improper contact by
25

1 the Applicant and Mr. Morris that started the creation
2 of the retraction.

3 Your Honor, I think that lack of evidence is
4 what goes to his credibility. It doesn't make sense
5 when analyzing his credibility here on the stand, he
6 says, yeah, that guy, he's the one who's responsible
7 for me getting three life sentences. That's him, he's
8 the one responsible. So to suggest that he doesn't
9 say anything to him is not credible, simply not
10 credible. And then there's all of a sudden a
11 retraction and then to again say, yeah, I saw him but
12 I didn't say anything about that. That makes no sense
13 whatsoever.

14 That is not credible, the State submits, and
15 that's why his testimony, being that he had no contact
16 with him, is not credible.

17 Thank you, Judge.

18 THE COURT: Mr. Schnee.

19 MR. SCHNEE: Very briefly I will address the
20 last issue first, the retraction. The mere fact that
21 Mr. Morris wanted a deal and ended up getting 13
22 years, that's a very good motivation, saying, you know
23 what, State, I'm pissed off at you, I'm going to tell
24 the truth. That's plenty of motivation, being --
25

1 speculating that my client attacked him or anything
2 else is simply improper or ---

3 THE COURT: Let me suggest that upset would
4 be a better word than pissed off.

5 MR. SCHNEE: I apologize.

6 THE COURT: Go ahead.

7 MR. SCHNEE: He's upset, let's say. The
8 simple fact is there is absolutely nothing on the
9 record before Your Honor or any records in the
10 Department of Corrections or anything else that would
11 show anything improper.

12 In dealing with the Court of Appeals issue,
13 they declined to remand it on procedural grounds.
14 They didn't have to and they chose not to. And the
15 fact is, in the appellate -- in the appellate brief
16 its cites State v. Spann, Hayden v. State and State v.
17 Kelly. The motion for retrial based on after-
18 discovered evidence, it should be -- it probably would
19 have changed the result of the trial, probably being
20 probable, 50/50. It's been discovered since the trial
21 date which is clear since it was a month after that it
22 was written. Could not have been discovered through
23 the exercise of due diligence before trial. Well,
24 Anthony Morris wasn't going to say what he had to say
25

1 until he decided to say it. There's no way of forcing
2 that to happen. Material, it's clearly material to
3 the cross-examination of the investigators, the cross-
4 examination of Mr. Wiggins, to putting Anthony Morris
5 on the stand to completely disrupt the State's theory
6 that these three people were all participating
7 together.

8 That drastically changes the entire effect to
9 the jury and is not merely cumulative or impeaching.
10 This is more than just -- it certainly is since no one
11 else testified in this regard. And it's not just
12 impeaching, it's an entire story that contradicts much
13 of the evidence.

14 Now in terms of the dog tracking, like I
15 said, I have not seen anything in this transcript that
16 they said Gary White is the one the dog picked out.
17 They picked out -- the dog followed and found three
18 people ---
19

20 THE COURT: Well, why was he arrested then?

21 MR. SCHNEE: Well, Your Honor, he was
22 arrested because he was with the other two people.

23 THE COURT: Okay.

24 MR. SCHNEE: They arrested all three of them
25 and charged all three of them.

1 THE COURT: Okay.

2 MR. SCHNEE: But there's no actual
3 identification that Gary White arm robbed that store.

4 THE COURT: I thought one or both of the Co-
5 Defendant's said he was involved.

6 MR. SCHNEE: They both testified that he was
7 involved and now one of them has changed his mind and
8 decided -- is deciding to tell the truth because he's
9 unhappy that he ---

10 THE COURT: Well, he decided to change his
11 story.

12 MR. SCHNEE: Well, that's correct, Your
13 Honor. And as to which is the truth should be left
14 for a jury.

15 THE COURT: All right, sir.

16 MR. SCHNEE: And that's why I'm asking for
17 the jury to reconsider this issue.

18 THE COURT: All right.

19 MR. SCHNEE: The only other thing, my
20 client's brief, I would ask it be part of the record.

21 THE COURT: What?

22 MR. SCHNEE: To be made part of the record,
23 the brief he submitted to Your Honor.

24 THE COURT: All right, very well. Mr.
25

1 Petrano, anything else?

2 MR. PETRANO: I do, and Your Honor, I hate
3 the go back and forth but there's a couple of things I
4 need to point out.

5 THE COURT: That's all right, go ahead.

6 MR. PETRANO: Thanks, judge. I'm looking at
7 the December 9th, 2005 order from the South Carolina
8 Court of Appeals. These aren't my words, these are
9 theirs.

10 Reading: Based on the authority of State
11 versus Porter and Hayden versus State, as applied to
12 the facts of this case, the motion is denied.

13 The Court of Appeals has addressed this.
14 They found that this supposedly newly discovered
15 evidence, and they call it recently created
16 recantation, that would not have made a difference,
17 that's what this order says.

18 And then there was some suggestion just now
19 that regarding Morris, that I think you said don't
20 used pissed off, say upset, that there was a deal for
21 him and that was why he's coming forward now and
22 telling the truth.

23 Well, Your Honor, I think you can take
24 judicial notice that there's -- where's the PCR for
25

1 us? I'll tell you where it is, he filed one then he
2 withdrew. And that's a matter of public record in the
3 Clerk's office. That was really an issue, that was
4 really an issue from Morris -- Morris's perspective,
5 he would have followed that up.

6 That's all I've got, Judge.

7 THE COURT: All right. Go ahead, Mr. Schnee.

8 MR. SCHNEE: Judge, I would simply direct
9 Your Honor's attention to the footnote dealing with
10 the Court of Appeals issue from the remittitur in the
11 Supreme Court. It says, White also asked the Court of
12 Appeals to grant a new trial based on newly discovered
13 evidence. It appears the new trial motion was not
14 presented to the trial court. Moreover, White did not
15 ask the Court of Appeals to remand for a new trial to
16 the trial court, and continues and says, we affirm the
17 issue -- disposition of this issue is without
18 prejudice to White seeking such relief in the trial
19 court. That's what we're here for today.

