

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Appeal from Kershaw County

S.C. Supreme Court

James R. Barber, III, Circuit Court Judge

MICHAEL A. HOUGH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000813

SUPPLEMENTAL APPENDIX

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

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

Michael A. Hough, Respondent,

v.

State of South Carolina, Petitioner.

Appellate Case No. 2011-196568

Appeal From Kershaw County
James R. Barber, III, Circuit Court Judge

Unpublished Opinion No. 2015-UP-071
Heard December 8, 2014 – Filed February 11, 2015

REVERSED

Attorney General Alan McCrory Wilson, Assistant
Attorney General Brian T. Petrano, and Daniel Francis
Gourley, II, all of Columbia, for Petitioner.

Chief Appellate Defender Robert Michael Dudek and
Appellate Defender Lara Mary Caudy, both of Columbia,
for Respondent.

PER CURIAM: Hough pled guilty to voluntary manslaughter, and the plea court sentenced him to twenty-three years' imprisonment. Following his plea, Hough

filed for post-conviction relief (PCR), arguing ineffective assistance of counsel. The PCR court granted relief, and this court granted the State's petition for certiorari. The State argues the PCR court erred in finding trial counsel was deficient for failing to advise Hough of the possibility of an involuntary manslaughter jury charge. We reverse.

Involuntary manslaughter is defined as the unintentional killing of another without malice while engaged in either (1) the commission of some unlawful act *not amounting to a felony* and not naturally tending to cause death or great bodily harm, or (2) the doing of a lawful act with a reckless disregard for the safety of others.

State v. Sams, 410 S.C. 303, 309, 764 S.E.2d 511, 514 (2014) (emphasis added) (citing *State v. Tucker*, 324 S.C. 155, 170, 478 S.E.2d 260, 268 (1996)).

It is a felony offense for a person who has been convicted of a crime of violence or a violent crime that is classified as a felony offense, to possess or acquire handguns within this state. S.C. Code Ann. § 16-23-30(B) (Supp. 2014); S.C. Code Ann. § 16-23-50(A)(1) (Supp. 2014); § 16-23-500 (Supp. 2014). Armed robbery is considered a violent crime and is a felony offense. S.C. Code Ann. § 16-1-60 (Supp. 2014); S.C. Code Ann. § 16-11-330(A) (2003).

The PCR court failed to consider Hough's felonious act when it granted PCR. As a result, the PCR court erred as a matter of law when it determined Hough's case met the first definition of involuntary manslaughter.¹ Under either version of the facts presented to the PCR court, it appears Hough would not have been entitled to the requested charge as he was a convicted felon in possession of a pistol. Because Hough has a prior conviction for armed robbery, him possessing a pistol, whether to rob the victim or sell him the gun, amounted to a felony precluding an involuntary manslaughter jury instruction. See *State v. Reese*, 370 S.C. 31, 36, 633 S.E.2d 898, 901 (2006), *overruled on other ground by State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009) (reversing this court's holding that Reese was entitled to an involuntary manslaughter instruction; "Reese was pointing or presenting a firearm, a felony, which would preclude an involuntary manslaughter charge."); *State v. Cabrera-Pena*, 361 S.C. 372, 381, 605 S.E.2d 522, 526 (2004) ("Cabrera-

¹ The PCR court's order does not consider whether Hough met the second definition of involuntary manslaughter.

Pena's conduct does not fit within the first definition of involuntary manslaughter because he was engaged in unlawful, felonious[,] and harmful conduct."). Accordingly, the PCR court's grant of PCR is

REVERSED.

HUFF and SHORT, JJ., and CURETON, A.J., concur.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

MICHAEL A. HOUGH,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO. 2011-196568

Certiorari to Kershaw County

James R. Barber, III, Circuit Court Judge

Opinion No. 2015-UP-071

PETITION FOR REHEARING

Respondent, Michael Hough, by and through his undersigned counsel, respectfully petitions this Court for rehearing pursuant to Rule 221(a), SCACR. Respondent seeks rehearing of the Court's conclusion that Respondent would not have been entitled to an involuntary manslaughter instruction because he was a convicted felon in possession of a pistol. Respectfully, this Court misapprehends South Carolina law which holds that the unlawful possession of a firearm does not preclude a charge on self-defense, accident, or involuntary manslaughter. State v. Cabrera-Pena,

361 S.C. 372, 383, 605 S.E.2d 522, 527 (2004); State v. Slater, 373 S.C. 66, 71, 644 S.E.2d 50, 53 (2007); State v. Brayboy, 387 S.C. 174, 180, 691 S.E.2d 482, 485 (Ct. App. 2010).

There was evidence to support the PCR court's finding that defense counsel was ineffective for failing to advise Respondent that involuntary manslaughter could apply to his case where Respondent was attempting to sell the decedent a handgun, the decedent suddenly grabbed the gun, and the gun went off during a struggle. Further, the PCR judge correctly found that if defense counsel did not know the full version of the facts that remained the fault of defense counsel given his deficient performance.

The proper standard of review of a post-conviction relief evidentiary ruling is whether there is "any evidence of probative value" to sustain the PCR court's finding. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). A PCR applicant must prove that counsel's performance was deficient, and that he was prejudiced by that deficiency to obtain relief. See Hill v. Lockhart, 474 U.S. 52 (1985).

"In determining whether the evidence requires a charge on a lesser included offense, **the court views the facts in the light most favorable to the defendant.**" Brayboy, 387 S.C. at 179 691 S.E.2d at 485 (citing State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001)) (emphasis added). "Importantly, our courts have long emphasized that to warrant a court's eliminating the offense of manslaughter, it should very clearly appear that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter." Brayboy, 387 S.C. at 180, 691 S.E.2d at 485 (citing State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 513 (2000)).

"Involuntary manslaughter is (1) the unintentional killing of another without malice, but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm; or (2) the unintentional killing of another without malice, while engaged in a lawful activity with

reckless disregard for the safety of others.” State v. Crosby, 355 S.C. 47, 51-52, 584 S.E.2d 110, 112 (2003) (citing State v. Chatman, 336 S.C. 149, 519 S.E.2d 100 (1999)). The factual scenario relayed to defense counsel by Respondent before the plea easily satisfies the first definition of involuntary manslaughter.

The PCR court was correct in finding defense counsel was ineffective for failing to advise Respondent that involuntary manslaughter applied to his case. Respondent testified that he and two others intended to steal money and drugs from a residence when no one was home. The group ultimately abandoned the plan because numerous people were present at the home. Instead, Respondent approached the decedent and attempted to sell him a gun. The decedent wanted to inspect the gun, and Respondent refused to allow him to do so. The decedent then grabbed the gun and a struggle ensued over the weapon. The gun discharged accidentally. This is a classic involuntary manslaughter situation. See State v. Crosby, 355 S.C. 47, 51-52, 584 S.E.2d 110, 112. see also State v. Light, 378 S.C. 641, 664 S.E.2d 465 (2008); see also State v. Brayboy, 387 S.C. 174, 691 S.E.2d 482 (Ct. App. 2010); see also State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (1999).

“Evidence of a struggle between the defendant and the victim over a weapon supports submission of an involuntary manslaughter charge.” Tisdale v. State, 378 S.C. 122, 125, 662 S.E.2d 410, 412 (2008); Casey v. State, 305 S.C. 445, 447, 409 S.E.2d, 391, 292 (1991). The fact that a struggle between Respondent and the decedent occurred immediately before the gun went off is not in dispute. Defense counsel knew, in his own words, that a “significant struggle” had occurred between Respondent and the decedent before he advised Respondent to plead guilty. App. 103, ll. 8-12. Defense counsel was incorrect as a matter of law that involuntary manslaughter was not a

verdict option if Respondent went to trial. See Light, 378 S.C. 641, 664 S.E.2d 465; see also Brayboy, 387 S.C. 174, 691 S.E.2d 482; see also Burris, 334 S.C. 256, 513 S.E.2d 104.

Because of Respondent's prior conviction for armed robbery it appears he was not lawfully allowed to possess a firearm and would not have been allowed to legally sell the gun to the decedent. However, that obviously does not end the inquiry, and an issue involved is whether Respondent's actions constituted activity "not naturally tending to cause death or great bodily harm." State v. Crosby, 355 S.C. 47, 51-52, 584 S.E.2d 110, 112.

The PCR court was correct that the unlawful sale of a firearm is not an activity that naturally tends to cause death or great bodily harm. The average unlawful sale of a firearm is not a dangerous activity. It happens regularly with no one being injured. It is simply an interaction between two people in which money or some other form of payment is exchanged for a firearm. It is a peaceful encounter where each participating party receives the benefit of the bargain.

Consequently, the PCR court's conclusion that the unlawful sale of a firearm is not an activity that naturally tends to cause death or great bodily harm was correct and defense counsel was thus ineffective for failing to advise Respondent that involuntary manslaughter applied to his case. See Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 595 (2009).

Furthermore, this Court's holding that Respondent would not have been entitled to an involuntary manslaughter charge because he was a convicted felon in possession of a pistol is respectfully incorrect. Our Supreme Court has held that in the context on involuntary manslaughter, "a person can be acting lawfully, even if he is in unlawful possession of a weapon, if he was entitled to arm himself in self-defense at the time of the shooting." Cabrera-Pena, 361 S.C. at 383, 605 S.E.2d at 527 (quoting Burris, 334 S.C. at 265, 513 S.E.2d at 109) (internal quotation marks omitted); Brayboy, 387 S.C. at 180, 691 S.E.2d at 485. If Respondent had gone

to trial, he could have argued he was acting in self-defense when the decedent grabbed the pistol from him and the two struggled over the weapon. Therefore, even if Respondent was in unlawful possession of a weapon, he was acting lawfully when the gun went off because he was armed in self-defense. Because Respondent was acting lawfully and the gun went off during a struggle, he would have been entitled to a charge on involuntary manslaughter. See Burris, 334 S.C at 263, 513 S.C at 108 (“It is well-settled the law to be charged is determined from the evidence presented at trial, and if any evidence exists to support a charge, it should be given.”).

Moreover, “the burden rests upon the State to prove beyond a reasonable doubt that the unlawful act in which the accused was engaged was at least the proximate cause of the homicide.” Burris, 334 S.C. at 261-262, 513 S.E.2d at 107 (citing Goodson, 312 S.C 278, 280 n. 1, 440 S.E.2d 370, 372 n. 1 (1994)); See 40 Am.Jur.2d Homicide § 75 (1968) (“The fact that one carries a concealed weapon in violation of the law does not render him criminally responsible . . . where death is caused by the accidental discharge of the weapon, for in such case death cannot be said to be the natural or necessary result of carrying the weapon in violation of the law.”). Because Respondent’s unlawfully carrying of the pistol was not the proximate cause of the decedent’s death, he would have been entitled to a charge on involuntary manslaughter.

Therefore, the PCR court was correct in holding that Respondent’s conduct meets involuntary manslaughter’s first definition and that defense counsel’s advice to Respondent was incorrect as a matter of law. App. 172. Additionally, the PCR court was correct in concluding that because defense counsel’s advice was incorrect counsel’s performance unquestionably “fell below prevailing professional norms.” App. 172; See Pelzer v. State, 381 S.C. 217, 672 S.E.2d 790 (Ct. App. 2009).

Additionally, the PCR court made credibility findings against defense counsel after hearing his testimony and observing his demeanor. The PCR court was entitled to make these credibility findings and this Court respectfully should treat them with great deference. Petitioner asserts in its brief that since defense counsel maintained that Respondent was attempting to rob the decedent at the time the gun discharged, that the judge was incorrect in ruling defense counsel gave deficient and ineffective legal advice. Brief of Petitioner at 9. However, this ignores that fact that the PCR court made a credibility finding against defense counsel, after observing Respondent and defense counsel on the witness stand. The court found that “defense counsel’s deficient performance” was the reason for any communication problem between the two. App. 173.

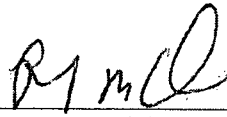
Further, the PCR court cited the dispute between defense counsel and Respondent prior to the aborted trial and the fact that defense counsel had spent approximately three to four hours meeting with Respondent. App. 173. The court found that if Respondent “did hold back information from defense counsel, it was defense counsel’s ineffective assistance that caused the difficulties.” App. 173. This was another credibility finding that was made against defense counsel.

The prejudice in this case is clear. Respondent testified at the PCR hearing that had he received the proper advice, he would have never have pled guilty to voluntary manslaughter, and he would have went to trial. See Hill v. Lockhart, 474 U.S. 52 (1985). The PCR court was correct in finding Respondent credible on this issue. App. 174. The PCR court was also correct in finding that proper advice about the possible results at trial, instead of the improper advice which was given, would have resulted in Respondent going to trial, not pleading guilty to voluntary manslaughter – the best trial counsel told him was possible. App. 174. See Stalk v.

State, 383 S.C. 559, 563, 681 S.E.2d 592, 595 (2009). Since there is evidence to support the PCR court's ruling it should have been affirmed.

Respondent respectfully submits that this Court should grant rehearing and reconsider its opinion in this case since it overlooked case law in South Carolina that holds that the unlawful possession of a firearm does not preclude a charge on involuntary manslaughter.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

Lara M. Caudy
Appellate Defender

ATTORNEYS FOR RESPONDENT

This 25th day of February, 2015.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

MICHAEL A. HOUGH,

RESPONDENT,

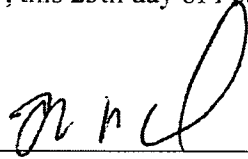
V.

STATE OF SOUTH CAROLINA,

PETITIONER

CERTIFICATE OF SERVICE

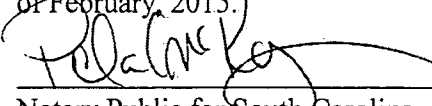
The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Daniel Gourley, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 25th day of February, 2015.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 25th day
of February, 2015.)



(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.

The South Carolina Court of Appeals

Michael A. Hough, Respondent,

v.

State of South Carolina, Petitioner.

Appellate Case No. 2011-196568

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Thomas E. Luff J.

Paul D. Short, Jr. J.

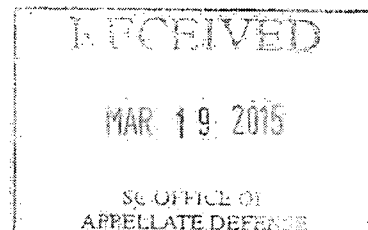
Joseph W. Curreton A. J.

Columbia, South Carolina

cc: Robert Michael Dudek, Esquire
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Daniel Francis Gourley, II, Esquire
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Lara Mary Caudy, Esquire
The Honorable James R. Barber, III

FILED

March 19, 2015



21077

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

James R. Barber, III, Circuit Court Judge

Case No. 2009CP2801346

MICHAEL A. HOUGH,
#255832,

Respondent,

v.

State of South Carolina,

Petitioner.

APPENDIX

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STATE OF SOUTH CAROLINA)
COUNTY OF KERSHAW) COURT OF GENERAL SESSIONS
08-GS-28-00847

State of South Carolina,)
Plaintiff,)
vs.) TRANSCRIPT OF RECORD
Michael Hough,)
Defendant.)

June 22-25, 2009
Camden, South Carolina

B E F O R E:

THE HONORABLE J. ERNEST KINARD, JR., JUDGE.

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Official Court Reporter

I N D E X O F W I T N E S S E S

(WHEREUPON, no witnesses were called
during these proceedings.)

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1 JUNE 22, 2009

2 THE COURT: Mr. Riley, they are going to call
3 the case of Mr. Hough, is that right?

4 MR. RILEY: Yes, sir.

5 THE COURT: And that is Mr. Hough?

6 MR. RILEY: Yes, sir.

7 THE COURT: Mr. Hough, you wanted to make a
8 motion?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: The jury is out. I don't know
11 what kind of motion you want.

12 THE DEFENDANT: Yes, sir. I would just like
13 to state that I'm not pleased with Mr. Riley's
14 performance in my case and I'd like to terminate
15 him because Mr. Riley has failed to represent me in
16 a way that I feel comfortable to go on with this
17 trial.

18 It has been a year and two months, and I only
19 have talked to Mr. Riley in that year and two
20 months less than three hours.

21 Mr. Riley have failed to give me my motion of
22 discovery, which he only gave me on Friday, and I
23 haven't had time to even go through this for two
24 days.

25 I didn't even know that I was scheduled for

1 trial until about a week ago, and then he hadn't
2 even come to see me and let me know nothing about
3 it. He come in there Thursday evening and sit with
4 me about an hour or so.

5 THE COURT: Who are y'all letting in, not
6 jurors?

7 MR. MEADORS: The victim's family. Before we
8 started, Judge, I'm sorry, I told them not to let
9 anybody in while you were talking.

10 THE DEFENDANT: Yes, sir. And he have failed
11 on my behalf, and it is not in my best interest to
12 keep him as my representative.

13 And that I'm not comfortable with him. He has
14 already convicted me himself before I have even
15 been convicted of any crime, what I have not done.
16 He said that out of his own mouth. And I do not
17 feel comfortable that he is going to perform in my
18 best interest for me to come before a trial, which
19 I had no time with him, he has spent no time with
20 me conversating nothing about my case.

21 THE COURT: All right, Mr. Riley, what about
22 all this?

23 MR. RILEY: Judge, we have met three times. I
24 think he is about right, three or four hours total
25 all together.

1 We initially had this case -- or the State had
2 this case scheduled for trial in March. We were
3 ready to go in March. Mr. Kirincich and I had
4 everything ready to go. So we've been more than
5 prepared since that period of time.

6 It wasn't tried in March due to the need for a
7 psychiatric evaluation.

8 What is surprising me is that all the meetings
9 I had with Mr. Hough up to and including Friday,
10 he's been perfectly cooperative, seemingly
11 grateful, and in fact thanked me profusely through
12 one of our meetings last week.

13 Now this morning all of a sudden, or this
14 afternoon all of a sudden it is a 180-degree turn.
15 I suppose it is getting up to start the trial. I
16 have not had any trouble with him until this
17 afternoon. He has been completely cooperative.

18 THE COURT: You represent you were ready to
19 try the case in March, you have interviewed
20 witnesses and done everything he asked you to do?

21 MR. RILEY: Yes, sir.

22 THE DEFENDANT: No, sir, Your Honor, he have
23 not interviewed nobody because he is saying he
24 couldn't even find the people that -- one person
25 that I asked him to find. He said -- asking me

1 have I been able to -- what their address, what
2 their phone number.

3 You know, and I been locked up for a year, and
4 I just got out in April, and they send me right
5 back, which he said once in April when they filed
6 for me to be here at court, they just gave me a
7 statement that said I was going to be doing trial,
8 which he haven't even talked to me nothing about
9 it.

10 I have wrote him. I have filed my motions all
11 the way in May of 2008. And I just now got it on
12 Friday.

13 And then Mr. Riley, he going to ask me where
14 they stay at. I don't know where they stay. They
15 moved. So he haven't -- he isn't correct about
16 that, he just lied, because he haven't talked to
17 nobody.

18 My family have been calling him, calling him,
19 to try to get in touch. For me to get in touch
20 with him, I have to go through my family to call
21 him and ask him what is going on, what is going on
22 with my case.

23 He haven't -- he failed to represent me in a
24 correct way that I feel comfortable.

25 THE COURT: Well, comfortable means you think,

1 you know, he might get you off, and he might, but
2 he represents he was ready in March, and here it is
3 June.

4 THE DEFENDANT: But he haven't represented me.
5 They just brought -- sir, he didn't -- they just
6 brought me down here and served me a paper, that is
7 all they did, and sent me back to Lieber. That's
8 all they did, sir, Your Honor. That's all they
9 did, Your Honor.

10 And he is not -- he is not capable of
11 representing me, I feel, and giving me a fair trial
12 from the time that we had on this here case.

13 And I'm talking about three hours, Your Honor?
14 Three hours out of a year and two months? That is
15 not -- that is not no justice.