20 THE COURT: All right. Anything further?

21 MR. PETRANO: I just think we have a problem
22 here then based on that footnote and this order from
23 the Court of Appeals because they most certainly did
24 address it and I don't know where that leaves us but
25

1 with -- I'm not sure where that goes.

2 Thank you, Judge.

3 THE COURT: All right. Thank you both for
4 your lively presentations. I'll consider everything
5 I've heard here today and let you know my decision in
6 due course.

7 MR.. SCHNEE: Thank you, Your Honor.

8 MR. PETRANO: Thank you, Your Honor.

9 ----- END OF TRANSCRIPT OF RECORD -----

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1 CERTIFICATE OF REPORTER
2

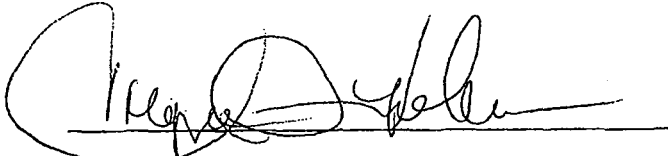
3 STATE OF SOUTH CAROLINA)

4 COUNTY OF RICHLAND)
5

6 I, Crystal Holmes, Official Court Reporter for
7 the Fifth Judicial Circuit of the State of South
8 Carolina, do hereby certify that the foregoing is a
9 true, accurate and Complete Transcript of Record of
10 the proceedings had and evidence introduced in the
11 hearing of the captioned case, relative to appeal,
12 in the Court of Common Pleas for Richland County,
13 South Carolina, on the 18th day of October, 2010.

14 I do further certify that I am neither of kin,
15 counsel nor interest to any party hereto.
16

17 April 15, 2012

18
19 20 Crystal Holmes, Court Reporter
21
22
23
24
25

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

)
) IN THE COURT OF COMMON PLEAS
)

)
) 2009CP4005549
)

White, Gary, #00309726,

)
) Applicant,
)

v.

) ORDER OF DISMISSAL
)

State of South Carolina,

)
) Respondent.
)

RICHLAND COUNTY
FILED
2011 AUG 31 AM 11:04
JEANETTE W. MCBRIDE
C.C.P. & G.S.

PROCEDURAL HISTORY

This matter comes before the Court by way of an Application for Post-Conviction Relief filed August 5, 2009. The Respondent made its Return on or about May 24, 2010. An evidentiary hearing into the matter was convened on October 18, 2010 at the Richland County Courthouse. The Applicant was present at the hearing and was represented by Mark E. Schnee, Esquire. Brian T. Petrano of the South Carolina Attorney General's Office represented the Respondent.

At the hearing, the Applicant testified on his own behalf. The Applicant's trial counsel, who was at the time of the trial an Assistant Public Defender, Stacy Owings also testified. This Court had before it the records of the Richland County Clerk of Court, the transcript of the proceedings against the Applicant, the Applicant's records from the South Carolina Department of Corrections, and finally the records from the Applicant's direct appeal.

White, Gary, #00309726 - Order of Dismissal (2009CP4005549)

Page 1 of 18

SCANNED

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Richland County. The Applicant was represented by Stacy Owings, Assistant Public Defender.¹ On June 16, 2005, after a jury trial with the Honorable James R. Barber, III, the Applicant was convicted and sentenced to the following:

Case Number	Charged Offense	Penalty	Actual Sentence
7-04 2004GS4003018	0139 16-11-0330(A) * 10-30 * Robbery / Armed Robbery (victim: Circle K)	☒ LWOP	☒ No
7-04 2004GS4003017	0095 16-03-0910 * 30 * Kidnapping / Kidnapping (J. Gwen Anthony)	☒ LWOP	☒ No
7-04 2004GS4003016	0139 16-11-0330(A) * 10-30 * Robbery / Armed Robbery (J. Gwen Anthony)	☒ LWOP	☒ No
LWOP: 30 months (S.C. Code 17-25-25) (No weapons charged or used and no parked animal)		TOTAL	POSSIBLE
NOTES: Indentment source 12		LWOP	

A timely Notice of Appeal was filed on Applicant's behalf. The Court of Appeals affirmed the conviction. State v. White, 382 S.C. 265, 267, 676 S.E.2d 684, 685 (2009), reh'g denied (May 28, 2009). The South Carolina Supreme Court also confirmed the conviction. State v. White, 372 S.C. 364, 370, 642 S.E.2d 607, 609 (S.C. Ct. App. 2007) aff'd but criticized, 382 S.C. 265, 676 S.E.2d 684 (2009).² The facts of the case from the Supreme Court opinion are as follows:

This case arises from an armed robbery of a convenience store in Columbia, South Carolina. After midnight on April 19, 2004, Gary White and Anthony Morris were riding in a car driven by Roy Wiggins. As Wiggins drove past a convenience store, White told Wiggins to turn around and go back to the store. Wiggins complied. Wiggins drove to the store and parked behind it. White and Morris exited the car, with Wiggins staying behind in the driver's seat. White was carrying a gun.

¹ Ms. Owings is now in private practice.

² This case was our Supreme Court's "Case of the Month." A video of the oral argument is available online at: <http://www.sccourts.org/caseOfMonth/Feb2009/index.cfm>

White and Morris entered the convenience store. Gwen Anthony, the store manager, was restocking the grill area when White and Morris entered suddenly. Anthony described the robbers' entry as a "flash."

White, armed with the gun, grabbed Anthony, put his arm around her, and pointed the gun to her neck. Morris moved through the store stealing cash, lottery tickets and an 18-pack of beer while White continued to hold Anthony at gunpoint. While Morris was at the beer cooler, White, while standing up, apparently lost consciousness.

Anthony testified that White's head fell to her shoulder, and the gun dropped from her neck. Although he was unconscious for only a few seconds, Anthony observed that White's breath smelled like alcohol, his gun was black with a silver top, and his jeans were baggy and dark in color. With the 18-pack of beer in hand, Morris ran up the aisle toward the door and screamed at White, waking him. White, still holding Anthony, returned the gun to her neck and began to move toward the door, forcing her to accompany him. As they exited the store, White pushed Anthony away and ran in the opposite direction. At that very moment, Officer Rouppasong of the Columbia Police Department pulled into the store parking lot on a routine break.

Upon his arrival on the scene, Officer Rouppasong saw two people: Anthony, waving and flagging him down and another person running away from the store. Rouppasong described the man he saw running as a black male, wearing a white t-shirt and dark colored pants, holding or carrying something in one of his hands. Rouppasong remained in his vehicle and followed White. As he followed him around the corner of the store, Rouppasong saw a car parked on the street. Rouppasong saw a black male (later identified as White) exit the car on the passenger side and flee. Rouppasong did not give chase; instead, he stayed with the vehicle and Wiggins. Officer Gunter, with the K9 unit, was called to the scene to search for the suspect. Officer Gunter arrived on the scene approximately thirty minutes after the robbery. Once there, Rouppasong relayed the necessary information that allowed Gunter to know where to initiate the track. Gunter and his tracking dog, Aurie, began tracking

and soon found White nearby sleeping next to some bushes, gun in hand. Rouppasong testified that the man he saw lying by the bushes, asleep, was the same man he saw exiting the store and fleeing the crime scene. There were two other in-court eyewitness identifications of White. Wiggins testified that White left his car with a gun, returned to his car a short time later, and then fled when police arrived. The second identification came from Morris.

White was convicted of two counts of armed robbery and kidnapping; he was sentenced to life without parole.

State v. White, 382 S.C. 265, 267-68, 676 S.E.2d 684, 685-86 (2009).

In the PCR application the Applicant made the following allegations:

9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) NEW DISCOVERED EVIDENCE
- (b) INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL
- (c) INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

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

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

(a) which grounds have been presented:

- i. NEWLY DISCOVERED EVIDENCE
- ii. _____
- iii. _____

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

- i. BY MOTION TO REMAND FOR NEW TRIAL OR IN THE ALTERNATIVE FOR A HEARING INTO NEW EVIDENCE.
- ii. _____
- iii. _____

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

- (a) CERTAIN ISSUES WERE NOT PRESERVED AT TRIAL AND COULD NOT BE
- (b) RAISED ON DIRECT APPEAL.
- (c) _____

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

TO HAVE SENTENCE VACATED OR IN THE ALTERNATIVE, TO HAVE A NEW TRIAL.

7. IF YOU ANSWERED "YES" TO (6), LIST

(A) THE NAME OF EACH COURT TO WHICH YOU APPEALED:

IV. WRIT OF HABEAS CORPUS TO SUPREME COURT (S.C.)

IV. PETITION FOR REHEARING TO SUPREME COURT (S.C.)

(B) THE RESULT IN EACH SUCH COURT TO WHICH YOU APPEALED:

IV. GRANTED NOV. 19, 2007 AFFIRMED APRIL 27, 2009

IV. DENIED MAY 28, 2009

(C) THE DATE OF SUCH RESULT:

IV. APRIL 27, 2009

IV. MAY 28, 2009

10. STATE CONCISELY AND IN THE SAME ORDER THE FACTS WHICH SUPPORT EACH OF THE GROUNDS SET OUT IN (9)

(A) CO-DEFENDANT ANTHONY MORRIS RETRACTED HIS TRIAL TESTIMONY BY WAY OF A SWORN STATEMENT. THE STATEMENT ITSELF WEAKENS THE STATES CASE AGAINST MR. WHITE.

(B) TRIAL COUNSEL WAS INEFFECTIVE BY ALLOWING THE STATE TO PRESENT EVIDENCE IN CASE ON A ~~CHARGED~~ CHARGE THAT WAS DISMISSED AT THE START OF TRIAL.

(C) TRIAL COUNSEL WAS INEFFECTIVE BY FAILING TO PURSUE OBJECTION OF JURY CHARGE HAND OF ONE HAND OF ALL. BY FAIL TO PURSUE OBJECTION, COUNSEL ALLOWED THE JUDGE TO GIVE THE CHARGE WITHOUT MAKING A RULING ON OBJECTED CHARGE.

CONTINUED ON BACK SIDE →

12. IF YOU ANSWERED "YES" TO ANY PART OF (11), LIST WITH RESPECT TO EACH PETITION, MOTION OR APPLICATION:

(A) THE SPECIFIC NATURE THEREOF:

IX. PETITION FOR REHEARING TO SUPREME COURT (S.C.)

(B) THE NAME AND LOCATION OF THE COURT IN WHICH EACH WAS FILED:

IX RICHMOND COUNTY, COLUMBIA S.C.

As shown below, at the evidentiary hearing the Applicant proceeded, for the most part, on the allegations as stated in the application for post-conviction relief.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

The Applicant testified that Anthony Morris issued a statement following his (Morris') testimony at the trial recanting any involvement in the robbery. The Applicant argued that Morris' retraction affected the testimony of Higgins because Higgins testified that Morris was also at the scene, whereas Morris' recant disclaims any involvement or presence at the scene whatsoever. Morris' "recant" is inserted below:³

³ The "recant" was filed as page five (5) of the Applicant's "Motion to Remand For a New Trial, Or, In the Alternative, For a Hearing into New Evidence" filed with the Court of Appeals on October 19, 2005. The State filed their "Return to Motion to Remand for a New Trial" on November 16, 2005. The South Carolina Court of Appeals denied the Applicant's request by written order dated December 9, 2005.

White, Gary, #00309726 - Order of Dismissal (2009CP4005549)

My Name is Anthony Russell Morris, and I'm claiming this to be a true statement that I'm about to write, On June 15, 2004 I gave a statement to the Court house, which was a lie, but the reason why, was because I was told that if I testify on my Co-defendant, I would plea to a lesser charge than what they wanted me to plea to. So being that I had custody of my mother, and saw the video tape, I put parts together, and came up with a story, I also was able to see Ray's statements, To be truthful I wasn't on the scene of the crime, My lawyer just told me that I was now in the middle of all this, and either way it would I was gonna face sometime. But if I wanted the minimum I would have to testify on a person, and a crime that I didn't ^{know} anything about. This is my first time ever being in trouble with the law, so what ever my lawyer told me, I believed him. On the day it was time for me to plea, he came to the County and told me that, they were not gonna drop my charges, so I told him that I didn't want to testify, and I wasn't ready to plea. In Return he told me that I would have to testify, and I would either have to plea, or either go to trial with my Co-defendant, and would get 90 years. So being that I didn't know what was going on, I did what I was told, and in Return, I Received 13 years for something I didn't do, and Also got my Co-defendant's time, and Really don't know him, or if he was on the Crime Scene either.