16 THE COURT: Well, I don't know anything about
17 it. What was your relationship, if any, with
18 Francis Horton?

19 THE DEFENDANT: None.

20 THE COURT: I mean, all I've got is the
21 indictment that I just looked at.

22 THE DEFENDANT: And then, again, on that, he
23 had give me a paper stating that I was -- had an
24 indictment, but it wasn't nothing -- true-billed or
25 nothing wasn't on it. He gave me just a blank

1 piece of paper with the Solicitor on the front of
2 it saying --

3 THE COURT: You were arrested. You know you
4 are charged with the killing --

5 THE DEFENDANT: Yes, sir. Yes, sir.

6 THE COURT: -- of one Francis Horton.

7 THE DEFENDANT: Yes, sir.

8 THE COURT: That's all I'm asking you. So you
9 have known that for a long period of time.

10 THE DEFENDANT: Yes, sir. But I'm talking
11 about before the true-bill. See, you have to have
12 a true-bill. He didn't have that on there. He
13 just now give me a copy of that, but --

14 THE COURT: You know what you are being held
15 for. You were locked up.

16 THE DEFENDANT: Yes, sir. Yes, sir. But
17 still, sir, we haven't -- he haven't had time to
18 prepare a case for me in my defense to be able to
19 stand trial, sir, Your Honor.

20 THE COURT: What defense has he not
21 investigated that you think you have?

22 THE DEFENDANT: Because he haven't talked to
23 anyone that can verify that I wasn't at that place
24 at a point in time. He haven't interviewed those
25 people. He is saying he can't find them. He

1 failed to try to get in touch. He failed to get in
2 touch with them, sir. Your Honor, I'm sorry, sir,
3 but, Your Honor --

4 THE COURT: All right. Mr. Riley, what is he
5 talking about?

6 MR. RILEY: He is talking about, I gave you
7 the witness list, Judge. I listed a Judy
8 McCaskill. He just brought her up to me last week
9 and claims that she can provide him with an alibi.

10 I have been unable to track her down yet, but
11 I have two other people, family members of his, who
12 promised me they would be getting in touch with her
13 and telling her to call me. She has not yet done
14 so.

15 The family -- the other family members listed
16 there don't know a thing about the crime. I might
17 be calling them for other reasons.

18 The only one who might possibly know anything
19 about the events of the incident date is Judy
20 McCaskill, who he claims is his sister-in-law, even
21 though he doesn't have an address and he doesn't
22 have a phone number.

23 THE DEFENDANT: I told him that was my ex-
24 sister -- that is my ex-sister-in-law. That is my
25 brother's ex-wife.

1 And two other gentlemen that was with me --
2 that I was with, you know what I mean, that he
3 knowed I talked to them about it, you know, that he
4 could get in touch with them. He said he found one
5 of them, but he couldn't find the other one.

6 Therefore, and only the information he got
7 that because he finally showed up on Friday after a
8 year and two months. He finally showed up Friday
9 and spent an hour, hour and a half with me, and
10 then came back that Thursday and Friday when I met
11 this gentleman right here. I never seen him before
12 in my life.

13 And after I talked to him, and he is supposed
14 to be a representative of mine also, and I just met
15 the man and ain't even talked to him an hour.

16 THE COURT: All right, Mr. Riley, as an
17 officer of the court are you prepared to go
18 forward, sir?

19 MR. RILEY: I'm sorry, Judge?

20 THE COURT: As an officer of the court -- you
21 know better than me -- are you prepared to go
22 forward?

23 MR. RILEY: Judge, I'm prepared to proceed or
24 not, as the Court deems appropriate.

25 THE COURT: If you are prepared, you can -- we

1 will go forward. If you are not prepared, I will
2 grant his motion.

3 MR. RILEY: It does bother me, Judge, that the
4 one individual that I just learned of last week
5 that he claims can provide him with an alibi, I
6 have not made contact with. I don't want to, you
7 know, obscure that point. That is a valid point.
8 It troubles me a lot.

9 THE COURT: How long have you been appointed
10 to represent him?

11 MR. RILEY: Since early 2008. I don't
12 remember exactly.

13 THE COURT: And you were ready to go in March,
14 and he didn't mention that person to you at that
15 time?

16 MR. RILEY: No, sir.

17 THE COURT: Well, then tough luck. We are
18 going forward with the trial, Mr. Hough.

19 THE DEFENDANT: But, Your Honor --

20 THE COURT: He was ready in March, but you
21 didn't tell him about this person in March, he
22 says.

23 THE DEFENDANT: In March -- the only thing
24 they served me, Your Honor, was a trial date, that
25 I was supposed to be going up for trial. He didn't

1 ask me -- we didn't even have time -- we didn't
2 even have time to discuss none of my case, Your
3 Honor. None of my case.

4 I asked for the motion then. He said, when
5 you get -- when you get -- we going to have you
6 transferred. I will try to get you transferred to
7 Kershaw County Jail so that we can sit down and go
8 over your motion of discovery.

9 He said, I will have all the copies and stuff
10 ready for you then.

11 I asked him right then for them. I asked him
12 for the information. And we didn't even -- he
13 didn't have time. He left out. We didn't even
14 have time. They just took me right on back. We
15 didn't even have time to discuss it. He didn't
16 take that time to discuss me with those matters,
17 Your Honor.

18 THE COURT: All right, we'll pick the jury,
19 not swear them. He will try to find this person,
20 whoever she is, Judy McCaskill. Best I can do.

21 MR. MEADORS: Judge, if I can put one thing on
22 the record.

23 Your Honor issued an order for the competency
24 evaluation. I don't think that is in dispute, and
25 I'd like the record to reflect this colloquy with

1 Your Honor he seems to understand very well what is
2 going on.

3 This is a licensed clinical psychologist,
4 Maria L. Domino. This report was dated April 24th,
5 2009.

6 And based on the summary, which we have marked
7 as a Court Exhibit, it is their clinical opinion
8 that Mr. Hough is not evidencing current symptoms
9 of a mental illness or other defects that would
10 significantly compromise his present capacity to
11 understand the proceedings against him and/or to
12 assist his own defense.

13 And they actually comment in here, although he
14 may not be pleased with Mr. Riley's assistance,
15 although he does understand the system.

16 And we would ask that this be marked as a
17 Court Exhibit. I don't think there is any dispute
18 about his competence at this point.

19 (WHEREUPON, Court Exhibit No. 1 was
20 marked for identification only.)

21 MR. MEADORS: Your Honor, also I think
22 Mr. Hough was served with an LWOP notice, this is
23 an LWOP case, on February 2nd, 2009, maybe the date
24 he is referring to. I'd like that this also be
25 made a Court exhibit.

1 THE COURT: All right.

2 (WHEREUPON, Court Exhibit No. 2 was
3 marked for identification only.)

4 MR. MEADORS: His prior conviction was a 1999
5 armed robbery conviction.

6 THE COURT: He says he is not even there. Do
7 y'all have witnesses to say he was there?

8 MR. MEADORS: Judge, this is a April 17th,
9 2008, incident in Bethune. Your Honor is well
10 familiar with the Bethune area. The victim in this
11 case was a Francis Horton, known as Puddin.

12 Allegedly, the family is aware of this, Puddin
13 may have been there with another individual to
14 purchase some drugs from a Mr. Rodney Baskins.

15 The allegations are that Mr. Hough comes up
16 basically from out of nowhere. And the victim,
17 Mr. Horton, is exiting Mr. Baskins' trailer.

18 He comes up, points a gun at him, and tries to
19 rob him, and the gun then goes off and he kills
20 him. That is kind of a summary of the case.

21 So we have -- yes, sir, we have witnesses
22 putting him there.

23 THE COURT: All right. He has alibi -- one
24 alibi witness apparently?

25 MR. MEADORS: He was served with that I think

1 this morning, or he may have told Mr. Anders that
2 last week.

3 THE COURT: Okay. We'll pick the jury and
4 roll.

5 (WHEREUPON, a break was taken.)

6 THE COURT: Jurors, if I can have your
7 attention. The State just handed me this document.
8 It is called an indictment. It creates no
9 inference of guilt against anyone. It contains
10 allegations. It alleges that one Michael Anthony
11 Hough committed the crime of murder in Kershaw
12 County back on April 17th of 2008 by killing
13 Francis Horton by shooting him with malice
14 aforethought. That is basically all it says.

15 Mr. Hough is presumed innocent of all charges.
16 There is no obligation on his part to prove he is
17 not guilty. The State has the burden of proof
18 beyond a reasonable doubt to establish his guilt.

19 Now, Mr. Hough is present. If you would just
20 stand, Mr. Hough, and kind of face the panel.

21 (Mr. Hough complies.)

22 THE COURT: All right, jurors, is anybody
23 related to Mr. Hough? Do you know him at all?
24 Live in the neighborhood with him? Have you ever
25 worked with him?

1 All right. Thanks, Mr. Hough. You can have a
2 seat.

3 (Mr. Hough complies.)

4 (Juror stands.)

5 THE COURT: Yes, ma'am?

6 JUROR ATKINSON: I live in the area with him.
7 I was one of his classmates. And I know his family
8 real well.

9 THE COURT: All right, now, any time you stand
10 remember you have to tell us who you are.

11 JUROR ATKINSON: Cynthia Atkinson. I'm sorry.

12 THE COURT: Bottom line, Ms. Atkinson, that is
13 not automatically a disqualification. Can you be
14 fair and impartial?

15 JUROR ATKINSON: Yes.

16 THE COURT: Okay, thanks. If you can be fair
17 and impartial, just have a seat.

18 (Juror Atkinson seated.)

19 THE COURT: All right, now, the case for the
20 State is going to be handled by the Deputy
21 Solicitor and Assistant Solicitors. If you would
22 tell us who you are.

23 (Solicitors stand.)

24 MR. MEADORS: John Meadors, Deputy Solicitor
25 for the Fifth Circuit.

1 MR. ANDERS: Jason Anders, Assistant Solicitor
2 for the Fifth Circuit.

3 MR. MOAK: Ron Moak, Assistant Solicitor for
4 the Fifth Circuit.

5 (Solicitors seated.)

6 THE COURT: Jurors, do any of y'all have any
7 connection with any of these Solicitors or with the
8 Fifth Circuit Solicitor's Office? Have you ever
9 worked there? Had a relative employed there?

10 Okay. Now, Mr. Hough --

11 (Juror stands.)

12 JUROR MULLIKIN: Charles Mullikin. I used to
13 work with my brother five or six or seven years
14 ago.

15 (Juror stands.)

16 JUROR LEONARD: I attend church and Sunday
17 School with Ron.

18 THE COURT: I can't hear.

19 JUROR LEONARD: My name is Brenda Leonard. I
20 attend church and Sunday School with Ron.

21 THE COURT: Bottom line, if you can't be fair
22 and impartial, tell us. If you can, just have a
23 seat.

24 (Jurors Mullikin and Reynolds are seated.)

25 (Juror raises hand.)

1 JUROR MUNN: Paulette Munn. I attend church
2 with Ron as well, but I can be fair and impartial.

3 THE COURT: Thanks.

4 (Juror Munn puts hand down.)

5 THE COURT: All right. Now, Mr. Hough's
6 attorneys will tell us who they are.

7 (Public Defenders stand.)

8 MR. RILEY: Neil Riley, Chief Public Defender
9 for Kershaw County.

10 MR. KIRINCICH: Jason Kirincich, Assistant
11 Public Defender.

12 (Public Defenders seated.)

13 THE COURT: Same thing, jurors. Do you have
14 any connection, direct or indirect, with either of
15 these attorneys, Mr. Kirincich or Mr. Riley? If so,
16 please stand.

17 (WHEREUPON, there was no response.)

18 THE COURT: Jurors, apparently this happened
19 in the Bethune area on April 17th, 2008. I don't
20 think it is a dispute that one Francis Horton was
21 shot and died. The question is whether Mr. Hough
22 did it with malice aforethought.

23 So if anybody knows anything about it, direct
24 or indirect, you don't need to tell us what you
25 know, you need to stand and come up and tell us

1 about it. If you heard something about it or
2 somebody said they saw something or heard
3 something, you need to tell us.

4 (WHEREUPON, there was no response.)

5 THE COURT: Now, jurors, if you or an
6 immediate family member -- immediate family member
7 would go up and down and across, talking about
8 parents, brothers and sisters, children --
9 currently or in the past have been employed by or
10 are employed by law enforcement at any level, I
11 need for you to stand. That would be anything from
12 FBI to the Town of Elgin City Policeman.

13 (Juror stands.)

14 JUROR BARTON: Karen Barton. My son is a
15 deputy for Kershaw County Sheriff's Department and
16 he lives in Bethune.

17 THE COURT: Okay, thanks.

18 (Juror Barton seated.)

19 (Juror stands.)

20 JUROR ADAMS: Evelyn Adams. I have one nephew
21 with the Kershaw County Sheriff's Department and
22 one from Richland County Sheriff's Department. I
23 also have a nephew that is FBI.

24 THE COURT: Okay, thanks.

25 (Juror Adams seated.)

1 THE COURT: Jurors, if you or an immediate
2 family member, while not directly employed by law
3 enforcement, have been employed in a quasi-law
4 enforcement position, such as a nightwatchman, a
5 security guard, something like that?

6 (WHEREUPON, there was no response.)

7 THE COURT: Jurors, if you or an immediate
8 family member have ever been employed by any
9 Solicitor's Office, not just the Fifth Circuit, but
10 any Solicitor's Office, any District Attorney's
11 Office, or any individual or agency that prosecutes
12 cases, such as Jag Corps in the service, I need for
13 you to stand.

14 (Juror stands.)

15 JUROR MULLIKIN: Charles Mullikin. I
16 mentioned earlier, my brother Thomas worked as an
17 Assistant Solicitor of the Fifth Circuit.

18 THE COURT: Okay, thanks.

19 (Juror Mullikin seated.)

20 THE COURT: Jurors, if you or an immediate
21 family member have ever been employed by a Public
22 Defender Corporation, that is, a group of attorneys
23 that represent individuals accused of crime, or
24 have been employed by an attorney who defended or
25 defends people accused of crime, the attorneys

1 would like to know.

2 (Juror stands.)

3 JUROR CANTEY: Darlene Cantey. I worked for
4 William Tetterton's office 30 years ago.

5 THE COURT: Okay.

6 (Juror Cantey seated.)

7 THE COURT: Jurors, if you belong to any
8 organization that takes a position on crime in
9 society, the attorneys would like to know. It
10 could be anything from CADRE -- they all have
11 initials -- MADD, SADD. You would know if you
12 belonged to it.

13 (WHEREUPON, there was no response.)

14 THE COURT: All right. Jurors, is there
15 anything in the nature of the charge that would
16 prevent you from serving for, you know, religious
17 or moral reasons? We are talking about a crime of
18 murder.

19 (WHEREUPON, there was no response.)

20 THE COURT: Jurors, if you -- and if you want
21 to come up to the front, you can, you don't have to
22 stand up out there -- but if you or an immediate
23 family member to your knowledge has ever been the
24 victim of what you would perceive to be a crime of
25 violence, the attorneys would like to know. That

1 can be anything from, you know, kidnapping,
2 burglary, armed robbery, anything you would
3 consider a crime of violence.

4 (Juror stands.)

5 JUROR SPRINGS: Levonne Springs. My
6 brother-in-law got killed about 15 years ago here
7 in Kershaw County.

8 THE COURT: Okay, thanks.

9 (Juror Springs seated.)

10 MR. MEADORS: Judge, may we approach?

11 (WHEREUPON, a bench conference was held
12 in the presence of the jury but out of
13 the hearing of the jury.)

14 THE COURT: Has any member of the jury ever
15 been accused -- you don't have to stand up and tell
16 us -- of committing a crime of violence? You
17 understand the term. I need you to either stand up
18 and tell us or come up. You could have been
19 convicted, it could have been your first cousin,
20 anybody.

21 All right, a gentleman is coming up.

22 (Juror approaches.)

23 (WHEREUPON, the following colloquy was
24 heard at the bench.)

25 JUROR BUSBY: I served in Vietnam. MPI came

1 to arrest me for rape and murder. I wasn't there.

2 THE COURT: Your name is?

3 JUROR BUSBY: James Busby.

4 THE COURT: Will you be all right serving on a
5 jury like this?

6 JUROR BUSBY: I can, yes, sir.

7 THE COURT: Okay. That is all you need to
8 tell us.

9 (Juror Busby seated.)

10 (WHEREUPON, the following was heard in
11 open court.)

12 THE COURT: We have one more coming up.

13 (Juror approaches.)

14 (WHEREUPON, the following was heard at
15 the bench.)

16 JUROR HAYES: How you doing?

17 THE COURT: Come on up. Whisper, don't shout
18 out.

19 JUROR HAYES: I was a victim of a violent
20 crime about two years ago. I was shot on the right
21 side of my face.

22 THE COURT: All right. Your name is?

23 JUROR HAYES: Earl Hayes, III.

24 THE COURT: Can you be fair and impartial?

25 JUROR HAYES: I kind of can say that I'm kind

1 of getting railroaded by the system. It is a
2 little bit a flip of the coin.

3 MR. RILEY: I represent the Defendant. I
4 spoke with Mr. Hayes before about the case.

5 MR. MEADORS: Maybe he should be excused for
6 cause with all that going on.

7 THE COURT: We'll just excuse you from going
8 on. Have a seat out there.

9 (Juror seated.)

10 THE COURT: I ought to excuse him for the
11 week.

12 MR. MEADORS: Yes, sir. We talked to him.
13 He's got pending charges.

14 (WHEREUPON, the following is heard in
15 open court.)

16 THE COURT: Okay, jurors, now this is not a
17 trial we are going to finish in an hour, okay? I
18 am going to run over the witness list. Some of the
19 witnesses are present; everybody is not present.
20 If you recognize a name and do not know whether the
21 name I read out is the person you are related to or
22 know, if you would stand the attorneys can tell us
23 whether the person you know is the person on the
24 list. But if the people whose name I called are
25 present, if they would stand. I don't know any of

1 them, of course.

2 Potential witnesses:

3 Theodore Billy Humphries.

4 Ricky Lee Hough.

5 Raeford Linton.

6 Johnny Fellers. He is the coroner of Kershaw
7 County.

8 Just hold it. Stand up.

9 (Juror stands.)

10 JUROR ROSS: Teresa Ross. I know who he is,
11 but it is not going to affect my --

12 THE COURT: Okay, thanks.

13 (Juror Ross seated.)

14 THE COURT: Phil Crawford, employed by the
15 Kershaw County Sheriff's Department.

16 David Horne.

17 David Thomley, Captain with the Kershaw County
18 Sheriff's Department.

19 Boyd Timothy Sweetenburg.

20 Kirk Corley, Kershaw County Sheriff's
21 Department.

22 Ty Cobb, Kershaw County Sheriff's Department.

23 (Juror stands.)

24 JUROR SEMINO: I know Kirk Corley's family
25 pretty well, but it would not make me impartial. I

1 know Captain Thomley, and it wouldn't make me
2 impartial either.

3 THE COURT: Your name?

4 JUROR SEMINO: Lauren Semino. We're not good
5 friends, I just know them.

6 (Juror seated.)

7 THE COURT: Debra Williams.

8 Phil McLeod, Kershaw County Sheriff's
9 Department.

10 Denise Hough.

11 Beatrice Dixon.

12 David Black, employed by SLED.

13 Somebody named H-U-A Tang, employed by SLED.

14 Dr. Janice Ross.

15 Rodney Baskins.

16 Kathleen Amick.

17 I guess Patricia Crawford. That is not a
18 person?

19 MR. MEADORS: Comma, Communications, 9-1-1.
20 Works at 9-1-1.

21 THE COURT: Works at 9-1-1.

22 Cedric Peebles.

23 Judy McCaskill.

24 Louesther Henry.

25 Sylvia Pond.

1 Any other potential witnesses anybody is aware
2 of?

3 (WHEREUPON, there was no response.)

4 THE COURT: Jurors, have any of y'all heard
5 anything about this case other than what I just
6 briefly told you?

7 (WHEREUPON, there was no response.)

8 THE COURT: Has anybody formed or expressed an
9 opinion as to how this matter should be resolved?

10 (WHEREUPON, there was no response.)

11 THE COURT: Is any juror aware of any reason
12 why you couldn't be fair and impartial, whether I
13 have asked you about it or not?

14 JUROR ATKINSON: Cynthia Atkinson. I have
15 heard a lot about this case because, like I said, I
16 deal with their family.