SWORN or affirmed to and subscribed
before me this 15th day of July,
2005.

[Signature]
Notary Public

My Commission Expires May 18, 2014

7/15/05

[Signature]
Anthony Morris

The Applicant further alleged that the indictments failed to put him on proper notice that there would be any alleged co-defendants and that precluded him from properly preparing a defense. The Applicant testified that he did see Morris after Morris testified at the trial but that he (Applicant) did not say anything to Morris. The Applicant testified that he never asked Morris to issue the statement/recant.

Trial counsel testified that Morris' testimony during the trial was not unimportant. Trial counsel explained that the retraction would have provided something to cross examine the other co-defendant (the driver - Roy Wiggins). Trial counsel explained that Wiggins and Morris put the Applicant at the scene, and the recant would have given them a better chance.

In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts

presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625, (citing Strickland). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. As discussed above, the Applicant has failed to carry his burden in this action. Therefore, this Court finds that the application must be denied and dismissed.

Beyond his review of the undisputed procedural history, this Court finds Applicant's testimony is not credible. Trial counsel's testimony was credible.

Regarding Morris' supposed recant. This Court notes that Morris [Morris, Anthony Terrell #309858] was never produced at the PCR hearing as a witness to authenticate and/or be cross examined about his recant. According to the Richland County Clerk of Court's Online Judicial Index, Morris pled guilty on June 9, 2005 (a week prior to the Applicant's trial) about a month prior to his supposed recant

(2004GS4005082).⁴ Yet Morris, despite the supposed recant, waited until August 2006 to file an untimely PCR application (2006CP4004860).⁵ This Court notes that it is odd and somewhat inconsistent for Morris to supposedly issue this recant claiming his innocence yet never timely pursue any challenge to his conviction/sentence regarding the crime that he claims (according to the recant) he was not involved with.⁶

The Respondent argued that the recant issue was dealt with by the Court of Appeals and the issue is therefore not properly before this Court, i.e. the issues are procedurally barred by S.C. Code Ann. § 17-27-20(b) (1985). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). The Respondent argued specifically that issue (Morris recant) was presented to the Court of Appeals. The “recant” was filed as page five (5) of the Applicant’s “Motion to Remand For a New Trial, Or, In the Alternative, For a Hearing into New Evidence” filed with the Court of Appeals on October 19, 2005. The State filed their

⁴See <http://www4.rcgov.us/publicindex/PICaseDetails.aspx?County=40+&Casenum=2004GS4005082&CourtType=G&CaseType=Criminal&CourtAgency=40001&LastName=Morris&FirstName=Anthony>

⁵ Anthony Morris’ PCR was denied/dismissed on June 25, 2007 (2006CP4004860).
<http://www4.rcgov.us/publicindex/PICaseDetails.aspx?County=40+&Casenum=2006CP4004860&CourtType=G&CaseType=Civil&CourtAgency=40002&LastName=Morris&FirstName=Anthony>

⁶ Mr. Morris’ testimony begins on page 369 of the Applicant’s trial.

"Return to Motion to Remand for a New Trial" on November 16, 2005. The South Carolina Court of Appeals denied the Applicant's request by written order dated December 9, 2005.⁷

The South Carolina Court of Appeals	
The State,	Respondent,
v.	
Gary A. White,	Appellant.
The Honorable James R. Barber Richland County Trial Court Case No. 2004-GS-40-03015 2004-GS-40-03016 2004-GS-40-03017 2004-GS-40-03018	
ORDER	
The appellant moves for a remand for either a new trial or a hearing on whether a new trial should be ordered. The ground for this motion is the recently created recantation statement of a trial witness.	
Based on the authority of <u>State v. Porter</u>, 296 S.C. 618, 239 S.E.2d 641 (1977), and <u>Hayden v. State</u>, 278 S.C. 610, 299 S.E.2d 854 (1983) as applied to facts of this case, the motion is denied.	
IT IS SO ORDERED. 	
Columbia, South Carolina December 9, 2005	
cc: Assistant Appellate Defender Aileen P. Clare Assistant Deputy Attorney General Salley W. Elliott	

⁷ The Applicant's October 19, 2005 "Motion to Remand For a New Trial, Or, In the Alternative, For a Hearing into New Evidence" (including the Morris statement itself) and the December 9, 2005 Order by the Court of Appeals was part of the Supplemental Appendix submitted on certiorari to the South Carolina Supreme Court.

The Respondent argues that the Court of Appeals Order and the specific citation to Hayden v. State makes it clear that this issue of Morris' recant as supposed newly discovered evidence was flatly rejected by the Court of Appeals.

A party requesting a new trial based on after-discovered evidence must show that the evidence:

- (1) Is such as would probably change the result if a new trial was had;
- (2) Has been discovered since the trial;
- (3) Could not by the exercise of due diligence have been discovered before the trial;
- (4) Is material to the issue of guilt or innocence; and,
- (5) Is not merely cumulative or impeaching.

Hayden v. State, 278 S.C. 610, 611, 299 S.E.2d 854, 855 (1983)

The Respondent argued that the Court of Appeals was correct in denying the Applicant's newly discovered evidence motion because the Morris statement fails to satisfy the Hayden test. The Morris statement is self serving and it does not materially affect the outcome of the trial because Morris is not the only evidence putting the Applicant at the scene of the crime.⁸ Morris' statement is not exculpatory (but for Morris himself) because it denies any knowledge of whether the Applicant was involved in the crime.

The Applicant on the other hand relies on the published opinion by the Supreme Court that footnotes the newly discovered evidence issue:

White also asked the court of appeals to grant him a new trial based on newly discovered evidence. It appears the new trial motion was not presented to the trial court. Moreover, White did not ask the court of appeals to remand the new trial motion to the trial court. *See State v. Mercer*, 381 S.C. 149, 165-66, 672 S.E.2d 556, 564-65 (2009) (recognizing that a motion for a new trial based upon after discovered evidence must be presented to the trial court in the first instance). The court of

⁸ As the appellate opinion explained, Officer Rouppasong, Aurie (the German Shepherd), and substantial circumstantial evidence placed the Applicant at the scene of the crime.

White, Gary, #00309726 - Order of Dismissal (2009CP4005549)

appeals declined to address the issue “because it ha[d] not been raised to and ruled on by the trial court and [wa]s not properly before th[e] court.” *White*, 372 S.C. at 387, 642 S.E.2d at 619. We affirm the court of appeals on this issue. Rule 220(b)(1), SCACR. The disposition of this issue is without prejudice to White seeking such relief in the trial court.

State v. White, 382 S.C. 265, 275, 676 S.E.2d 684, 689 n.2 (2009), reh'g denied (May 28, 2009).

This Court respectfully notes that the Supreme Court footnote appears to be inconsistent with the appellate records before this Court. The footnote includes the following: “White did not ask the court of appeals to remand the new trial motion to the trial court.” The Applicant’s October 19, 2005 “*Motion to Remand for a New Trial, Or, In the Alternative, For a Hearing into New Evidence*” (including the Morris statement itself) clearly requested the Court of Appeals to remand the case to the trial court. To be clear, according to the appellate records, the Applicant’s October 19, 2005 “*Motion to Remand for a New Trial, Or, In the Alternative, For a Hearing into New Evidence*” (including the Morris statement itself) and the December 9, 2005 Order by the Court of Appeals was part of the Supplemental Appendix submitted on certiorari to the South Carolina Supreme Court. In fact, the first sentences of the Applicant’s October 19, 2005 “*Motion to Remand for a New Trial, Or, In the Alternative, For a Hearing into New Evidence*” request that the Court of Appeals remand the case for a hearing into the new evidence.

Accordingly, there is no good faith claim that counsel did not move the appellate court to remand the case to the trial court to determine if the Morris statement was sufficient newly discovered evidence. It is obvious that the Court of Appeals rejected the Applicant’s argument regarding the Morris statement and found that it did not satisfy the Hayden factors for newly discovered evidence – the Order specifically cites Hayden. The Applicant has failed to satisfy his

burden of proof and demonstrate that the Morris statement satisfies the Hayden factors and/or that the Court of Appeals decision was incorrect when his motion to remand was denied. The Court recognizes the Applicant's argument that the final sentence of the Supreme Court opinion implies that the newly discovered evidence issue is still available: "[t]he disposition of this issue is without prejudice to White seeking such relief in the trial court." White at n.2. Once again, the Applicant simply failed to satisfy his burden of proof at the PCR hearing and demonstrate that the Morris statement satisfied the Hayden factors, i.e. that it was/is material to his guilt or innocence and would have changed the result of the trial.⁹ Accordingly, there is has been no demonstration of prejudice no matter which court was presented with the recant issue, i.e. the Supreme Court, the Court of Appeals, or the trial court.

The Applicant's remaining issue(s) are without merit. The Applicant had notice that the State's case included the co-defendants. The defense was well aware that the co-defendant(s) were part of the State's case. In fact, trial counsel, in pretrial matters, knew (from the discovery) that one of co-defendants might mention that that the Applicant indicated he needed to do the robbery to pay his parole fees. (Transcript, p. 6 L. 20 – p. 11 L. 25).

⁹ Further, this Court did not find the Applicant credible that he did not confront Morris when the two crossed paths after Morris testified against the Applicant at trial.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Counsel was not deficient in any manner, nor was Applicant prejudiced by counsel's representation. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

Except as discussed above, this Court finds that the Applicant failed to raise the remaining allegations set forth in his application at the hearing and has, thereby, waived them. As to any and all allegations that were or could have been raised in the application or at the hearing in this matter, but were not specifically addressed in this Order, this Court finds Applicant failed to present any probative evidence regarding such allegations. Accordingly, this Court finds that Applicant waived such allegations and failed to meet his burden of proof regarding them. Accordingly, they are dismissed with prejudice. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BMI, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address these issue at the hearing indicates a voluntary and intentional

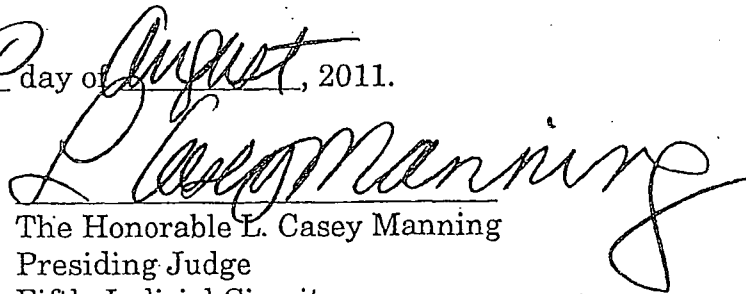
relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

This Court cautions the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant and counsel are directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

IT IS THEREFORE ORDERED:

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

AND IT IS SO ORDERED this 30 day of August, 2011.


 The Honorable L. Casey Manning
 Presiding Judge
 Fifth Judicial Circuit

, South Carolina.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Case No. 2009-CP-40-05549

JEANETTE W. McBRIDE
C.C.P. & G.S.

2011 SEP 15 PM 12:59

RICHLAND COUNTY
FILED

Gary A. White, Jr., #309726, ...Petitioner,

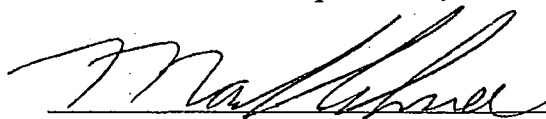
v.

State of South Carolina, ... Respondent.

NOTICE OF APPEAL

Gary A. White, Jr. appeals the Order of Dismissal to his Application for Post-Conviction Relief. The Application for Post-Conviction Relief by the Petitioner was filed on August 5, 2009. The Order of Dismissal was imposed by the Honorable L. Casey Manning on August 30, 2011. Counsel for the Petitioner received notice of the Order of Dismissal on September 4, 2011.