17 THE COURT: If you can't be fair and
18 impartial, that is all you have to say if you would
19 rather not serve.

20 JUROR ATKINSON: I don't feel like I could be
21 fair because I know his family. I have grown up
22 with him, I mean.

23 THE COURT: That is no problem if you don't.
24 You would feel uncomfortable?

25 JUROR ATKINSON: Yes, sir.

1 THE COURT: We will just hang you at sunset,
2 you don't have to serve. No.

3 JUROR SPRINGS: Levonne Springs. And as you
4 were calling his name, I taught in Bethune. And my
5 brother-in-law got killed. So I wouldn't be able
6 to serve.

7 THE COURT: You can be hung at sunset. No.
8 We'll excuse those two.

9 (Jurors Atkinson and Springs excused.)

10 THE CLERK: Number 39 and Number 7.

11 THE COURT: State, any other questions you
12 want me to inquire?

13 MR. MEADORS: Beg the Court's indulgence.

14 THE COURT: Defense, do have any other
15 questions?

16 MR. KIRINCICH: No, sir.

17 MR. RILEY: Nothing else.

18 MR. MEADORS: Nothing, Your Honor.

19 THE COURT: All right, jurors. Ms. McDonald
20 is going to call your names out.

21 THE CLERK: That was Juror 123 and Number 7.

22 THE COURT: When she calls your name out, just
23 stand. That is all you have to do. And then there
24 is no delicate way to put it, they are either going
25 to accept you or reject you, okay? They might say,

1 seat the juror or present the juror, but the bottom
2 line, whatever they say, the State goes first and
3 then the Defense, just have a seat. Eventually
4 we'll get 12 jurors selected and one alternate, and
5 then those will be called up. But don't come up,
6 if they say seat the juror, just have a seat and
7 we'll call them all up at the same time.

8 All right. The strikes are ten and ten.

9 THE CLERK: Number 1, Evelyn B. Adams.

10 What sayeth the State?

11 MR. MEADORS: Please present the juror.

12 THE CLERK: What sayeth the Defense?

13 MR. RILEY: Please swear the juror.

14 THE CLERK: Number 103, Joshua S. Phipps.

15 What sayeth the State?

16 MR. MEADORS: Please present Ms. Phipps.

17 THE CLERK: What sayeth the Defense?

18 MR. RILEY: Please swear the juror.

19 THE CLERK: Number 47, Tracy L. Elmore.

20 What sayeth the State?

21 MR. MEADORS: Please present Ms. Elmore.

22 THE CLERK: What sayeth the Defense?

23 MR. RILEY: Please excuse the juror.

24 (Juror 47, Tracy L. Elmore, a white
25 female, was excused by the Defense.)

1 THE CLERK: Number 109, Teresa S. Ross.
2 What sayeth the State?
3 MR. MEADORS: Please present the juror.
4 THE CLERK: What sayeth the Defense?
5 MR. RILEY: Please excuse the juror.
6 (Juror 109, Teresa S. Ross, a white
7 female, was excused by the Defense.)
8 THE CLERK: Number 84, Hubert Kinlaw, III.
9 What sayeth the State?
10 MR. MEADORS: Please present Mr. Kinlaw.
11 THE CLERK: What sayeth the Defense?
12 MR. RILEY: Please swear the juror.
13 THE CLERK: Number 11, Angela D. Barnes.
14 What sayeth the State?
15 MR. MEADORS: Please present Ms. Barnes.
16 THE CLERK: What sayeth the Defense?
17 MR. RILEY: Please swear the juror.
18 THE CLERK: Number 46, Amanda D. Elmore.
19 What sayeth the State?
20 MR. MEADORS: Please present Ms. Elmore.
21 THE CLERK: What sayeth the Defense?
22 MR. RILEY: Please swear the juror.
23 THE CLERK: Number 133, Wendy L. Tyner.
24 What sayeth the State?
25 MR. MEADORS: Please present Ms. Tyner.

1 THE CLERK: What sayeth the Defense?

2 MR. RILEY: Please swear the juror.

3 THE CLERK: Number 17, Ronnie B. Bennett.

4 What sayeth the State?

5 MR. MEADORS: Please excuse the juror.

6 (Juror 17, Ronnie B. Bennett, a black
7 male, was excused by the State.)

8 THE CLERK: Number 104, Gabor D. Pinter.

9 What sayeth the State?

10 MR. MEADORS: Please present Mr. Pinter.

11 THE CLERK: What sayeth the Defense?

12 MR. RILEY: Please excuse this juror.

13 (Juror 104, Gabor D. Pinter, a white
14 male, was excused by the Defense.)

15 THE CLERK: Number 55, Nehemiah Glee.

16 What sayeth the State?

17 MR. MEADORS: Please excuse Ms. Glee.

18 (Juror 55, Nehemiah Glee, a black
19 female, was excused by the State.)

20 THE CLERK: Number 110, Colleen M. Schneider.

21 What sayeth the State?

22 MR. MEADORS: Please present the juror.

23 THE CLERK: What sayeth the Defense?

24 MR. RILEY: Please swear the juror.

25 THE CLERK: Number 39, Rebecca E. Davis.

1 What sayeth the State?

2 MR. MEADORS: Please present Ms. Davis.

3 THE CLERK: What sayeth the Defense?

4 MR. RILEY: Please swear the juror.

5 THE CLERK: Thank you.

6 Number 82, Linda L. Kelly.

7 What sayeth the State?

8 MR. MEADORS: Please present the juror.

9 THE CLERK: What sayeth the Defense?

10 MR. RILEY: Please excuse the juror.

11 (Juror 82, Linda L. Kelly, a white
12 female, was excused by the Defense.)

13 THE CLERK: Number 143, Hannah E. White.

14 What sayeth the State?

15 MR. MEADORS: Please present Ms. White.

16 THE CLERK: What sayeth the Defense?

17 MR. RILEY: Please swear the juror.

18 THE CLERK: Number 113, Lauren M. Semino.

19 What sayeth the State?

20 MR. MEADORS: Please present Ms. Semino.

21 THE CLERK: What sayeth the Defense?

22 MR. RILEY: Please excuse the juror.

23 (Juror 113, Lauren M. Semino, a white
24 female, was excused by the Defense.)

25 THE CLERK: Number 73, James F. Johnson.

1 (Previously transferred and not present.)
2 THE CLERK: Number 19, Yolanda N. Blackwell.
3 What sayeth the State?
4 MR. MEADORS: Please present Ms. Blackwell.
5 THE CLERK: What sayeth the Defense?
6 MR. RILEY: Please swear the juror.
7 THE CLERK: Number 36, Stephanie M. Count.
8 What sayeth the State?
9 MR. MEADORS: Please present Ms. Count.
10 THE CLERK: What sayeth the Defense?
11 MR. RILEY: Please swear the juror.
12 THE CLERK: Thank you.
13 Number 15, Shawana L. Beaufort.
14 What sayeth the State?
15 MR. MEADORS: Please excuse Ms. Beaufort.
16 THE CLERK: Thank you.
17 (Juror 15, Shawana L. Beaufort, black
18 female, was excused by the State.)
19 THE CLERK: Number 130, Cynthia R. Taylor.
20 What sayeth the State?
21 MR. MEADORS: Please present Ms. Taylor.
22 THE CLERK: What sayeth the Defense?
23 MR. RILEY: Please swear the juror.
24 THE CLERK: Thank you.
25 Do you want one alternate?

1 THE COURT: Yes.

2 THE CLERK: Number 28, James M. Busby.

3 What sayeth the State?

4 MR. MEADORS: Please excuse Mr. Busby.

5 (Juror 28, James M. Busby, a white male,
6 was excused by the State.)

7 THE CLERK: Number 89, Leeza R. Ballew.

8 What sayeth the State?

9 MR. MEADORS: Please present Ms. Ballew.

10 THE CLERK: I'm sorry?

11 MR. MEADORS: I said present.

12 THE CLERK: What sayeth the Defense?

13 MR. RILEY: Please swear the juror.

14 THE COURT: Do the attorneys need to take up
15 anything before we call them up?

16 MR. MEADORS: Thank you, Your Honor. One
17 second.

18 (Pause.)

19 MR. MEADORS: Nothing for the State.

20 MR. RILEY: Nothing from the Defense, Your
21 Honor.

22 THE CLERK: Thank you, Your Honor.

23 As I call your name, please come forward and
24 be seated in the jury box to my right, and please
25 bring any personal items that you may have with

1 you.

2 Thank you.

3 Number 1, Evelyn B. Adams.

4 Number 103, Joshua S. Phipps.

5 Number 84, Hubert Kinlaw, III.

6 Number 11, Angela D. Barnes.

7 Number 46, Amanda D. Elmore.

8 Number 133, Wendy L. Tyner.

9 Number 110, Colleen M. Schneider.

10 Number 39, Rebecca E. Davis.

11 Number 143, Hannah E. White.

12 Number 19, Yolanda N. Blackwell.

13 Number 36, Stephanie M. Count.

14 Number 130, Cynthia R. Taylor.

15 And for our alternate, Number 9, Leeza R.

16 Ballew.

17 THE COURT: Okay, jurors, don't talk about the
18 case. We're going to pick another jury. Y'all
19 just go to the jury room. We're not going to start
20 into the trial today, but when you step out, elect
21 somebody a foreperson. It can be anybody except
22 the alternate. But don't get your hopes up, the
23 foreperson doesn't get paid any more than anybody
24 else.

25 All right.

1 (Whereupon, the jury retires to the jury
2 room at 4:24 p.m.)

3 THE COURT: One of the jurors back there had
4 some problem. We'll find out. We might have to
5 pick another one, but we can do that.

6 (WHEREUPON, a break was taken.)

7 MR. MEADORS: If we go over them we might
8 could dispose of it today, quite frankly, or if not
9 at least know how much time tomorrow.

10 THE COURT: Well, I need to bring this other
11 jury back. Is it a safe thing to tell them to come
12 at 10:00 and if we need to make motions in the
13 morning we can do that?

14 MR. MEADORS: Fine.

15 THE COURT: Is that fair?

16 MR. RILEY: That will be fine.

17 THE COURT: They need to know something. Just
18 bring that jury in.

19 (WHEREUPON, the jury came into open
20 court at approximately 5:00 p.m.)

21 THE COURT: All right, jurors, it is already
22 5:00 o'clock. We just picked the second jury and
23 sent them home. Y'all don't talk about the case
24 with anybody because you don't know anything about
25 it yet. You haven't even been sworn in.

1 And I am going to let you come back in the
2 morning at 10:00. I'm going to listen to some
3 motions. We might try to eliminate some of the
4 witnesses, you know. Sometimes they list four
5 police officers and all they did was arrive at the
6 scene and found the body, and they can just do that
7 with one person testifying.

8 But I don't know anything about the facts, but
9 if you list all potential witnesses, sometimes they
10 don't call them all. We'll go over it and see how
11 we can shorten it some.

12 Don't talk about the case. Be back in the
13 morning at 10:00 o'clock. I would say 9:00, but we
14 might have more motions in the morning.

15 Report to the jury room, not in the courtroom.
16 See y'all in the morning at 10:00. Now, we need
17 all of y'all here. We'll move it along as quick as
18 we can, but understand it is a serious case, so we
19 can't just fly, we need to take our time.

20 One of the jurors needs a ride. Make sure she
21 gets a ride here.

22 (Whereupon, the jury retires for the
23 evening at 5:02 p.m.)

24 THE COURT: If tonight you can't find Judy
25 McCaskill you might have a motion to delay starting

1 the trial, you know, something like that. I don't
2 know what might happen in this case. All the
3 motions you can --

4 MR. RILEY: I can tell the Court all my
5 efforts have been failed so far in contacting her.
6 Are you ready, Judge?

7 THE COURT: I'm sitting here waiting.

8 MR. RILEY: First, I have gone over all these
9 with Mr. Meadors just so he knows exactly what I'm
10 going to get into.

11 THE COURT: All right.

12 MR. RILEY: The first one, Judge, I would move
13 to quash the indictment on the grounds that 17-1930
14 and 17-1940 deal with the allegations necessary in
15 an indictment for murder.

16 17-1930 requires that the indictment set forth
17 with specificity the time and place of the alleged
18 murder. This indictment states the county and the
19 date.

20 Whether that -- whether the Court feels that
21 is sufficient specificity, of course, is
22 essentially the question that I'm asking the Court
23 to rule upon.

24 More importantly, 17-1940, which provides in
25 part that in every indictment for murder and other

1 crimes there shall be a special count in the
2 indictment for carrying concealed weapons. If the
3 murder is allegedly charged to have been committed
4 with a deadly weapon, this indictment, which Your
5 Honor has in front of you, doesn't include a
6 special count in the indictment for carrying a
7 concealed weapon. It clearly doesn't.

8 I've got a case from -- I wasn't able to find
9 anything current. This case is from 1904. It is a
10 case that was reversed and remanded but on other
11 grounds.

12 Drawing the Court's attention to the first
13 pages, the first full paragraph in the right-hand
14 column, the one that begins, we will first briefly
15 notice, the Court in State versus Edwards provided
16 that in this particular case after the Grand Jury
17 had found a true-bill on the indictment the
18 Solicitor withdrew or nol-prossed the charge of
19 carrying concealed weapons.

20 The Court goes on to point out, it does not --
21 is not involved. Their decision on the issue of
22 whether the Solicitor has the right to withdraw
23 such special count is not involved in this appeal.
24 If the striking out of such special count
25 determined the indictment defective as not in

1 accordance with Section 131, which is now 17-1940,
2 it was a defect apparent on the face of the
3 indictment and cannot be raised for the first time
4 on motion in arrest of judgment.

5 Obviously this is a motion that I need to make
6 under the law prior to the swearing of the jury.
7 And that is what I'm doing now.

8 THE COURT: All right. The motion is denied.

9 MR. RILEY: All right, sir.

10 THE COURT: That was just all that argument
11 from the Solicitor.

12 MR. MEADORS: I think we addressed this in the
13 last murder case a few months ago. I actually read
14 the statute, and I don't think it requires it.

15 THE COURT: It is not required in my opinion.
16 You know, I tried innumerable murder cases, and it
17 is just not alleged like that.

18 I think what that case says is if he was
19 charged with that and carrying a concealed weapon
20 and the Solicitor nol-prossed it, that part of it
21 that was defective, and needs to have it reindicted
22 probably.

23 MR. RILEY: All right, sir.

24 THE COURT: It is not critical, you know.

25 Half of them with shotguns it is not a concealed

1 weapon, it is just whatever.

2 MR. RILEY: Judge, secondly, we have got --
3 the State has on their witness list two witnesses
4 who are technically Co-Defendants. They are
5 charged with conspiracy in this case. Rodney
6 Baskins and Ricky Lee Hough.

7 THE COURT: Okay.

8 MR. RILEY: I don't know if when they are
9 called to the witness stand if they are going to
10 take the Fifth Amendment. Should they do so, we've
11 got a Bruton problem in this case. I just wanted
12 to bring that to the Court's attention.

13 THE COURT: Yes, well, we'll address that. I
14 mean, I don't know anything about the case, but
15 they can take the Fifth if they want to and we'll
16 deal with it.

17 MR. RILEY: All right, sir. Your Honor, may I
18 reserve --

19 THE COURT: If they testify you can question
20 them and cross-examine them about, aren't you also
21 charged, what deals have you cut with them.

22 MR. RILEY: Right.

23 THE COURT: Point the finger at Mr. Hough.

24 MR. RILEY: Right.

25 THE COURT: You can do all that.

1 MR. RILEY: Judge, thirdly, one of the State's
2 proposed witnesses is, for lack of a more delicate
3 term, a jailhouse snitch.

4 THE COURT: Oh no.

5 MR. RILEY: Who claims that he overheard
6 Mr. Hough make an implicating statement down in the
7 detention center. I don't know a thing about --
8 under what circumstances he allegedly overheard
9 Mr. Hough, how well he knew Mr. Hough, whether he
10 even knew him before he heard this statement, if he
11 knew who the speaker was at the time he heard it or
12 if he found out who it was later. I don't know a
13 thing about the foundation for this alleged
14 statement that the Defendant made.

15 And it really -- it obviously raises issues
16 about the reliability of the alleged voice
17 identification. The Court may also --

18 THE COURT: I don't know if I can help you
19 with it at pretrial.

20 MR. MEADORS: If he attempted to offer that
21 question, proffer it for Your Honor's
22 consideration, we wouldn't interject that and that
23 won't be brought out in opening.

24 THE COURT: He will not mention it in opening.
25 You have an opportunity to question the person

1 outside the presence of the jury before we put him
2 up, if they call him.

3 MR. RILEY: All right, sir. And then lastly
4 is just a standard motion to sequester witnesses,
5 with the exception of course of the victim's family
6 and the primary investigating officer, whichever
7 officer it is.

8 THE COURT: Okay, y'all designate the officer
9 in charge or something.

10 MR. MEADORS: Reciprocity we ask in that, and
11 we're fine, Your Honor.

12 MR. RILEY: Yes, sir. All right, sir.

13 THE COURT: Now, Mr. Hough, if you have
14 anybody that Mr. Riley needs to call to see if he
15 can find out where Judy McCaskill is, he'll be
16 happy to do it. That is something y'all have to
17 work out. I mean, I'm not getting into it. If you
18 know anybody who might know who -- where she is, if
19 she can help you, he needs to find her. It is a
20 little late to give him the name yesterday, but
21 there you go.

22 Anything else? I will be here of course in
23 the morning at 9:00 if y'all need something. Y'all
24 need to have Mr. Hough over here at 9:00 at least
25 so Mr. Riley can talk with him.

1 MR. RILEY: Yes, sir.

2 THE COURT: I'll just be across the hall. And
3 the court reporter, who is always early, will be
4 here at 9:00.

5 MR. MEADORS: Thank you, Your Honor.

6 (WHEREUPON, the proceedings adjourned
7 for the day.)

8 (WHEREUPON, the proceedings resumed as
9 follows.)

10 JUNE 23, 2009

11 THE COURT: Okay, we need Ms. McDonald.

12 (Clerk enters courtroom.)

13 THE COURT: Mr. Riley, you have a continuance
14 motion, as I understand it?

15 MR. RILEY: Judge, two critical witnesses for
16 the Defense in this case I have been unable to
17 locate. One of them I just received an affidavit
18 of non-service. The other one has -- thus far I
19 have not even ascertained an address or a phone
20 number, although I have been trying for quite a
21 while now to locate this other witness.

22 Based on that, I feel that the Defense would
23 be prejudiced by going forward at this point.
24 These witnesses are not merely embellishing
25 witnesses, they are critical witnesses.

1 And based on that, I would move the Court for
2 a continuance.

3 THE COURT: All right. Well, here is how it
4 breaks down. Mr. Hough is looking at life without
5 parole, so -- I briefly mentioned to y'all when we
6 just spoke in the hall that I would give you some
7 time. I think you might be able to find one of the
8 witnesses, you said from the sidebar.

9 MR. MEADORS: That's my understanding, yes,
10 sir.

11 THE COURT: He needs to interview him anyway.
12 And so let's just bring -- bring the foreperson in,
13 just the foreperson.

14 MR. MEADORS: Judge, just for the record, the
15 State is ready to proceed.

16 THE COURT: I understand the State is clearly
17 ready to proceed.

18 What we are going to try to do is just start
19 the trial Monday to give y'all time, if the jury
20 can come back.

21 If the jury can't come back, Mr. Hough, we are
22 going to pick alternate jurors. I mean, if some of
23 them are on vacation, from the next -- the other
24 jurors that we have, we'll just do it computer-wise
25 so we will end up with 13. Those jurors have

1 already been qualified on your case also.

2 MR. MEADORS: Judge, are you going to inform
3 them not to -- here comes the juror.

4 (WHEREUPON, the foreman comes into open
5 court.)

6 THE COURT: Mr. Foreman, you haven't been
7 formally sworn in yet. Here is what has happened.
8 We have a couple of critical witnesses, according
9 to the attorneys, that are not available this week.

10 Murder is a serious situation. So what we
11 would like to do -- y'all haven't been sworn yet,
12 but you have been selected -- is start the trial
13 Monday and we would finish it Tuesday. The choice
14 is maybe start it Friday and finish it Sunday, but
15 I don't think that works.

16 So I need you to poll the jury and see if they
17 can all be here Monday, and you would be through
18 for the week. But it may not go next week. And
19 here is why. You know, we had that long witness
20 list.