September 15, 2011



Mark Schnee
The Schnee Law Firm
1720 Main Street, Suite 202
Columbia, South Carolina 29201
(803) 771-0075
Attorney for Petitioner

Other Counsel of Record:

Assistant Attorney General Brian Petrano
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

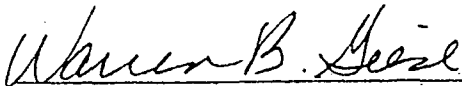
INDICTMENT

At a Court of General Sessions, convened on July 21, 2004, the Grand Jurors of Richland County present upon their oath:

ARMED ROBBERY

That Gary White Jr. did in Richland County on or about April 19, 2004, commit robbery by feloniously taking from the person or presence of J. Gwen Anthony by means of force or intimidation goods or monies of J. Gwen Anthony, such goods or monies being described as a wallet and/or keys, with the intent to deprive the owner permanently of such property, while armed with a pistol, dirk, slingshot, metal knuckles, razor, or other deadly weapon, or while alleging, either by actions or words, that he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon. All in violation of SC Code of Laws § 16-11-330(A).

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


WARREN B. GIESE, SOLICITOR

ARREST WARRANT

H669699 H-669699 0411827

STATE OF SOUTH CAROLINA

☐ County/ ☒ Municipality of
COLUMBIA

THE STATE

against

GARY A WHITE JR

do
COLUMBIAPhone: _____ SSN: _____
Sex: M Race: B Height: 6 01 Weight: 1
te: _____ DL#: _____

DOB: _____ Agency ORI#: SC0400100

Prosecuting Agency: CITY OF COLUMBIA

Prosecuting Officer: BULLOCK GJ/BELL

Offense: ARMED ROBBERY INDIVIDUAL

Offense Code: ARI

Code/Ordinance Sec. 16-11-330 A

This warrant is CERTIFIED FOR SERVICE in the

☐ County/ ☒ Municipality of
COLUMBIAThe accused
is to be arrested and brought before me to be
dealt with according to law.

Signature of Judge

(LS.)

RETURN

A copy of this arrest warrant was delivered to
defendant GARY A WHITE JR
on 4-19-04

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

STATE OF SOUTH CAROLINA

☐ County/ ☒ Municipality of
COLUMBIA

AFFIDAVIT

Personally appeared before me the affiant GJ BULLOCK
being duly sworn deposes and says that defendant GARY A WHITE JR
did within this county and state on 04/19/2004 violate theState of South Carolina (or ordinance of ☐ County/ ☒ Municipality of COLUMBIA)
in the following particulars:

DESCRIPTION OF OFFENSE: ARMED ROBBERY INDIVIDUAL 16-11-330 A

I further state that there is probable cause to believe that the defendant named GARY A WHITE JR did commit the crime set forth and that probable cause is based on the following facts:

ON 19 APRIL 2004 WHILE ARMED WITH A HANDGUN (DEADLY WPN) DEFENDANTS DID ENTER THE CIRCLE K CONVENIENCE STORE LOCATED AT 6122 GARNERS FERRY RD., CITY OF COLA RICHLAND CNTY, SOUTH CAROLINA AND ROB TH CLERK WITH THE INTENT OF DEPRIVING CLERKS EMPLOYER (CIRCLE K) AND ALSO THE INDIVIDUAL OF PROPERTY IN US CURRENCY, LOTTERY TICKETS & ALCOHOLIC BEVERAGES. UPON COMPLETION OF ROBBERY DEF'S FORCED VICTIM OUTSIDE OF HER PLACE OF EMPLOYMENT WHILE STILL ARMED.

Signature of Affiant

Affiant's Address

#1 JUSTICE SQ

COLA, SC. 29201

Affiant's Telephone

5433500

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that
on 04/19/2004 defendant GARY A WHITE JR

did violate the criminal laws of the State of South Carolina (or ordinance of

☐ County/ ☒ Municipality of COLUMBIA) as set forth below:

DESCRIPTION OF OFFENSE: ARMED ROBBERY INDIVIDUAL 16-11-330 A

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable.

Sworn to and subscribed before me

on

04/19/2004
[Signature] (LS.)Minister of the Gospel
Judge Code

Judge's Address

CITY OF COLUMBIA, SC

MUNICIPAL COURT, P.O. BOX 644 29202

Judge's Telephone

Issuing Court:

☐ Magistrate☒ Municipal☐ Circuit

ORIGINAL

Form Approved by
Secretary General
SC 03
CERTIFIED TRUE COPY
OF ORIGINAL
FILED
G. S. BULLOCK
C.C.C.P. & G.S.
RICHLAND COUNTY
SOUTH CAROLINA

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

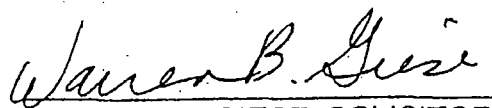
INDICTMENT

At a Court of General Sessions, convened on July 21, 2004, the Grand Jurors of Richland County present upon their oath:

ARMED ROBBERY

That Gary White Jr. did in Richland County on or about April 19, 2004, commit robbery by feloniously taking from the person or presence of J. Gwen Anthony by means of force or intimidation goods or monies of Circle K, such goods or monies being described as US Currency and/or Lottery tickets and/or alcoholic beverages, with the intent to deprive the owner permanently of such property, while armed with a pistol, dirk, slingshot, metal knuckles, razor, or other deadly weapon, or while alleging, either by actions or words, that he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon. All in violation of SC Code of Laws § 16-11-330(A).

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


WARREN B. GIESE, SOLICITOR

ARREST WARRANT

H-669695 0411827

STATE OF SOUTH CAROLINA

☐ County/ ☒ Municipality of
COLUMBIA

THE STATE

against

GARY A WHITE JR

Address:

6 01 Weight: 180

DL State: DL#:

DOB: Agency ORI#: SC0400100

Prosecuting Agency: CITY OF COLUMBIA

Prosecuting Officer: BULLOCK GJ/BELL

Offense: ARMED ROBBERY COMMERCIAL

Offense Code: ARC

Code/Ordinance Sec. 16-11-330 A

This warrant is CERTIFIED FOR SERVICE in the

☐ County/ ☒ Municipality of
COLUMBIAThe accused
is to be arrested and brought before me to be
dealt with according to law.