21 THE FOREMAN: Yes, sir.

22 THE COURT: We only know about the two that
23 are unavailable. All the rest of them are
24 available this week, but they are not all in here
25 right now, so we have to check with other witnesses

1 to see if they will be available next week. If any
2 of them are not available, it will just be
3 continued until the next term of court.

4 But since everybody is in place and ready to
5 go, we would like to just complete the trial next
6 week Monday and Tuesday.

7 But I need for you to canvass the jury, just
8 tell them what it is, how it is. And if somebody
9 has got vacation plans, don't -- you know, don't
10 worry about it. We'll select an alternate and
11 other jurors.

12 THE FOREMAN: Yes, sir.

13 THE COURT: And just knock on the door and
14 come back.

15 THE FOREMAN: Okay.

16 (Whereupon, the foreman returns to the
17 jury room.)

18 THE COURT: Oh, Mr. Meadors, I forgot to tell
19 them it is another case of the Solicitor not being
20 prepared.

21 MR. MEADORS: He's kidding.

22 THE COURT: No, the State is ready.

23 (Pause.)

24 THE COURT: Mr. Meadors?

25 MR. MEADORS: Yes, sir.

1 THE COURT: If you would know whether you have
2 the witnesses next week before Sunday night, like
3 the jury would like to know probably.

4 MR. MEADORS: We will get on the phone today.

5 THE COURT: We can just tell them to call
6 Thursday night.

7 MR. MEADORS: Yes, sir.

8 THE COURT: And either say come in Monday or
9 don't worry about it.

10 MR. MEADORS: Could Your Honor start Monday at
11 10:00 just in case we have some witnesses who
12 may --

13 THE COURT: We can start at 6:10, that is the
14 time I get up in the morning, give me ten minutes
15 to get here. But 10:00 would be fine.

16 MR. MEADORS: Thank you.

17 (WHEREUPON, the foreman came into open
18 court.)

19 THE COURT: Yes, sir?

20 THE FOREMAN: We are all good with that except
21 for two. Wendy Tyner will be on vacation.

22 THE COURT: All right.

23 THE FOREMAN: And Josh Phipps is enrolled at
24 Midlands Tech and he has class.

25 THE COURT: Okay. So we have an alternate, so

1 we just have to pick one more from the 13. Does
2 that suit everybody?

3 MR. MEADORS: Yes, sir.

4 MR. RILEY: Judge, there was a point yesterday
5 when the jury pool was in the courtroom when
6 Mr. Hough --

7 MR. MEADORS: Judge, do you want us to
8 continue? I don't mind talking in front of this
9 juror, but I didn't know where he was going.

10 THE COURT: That does not matter.

11 MR. MEADORS: Okay.

12 MR. RILEY: When Mr. Hough exited the
13 courtroom the jury pool was seated out there.

14 THE COURT: That's fine.

15 MR. RILEY: That is my only observation.

16 THE COURT: All right. Bring the jury in.

17 (WHEREUPON, the remaining jurors came
18 into open court 10:06 a.m.)

19 THE COURT: Okay, jurors, here is how it
20 shakes down. We were unable to get two witnesses
21 here this week who everybody hoped would be here.

22 So since y'all are all in place, we are going
23 to reconvene the trial Monday, we think. Okay. I
24 don't need for you to talk about the case. Two
25 people are going to be excused. One has got tech

1 classes starting and one on vacation. We'll pick
2 one other juror, since everybody has been
3 qualified, who will join you Monday.

4 But we have a good many witnesses and we don't
5 know that all of them will be available, you know,
6 Monday and Tuesday. Some of them might -- it is
7 the Fourth of July week, some of them might be
8 gone, and it may be that we won't try the case.

9 But we will know -- just to be clear, y'all
10 just call that number that you have Thursday after
11 5:00, and it will either say report Monday or you
12 are through for the week -- through for the term.

13 Or if we can't get all the witnesses here
14 Monday and Tuesday -- like some of them had
15 conflicts this week, others might have conflicts
16 next week -- we will just continue it to July. But
17 if we can get the witnesses all lined up, we'll
18 start it Monday and Tuesday.

19 But y'all don't talk about the case. You
20 don't know anything about it.

21 We wanted to start, though, at what
22 10:00 o'clock, is that what everybody agreed on?

23 MR. MEADORS: From the State, yes, sir.

24 THE COURT: 10:00 o'clock Monday. But check
25 the messages Thursday. It may say, thanks for your

1 service. It will either say, thanks for your
2 service, you do not have to report; or it will say,
3 report Monday at 10:00.

4 Other than that -- and of course if we had
5 known this yesterday you wouldn't have had to come
6 in today, but we didn't know yesterday.

7 So see y'all Monday, perhaps.

8 (WHEREUPON, the jury was excused to call
9 in on Thursday.)

10 THE COURT: Okay, now, Mr. Riley, what kind of
11 whiny little thing are you talking about?

12 MR. RILEY: Judge, I don't recall exactly at
13 what point it was yesterday, but it was after this
14 jury was selected and Your Honor had sent them back
15 to the jury room. The rest of the jury pool was
16 seated out here. I think it was at the point where
17 you were getting ready to pick the second jury on
18 the second case.

19 Mr. Hough, in front of the jury pool, was
20 escorted out of the courtroom. They could clearly
21 have seen the shackles on his --

22 THE COURT: Good for them. Like any juror
23 does not know that someone accused with murder is
24 currently incarcerated. If they don't know that,
25 they are too naive to be on the jury in the first

1 place. He suffered no prejudice by that.

2 MR. RILEY: All right, sir.

3 THE COURT: And they understood he is being
4 escorted back to jail. He is not charged with
5 shoplifting.

6 All right.

7 MR. RILEY: All right.

8 THE COURT: So, Mr. Hough, Mr. Riley -- you
9 don't have to stand up -- Mr. Riley came back with
10 Mr. Meadors and Mr. Anders this morning and told me
11 about not being able to have a subpoena delivered
12 to one of the witnesses. He did not even tell me
13 who, and I still don't know who it was, which is
14 why I didn't go into a lot on the record. You are
15 entitled to be apprised. You know, I am not
16 supposed to talk about your case unless you are
17 present, but that is all that was said.

18 So at that point, it looked like to me the
19 simplest thing was to just continue the case since
20 we already had jurors there until next week to give
21 you time to review the discovery that you said you
22 needed to go over in detail and to try to find
23 these two witnesses.

24 I believe we have been able to locate one of
25 them now. We have an address on the one, Judy

1 McCaskill I think. We should be able to find her
2 before that.

3 So rather than just continue the case
4 indefinitely, we will just continue it until
5 Monday.

6 Now, if per chance you can't serve this other
7 witness by Monday, that is just tough luck. And in
8 fairness, the Solicitor -- not the Solicitor, but
9 if the State cannot find any of their witnesses
10 available next week, we will just continue the case
11 until July or whenever the Solicitor puts it down
12 for next time. That's all.

13 MR. MEADORS: Yes, sir.

14 THE COURT: Since it is July 4th week, some of
15 his witnesses may be on vacation. But we are going
16 to try, if we can, to finish the case in two days.
17 You need to streamline your testimony.

18 MR. MEADORS: I think that is possible, Judge.

19 THE COURT: And anything else I can help y'all
20 with on this case?

21 MR. RILEY: No, sir.

22 THE COURT: All right. Now, the other jury is
23 coming in in the morning. We need to probably draw
24 first, so we will need Mr. Hough back here. I
25 think we said we would start at 9:30 on your case.

1 MR. HODGE: I believe that's correct, Your
2 Honor.

3 THE COURT: So they'll be here at 9:30. And
4 we will bring all of them in and ask them if any of
5 them have any -- I recall they had a conflict.
6 Now, one of the jurors on the other case -- what
7 was her name?

8 THE CLERK: On this case, sir?

9 THE COURT: No, the second case. The one that
10 said she had a first cousin that worked for the
11 city cops.

12 THE CLERK: That was Kessler.

13 THE COURT: Ms. Kessler?

14 THE CLERK: Yes, sir. Her son-in-law works
15 for the City Police.

16 THE COURT: She didn't stand out there.
17 She -- Ms. Kessler, who is on this jury, has a
18 son-in-law that works for the City Police. Just in
19 the back of your mind make a note of that.

20 MR. MEADORS: So the strikes will be --

21 THE COURT: It is just like an alternate.

22 MR. MEADORS: Okay. That's right.

23 THE COURT: Two and one.

24 MR. MEADORS: Two and one.

25 THE COURT: Anything else I can help y'all

1 with?

2 MR. MEADORS: Thank you.

3 THE COURT: All right. Good luck.

4 (WHEREUPON, the proceedings adjourned
5 for the day.)

6 (WHEREUPON, the proceedings resumed as
7 follows:)

8 JUNE 24, 2009

9 THE COURT: Just so we understand how we are,
10 we have 13 jurors back there. They don't know
11 anything about it at this point. Two of them have
12 already been stricken.

13 THE CLERK: Your Honor, there is only 12 back
14 there.

15 THE COURT: Only 12. But one of them not back
16 there was stricken. He was the CIA agent or
17 something. He has already been stricken. So we
18 have got 12.

19 On the original strike deal you used five, I
20 think, Mr. Riley?

21 MR. RILEY: Yes, sir.

22 THE COURT: And you used four, I think?

23 MR. MEADORS: I thought it was three.

24 THE COURT: Well, whatever.

25 MR. MEADORS: I'm not -- it is not an issue.

1 THE COURT: You actually have five left. You
2 can automatically continue by striking everybody,
3 you know, if that is your choice, but that is up to
4 you.

5 Now, since it is vacation week for a lot of
6 people, they don't know about this, I am going to
7 bring them in and tell them to go back and
8 decide -- tell them whether they can serve or not
9 and report back.

10 The original alternate will just become a
11 regular juror.

12 MR. MEADORS: Okay.

13 THE COURT: So then we will have to pick two
14 to be jurors, one as alternate and a second
15 alternate, if we have enough.

16 MR. MEADORS: The State is ready.

17 THE COURT: All right. Well, bring the jury
18 in.

19 (WHEREUPON, the jury came into open
20 court at approximately 9:56 a.m.)

21 THE COURT: Okay, jurors, it is kind of warm
22 back there, huh? Well, life is hard. Here is --
23 we didn't have any air at all in the courthouse
24 last time we were holding court here. It is really
25 punishing. But we made it through.

1 Jurors, here is what is happening. Y'all were
2 all qualified on a case that we picked the first
3 jury on involving Michael Hough, which involved a
4 murder charge. And some of y'all -- a couple of
5 y'all were stricken from that jury.

6 We had some witness problems on the case. So
7 we polled that other jury and they elected -- I had
8 to excuse three of them that had vacation plans.
9 And we're going to try the case Monday and Tuesday
10 of next week.

11 We could start it Friday and work Friday,
12 Saturday and Sunday, but nobody wants to do that.

13 So here is the thing. I need for y'all to go
14 back -- and we recognize next week is Fourth of
15 July week. We can finish it in two days with no
16 problem. The case that y'all were on has
17 disappeared, you are not going to have to serve
18 today.

19 Just go back, and if anybody has a conflict,
20 like if you rented a beach house, you know, or
21 something, we won't make you serve. But if you
22 don't, then we're going to pick three of you to be
23 on that jury. We had to excuse three. We may pick
24 four if we have enough left because over the
25 weekend people can get sick and things happen.

1 But, anyway, it is no pressure on you. If you
2 have got previous commitments -- it has to be a
3 real commitment, not that you would rather not be
4 here. Nobody that is a juror for \$10 a day wants
5 to be here. So somebody has to canvass and come
6 back. I'll just say Mr. Cork, if you would just
7 report back after y'all talk about it. If anybody
8 can't serve next week, just let us know.

9 And, Ms. Glee, I believe, are you there? They
10 had already stricken you. That is hard -- they had
11 excused you from this trial, so you don't even have
12 to go back there, you can go home.

13 The rest of y'all go back and talk. And,
14 Mr. Cork, once you have found out anybody that
15 can't serve, if you would just write their name
16 down.

17 You have to have a reason, now: Vacation,
18 plane flight.

19 Ms. Glee, just stay in the courtroom. I'll
20 tell you what will happen with you. You'll be free
21 to go.

22 The rest of y'all, just step back.

23 (Whereupon, the jury retires to the jury
24 room at 9:59 a.m.)

25 THE COURT: Ms. Glee, you are through for the

1 week. If you need a statement saying you were
2 here, you can just step across the hall and they
3 will get that for you. Ms. McDonald will mail your
4 check to you probably Friday. But you are free to
5 go.

6 (Juror Glee excused.)

7 THE COURT: Now, Mr. Riley and Mr. Meadors.

8 MR. MEADORS: Yes, sir.

9 THE COURT: Assuming we have enough --

10 DEPUTY: They are out, sir.

11 THE COURT: -- y'all know who they are without
12 bringing them in here. We can probably -- she can
13 just call the name and we can go straight down and
14 strike. Would that suit you?

15 MR. MEADORS: We're ready, yes, sir.

16 THE COURT: Okay.

17 THE CLERK: So the State will have five and
18 they will have six?

19 MR. MEADORS: Are the numbers the same as the
20 other numbers?

21 THE COURT: She'll just call out the name.

22 THE CLERK: The juror numbers are still the
23 same.

24 (Pause.)

25

1 (WHEREUPON, the foreman enters the
2 courtroom and speaks with the judge at
3 the bench at approximately 10:08 a.m.
4 and then returns to the jury room.)

5 THE COURT: I am saving y'all a strike.
6 Katherine Rogers can't --

7 MR. MEADORS: We were presenting her, Judge.

8 THE COURT: She is on vacation. And Amy
9 Barrett is on vacation.

10 MR. MEADORS: One second, Your Honor, to
11 scratch them off.

12 THE COURT: If you are ready, Ms. McDonald,
13 just start calling the names.

14 THE CLERK: Number 150, Carl A. Wright.
15 What sayeth the State?

16 MR. MEADORS: Present the juror.

17 THE CLERK: What says Defense?

18 MR. RILEY: Swear the juror.

19 THE CLERK: Thank you.

20 Number 83, Teri D. Kessler.

21 What sayeth the State?

22 MR. MEADORS: Present the juror.

23 THE CLERK: What sayeth Defense?

24 MR. RILEY: Please excuse Ms. Kessler.

25 THE CLERK: Thank you.

1 Number 38, Julia E. Creel.

2 What sayeth the State?

3 MR. MEADORS: Please present Ms. Creel.

4 THE CLERK: What sayeth Defense?

5 MR. RILEY: Please excuse Ms. Creel.

6 (Juror 38, Julia E. Creel, a white
7 female, was excused by the Defense.)

8 THE CLERK: Number 8, Christopher L. Bailey.

9 What sayeth the State?

10 MR. MEADORS: Please present Mr. Bailey.

11 THE CLERK: What sayeth the Defense?

12 MR. RILEY: Please swear the juror.

13 THE CLERK: Thank you.

14 Number 119, Suzanne H. Smith.

15 What sayeth the State?

16 MR. MEADORS: Please present Ms. Smith.

17 THE CLERK: What sayeth the Defense?

18 MR. RILEY: Please excuse the juror.

19 (Juror 119, Suzanne H. Smith, a white
20 female, was excused by the Defense.)

21 THE CLERK: Number 66, Terri L. Householder.

22 What sayeth the State?

23 MR. MEADORS: Please present Ms. Householder.

24 THE CLERK: What sayeth the Defense?

25 MR. RILEY: Please swear the juror.

1 THE CLERK: Thank you.

2 THE COURT: Okay, that is two plus an
3 alternate, right?

4 MR. MEADORS: Well, that's three we've got.

5 THE COURT: No, we excused three, so the last
6 one we called will be the alternate. Let's pick
7 another alternate just in case, it is a long
8 weekend, if y'all don't use up your strikes.

9 THE CLERK: Number 35, John Coleman Cork, III.
10 What sayeth the State?

11 THE COURT: This will be the second alternate.

12 MR. MEADORS: Please present Mr. Cork.

13 THE CLERK: What sayeth the Defense?

14 MR. RILEY: Please swear the juror.

15 THE CLERK: Thank you.

16 THE COURT: Now, does anybody have any
17 problems with the strikes?

18 MR. MEADORS: Just so I'm clear -- and I
19 apologize if I'm not -- we now have 12 jurors and
20 one alternate or two?

21 THE COURT: Two.

22 MR. MEADORS: Two alternates?

23 THE COURT: We are going over it right now.
24 Carl Wright and Christopher Bailey are regular
25 jurors, along with the current alternate, who has

1 been promoted.

2 And then Terri I guess Householder is the
3 first alternate and John Cork is the second
4 alternate.

5 Is everybody straight?

6 MR. MEADORS: The State is ready, and no
7 problem with strikes.

8 MR. RILEY: Yes, sir.

9 THE COURT: All right, let's bring the jury
10 in.

11 And we'll know by Thursday night whether we're
12 going or not. They will call after 5:30.

13 MR. MEADORS: We'll know hopefully by tomorrow
14 morning.

15 THE COURT: Well, I know.

16 (WHEREUPON, the jury came into open
17 court at approximately 10:14 a.m.)

18 THE COURT: Okay, jurors. Everybody is going
19 to be able to go at the same time. Here is what
20 happened, rather than bring y'all out and have you
21 stand up and strike, they just struck from the list
22 since they already knew who you were or had
23 information about you.

24 Carl Wright and Christopher Bailey are on the
25 jury as regular jurors, okay?

1 Katherine Rogers -- no, no, no -- Terri
2 Householder is the first alternate. And John Cork
3 is the second alternate.

4 It is a long weekend. Somebody might get sick
5 or something. We need to have two alternates.

6 Even so, we have lots of witnesses and it is
7 the Fourth of July week and we've got to make sure
8 everybody can be here next week.

9 I know y'all think it is -- you're here and
10 everything ought to be just put up, but witnesses
11 also have lives, and some of them might be operated
12 on or whatever, you know. So we have to have them
13 all here to go.

14 So if y'all would call, those four, tomorrow
15 at 5:30. We will check with everybody that is
16 going to testify and make sure they are available
17 next week. No need to call until 5:30. There will
18 be a message on there and it will just say, come in
19 Monday at 10:00 o'clock, or, you are through for
20 the week, you don't have to report.

21 Now, those that were unfortunate enough not to
22 be selected, you are through. If you need a
23 statement saying you have been here, you can just
24 go out of that door, across the hall, and the
25 Clerk's Office will give it to you. But your check

1 will be mailed Friday, Ms. McDonald says.

2 But everybody is now free to go. Those four,
3 now, you know you have to call tomorrow after 5:30.
4 There be a message on there. It won't just say you
5 four, it will be for the other jurors, they are
6 calling also, to report Monday at 10:00.

7 And if something happens in the meantime, the
8 Clerk's Office will call you. Not that it will
9 happen, if Mr. Meadors gets sick or something then
10 the case won't go, or Mr. Riley.

11 So we will see some of y'all Monday. And
12 everybody is free to go.

13 Now, of course don't talk about the case.
14 Y'all don't know anything about it.

15 (Whereupon, the jury is excused at
16 10:17 a.m.)

17 MR. MEADORS: Thank you, Your Honor.

18 MR. RILEY: Thank you, Judge.

19 (WHEREUPON, the proceedings were
20 adjourned for the day.)

21 (WHEREUPON, the proceedings resumed as
22 follows.)

23 JUNE 25, 2009

24 MR. RILEY: Judge, as Your Honor knows in
25 Mr. Hough's trial, his case is charged with murder.

1 On Monday we picked a jury of 12 and one alternate.
2 On Tuesday I made a motion for a continuance based
3 on the inability to find two witnesses. The Court
4 granted that until next Monday.

5 And the Court also inquired of the jury as to
6 whether they could all be here Monday, and three of
7 them couldn't.

8 And Wednesday the Court picked -- we and the
9 Court picked three more jurors.

10 THE COURT: Well, actually we picked four. It
11 gave us two alternates.

12 MR. RILEY: I'm sorry. It has come to my
13 attention and the Court's attention that --
14 apparently on Tuesday when the Monday folks were
15 here on Tuesday, at least one member of the jury
16 had obtained by means unknown, but presumably off
17 the internet, complete and total and full
18 information about Mr. Hough's criminal record, and
19 that that juror was sharing it with all the other
20 members of the jury, and that there was a good deal
21 of conversation among the members of the jury about
22 Mr. Hough's entire criminal record.

23 The second point, Judge, is that in the
24 Wednesday issue of the Camden Chronicle-Independent
25 there was a front-page article about the case.

1 The reporter for the Camden Chronicle knew
2 that the Court was picking additional jurors that
3 day because he mentions it in his article. And yet
4 it was published in the Camden Chronicle,
5 Wednesday's edition, yesterday's edition. I have a
6 copy of it. I would ask that this be made a Court
7 Exhibit.

8 THE COURT: All right.

9 MR. RILEY: That article contains an
10 extraordinary amount of information not only about
11 Mr. Hough's record, but about what he is charged
12 with, about the potential penalties he is facing,
13 about his probationary history, about a 14-hour
14 manhunt that was conducted in an effort to find him
15 on the day of this incident that he is charged
16 with, about his cutting off a monitoring bracelet
17 or anklet while he was on community supervision,
18 and several other things that I don't recall right
19 now.

20 But in light of those two things, the juror
21 who looked up and shared with all the other members
22 of the jury Mr. Hough's record, and the article
23 that appeared in the Camden Chronicle, I would move
24 for this jury that has been selected to be
25 dissolved and for the trial to be postponed.

1 I think not only this particular jury that we
2 struck, but potentially the entire pool of jurors
3 in Kershaw County has been polluted.

4 The first reason, which is the juror sharing
5 Mr. Hough's criminal record with the other members
6 of the jury, that is the more immediate concern.

7 But the second one has more -- has longer
8 lasting ramifications. That article in the
9 newspaper may end up costing the taxpayers of
10 Kershaw County and the taxpayers of the State of
11 South Carolina a significant amount of money.

12 And I submit to the Court that that article
13 being published, there ought to be consequences for
14 it.

15 That was either an intentional or a negligent
16 attempt to interfere with the criminal justice
17 system.

18 And I submit to the Court that there ought to
19 be real consequences for that article being
20 published on a day when the reporter knew that
21 additional jurors were being selected.

22 Thank you, Judge.

23 THE COURT: Well, of course the press is not
24 here, so there can't be any consequences.

25 MR. RILEY: How fortuitous.

1 MR. MEADORS: For whatever it is worth, Martin
2 Cahn is very thorough, I'll just say that.

3 Judge, for whatever -- I mean, I'm not going
4 to get into that. They have their lawyer, Jay
5 Bender, you know, clearly they have a right to be
6 here to say what goes on with court.

7 Obviously whether the whole county has been
8 polluted will have to be decided the next time we
9 pick a jury, obviously, in the State's opinion.

10 Other than that, the only remedy -- I
11 understand Ms. McDonald, and I certainly believe
12 every word she said, that the juror said his record
13 was discussed. To what extent and who all was
14 discussing it, I don't know if any of us know, but
15 clearly someone was discussing it.

16 So I guess the only two options at this point
17 would be to bring them all in Monday and ask if
18 that really happened. And then, second, if they
19 can be fair and impartial.

20 I think the newspaper really is moot because
21 you don't even know if they read it, and you would
22 have to ask them that too.

23 But considering all that, I don't know if that
24 is a very good use of the county's money, quite
25 frankly, since we know at least one was already

1 infected, if you will, and perhaps there were more.
2 So --

3 THE COURT: Well, of course --

4 MR. MEADORS: -- we certainly defer to your
5 wisdom.

6 THE COURT: Without getting into it, since we
7 don't really have to -- Ms. McDonald?

8 THE CLERK: Yes, sir. Yes, Your Honor?

9 THE COURT: Without naming the juror --

10 THE CLERK: Yes, sir.

11 THE COURT: A juror approaches you, as I
12 understand it?

13 THE CLERK: Yes, Your Honor.

14 THE COURT: Because that juror had concern
15 because discussions about Mr. Hough's prior record
16 went on at some length while we were picking the
17 second jury. The jury was back there a while. And
18 then they were sent home, of course. And she came
19 back and was concerned about it. And it was lunch
20 time. And Mr. Meadors was not here and Mr. Riley
21 was not here, and rather than keep that juror, I
22 just told you to tell her to go home and we would
23 tell them what had happened.

24 And nobody called that juror in, the juror
25 voluntarily appeared, as I understand it?

1 THE CLERK: Correct.

2 THE COURT: But based on that, really it is
3 Mr. Hough's call, not his attorney's call.

4 Mr. Hough, here is how it breaks down. I have
5 a motion to continue your case, you understand?

6 We have picked a jury, but the jury -- and the
7 judge has been around, the judge didn't swear them
8 in. If the judge swore them in, we would have
9 double jeopardy problems. The jury is not sworn.
10 We told that jury to call back today after 4:30
11 just to see if we could get all of the witnesses,
12 and we planned on starting Monday, as you are well
13 aware.

14 I can bring that jury in Monday and question
15 each of those jurors individually as to whether
16 they have read any of these newspaper reports or
17 discussed the newspaper with them or ask them what
18 happened in the jury room about discussions about
19 your prior record, and so forth. Or I can just
20 continue it. And, really, it is your call. What
21 do you want to do? We can bring them in Monday and
22 question them one by one and go ahead with it.

23 THE DEFENDANT: Bring them in, Your Honor.

24 THE COURT: You want to bring them in Monday?

25 THE DEFENDANT: No, sir.

1 THE COURT: You do not?

2 THE DEFENDANT: No, sir.

3 THE COURT: You want a continuance?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: All right. Now, you do
6 understand, I don't call your case for trial or any
7 other circuit judge, it is up to the Solicitor.
8 And they may call it for trial the next term, it
9 may be the next term, I don't know. They won't put
10 it off indefinitely, but they have got to get their
11 witnesses together too.

12 MR. MEADORS: We will call it before the
13 summer is out, Your Honor, I promise.

14 THE COURT: So if you want me to continue it,
15 I think that is in your best interest, but I
16 can't -- I can't tell you that, you know, because
17 the article, if they read it, couldn't be favorable
18 to you, if anybody has talked to them about the
19 article. If they have talked about your prior
20 record, that can't be favorable to you either.

21 THE DEFENDANT: Yes, Your Honor.

22 THE COURT: All right, we'll just continue it.

23 MR. RILEY: Thank you, Judge.

24 THE COURT: We are not reprimanding the press
25 at this point. And whether the case is removed

1 from Kershaw County is another time and another
2 place. Another panel will have to be questioned as
3 to whether they have heard anything about the case
4 or formed or expressed an opinion, or so forth. If
5 we can't get jurors, then the case of course will
6 be moved, but that is before another judge at
7 another time.

8 MR. MEADORS: Yes, sir. Thank you, Judge.

9 THE COURT: Ms. McDonald?

10 THE CLERK: Yes, sir.

11 THE COURT: If you will put the message on the
12 machine that the jurors do not have to report, they
13 are through.

14 THE CLERK: Yes, sir. Thank you.

15 THE COURT: They will be more than happy, I'm
16 sure.

17 THE CLERK: I'm sure. Yes, sir, I will.
18 Thank you.

19 MR. MEADORS: Thank you, Judge.

20 (WHEREUPON, Court Exhibit No. 3 was
21 marked for identification only.)

22 (WHEREUPON, the proceedings were concluded.)

23

24

25

(END OF TRANSCRIPT)

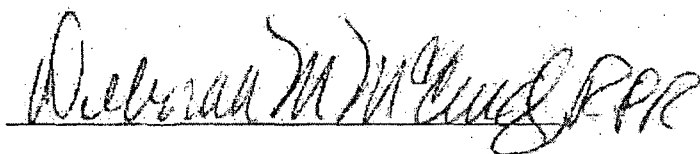
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COUNTY OF KERSHAW)

I, Deborah M. McCurdy, 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 Kershaw County, South Carolina, on the 22nd, 23rd, 25ths day of June, 2009.

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

March 24, 2010



Deborah M. McCurdy, RPR
Fifth Circuit Court Reporter

A	ASSISTANT... [4] 17/1 17/3 18/10 20/17 Assuming [1] 59/9 at [63] 6/6 6/14 7/21 8/23 8/24 11/14 13/18 14/18 15/23 19/10 22/24 23/14 26/20 26/21 28/1 28/7 29/7 36/2 36/9 36/12 36/20 37/2 37/5 37/13 37/16 37/23 41/23 42/11 42/19 43/23 43/24 43/24 44/4 44/23 45/4 48/10 48/13 48/23 50/21 51/3 51/12 51/16 52/18 53/25 54/3 55/11 56/20 56/23 58/24 60/2 60/3 63/17 63/19 64/15 64/19 65/6 65/15 66/15 69/16 69/25 70/16 72/25 73/6 ATKINSON [11] 16/6 16/11 16/11 16/12 16/15 16/18 27/14 27/14 27/20 27/25 28/9 attempt [1] 68/16 attempted [1] 42/20 attend [3] 17/16 17/20 18/1 attention [5] 15/7 39/12 41/12 66/13 66/13 attorney [1] 20/24 attorney's [2] 20/10 71/3 attorneys [11] 1/18 1/20 18/6 18/15 20/22 20/25 21/9 21/25 24/22 34/14 46/9 automatically [2] 16/13 56/2 available [7] 46/9 46/24 47/1 47/2 50/5 53/10 64/16 aware [4] 14/12 27/1 27/11 71/13	belonged [1] 21/12 bench [4] 22/11 22/24 23/15 60/3 Bender [1] 69/5 Bennett [2] 31/3 31/6 best [4] 4/11 4/18 12/20 72/15 Bethune [5] 14/9 14/10 18/19 19/16 28/4 better [1] 10/21 beyond [1] 15/18 bill [3] 8/11 8/12 39/17 billed [1] 7/24 Billy [1] 25/3 bit [1] 24/2 black [4] 26/12 31/6 31/18 33/17 Blackwell [3] 33/2 33/4 35/12 blank [1] 7/25 body [1] 37/6 bother [1] 11/3 bottom [3] 16/12 17/21 29/1 box [1] 34/24 Boyd [1] 25/19 bracelet [1] 67/16 break [2] 15/5 36/6 breaks [2] 45/4 71/4 Brenda [1] 17/19 briefly [3] 27/6 39/14 45/5 bring [17] 34/25 36/10 36/18 41/12 45/12 45/12 49/16 54/4 56/7 56/17 63/9 63/20 69/17 71/14 71/21 71/23 71/24 bringing [1] 59/12 brother [4] 17/13 20/16 22/6 28/5 brother's [1] 9/25 brother-in-law [2] 22/6 28/5 brothers [1] 19/8 brought [4] 7/5 7/6 9/8 42/23 Bruton [1] 41/11 burden [1] 15/17 burglary [1] 22/2 BUSBY [8] 22/25 23/3 23/3 23/6 23/9 34/2 34/4 34/5	14/20 16/19 24/4 27/5 27/15 35/18 36/23 37/12 37/18 38/2 39/8 39/9 39/10 39/16 40/13 40/18 41/1 41/1 41/14 44/16 46/1 47/19 48/1 48/14 50/8 50/19 51/18 52/16 52/19 53/3 53/10 53/16 53/20 53/25 54/6 54/8 54/9 57/2 57/6 57/9 57/16 62/7 65/10 65/13 65/25 66/25 71/5 72/6 72/25 73/3 73/5 74/13 cases [2] 20/12 40/16 cause [1] 24/6 Cedric [1] 26/22 center [1] 42/7 certainly [2] 69/11 70/4 CERTIFICATE [1] 74/1 certify [2] 74/10 74/16 chance [1] 53/6 charge [4] 21/15 39/18 43/9 57/4 charged [9] 8/4 39/3 40/19 41/5 41/21 52/4 65/25 67/11 67/15 charges [2] 15/15 24/13 Charles [2] 17/12 20/15 check [5] 46/25 50/24 59/4 64/15 64/25 Chief [1] 18/8 children [1] 19/8 choice [2] 46/13 56/3 Christopher [3] 61/8 62/24 63/24 Chronicle [4] 66/24 67/1 67/4 67/23 Chronicle-Independent [1] 66/24 church [3] 17/16 17/20 18/1 CIA [1] 55/16 circuit [9] 16/25 17/2 17/4 17/8 20/9 20/17 72/7 74/9 74/23 circumstances [1] 42/8 city [4] 19/12 54/11 54/15 54/18 claims [4] 9/9 9/20 11/5 42/5 class [1] 48/24 classes [1] 50/1 classmates [1] 16/7 clear [2] 50/9 62/18 clearly [5] 39/7 45/16 51/20 69/5 69/15 Clerk [1] 44/12 Clerk's [2] 64/25 65/8 clinical [2] 13/3 13/7 Co [1] 41/4 Co-Defendants [1] 41/4 Cobb [1] 25/22 coin [1] 24/2 Coleman [1] 62/9 Colleen [2] 31/20 35/9 colloquy [2] 12/25 22/23 column [1] 39/14 come [19] 4/2 4/3 4/18 18/25 21/21 22/18 23/17 29/5 34/23 36/11 37/1 45/20 45/21 47/14 48/8 51/5 58/5 64/1 66/12 comes [4] 14/15 14/18 46/3 46/4 comfortable [5] 3/16 4/13 4/17 6/24 6/7 coming [3] 22/21 23/12 53/23 Comma [1] 26/19 comment [1] 13/13 commitment [1] 58/3 commitments [1] 58/2 committed [2] 15/11 39/3 committing [1] 22/16 Communications [1] 26/19 community [1] 67/17 competence [1] 13/18 competency [1] 12/23 complete [3] 47/5 66/17 74/11 completely [1] 5/17 complies [2] 15/21 16/3 compromise [1] 13/10
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STATE OF SOUTH CAROLINA
COUNTY OF KERSHAW

) COURT OF GENERAL SESSIONS

)
2008-GS-28-0847

State of South Carolina

)
)
vs.

) TRANSCRIPT OF RECORD
) (Guilty Plea)

Michael Anthony Hough,

)
)
Defendant.

Tuesday, July 28, 2009
Camden, South Carolina

BEFORE:

THE HONORABLE G. THOMAS COOPER, JR., JUDGE

APPEARANCES:

JOHN MEADORS, ASSISTANT SOLICITOR
JASON ANDERS, ASSISTANT SOLICITOR
Attorneys for the State

NEIL RILEY, PUBLIC DEFENDER
Attorney for the Defendant

JENNY H. WILLIAMS
Official Circuit Court Reporter
(803) 576-1743

1 Tuesday, July 28, 2009

2 **MR. ANDERS:** Michael Hough.

3 **THE COURT:** You got some indictments?

4 **THE CLERK:** Yes, sir, I do. Mr. Hough, would
5 you raise your right hand, please.

6 Michael Hough, having been first duly sworn,
7 pleads guilty as follows:

8 **MR. ANDERS:** May it please the Court?

9 **THE COURT:** Yes, sir.

10 **MR. ANDERS:** Your Honor, before you is Michael
11 Hough. He is represented by Neil Riley. He is here
12 today before you on indictment number
13 2008-GS-28-00847 on a charge of murder. It's my
14 understanding after talking with his defense attorney
15 that he is going to plead to a negotiated plea of --

16 **THE COURT:** Negotiated sentence?

17 **MR. ANDERS:** Negotiated sentence, Your Honor, of
18 voluntary manslaughter for 23 years.

19 **MR. MEADORS:** Your Honor, that is after
20 consultation with the family who is in the courtroom,
21 of which I'm going to address you later. And also
22 Phil Crawford with the Sheriff's Department, we went
23 over in detail the facts, and everyone is in
24 agreement with that. We ask Your Honor to consider
25 it.

1 **THE COURT:** Mr. Riley, you represent Michael
2 Anthony Hough?

3 **MR. RILEY:** I do, Your Honor.

4 **THE COURT:** Have you advised your client of the
5 charges contained in this indictment and his right to
6 a trial by a jury?

7 **MR. RILEY:** Yes, sir.

8 **THE COURT:** How does your client indicate he
9 wishes to plead?

10 **MR. RILEY:** Guilty, Your Honor.

11 **THE COURT:** Mr. Hough, you're charged in this
12 indictment with murder. It's my understanding you
13 are pleading guilty to voluntary manslaughter, a
14 charge which carries a penalty of up to 30 years in
15 jail. Do you understand that?

16 **MR. HOUGH:** Yes, sir.

17 **THE COURT:** Understanding the charge you face
18 and the punishment you could receive, how do you wish
19 to plead? Guilty or not guilty?

20 **MR. HOUGH:** Guilty.

21 **THE COURT:** Do you understand by pleading guilty
22 you're giving up your right to remain silent?

23 **MR. HOUGH:** Yes, sir.

24 **THE COURT:** Do you understand by pleading guilty
25 you're giving up your right to a trial by a jury?

1 **MR. HOUGH:** Yes, sir.

2 **THE COURT:** If you requested or demanded a trial
3 by a jury, the State would give you a trial. Do you
4 understand that?

5 **MR. HOUGH:** Yes, sir.

6 **THE COURT:** At trial you would have the right to
7 confront and cross examine all witnesses against you.
8 You would have the right to present any witnesses
9 and/or evidence in your own defense. You would have
10 the right to testify in your own defense if you
11 wished to do so, but no one could make you testify at
12 your own trial.

13 If you decided to go to trial and not testify,
14 the judge would tell the jury they could not hold
15 your failure to testify against you. In fact, the
16 jury could not even consider your failure to testify
17 in their deliberations on your guilt or innocence.

18 You'd be presumed innocent throughout your
19 trial. The State would have to prove you guilty
20 beyond a reasonable doubt to a jury of 12 people and
21 all 12 people would have to unanimously agree that
22 you were guilty in order for you to be convicted.
23 Even if you were convicted, you would still have the
24 right to appeal that conviction. Do you understand
25 your rights with regard to a trial by a jury?

1 **MR. HOUGH:** Yes, sir.

2 **THE COURT:** Understanding those rights, do you
3 still want to plead guilty, or do you want me to set
4 your case for trial?

5 **MR. HOUGH:** Guilty.

6 **THE COURT:** All right. Has anyone promised you
7 anything, held out any hope of reward, threatened you
8 in any manner to make you plead guilty?

9 **MR. HOUGH:** No, sir.

10 **THE COURT:** Are you satisfied with the manner in
11 which your attorney has advised and represented you
12 in this case?

13 **MR. HOUGH:** Yes, sir.

14 **THE COURT:** Have you and your attorney fully
15 discussed the charges against you?

16 **MR. HOUGH:** Yes, sir.

17 **THE COURT:** Has your attorney told you the
18 witnesses and evidence the State has available to
19 present at a trial to prove that you're guilty?

20 **MR. HOUGH:** Yes, sir.

21 **THE COURT:** Has your attorney discussed with you
22 any possible legal defenses that might be available
23 to you should you go to trial?

24 **MR. HOUGH:** Yes, sir.

25 **THE COURT:** Have you told your attorney the

1 names of any and all witnesses that you know of that
2 your attorney could subpoena to bring to trial to
3 assist in your defense if you decided to go to trial?

4 **MR. HOUGH:** Yes, sir.

5 **THE COURT:** Has he done everything you asked him
6 to do in preparation for this plea?

7 **MR. HOUGH:** Yes, sir.

8 **THE COURT:** Do you need any more time to spend
9 with him prior to entering this plea?

10 **MR. HOUGH:** No, sir.

11 **THE COURT:** All right. Are you under the
12 influence of any alcoholic beverages, drugs or
13 prescription medications at this time?

14 **MR. HOUGH:** Prescription medication.

15 **THE COURT:** What is it?

16 **MR. HOUGH:** Remeron and Celexa.

17 **THE COURT:** All right, sir. Do those
18 prescription medications -- have you taken them today
19 or this week?

20 **MR. HOUGH:** Every day, sir.

21 **THE COURT:** Every day. Do those medications in
22 any way interfere with your ability to understand
23 what you're doing here today?

24 **MR. HOUGH:** No, sir.

25 **THE COURT:** You clearly understand what you're

1 doing here today?

2 **MR. HOUGH:** Yes, sir.

3 **THE COURT:** Do you know of any other mental,
4 emotional or nervous condition that you have that
5 would interfere with what you're doing here today?

6 **MR. HOUGH:** No, sir.

7 **THE COURT:** All right, sir. Are you pleading
8 guilty today of your own free will and accord?

9 **MR. HOUGH:** Yes, sir.

10 **THE COURT:** All right, Solicitor. Give me a
11 factual basis for the plea.