Signature of Judge

(LS.)

Date:

RETURN

A copy of this arrest warrant was delivered to
defendant Gary A. White Jr

on 4-19-04

Signature of Constable/Law Enforcement Officer

RETURN WARRANT

ORIGINAL FILED
TRICE COPY

H-669696

0411827

STATE OF SOUTH CAROLINA

☐ County/ ☒ Municipality of
COLUMBIA

AFFIDAVIT

Personally appeared before me the affiant GJ BULLOCK w
being duly sworn deposes and says that defendant GARY A WHITE JR
did within this county and state on 04/19/2004 violate the criminal laws of t
State of South Carolina (or ordinance of ☐ County/ ☒ Municipality of COLUMBIA
in the following particulars:

DESCRIPTION OF OFFENSE: ARMED ROBBERY COMMERCIAL 16-11-330 A

I further state that there is probable cause to believe that the defendant named above did comm
the crime set forth and that probable cause is based on the following facts:

ON 19 APRIL 2004 WHILE ARMED WITH A HANDGUN (DEADLY WPN) DEFENDAN
DID ENTER THE CIRCLE K CONVENIENCE STORE LOCATED AT 6122 GARNE
FERRY RD., CITY OF COLA RICHLAND CNTY, SOUTH CAROLINA AND ROB
CLERK WITH THE INTENT OF DEPRIVING CLERKS EMPLOYER (CIRCLE K) AND
ALSO THE INDIVIDUAL OF PROPERTY IN US CURRENCY, LOTTERY TICKETS &
ALCOHOLIC BEVERAGES. UPON COMPLETION OF ROBBERY DEF'S FORCED VIC
OUTSIDE OF HER PLACE OF EMPLOYMENT WHILE STILL ARMED.

Signature of Affiant

Affiant's Address #1 JUSTICE SQ

COLA, SC. 29201

Affiant's Telephone 5453500

STATE OF SOUTH CAROLINA

☐ County/ ☒ Municipality of
COLUMBIA

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe th
on 04/19/2004 defendant GARY A WHITE JR
did violate the criminal laws of the State of South Carolina (or ordinance of

☐ County/ ☒ Municipality of COLUMBIA) as set forth below.

DESCRIPTION OF OFFENSE: ARMED ROBBERY COMMERCIAL 16-11-330 A

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said
defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to
the defendant at the time of its execution, or as soon thereafter as is practicable.

Sworn to and subscribed before me

on 04/19/2004

Judge's Address

Judge Code: 403003

X ORIGINAL
COLUMBIA

Judge's Address

CITY OF COLUMBIA, SC
MUNICIPAL COURT, P.O. BOX 644 29202

Judge's Telephone

Issuing Court:

☐ Magistrate☒ Municipal☐ Circuit

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

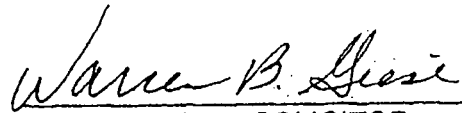
INDICTMENT

At a Court of General Sessions, convened on July 21, 2004, the Grand Jurors of Richland County present upon their oath:

KIDNAPPING

That Gary White Jr. did in Richland County on or about April 19, 2004, unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away the victim, J. Gwen Anthony, by any means whatsoever without authority of law. All in violation of § 16-3-910, 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.


Warren B. Giese, SOLICITOR

WITNESSES

(S) INV. GLENN BULLOCK - CPD

ARREST WARRANT NUMBER

H669697

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

Date:

JUL 21 2004

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2004-GS-40-3017

The State of South Carolina
County of Richland

COURT OF GENERAL SESSIONS

JULY TERM 2004

104

THE STATE
vs.

GARY WHITE JR.

Indictment for
KIDNAPPING

SC Code: 16-3-910
CDR Code:0095
Class FEL/A(V)

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment of to

Defendant

Witness:

C.C.C. PLS. AND G.S.

CERTIFIED TRUE COPY

FILED

CLERK OF COURT

C.C.C. PLS. & G.S.

RICHLAND COUNTY

SOUTH CAROLINA

STATE OF SOUTH CAROLINA

COUNTY OF
STATERichland

AKA:

Race:

ix:

ge:

DOB:

SS#:

Address:

City, State, Zip

DL#

SID#

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#:

AW#:

Date of Offense:

S.C. Code §:

CDR Code #:

☐ CASE RESTORED

SENTENCE

☐ PLEA ☒ TRIALIn disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADSTO: Armed Robberyin violation of § 16-11-330(A) of the S.C. Code of Laws, bearing CDR Code # 011 1 319☐ NON-VIOLENT☒ VIOLENT☐ SERIOUS☒ MOST SERIOUS☐ 17-25-45The charge is: ☐ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Solicitor

Defendant

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of LIFE days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____☐ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms:

☐ set by SCDPPPS

Recipient:

*Fine:

§14-1-206 (Assessments 107.5%)	\$	
§14-1-211(A)(1) (Conv. Surcharge)	\$100	\$
§14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§56-5-2995 (DUI Assessment)	\$12	\$
§ 35.13 (Public Def/Prob)	\$500	\$
§73.3, 1B TP (Law Enforce. Funding)	\$25	\$
§33.7, 1B TP (Drug Court Surcharge)	\$100	\$
§50-21-114(BUI Breath Test Fee)	\$50	\$
§56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
3% to County (if paid in installments)	3.75	\$
TOTAL		\$128.75

PTUP

_____ days/hours Public Service Employment

Obtain GED

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning

Substance Abuse Counseling

Random Drug/Alcohol Testing

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ _____ beginning

\$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel, \$35.13 TP
Requires \$500 be paid to Clerk during probation.

PRESIDING JUDGE

Judge Code:

Sentence Date:

Court Reporter:

Clerk of Court/Deputy Clerk

White - Clerk

Green - Corrections

Canary - Probation

Pink - Defendant

TRUE COPY
OF ORIGINAL FILED
SCCA 217 (7/2003)
SOUTH CAROLINA

WITNESSES

(S) INV. GLENN BULLOCK - CPD

ARREST WARRANT NUMBER

H669699

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

Date: JUL 21 2004

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2004-GS-40-3016

The State of South Carolina

County of Richland

COURT OF GENERAL SESSIONS

JULY TERM 2004

104

THE STATE
vs.

GARY WHITE JR.

Indictment for

ARMED ROBBERY

SC Code: 16-11-330(A)

CDR Code: 0139

Class FEL-A(V)

After being fully advised as to my

legal rights, I hereby waive presentment
to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead
guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

CERTIFIED TRUE COPY
OF ORIGINAL FILED
JUL 21 2004
RICHLAND COUNTY
SOUTH CAROLINA

STATE OF SOUTH CAROLINA

COUNTY OF
STATE

VS.

AKA:

Race:

Sex:

Age:

DOB:

SS#:

Address:

City, State, Zip

DL#

SID#

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#:

AW#:

Date of Offense:

S.C. Code §:

CDR Code #:

☐ CASE RESTORED

SENTENCE

☐ PLEA ☒ TRIALIn disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADSTO: Armed Robberyin violation of § 16-11-330(A) of the S.C. Code of Laws, bearing CDR Code # 011319☐ NON-VIOLENT☒ VIOLENT☐ SERIOUS☒ MOST SERIOUS☐ 17-25-45The charge is: ☐ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Solicitor

Defendant

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 180 days/months/years or ☐ under the Youthful Offender Act not to exceed 3 years and/or to pay a fine of \$ 100; provided that upon the service of 180 days/months/years and/or payment of \$ 100; plus costs and assessments as applicable*; the balance is suspended with probation for 180 months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____☐ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms:

☐ set by SCDPPPS

Recipient:

*Fine:

\$14-1-206 (Assessments 107.5%)	\$	
\$14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ ✓
\$14-1-211(A)(2) (DUI Surcharge)	\$100	\$
\$56-5-2995 (DUI Assessment)	\$12	\$
\$ 35.13 (Public Def/Prob)	\$500	\$
\$73.3, 1B TP (Law Enforce. Funding)	\$25	\$ ✓
\$33.7, 1B TP (Drug Court Surcharge)	\$100	\$
\$50-21-114(BUI Breath Test Fee)	\$50	\$
\$56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
3% to County (if paid in installments)	\$3.75	\$
TOTAL		\$ 128.75

PTUP

days/hours Public Service Employment

Obtain GED

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning

Substance Abuse Counseling

Random Drug/Alcohol Testing

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ _____ beginning

\$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel, \$35.13 TP
Requires \$500 be paid to Clerk during probation.

PRESIDING JUDGE

Judge Code:

Sentence Date:

CERTIFIED TRUE COPY

OFFICIAL FILED

C.C.C.P. & G.S.

RICHLAND COUNTY

SOUTH CAROLINA

White - Clerk Green - Corrections Canary - Probation

Pink - Defendant

WITNESSES

(S) INV. GLENN BULLOCK - CPD

ARREST WARRANT NUMBER

669695

ACTION OF GRAND JURY

TRUE BILL

Representative of Grand Jury
Date:

JUL 21 2004

VERDICT

Representative of Petit Jury
Date:

DOCKET NO. 2004-GS-40-3018

The State of South Carolina

County of Richland

COURT OF GENERAL SESSIONS

JULY TERM 2004

104

THE STATE
vs.

GARY WHITE JR.

Indictment for

ARMED ROBBERY

SC Code: 16-11-330(A)

CDR. Code: 0139

Class FEL-A(V)

After being fully advised to my

legal rights, I hereby waive presentment
to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead
guilty to the within indictment of

Defendant

Witness:

C.C.C. PLS. AND G.S.

CERTIFIED TRUE COPY
OF ORIGINAL FILED
Janelle W. White
C.C.C. & G.S.
RICHLAND COUNTY
SOUTH CAROLINA

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF
STATE

VS.

AKA:

Race:

Sex:

Age:

DOB:

SS#:

Address:

City, State, Zip

DL#

SID#

INDICTMENT/CASE#:

A/W#:

Date of Offense:

S.C. Code §:

CDR Code #:

☐ CASE RESTORED

SENTENCE

☐ PLEA ☐ TRIALIn disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS TO: Kidnappingin violation of § 16-3-910 of the S.C. Code of Laws, bearing CDR Code # 0101915☐ NON-VIOLENT☒ VIOLENT☐ SERIOUS☒ MOST SERIOUS☐ 17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTORNEY:

Solicitor

Defendant

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of _____ days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____☐ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms:

☐ set by SCDPPPS

Recipient:

*Fine:

\$14-1-206 (Assessments 107.5%)

\$14-1-211(A)(1) (Conv. Surcharge)

\$14-1-211(A)(2) (DUI Surcharge)

\$56-5-2995 (DUI Assessment)

\$35.13 (Public Def/Prob)

\$73.3, 1B TP (Law Enforce. Funding)

\$33.7, 1B TP (Drug Court Surcharge)

\$50-21-114(BUI Breath Test Fee)

\$56-5-2942(J) (Vehicle Assessment)

3% to County (if paid in installments)

TOTAL

\$128.75

PTUP

_____ days/hours Public Service Employment

Obtain GED

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning

Substance Abuse Counseling

Random Drug/Alcohol Testing

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ _____ beginning

\$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel; \$35.13 TP
Requires \$500 be paid to Clerk during probation.

PRESIDING JUDGE

Judge Code:

Sentence Date:

CERTIFIED TRUE COPY

OF ORIGINAL FILED

C.C.C.P. & G.S.

RICHLAND COUNTY

SCCA 211 (7/2003)

SOUTH CAROLINA

White - Clerk

Green - Corrections

Canary - Probation

Pink - Defendant

BAIL set by

Judge _____

on _____

Type and Amount: _____

Name of Surety: _____

PRELIMINARY HEARING held by

Judge _____

on _____

Defense Attorney: _____

Decision: _____

DISPOSITION before

Judge _____

on _____

by _____

(indicate jury trial, bench trial, plea, nol. pros., etc.)

Disposition: _____

Sentence: _____

JURORS**WITNESSES**

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

CODEFENDANTS