12 **MR. ANDERS:** Thank you, Your Honor. This
13 happened April 17th, 2008. The victim, Francis
14 Horton, was driven by Billy Humphries to Bethune to
15 420 Caliber Drive, the home of Rodney Baskins. He
16 was there, Your Honor, to purchase some drugs. When
17 he got to the mobile home Francis Horton went inside
18 the mobile home.

19 At that point the defendant came to the driver's
20 side window of the car, asked Billy Humphries for
21 some money. He said he didn't have any money.
22 Shortly thereafter, Your Honor, Francis Horton came
23 down the steps, the rear steps of the mobile home.
24 The defendant went to the victim, put the gun to his
25 face and told him to give up what he got, give up

1 what he had, Your Honor.

2 Your Honor, at that point the victim grabbed the
3 gun from his head and got it down by his chest.
4 There was a slight struggle that ensued after that,
5 Your Honor, at which time the defendant shot Francis
6 Horton in the right side of the chest. Your Honor,
7 he wasn't dead at that point. He got up, tried to go
8 back into the mobile home, but he died shortly
9 thereafter. The defendant ran from the scene, Your
10 Honor.

11 Phil Crawford and Eric Tisdale were the first to
12 arrive on the scene, process the scene, took
13 pictures. They -- Your Honor, at 3:30 a.m. the
14 defendant showed up at the house of Deborah Williams
15 who lived not far from the scene, Your Honor, asking
16 for water, a place to stay. They said no.

17 The dog team was called in, Your Honor. They
18 had the helicopters out. At about 6 a.m. he showed
19 -- at 3:30 p.m., Your Honor, the next day he showed
20 back up at Deborah Williams' house. He was talking
21 biblical verse, Your Honor, asking for a place to
22 stay. Mrs. Williams had forethought to call the
23 police once again. They rode by the house.
24 Mrs. Williams told the police that he was in the
25 house and he was in there hiding, Your Honor.

1 I believe it was Ty Cobb and Kirk Corley went
2 inside the house, Your Honor, and found him hiding,
3 at which point he tried to escape, and they finally
4 arrested him, Your Honor.

5 Your Honor, the victim's family is present. I
6 believe John Meadors may want to introduce them at
7 the proper point, Your Honor.

8 **MR. MEADORS:** Your Honor, very briefly, this did
9 for the record happen at the residence of Boyd
10 Sweetenburg, 420 Calvert Drive which is in the town
11 of Bethune. And the cause of death that Dr. Ross
12 would have testified to was that the victim in this
13 case, Francis Horton, who went by Puddin', Your
14 Honor, was his nickname, did die as a result of a
15 gunshot wound to the chest. There's a laceration of
16 his heart and lungs and he basically bled from that
17 and that did cause his death, Your Honor.

18 **THE COURT:** All right. I'll get to some more on
19 it, but let me find out. Mr. Hough, is that what
20 happened the best you can recall?

21 **MR. HOUGH:** All I can say is the only thing that
22 is different, Your Honor, is there was a struggle and
23 the gun just went off.

24 **THE COURT:** Mr. Horton was killed as a result of
25 that?

1 **MR. HOUGH:** Yes, sir.

2 **THE COURT:** The gun was in your hand?

3 **MR. HOUGH:** Well, I mean, both of us had it. He
4 had his hands over the gun and all. He was just
5 shaking me back and forth and the gun went off, Your
6 Honor.

7 **THE COURT:** It was your gun?

8 **MR. HOUGH:** I had the gun, Your Honor.

9 **THE COURT:** All right.

10 **MR. MEADORS:** Your Honor, there were some
11 witnesses who identified him there at the scene and
12 put him at the scene and said that --

13 **THE COURT:** He says he was at the scene.

14 **MR. ANDERS:** Your Honor, the defense attorney
15 out of an abundance of caution did request a
16 competency evaluation for the defendant. He did
17 go --

18 **THE COURT:** Well, I'll get to that.

19 **MR. ANDERS:** Okay, Your Honor.

20 **THE COURT:** I'm trying to find out if Mr. Hough
21 admits that he committed this murder. And even
22 though we're taking the plea to voluntary
23 manslaughter, which may be a more appropriate charge
24 based on what he's told me, but he's pleading guilty
25 to that.

1 **MR. ANDERS:** Correct.

2 **THE COURT:** I find the decision of Michael
3 Anthony Hough to plead guilty to be freely,
4 voluntarily, intelligently made. He's had the
5 representation of a competent attorney in the person
6 of Mr. Riley with whom he's said he is satisfied. I
7 find a factual basis for the plea; and, therefore, I
8 will accept his plea.

9 Mr. Hough, if you disagree with the sentence I
10 give you or the procedure we have just completed, you
11 have ten days from today's date within which to file
12 notice of intent to appeal. Do you understand that?

13 **MR. HOUGH:** Yes, sir.

14 **THE COURT:** Now, let me go back. Were there any
15 recommendations or negotiations in this case other
16 than the reduction in the charge from murder to
17 voluntary manslaughter? Anything else?

18 **MR. ANDERS:** No, Your Honor.

19 **MR. RILEY:** The negotiated sentence.

20 **THE COURT:** And it's my understanding at one
21 point in time there was a notice to seek life without
22 parole. Is that correct?

23 **MR. ANDERS:** That is correct, Your Honor.

24 **THE COURT:** And that is now being withdrawn. Is
25 that correct?

1 **MR. ANDERS:** Correct, Your Honor.

2 **THE COURT:** All right. Now, tell me about his
3 evaluation. Or, Mr. Riley, you can.

4 **MR. RILEY:** Yes, Judge. Out of an abundance of
5 caution I asked that the Court order a psychiatric
6 evaluation. Judge Kinard signed that order. He was
7 evaluated on -- he first went on the 26th of March
8 for an evaluation. They determined that a joint
9 evaluation with the Department of Disabilities and
10 Special Needs needed to be conducted. So that was
11 arranged and he had that joint evaluation on the 24th
12 of April of this year. I have a copy of the report.
13 My copy is all marked up though, Judge.

14 **THE COURT:** Well, it doesn't matter.

15 **MR. RILEY:** I'd like to make it a Court's
16 Exhibit.

17 **THE COURT:** Do you have a copy, Solicitor?

18 **MR. ANDERS:** I do, Your Honor.

19 **MR. MEADORS:** Your Honor, we'll provide a clean
20 copy and substitute it afterwards.

21 **THE COURT:** All right. Well, let me just see
22 it.

23 (Document handed to the Court)

24 **THE COURT:** Is this DDSN or --

25 **MR. RILEY:** It was a joint evaluation --

1 **THE COURT:** Joint. Okay.

2 **MR. RILEY:** -- both by DMH and DDSN.

3 (Pause)

4 **THE COURT:** All right. This is the report of
5 Dr. Maria Domino dated April the 24th, 2009 which
6 finds that Mr. Hough is capable of assisting in his
7 defense and is not currently suffering from any
8 significant mental illness or mental disorder,
9 including mental retardation. So I feel comfortable
10 that he understands the nature of these proceedings
11 and the consequences of his plea.

12 All right. Now, anything further from the
13 State? Does he have a criminal record?

14 **MR. ANDERS:** He does, Your Honor. Just briefly.
15 He has an armed robbery, Your Honor, from 1999. He
16 was convicted, served ten years, Your Honor.

17 **THE COURT:** He got a ten-year active sentence at
18 that time?

19 **MR. ANDERS:** Yes, Your Honor. In 2007 it looks
20 like he had an assault and battery of a high and
21 aggravated nature. He was convicted of that and
22 sentenced to one year. And at that point I believe
23 he was put on -- his parole was revoked also, Your
24 Honor, later in 2007, November, Your Honor.

25 Your Honor, as I stated before, the Horton

1 family is here. I believe Sherry Horton would like
2 to address the Court.

3 **THE COURT:** I'll be glad to hear from them.

4 **MR. ANDERS:** Just briefly, if I could, Your
5 Honor, Wilbur Horton, the father of Francis, is
6 present in the courtroom. Lee Horton, the brother,
7 is here. Sherry Horton, Your Honor, you'll hear from
8 her. Jay Horton, another brother. Peggy Horton,
9 sister-in-law. Latasha Horton is a niece. Jason
10 Horton, a nephew. Angela Wright who was Jason's
11 girlfriend is also present; along with Billy
12 Humphries, Your Honor, who was there that evening.
13 But I believe Sherry Horton would like to address the
14 Court, Your Honor.

15 **THE COURT:** I'll be glad to hear from her. Good
16 morning.

17 **MS. HORTON:** Hi, Your Honor.

18 **THE COURT:** Yes, ma'am.

19 **MS. HORTON:** I'm Sherry Horton. I was Francis'
20 sister. And since Puddin' passed away our family has
21 changed. He meant a lot to every single member of
22 our family and he always knew how to make everybody
23 feel better. He always knew how to make us laugh.
24 And we loved him more than anything in the world.
25 And he's taken him away from us and it's broke our

1 hearts. He has a good father, friends. He was a
2 good father, friend, son, brother, brother-in-law,
3 and he deserved to live. And we love him and miss
4 him very much. And that goes by that he don't
5 think -- a day don't go by that we don't think of
6 him.

7 **THE COURT:** I understand, ma'am. Thank you,
8 ma'am. Yes, ma'am. I'm sorry for your grief.

9 **MR. MEADORS:** Judge, I just have a few --
10 obviously the victim, Puddin', put himself in a bad
11 situation, but he still didn't deserve to die. And
12 after talking with Phil or Investigator Crawford, the
13 family and Jason Anders working on this, we all
14 thought that a voluntary and a 23 was the right thing
15 in this situation to save a trial, and we just
16 thought it was the right thing to do. So we'd
17 respectfully ask you to consider the negotiated
18 sentence of 23 years. And I'd like to publicly thank
19 the Kershaw County Sheriff's Department for the
20 outstanding job they did in this case. Thank you.

21 **THE COURT:** Mr. Riley.

22 **MR. RILEY:** Judge, I'd like to begin by saying
23 that part of what I'm going to be telling the Court
24 might be a little painful to the Horton family. I
25 don't mean anything negative. I think it's important

1 the judge understand these facts. I don't mean to
2 minimize this tragedy in any way. I just wanted to
3 say that to the members of the family to begin with.

4 **THE COURT:** Yes, sir. We understand.

5 **MR. RILEY:** Judge, this incident took place at
6 the home of a known drug dealer in Bethune.
7 Mr. Humphries who is present in the courtroom drove
8 the victim there because the victim wanted to buy
9 drugs.

10 The autopsy that was conducted on the victim
11 showed that in his clothing or in his pockets he had
12 a plastic pouch containing .27 grams of cocaine. He
13 also had about his person a crack pipe. His blood
14 alcohol level was .061. He tested positive for
15 cocaine. Also the autopsy showed that he had in his
16 system a substance known as Cokethaline which is
17 formulated in the body only when alcohol and cocaine
18 are ingested simultaneously.

19 Furthermore, as Mr. Hough indicated to the
20 Court, during the autopsy they did -- they tested Mr.
21 Horton's hands for gunshot residue. They did
22 detect and find gunshot residue on Francis Horton's
23 left palm which confirms the fact that there was a
24 struggle during the confrontation between Mr. Hough
25 and Mr. Horton.

1 Judge, Mr. Hough is 44 years old. As the
2 evaluation indicates and as he's confirmed to me in
3 our consultations, he's been a user of alcohol,
4 marijuana and cocaine ever since his mid teens. It
5 was his habit during most of his adult life to
6 consume two or more bottles of liquor a day, two or
7 more fifths per day. He used marijuana and cocaine
8 every opportunity that he got. He also confessed to
9 a history of huffing, both gasoline and paint.

10 During the evaluation they determined that he
11 clearly met the criteria for poly substance
12 dependence. His work history has been sporadic,
13 mostly manual labor. Because of his addictions, he
14 seldom held a job for more than a couple of months.
15 He mostly did odd jobs for known drug dealers and got
16 paid either in cash or in drugs.

17 His wife is deceased and he has three
18 stepchildren. With him here today are two of his
19 sisters. Immediately to Mr. Hough's right is
20 LouEsther Henry and to Ms. Henry's right is Tanya
21 Washington. At the appropriate time they may wish to
22 address the Court, and I would ask that you allow
23 them that opportunity.

24 This is an old tale, Judge. It shows what
25 cancer in our society drugs are. Everyone there that

1 night was using drugs or attempting to buy drugs or
2 interested in getting drugs or however you want to
3 characterize it.

4 Mr. Hough that night had had several hits of
5 crack cocaine. He and Mr. Horton, as Mr. Hough has
6 already indicated, got into a struggle. Which
7 apparently there's some testimony in dispute. But
8 apparently it was not a little struggle. It was a
9 significant struggle. Mr. Horton grabbed Mr. Hough's
10 arm under his right arm. Mr. Hough was behind him.
11 He was swinging Hough around trying to dislodge the
12 gun and the gun went off.

13 Mr. Hough is --

14 **THE COURT:** Where is the point of entry?

15 **MR. RILEY:** Just below the right nipple, about
16 here.

17 **THE COURT:** Frontal?

18 **MR. RILEY:** Yes, sir.

19 **THE COURT:** Okay.

20 **MR. RILEY:** Mr. Hough is standing up and taking
21 responsibility for what happened. He has said to me
22 many times that he deeply regrets what happened. We
23 can't ever undo a tragedy of this nature. If it were
24 in his power, he would undo it. It's just a terrible
25 tragedy that this happened. Mr. Hough might wish to

1 address the Court as well as his sisters. Thank you,
2 Judge.

3 **THE COURT:** All right.

4 **MR. RILEY:** I do -- oh, one other thing, Judge.
5 As far as time served, as of today, he's been
6 incarcerated four --

7 **THE COURT:** What is the date of arrest? Date of
8 arrest.

9 **MR. RILEY:** April the 17th of 2008. As of
10 today, that adds up to 468 days.

11 **THE COURT:** All right. Mr. Hough, do you have
12 anything you wish to say?

13 **MR. HOUGH:** Yes. I would just like to say to
14 the Horton family that I'm truly deeply sorry for
15 what happened and I really didn't mean for it to
16 happen that way. But I -- I really am sorry. And I
17 apologize from the bottom of my heart.

18 And also to my family, I'd like to apologize to
19 them for taking them through this also. And when
20 it's all over with, I'll be a better man. And I'm
21 seeking -- right now I'm seeking psychiatric help.
22 Mr. Palatay told me a lot of things, which is a
23 psychiatrist, and told me that I was bipolar which I
24 never knew about myself.

25 **THE COURT:** Hmm.

1 **MR. HOUGH:** And I will continue to get help in
2 the future.

3 **THE COURT:** All right. Ladies.

4 **MR. HOUGH:** Thank you.

5 **MS. HENRY:** Well, I would just like to say,
6 Judge, we came from a good family.

7 **THE COURT:** You're Ms. Henry?

8 **MS. HENRY:** Yes, sir. And my mom and daddy is
9 in their eighties. And we are sorry because we went
10 through something just like this. We lost a nephew
11 in the same situation. So deeply, this family has
12 been through something for a very long time now
13 because of drugs. And I know it's a very bad thing.
14 When you do drugs and alcohol, it's a chance you take
15 with your life.

16 And to the Horton family, we know how you feel.
17 We lost Chance the same way. He was only 23 years
18 old. And I just pray that God will forgive him for
19 being in the wrong place at the wrong time. And both
20 of these, Michael and my baby brother, this is my
21 baby sister. Like I stand here, I'm the oldest. And
22 I'd just like to just say that just forgive us, just
23 forgive us all, my brother for being in the wrong
24 place at the wrong time. And we're truly sorry that
25 it happened because we know how you guys feel. And

1 we're just sorry.

2 **THE COURT:** Thank you, Ms. Henry.

3 **MS. WASHINGTON:** I would just like to say to the
4 Horton family we are sorry that you lost your loved
5 one. And the person that did that was not my brother
6 at that time.

7 **THE COURT:** Anything else from the State?

8 **MR. MEADORS:** Nothing further.

9 **MR. ANDERS:** No, sir. Thank you, Your Honor.

10 **THE COURT:** From the defense?

11 **MR. RILEY:** No, sir.

12 **THE COURT:** All right, Mr. Hough. The sentence
13 of the Court is you be committed to the State
14 Department of Corrections for a period of 23 years.
15 You're given credit for time served since April 17th,
16 2008. Good luck to you, sir.

17 **MR. HOUGH:** Thank you, Your Honor.

18 **MR. RILEY:** Thank you, Your Honor.

19 **MR. ANDERS:** Thank you, Your Honor.

20 (Whereupon, the proceedings are concluded)
21
22
23
24
25

CERTIFICATE OF REPORTER:

STATE OF SOUTH CAROLINA)

COUNTY OF KERSHAW)

I, Jenny H. Williams, 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 guilty plea of the captioned case, relative to appeal, in the Court of General Sessions for Kershaw County, South Carolina, on the 28th day of July, 2009.

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

December 28, 2009

Jenny H. Williams

Jenny H. Williams, Court Reporter

577 BY

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FORM 5

STATE OF SOUTH CAROLINA

County of Kershaw

Michael Anthony Hough #255833

Full name and prison number (if any) of Applicant

v.

State of South Carolina

IN THE COURT OF COMMON PLEAS

2009-CP-28-1346

APPLICATION FOR
POST-CONVICTION RELIEF

FILED FOR RECORD
2009 NOV 20 AM 11:34

INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention Kershaw County Detention Center
2. Name and location of Court which imposed sentence South Carolina
7th Judicial Circuit 121 Broad Street Camden 29020
3. Name(s) of co-defendant(s) (if any) Ricky Lee Hough
Rodney Donell Baskin
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
(a) 2002-GS-28-0847, K 143977, 16-3-10, 10116
(b) Murder, FEL/Exm (V)

ATTEST True, Correct & Certified
Copy of Original on File in this
Court

Dea. Michael
Clerk of Court Kershaw County

- (c) 14-3-5c
5. The date upon which sentence was imposed and the terms of the sentence:

- (a) 7-28-09
- (b) 23 years to SOC
- (c) violent

6. 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 ☐

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

Did not Appeal

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

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

i.

ii.

iii.

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

i.

ii.

iii.

- (c) the date of each such result:

i.

ii.

iii.

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

i.

ii.

iii.

9. If you answered "no" to (7), state your reasons for not so appealing:

- (a) time expired

- (b) First PCR

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2009 NOV 20 AM 11:34
JESSIE E. DONALD
CLERK OF COURT
HENRICH COUNTY, S.C.

- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) Ineffective Assistance of Counsel

(b) _____

(c) _____

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

(a) SEE Attached

(b) _____

(c) _____

12. Prior to this application have you filed with respect to this conviction:

- (a) any petition in a State Court under South Carolina Law? none
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? none
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? none
- (d) any other petitions, motions or applications in this or any other Court? none

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

(a) the specific nature thereof:

i. same As Above

ii. _____

iii. _____

iv. _____

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

i. same As Above

ii. _____

iii. _____

iv. _____

FILED FOR RECORD
2009 NOV 20 AM 11:34
JUDGE HODGINS
CLERK OF COURT
SOUTH CAROLINA
JULIA A. COFFIN, S.C.

2009 NOV 20 AM 11:34

CLERK OF COURT
KERSHAW COUNTY, S.C.

(c) the disposition thereof:

i. same As previous

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. same As Aboveii. noneiii. noneiv. none

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

i. Same As Aboveii. noneiii. noneiv. none

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

No

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

(a) which grounds have been presented:

i. noneii. noneiii. none

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

i. noneii. noneiii. none

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

(a) First "PCL"

(b) _____

(c) _____

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

(a) your arraignment and plea? yes

(b) your trial, if any? yes

(c) your sentencing? yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? no

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

no

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

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

i. Neil Riley

1121 Broad St.

ii. Camden St. 29020

iii. _____

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

i. Bond Hearing

ii. preliminary hearing

iii. Sentencing

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2009 NOV 20 AM 11:34
CLERK OF COURT
SHERMAN COUNTY, S.C.

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

Sentence Correction
Time Out
New Trial

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

no

STATE OF SOUTH CAROLINA)

County of Kershaw)

VERIFICATION

JUDITH HODGKINS
 CLERK OF COURT
 KERSHAW COUNTY, S.C.

2009 NOV 20 AM 11:34

FILED FOR RECORD

I, Michael A. Hough, 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.

Michael Hough

SWORN to and subscribed before me this 18
 day of November, 2009.

Jennifer C Franklin (L.S.)
 Notary Public

My Commission Expires: 01-31-2010

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FILED FOR RECORD
2009 NOV 20 AM 11:34
CLERK OF COURT
JERSEY COUNTY

APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF

I, Michael Hough, 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 said proceeding or give security thereof.

Michael Hough
Applicant

SWORN or affirmed to and subscribed before me this
18 day of November, 2009.

Jennifer C Franklin
Notary Public

My Commission Expires: 01/31/2010

State of South Carolina
County of Berkeley

In the Court of Common Pleas

Michael Anthony Hough
Applicant

255832

C/A

2009-CP-28-1346

An Amendment to the Post Conviction

Relief Application

State of South Carolina

Respondant

FILED FOR RECORD
2009 NOV 20 AM 11:34
CLERK OF COURT
BERKELEY COUNTY, S.C.

This matter comes before this Honorable Court
Pursuant to An Application for Post-Conviction
Relief.

{ Presentation of the Issue }

0 Ineffective Assistance of Counsel

A Court Appointed Counsel was Ineffective By
Coercing Applicant into A Plea.

{Presentation of the Issue with
Citation of law in support}

State 16-3-60

FILED FOR RECORD
2009 NOV 20 AM 11:34
JULIE McDONALD
CLERK OF COURT
KERSHAW COUNTY, S.C.

Evidence of A struggle between
A Defendant and A Victim over A
Weapon is sufficient for sub-
mission of an involuntary manslaughter
instruction to the Jury.

{State v. Patrick} 289 S.C. 301,
345 S.E. 2d 481 (1986)

Error and Coercion Applicant
Would not have plead Guilty.

Sworn or Affirmed Before Me

This 18 Day of November 2009

Quincy C. Frankler

Notary Public for South Carolina

My Commission Expires 01-31-2010

Respectfully Submitted

Michael A. Hough

Michael Hough

STATE OF SOUTH CAROLINA)
COUNTY OF KERSHAW)

IN THE COURT OF COMMON PLEAS

2009-CP-28-1346

HOUGH Michael A, # 255832,)

Applicant,)

v.)

RETURN

State of South Carolina,)

Respondent.)

The Respondent, making its Return to the application for post conviction relief (PCR) filed 11/20/2009, 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 Kershaw County Clerk of Court. The Applicant was (according to the application) represented by Neil Riley, Esquire. On 7/28/2009, the Applicant pled guilty before The Honorable G. Thomas Cooper, Jr.. The Applicant had been indicted and/or pled guilty to the following: Murder - (2008-GS-28-0847). According to the South Carolina Department of Corrections, the Applicant is serving a 23 year sentence for "Voluntary Manslaughter."

II.

Attached herewith and incorporated herein are the records of the Richland County Clerk of Court regarding the subject conviction(s), the Applicant's records from the South Carolina Department of Corrections, and the guilty plea transcript. The Respondent reserves the right to

amend this Return upon receipt of any relevant materials or submit an amended Return to reflect any amended allegations and/or to provide a more detailed procedural history.

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.

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 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, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance 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. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

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 the record does not conclusively refute. **Accordingly, the Respondent requests an evidentiary hearing to fully resolve the issue(s).** See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

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

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held. The Respondent will coordinate with the Applicant's attorney who is, according to the Respondent's file, Jeremy A. Thompson, Esquire regarding when the hearing should be set.

Respectfully submitted,

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

March 19, 2010

STATE OF SOUTH CAROLINA
COUNTY OF KERSHAW

)
) IN THE COURT OF COMMON PLEAS

2009-CP-28-1346

Michael A. Hough, 255832

Applicant,

vs

State of South Carolina,

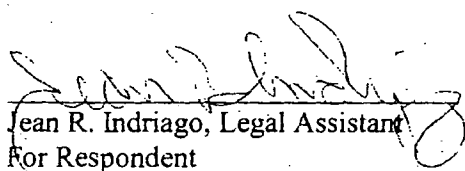
Respondent.

)
)
)
) AFFIDAVIT OF SERVICE BY MAIL
)
)
)
)

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Return in the above-captioned matter on the following person(s) by depositing same in the United States mail, postage prepaid:

Jeremy A. Thompson, Esquire
3614 Landmark Drive, Suite D
Columbia, South Carolina 29204

DATED this 22nd day of March, 2010.


Jean R. Indriago, Legal Assistant
For Respondent

State of South Carolina

Court of Common Pleas

County of Richland

2009-CP-28-01346

Michael A. Hough

-VS-

The State of South Carolina

TRANSCRIPT OF RECORD

June 7, 2011

Columbia, South Carolina

B E F O R E:

The Honorable James R. Barber, III, Judge.

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

Jeremy A. Thompson, Esquire
Attorney for the Applicant

Brian T. Petrano, Esquire
Attorney for the State

Daphne D. Helms
Circuit Court Reporter

I N D E XWitnessMichael A. Hough

Direct Examination by Mr. Thompson.....5
Cross-Examination by Mr. Petrano.....23

Cornelius J. Riley

Direct Examination by Mr. Thompson.....25
Cross-Examination by Mr. Petrano.....34

E X H I B I T S

<u>No.</u>	<u>Description</u>	<u>ID.</u>	<u>EV.</u>
P-1	letter to Mr. Hough from Mr. Riley		18

1 The Court: Thank you. Be seated if you would. All
2 right. What we got? How do you pronounce that? Hough?

3 Mr. Hough: Yes, sir.

4 The Court: Hough?

5 Mr. Hough: Yes, sir.

6 The Court: All right. Is that what we're going to do
7 first?

8 Mr. Petrano: Yes, sir.

9 The Court: Mr. Hough, do you want to come on over here,
10 please, sir? Good morning or good afternoon.

11 Mr. Thompson: Good afternoon, Judge.

12 The Court: How are you doing? All right. Mr. Petrano,
13 are you ready to proceed?

14 Mr. Petrano: May it please the Court, Your Honor? This
15 is a Kershaw County PCR. It's 2009-CP-28-01346, Mr. Michael
16 Hough. There was a PCR application filed November 20th,
17 2009. Mr. Hough pled guilty before Judge Cooper - that's G.
18 Thomas Cooper - on July 28, 2009. He was represented at that
19 time by Mr. Neil Riley of the Kershaw P.D.'s office who, for
20 the record, is here present in the courtroom.

21 He had been indicted by the October 2008 term of the
22 Kershaw County grand jury. That's 2008-GS-28-00847. He was
23 indicted for murder. He pled to a negotiated sentence of
24 23 years to voluntary manslaughter. So he got 23 years.

25 There was no direct appeal. I'll turn it over to Mr. Jeremy

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1 A. Right.

2 Q. It was a one-year sentence.

3 A. Right.

4 Q. And, Your Honor, I think the S.C.D.C. records will
5 reflect - they're in your packet - that he was moved to
6 Lieber. He came back to Kershaw County on April 1st of 2009.
7 You were housed out at Lieber which is in Ridgeville?

8 A. Down towards Charleston, yes.

9 Q. So pretty far away from Camden.

10 A. Yes.

11 Q. And while you were housed at Lieber, did Mr. Riley come
12 to visit you at all while you were at Lieber?

13 A. No contact.

14 Q. Did you get brought up to Kershaw at any point in time?
15 Did you talk to him there?

16 A. They brought me up in February and served me a docket
17 paper stating that I was being -- coming up for trial on
18 March the 16th. Mr. Neil Riley come in there and met with me
19 about -- I'd say about 30 minutes they kept me there.

20 Q. And that was your first meeting with Mr. Riley on this
21 case.

22 A. Yes, sir.

23 Q. And you were at some point again - I think the S.C.D.C.
24 records reflect April 1st - but you were moved back to
25 Kershaw correct -- Kershaw Detention Center at some point.

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1 A. As I -- when I maxed out. My max-out date was April the
2 1st.

3 Q. 2009?

4 A. 2009.

5 Q. And that's still two and a half months before you were
6 supposed to go to trial. You ended up going to trial in
7 front of Judge Kinard; right?

8 A. Yes.

9 Q. In that two-and-a-half, three-month period, how many
10 times would you say that Mr. Riley met with you at the
11 detention center?

12 A. Once.

13 Q. How long did that meeting last?

14 A. It lasted about 40 minutes.

15 Q. Were you upset?

16 A. Very.

17 Q. And was that part of the reason why you asked Judge
18 Kinard to remove Mr. Riley as your attorney?

19 A. Yes.

20 Q. And, in fact, you brought that up and, Your Honor, I'm
21 referring to page 7, lines 4 through 15, of the June 22nd
22 transcript. That's when you -- you brought that up to the
23 judge how long he had met with you; right?

24 A. Yes, sir.

25 Mr. Thompson: May I approach the witness, Your Honor?

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1 The Court: You may.

2 By Mr. Thompson:

3 Q. Is that you?

4 A. Yes.

5 Q. Read those three lines right there, lines 13 through 15.

6 A. 13 through 15? And I'm talking about three hours, Your
7 Honor, three hours out of a year, and two months. That is
8 not -- that is not no justice.

9 Q. And, again, that was page 7, lines 13 through 15, of the
10 June 22nd transcript. Did Judge Kinard grant that motion?

11 A. No, sir.

12 Q. Was Judge Kinard going to require you to go to trial
13 with Mr. Riley?

14 A. Yes, sir.

15 Q. And what ended up happening to that trial?

16 A. Well, it -- in some kind of way it got dismantled
17 because one of the jurors, Mr. Riley said after we done
18 picked the jury -- one of the jurors had went back and talked
19 about my case with the other jurors, and so in some kind of
20 way it got dismantled. They put me on hold, and then that
21 was -- that was about it for that.

22 Q. And Judge Kinard continued the case?

23 A. Yes.

24 Q. Now, during your short meetings with your attorney prior
25 to this trial on June 22nd, what did you tell your attorney

1 had occurred the night of the incident?

2 A. Well, at first I had told him that I was -- I was over
3 to my sister-in-law's house and that she could verify where I
4 was at because at first I know Mr. Riley was not going to
5 represent me in the right way because prior engagement with
6 him in that courtroom... He's -- basically he's a lawyer
7 that's tried to get you to plead. He's coerces you to plead
8 all the time. That's all his clients -- he all the time is
9 trying to coerce you to plead.

10 So I come back with a story that, you know, my sister-
11 in-law, she knowed I was out in the yard after the incident
12 had took place. Maybe that would fly.

13 Q. Did that fly?

14 A. No.

15 Q. How did that -- I guess how did that come about? How
16 did you learn that that was not going to work?

17 A. Well, he had said that he had got in contact with my
18 sister-in-law and that she said that I was lying on her.

19 Q. What did you then tell your attorney had happened the
20 night of the incident?

21 A. Well, then I told him about really what happened, you
22 know. I told him about, you know, I was home and that I'd
23 been home about all day long and I left around about six or
24 so, and I went by the country store and got me a couple of
25 bottles of -- mini bottles of vodka, took me a couple of

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1 drinks, and went over to a couple of guys house, little
2 small-time peddlers, dope dealers, and they said, "Man, we
3 got a job to do, man, and we're going to give you a 40 if
4 you'll help us out. Are you with us?" I said, "Yeah, man, I
5 can do that." Basically I hadn't had a hit of crack all day.
6 I was indulging in crack, liquor, marijuana. So, yeah, I was
7 down, you know.

8 And so they started telling me about they was going to
9 go to Mr. Raleigh Baskins' (phonetic) house, and then after
10 he leave they was going to break in and they was going to
11 steal his money and drugs.

12 Q. Let me -- let me stop you right there. Who is Mr.
13 Baskins?

14 A. Mr. Baskins is a known dope dealer in my neighborhood.

15 Q. And is he the victim in this case?

16 A. No.

17 Q. Is he the person that got shot?

18 A. No.

19 Q. Okay. Did you go to Mr. Baskins' house?

20 A. Yes, we went by Mr. Baskins' house. We walked over
21 there. We was on another block, so we walked by Mr. Baskins'
22 house and he had a -- he had a house full of people at the
23 time. So, therefore, we couldn't break in his house and
24 steal his dope and steal his money. So we walked -- we
25 walked down I'll say about 75 yards, a hundred yards away,

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1 and we sat in an old abandoned store yard and we just sat
2 there and talked for awhile. And them guys, they gave me a
3 hit of crack. So after they gave me a hit of crack, you know
4 -- and I said, "Well, shoot, I'll just go rob him straight
5 up," just like that. So they had---

6 Q. Let me stop you. Did you then rob Mr. Baskins?

7 A. No.

8 Q. Did you attempt to rob anybody?

9 A. No.

10 Q. Why did you not rob anybody?

11 A. Because after -- after I got there and we stayed in the
12 store yard for awhile -- so I left and previous they wanted
13 -- they wanted to sell the pistol. They had a pistol with
14 them. It was a .22 revolver, and they wanted to get rid of
15 it earlier during the week. So I took the pistol with me.
16 So when I got to Mr. Baskins' house, that's when Mr. -- I
17 went to the car. I guess they would have brought Mr. Horton
18 there; right?

19 Q. Let me stop you. What car?

20 A. It was a car there with Mr. Humphrey in it. He was one
21 of the -- he was one of the witnesses in this case.

22 Q. And where was this car parked?

23 A. I'll say it was -- it was in his -- in his backyard.

24 Q. And did you then try and walk up to the house?

25 A. I walked up to the car and talked to Mr. Humphrey. He

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1 had the window rolled up, and I asked him -- I said, "Man, do
2 you want me to go in there and get the dope for you?" He
3 said, "No. Somebody is already in there," like that. So I
4 walked away from the car, and that's when Mr. Horton was
5 coming out of the house.

6 Q. And is Mr. Horton the victim in this case?

7 A. Yes.

8 Q. And what did you do when you encountered Mr. Horton?

9 A. It was me and Mr. Horton. When Mr. Horton -- when I got
10 up to Mr. Horton, I had the pistol in my hand. I said, "Man,
11 I got a pistol for sale." And he said, "Man, let me see it."
12 I said, "No, you can't see it," and the next thing I know Mr.
13 Horton done grabbed this pistol. He grabbed my hand and he
14 sidestepped me, and Mr. Horton started slinging me, slinging
15 me, and the gun just went off.

16 Q. So you and Mr. Horton were fighting over the gun.

17 A. Yes.

18 Q. Is that what you told your attorney happened?

19 A. Yes.

20 Q. You told him about trying to sell the gun.

21 A. Yes, sir.

22 Q. When you told Mr. Riley this account---

23 A. Yes.

24 Q. ---what did he tell you I guess was the best possible
25 outcome at your trial?

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1 A. Basically he just -- he thanked me for my honesty, and
2 then he was saying that my best option was to go ahead and
3 take a plea. And I really thought by telling him that, you
4 know, he would at least buy me some more time and try to
5 investigate that with the two guys that I was with and it
6 wasn't even my idea in the first place of even going to Mr.
7 Baskins' house. I thought he might would have, you know,
8 investigated that a little bit and asked for more time or
9 something like that, but he was -- he was ready to proceed
10 and he really just throw me to the wolves, and he hadn't even
11 really talked to me three hours on my whole case.

12 And before -- before we even went into the courtroom
13 right before I even made my motion, he just had -- he just
14 had that Friday had given my motion of discovery. I had
15 wrote---

16 Q. Let me stop you.

17 A. Uh-huh.

18 Q. What Friday? Which Friday are you talking about?

19 A. It was the weekend before that Monday before court
20 started.

21 Q. But before Judge Kinard.

22 A. Yes.

23 Q. Okay. So this is back when you were going in front of
24 Judge Kinard?

25 A. Yes.

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1 Q. This is when you finally got your discovery.

2 A. Yes, that Friday.

3 Q. And had you been requesting it all along?

4 A. Yes. They had brought me from Lieber at the time. I
5 wrote him. As a matter of fact, I wrote him and asked him
6 for it, and he wrote me back and he stated that, you know,
7 for me to be patient because murder trials takes a long time.
8 They don't -- they don't -- they're not -- don't come up that
9 fast. So he advised me that just to wait, you know. He
10 stalled by giving me my motion of discovery really is what he
11 did until -- and I'm talking about I didn't even have time
12 enough to even see what really they had against me, you know
13 what I mean, the State had against me.

14 Q. Now, even though that was leading up before the trial,
15 you had a month before the plea, right?

16 A. Right.

17 Q. So you had -- you had that intervening period of time to
18 go over the discovery.

19 A. Well, after they wouldn't let me fire Mr. Riley, I ain't
20 had no other choice. I really wasn't comfortable with Mr.
21 Riley because from previous dealings with Mr. Riley I know
22 that, you know, he's not going to represent me to the best of
23 his ability because he's just -- he's just a public defender
24 and he really -- he really -- he really is not a good lawyer.

25 Q. Going back to the issue with trying to sell the weapon

1 to the victim---

2 A. Yes.

3 Q. ---how did you let Mr. Riley know that that was the
4 account of what happened?

5 A. I wrote Mr. Riley.

6 Q. And you told him this?

7 A. Right.

8 Mr. Thompson: May I approach the witness, Your Honor?

9 The Court: Sure.

10 By Mr. Thompson:

11 Q. Do you recognize that document?

12 A. Yes.

13 Q. Could you describe it? Just in general, what is it?

14 A. Well, that's just him telling me about, you know, going
15 to Mr. -- just like I told him, about going to Mr. Raleigh
16 Baskins' house with the gun and the struggle and the man
17 died.

18 Q. What is it? What is this?

19 A. What is it?

20 Q. Yeah, what is it? Is it a -- is it a -- is it a letter?

21 A. Yes.

22 Q. Who was the letter written by?

23 A. Mr. Riley.

24 Q. To whom?

25 A. To me.

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1 Q. And what's the date on it?

2 A. July the 17th, 2009.

3 Mr. Thompson: Your Honor, I'd like to admit this as
4 Applicant's 1.

5 Mr. Petrano: Without objection.

6 The Court: So admitted.

7 (Plaintiff's Exhibit 1 was received in evidence.)

8 By Mr. Thompson:

9 Q. If we could, Mr. Hough, read the last -- read the
10 paragraph beginning with, "Please remember that."

11 A. "Please remember that, as you told me, you went to
12 Rodney's house with a gun."

13 Q. Keep going.

14 A. Go on?

15 Q. Read the whole paragraph.

16 A. "You had the gun out and went and" --- "you had the gun
17 out and it went off in a struggle, and a man died. If the
18 prosecution can prove those three things as I believe that --
19 as I believe they can, the jury will have no choice but to
20 convict you of at least voluntary manslaughter which the
21 State has offered."

22 Q. Does that paragraph pretty succinctly summarize his
23 advice to you about taking the plea in this case?

24 A. Yes, sir.

25 Q. Was he basically telling you that because voluntary

1 manslaughter -- did he tell you that voluntary manslaughter
2 was the best you could get?

3 A. Yes.

4 Q. At trial?

5 A. Yes.

6 Q. And that's why you should take the plea.

7 A. Yes.

8 Q. Did Mr. Riley ever go over with you the possibility that
9 your testimony could lead to a charge of involuntary
10 manslaughter?

11 A. No, sir.

12 Q. Did the words involuntary manslaughter ever come up?

13 A. I brought it up.

14 Q. And what was his response?

15 A. He said I didn't fit that criteria.

16 Q. Did he tell you why you didn't fit that criteria?

17 A. He said because of my previous charges.

18 Q. And so based upon his advice, is that why you took the
19 plea to voluntary manslaughter?

20 A. I had no other choice.

21 Q. Because voluntary was the best you were going to do at
22 trial anyway.

23 A. Yes.

24 Q. After you got to prison, did you take it on your own
25 initiative to research the involuntary manslaughter?

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1 A. Yes, sir.

2 Q. After doing that research, what did you do?

3 A. I got a case and that's when I filed for -- for -- for
4 this PCR hearing.

5 Q. Defense counsel never went over with you that the law is
6 that involuntary manslaughter -- that the evidence of a
7 struggle over a gun can lead to a charge of involuntary
8 manslaughter?

9 A. No, he didn't.

10 Q. Did anything like that ever come up?

11 A. No, sir, it did not.

12 Q. Had you known that that was the law, would you have ever
13 pled guilty?

14 A. No, sir.

15 Q. Had you known that you could testify on your own behalf
16 and argue and say there was a struggle over the gun and it
17 just went off and argue that you should only be convicted of
18 involuntary manslaughter, would you have pled guilty?

19 A. No, sir.

20 Q. And is that what you want here today is the opportunity
21 to go back and tell your side of the story to a jury?

22 A. Yes, sir.

23 Q. Would you have even wanted to do that even though you
24 didn't have any faith in Mr. Riley?

25 A. No, sir.

1 Q. Would you have gone to trial even with Mr. Riley?

2 A. No, sir.

3 Q. You would have always taken the plea?

4 A. I'm sorry. I'm sorry. Restate that question.

5 Q. If Mr. Riley had given you the advice that you could go
6 to trial and present involuntary manslaughter, would you have
7 gone to trial with Mr. Riley?

8 A. Oh, yes.

9 Q. Would you have felt that he was more on your side at
10 that point?

11 A. As I -- as I had done investigated with the cases, you
12 know, and I have had time enough to get in the law library
13 and I could have coached him along but even -- you know, yes,
14 I would have.

15 Q. Now, you understand - and we've gone over this - that if
16 you overturn this case, you go back to square one. You go
17 back to a charge of murder. Do you understand that?

18 A. Yes, sir.

19 Q. And you're doing a 23-year sentence for voluntary
20 manslaughter right now; right?

21 A. Yes, sir.

22 Q. And murder carries a mandatory minimum of 30 years in
23 prison.

24 A. Yes, sir.

25 Q. Do you understand that?

1 A. Yes, sir.

2 Q. And a maximum of life.

3 A. Yes, sir.

4 Q. Understanding all of that, do you still want to go
5 forward with this hearing?

6 A. Yes, sir.

7 Q. Do you understand that you would be reopening that
8 murder charge?

9 A. Yes, sir.

10 Q. And that the jury might not believe you, might not buy
11 your side of the story, might not find you guilty of
12 involuntary manslaughter, and they might find you guilty of
13 voluntary or murder and you'd face more time than you're
14 currently serving. Do you understand that?

15 A. Yes, sir.

16 Q. And you still want to go forward with this hearing?

17 A. Yes, sir.

18 Q. I think I've gone over everything that we've talked
19 about before to raise at this hearing, but this is your one
20 and only shot at a PCR. So if there's anything you'd like to
21 tell the judge, I'd ask that you do it now.

22 A. I would just like to say that I would like to have the
23 opportunity to present my case. I didn't go there
24 intentionally to kill nobody. It hurts me to today that
25 somebody died, and if Mr. Horton -- if I could bring him

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1 back, I would. But I'm shocked and nervous. I'm on
2 medication. I'm going through a lot of turmoil and it's
3 because of that, and I just want my chance just to let them
4 know that I didn't mean -- I didn't mean for that to happen,
5 and if Mr. Horton wouldn't have grabbed that gun and tried to
6 take it from me, he wouldn't be dead.

7 Q. And just to go back over the facts one more time, did
8 you -- once you went up to sell that gun, were you planning
9 on robbing anybody that night?

10 A. No, sir.

11 Q. Did you intentionally point the gun at Mr. Horton?

12 A. No, I did not.

13 Q. Did you intentionally point the gun at him and fire at
14 him?

15 A. No, sir.

16 Q. Did it go off during the struggle?

17 A. Yes, sir.

18 Mr. Thompson: No further questions.

19 Cross-Examination

20 By Mr. Petrano:

21 Q. You didn't mean to kill anybody, so why did you run off?
22 Why didn't you stay there and tell the cops and explain
23 everything, try to give him CPR -- because he wasn't dead,
24 was he?

25 A. No, sir, he wasn't. I was scared and I was high. I

1 wasn't in my right mind.

2 Q. Why were you scared?

3 A. I was scared because the gun went off.

4 Q. How many armed robberies do you have? How many priors?

5 A. I have one.

6 Q. All right. What other priors have you got?

7 A. That's it.

8 Q. No other felonies?

9 A. No, sir.

10 Q. You're not lawfully allowed to carry a firearm, are you?

11 A. No, sir.

12 Q. Even if everyone here was to believe your story - and
13 I'm just saying that to ask the next question - even if he
14 did try to take the gun from you, why were you trying to take
15 it back? Why was there a struggle, quote?

16 A. I wasn't trying to. He took control of the gun. He
17 grabbed it. He---

18 Q. So he took control of the gun by choice.

19 A. He took control of the gun. When he -- when he grabbed
20 the gun, he sidestepped me and he started slinging me. My
21 right arm -- my right hand and arm was up on his right -- up
22 under his right armpit, and while he was slinging me, the gun
23 just went off, sir.

24 Q. You were high on crack?

25 A. Yes, sir.

1 Q. Did you know that it was a stolen gun that they had
2 given you?

3 A. No, sir.

4 Mr. Petrano: Nothing further.

5 The Court: Anything?

6 Mr. Thompson: Nothing, Your Honor.

7 The Court: All right. Thank you. You may step down.

8 Mr. Thompson: Your Honor, the applicant would call Neil
9 Riley.

10 Cornelius J. Riley, after being duly sworn,
11 testified as follows:

12 The Court: All right. Mr. Riley, tell us your full
13 name, please.

14 The Witness: My name is Cornelius J. Riley. I go by
15 Neil.

16 Direct Examination

17 By Mr. Thompson:

18 Q. How are you doing this afternoon, Mr. Riley?

19 A. Fine. Thanks.

20 Q. I promise to try and keep you not -- or try to not keep
21 you too long. All right?

22 A. Yes, sir.

23 Q. Do you recall your representation of the applicant in
24 this case?

25 A. Yes, sir.

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1 Q. Were you the chief public defender for Kershaw County at
2 the time?

3 A. Yes, sir, I was.

4 Q. And are you still in that position?

5 A. Yes, sir.

6 Q. Mr. Hough kind of described your relationship. Would
7 you agree with him? Was it a rocky relationship? Did you
8 have problems with him?

9 A. It wasn't a rocky relationship until just before trial
10 and particularly the first -- the Monday of the week we were
11 set to begin jury selection.

12 Q. And at that point was that the first time you were aware
13 that there were problems?

14 A. He had not really criticized my representation of him,
15 questioned, challenged, expressed disappointment up until
16 that point.

17 Q. He obviously wasn't happy at the outset of that hearing
18 on Monday though, was he?

19 A. He was not.

20 Q. Was -- to the best of your recollection, how many times
21 would you say you met with Mr. Hough prior to that trial?

22 A. If I could refresh my memory?

23 Q. (Mr. Thompson nodded affirmatively.)

24 A. I met with him on April 25th of 2008. That was, by the
25 way, two days after the order of appointment had come into my

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1 office. That was a bond hearing, a motion to have bond set
2 on the charge of murder. The court -- in fact, I think it
3 was -- I believe it was Judge Barber who denied bond, and
4 there was also a violation of probation hearing on that same
5 date.

6 Now, before the hearings began, I had a chance to meet
7 with Mr. Hough, discuss the case with him, take notes. I met
8 with him the next time. I remember that -- I would want to
9 point out that immediately after that bond hearing, in other
10 words, on May the 2nd of 2008, Mr. Hough was sent to S.C.D.C.
11 custody on the probation violation.

12 I next met in person -- we exchanged letters. He wrote
13 to me twice. I wrote to him July 2nd of 2008 and, let's see,
14 met with him in person next on February the 2nd, 2009.
15 That's when he was transported over by S.C.D.C. in order for
16 the State to serve a life-without-parole notice on Mr. Hough.
17 And, again, met with him, talked with him at court.

18 He was returned to -- there was a motion for a
19 psychiatric evaluation that I filed. He was evaluated. He
20 was returned from S.C.D.C. custody to Kershaw County on
21 March 31st, 2009. We met several times at K.C.D.C., the
22 Kershaw County Detention Center. I count one -- not counting
23 the times we met and talked in court, I count three other
24 times that I met with him while he was in K.C.D.C.

25 Q. And is that all -- is that the entire course of the

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22 Kershaw County Detention Center. I count one -- not counting
23 the times we met and talked in court, I count three other
24 times that I met with him while he was in K.C.D.C.

25 Q. And is that all -- is that the entire course of the

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1 representation?

2 A. Well, I'm -- I'm summarizing in a brief fashion the
3 conversations we had in court. I mean, before court --
4 before the judge took the bench, before court proceedings
5 actually began, we had what I consider - Mr. Hough obviously
6 does not - but what I consider to be lengthy conversations.

7 Q. The three meetings at K.C.D.C. was -- did that include
8 meetings that occurred after the aborted trial? Basically
9 after June 25th, 2009?

10 A. Yes, sir.

11 Q. Okay. So basically you had the two court proceedings --
12 the trial proceeding and three separate meetings at K.C.D.C.

13 A. Yeah and -- well, you're omitting what I mentioned about
14 the bond hearing and the service of the L-WOP notice.

15 Q. I was counting those.

16 A. Okay. All right.

17 Q. So you have those meetings at the courthouse.

18 A. Uh-huh.

19 Q. And then you have three other meetings at K.C.D.C.

20 A. Yes, sir.

21 Q. Okay. Is it -- is it the public defender's office's
22 policy not to, say, travel to prisons to meet with clients?

23 A. No, sir, that's not our policy, but it's -- you have to
24 understand -- and I don't know any better way to put it other
25 than to say that we're frequently, if not on a more or less

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1 continuous basis, in a triage mode. We have to -- we have to
2 put out the fires that are burning the hottest, and getting
3 the time to drive to a department of corrections facility to
4 meet with somebody is not -- it's very often difficult, if
5 not impossible, but we do -- it's not our policy not to; no,
6 sir.

7 Q. But you just don't do it unless you have to.

8 A. Well, I suppose that's one way to put it and carve out
9 the time, right.

10 Q. I mean, because for you at Camden, a trip down to
11 Charleston is like three and a half, four hours?

12 A. Yes, sir, not counting the time you actually are in
13 discussions with your client.

14 Q. Now, during your meetings with the applicant prior to
15 the trial, prior to, you know, the June 22nd trial that was
16 eventually continued, what was Mr. Hough telling you had
17 occurred during the incident?

18 A. He was basically up until that point telling me that he
19 wasn't there, that he was not present at Rodney Baskins'
20 house.

21 Q. And did that change after the trial was over?

22 A. It did and I also, if I could, summarize the position
23 that I was in when -- when trial was about to begin. You may
24 have intended to ask me that later; I don't know.

25 Q. Go ahead. That's...

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1 A. When I met with him the week before we were set to begin
2 the trial, it was the first time he'd mentioned an alibi
3 witness, a former sister-in-law of his, and I immediately
4 began efforts to try to locate her and those efforts were
5 unsuccessful. As the transcript shows, I moved for a
6 continuance before Judge Kinard in an effort to try to -- in
7 order to allow me extra time and further efforts to locate
8 those witnesses.

9 Of course, in a day or two after that, after the Court
10 granted a one-week continuance, the problem with a juror
11 having researched Mr. Hough's criminal history and discussed
12 it with all the other jurors cropped up. So, of course, the
13 judge, Judge Kinard, postponed the -- you know, dissolved the
14 jury that had been selected but not yet sworn and postponed
15 the trial until the solicitor at their discretion called it
16 again for trial.

17 Now, he -- between those events, the week of June the
18 22nd and when the solicitor's office rescheduled the trial,
19 Mr. Hough wrote me a very heartfelt letter basically
20 explaining in considerable detail and with -- and with
21 considerable candor and honesty exactly what had happened,
22 and he testified a minute ago that -- as to that letter. I
23 was grateful to get it. It was the first time he had
24 basically made a clean breast of it.

25 There had been an offer on the table for a plea to

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1 voluntary manslaughter which was not easy to obtain, by the
2 way. I had to pressure the solicitor's office quite a bit to
3 get them to make that offer, but Mr. Hough would have none of
4 it. But between the week of June 22nd and the week of -- I
5 guess it was the week of July 27th which is the week that he
6 pled, when I met with him he said he had prayed a lot,
7 thought a lot. This was after this letter that I refer to,
8 this honest and candid letter. Had thought a lot, prayed a
9 lot, and decided that he did want to take the offer that was
10 made by the State.

11 We did have a chance to discuss at various times
12 involuntary manslaughter. The problem was that the State had
13 available two co-defendants. I think they were both charged
14 with accessory, I believe, who were going to be State's
15 witnesses and who -- they were Ricky Hough, Mr. Hough's
16 brother, and I can't recall the name of the other one. But,
17 anyway, they were going to -- Baskins was it?

18 Q. Was it Mr. Baskins?

19 A. They were prepared to testify for the prosecut --
20 pardon?

21 Q. Humphrey? Humphrey?

22 A. Anyway, I don't believe it was Mr. Humphries. Humphries
23 was an eyewitness to the shooting. Those two co-defendants
24 were prepared to testify for the State that Mr. Hough had
25 gone there with the intention to rob Rodney Baskins who was,

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1 as Mr. Hough testified, a known drug dealer.

2 Now, involuntary requires in its -- and its elements
3 requires that the person be engaged in conduct not otherwise
4 illegal. He was going there to rob him, and he had a gun and
5 was a convicted felon and -- and was not allowed to be in
6 possession of a handgun.

7 Q. Aren't there two definitions to involuntary
8 manslaughter? Can't you be convicted of involuntary
9 manslaughter for doing an unlawful activity that would not
10 normally lead to death?

11 A. Right. Again, two eyewitnesses that were there, not --
12 not the same two that were co-defendants. The State had two
13 eyewitnesses who were going to say that they saw Mr. Hough
14 pull the gun and put it to the victim's head.

15 Q. I don't mean to sound facetious, but I'm sure you've
16 gone to trial with cases where your client would have a
17 different version of the events than the State's witnesses.

18 A. Uh-huh.

19 Q. And Mr. Hough -- this Mr. Hough---

20 A. Uh-huh.

21 Q. ---at least would have testified that he did not point
22 the gun.

23 A. Uh-huh.

24 Q. At the victim.

25 A. Uh-huh.

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1 Q. And that he was not intending to rob the victim.

2 A. Uh-huh.

3 Q. Did you at any point advise him that his version of the
4 events could lead to involuntary manslaughter?

5 A. I'm sure I did, but I have no specific recollection of
6 it. In other words, if the jury accepted his version of
7 events, that could lead to that, yes.

8 Mr. Thompson: And may I approach the witness, Your
9 Honor?

10 The Court: Yes, sir.

11 By Mr. Thompson:

12 Q. It's the same copy of that letter up there.

13 A. Right. Yes, sir.

14 Q. The last paragraph where you recite Mr. Hough's story---

15 A. Yes, sir.

16 Q. ---you tell him that the best he could do was voluntary
17 manslaughter. Is that right?

18 A. That's correct.

19 Q. So is that -- is that what your advice was to him, that
20 the best he could do with his testimony was voluntary
21 manslaughter?

22 A. Yes, sir, because I thought that the chances of -- bear
23 in mind now, by the time the first trial fell apart and the
24 case had been rescheduled, bear in mind that Mr. Hough had
25 written me this better admitting that he went there to rob

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1 Mr. Baskins. Okay? And admitting that he pulled the gun.
2 He didn't say anything in that letter about why -- about
3 saying to the victim, "You want to buy a gun?" He didn't
4 mention that. Today is the first I heard of that. Those
5 were things that were not on the horizon at that point. This
6 is a very rudimentary summary of my advice to him, but
7 basically that was my advice to him as of July 17th when I
8 wrote this.

9 Q. But that is the summary of your advice, that voluntary
10 manslaughter was the best he could do at trial.

11 A. Yes, sir, because I didn't think there was a chance --
12 that there was any chance -- any realistic chance at all that
13 the jury -- that I could even get the judge to charge the
14 jury on involuntary under the facts. Okay?

15 Mr. Thompson: Beg the Court's indulgence. No further
16 questions.

17 The Court: Anything, Mr. Petrano?

18 Mr. Petrano: Yes, sir.

19 Cross-Examination

20 By Mr. Petrano:

21 Q. Sir, what's your procedure, if any, when you have a
22 client who gives you different inconsistent conflicting
23 stories? How do you go about putting them up on the stand,
24 if you do?

25 A. Well, obviously it's -- it's my and I think every

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1 attorney's policy: You can't put a witness on the stand if
2 you know in advance they're going to commit perjury.

3 Mr. Petrano: Thank you. Nothing further.

4 The Court: Anything?

5 Mr. Thompson: Nothing, Your Honor.

6 The Court: All right. You may step down. Thank you.

7 The Witness: Thank you.

8 Mr. Petrano: Your Honor, may this witness be excused?

9 Mr. Thompson: Yes, sir.

10 The Court: All right. Mr. Riley, do you want to head
11 on back to Camden?

12 The Witness: Yes, sir, if I can.

13 The Court: Well---

14 The Witness: Okay. Thank you.

15 The Court: ---you're here. I don't know whether you
16 can or not, but you're certainly free to leave here.

17 The Witness: Thank you, Judge.

18 The Court: All right.

19 Mr. Thompson: The applicant would have no further
20 witnesses, Your Honor.

21 The Court: Anything from the State?

22 Mr. Petrano: Motion for directed verdict, Judge.
23 There's been no actual claim here made. At best the
24 suggestion is that there should have been advice that if Mr.
25 -- if the applicant was to take the stand at trial, he could

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1 maybe get an instruction for involuntary manslaughter. The
2 State disagrees with that for two reasons. One -- and my
3 motion being for a directed verdict that there is no genuine
4 issue of material fact, even taking the facts in the light
5 most favorable to the non-moving party, that being the
6 applicant.

7 Involuntary manslaughter doesn't really apply here.
8 You've got two flavors of involuntary, one being an
9 unintentional killing of another without malice while engaged
10 in an unlawful activity not naturally tending to cause the
11 death or cause great bodily harm. This just doesn't fit at
12 all. You've got a felon, who can't be armed, running up to a
13 guy trying to sell him a gun allegedly and basically pointing
14 the gun at him, pointing and presenting, maybe not pointing
15 it at him but certainly presenting it to offer it for sale,
16 quote.

17 That is an unlawful activity, and it certainly is one
18 that tends to cause great bodily injury or harm. He being on
19 crack certainly is likely -- the applicant being on crack,
20 the gun is likely to go off. So that is not unlikely to
21 cause death or great bodily harm.

22 The other flavor of involuntary manslaughter is the
23 unintentional killing of another without malice while engaged
24 in a lawful activity. We know it's not a lawful activity
25 because he is a felon not allowed to be armed.

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1 Second, there was no improper advice because, as Mr.
2 Riley explained, all he had was conflicting stories. He
3 didn't -- he had never even heard anything about a struggle
4 up until today. In re Goodwin is a -- basically an ethics
5 case, a bar disciplinary ruling. Counsel can't put a witness
6 up that he knows is going to commit perjury. He can, but he
7 can't ask him any questions. So it would be very difficult
8 for this even to get out there before the jury to even try to
9 get an involuntary instruction. There was nothing improper,
10 nothing deficient, and by that there was no prejudice. We
11 move to dismiss, Your Honor.

12 Mr. Thompson: In response, Your Honor, a couple of
13 things: One, Mr. Riley was very clear, one, that he felt
14 that Mr. Hough was being honest with him when he told him
15 about the struggle over the gun. Mr. Riley admits and admits
16 in his letter that there was indeed a struggle over the
17 weapon.

18 I would hand up, Your Honor, two cases, Casey versus
19 State and Tisdale versus State. Casey versus State is 305
20 S.C. 445, 409 Southeastern Second 391. That's a 1991
21 decision by the South Carolina Supreme Court. Tisdale versus
22 State is 378 S.C. 122, 662 Southeast Second 410. Right after
23 the discussion begins in Casey and I quote: "Evidence of a
24 struggle between a defendant and a victim over a weapon is
25 sufficient for submission of an involuntary manslaughter

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1 instruction to the jury." And I suppose that's S.C. 305 S.C.
2 447, 409 Southeastern Second 392, and that language is quoted
3 again with a PCR case from 2008. That's Tisdale versus State
4 where it says, "Evidence of a struggle between the defendant
5 and the victim over a weapon supports submission of an
6 involuntary manslaughter charge."

7 I don't know how I can get any clearer than that, that
8 if you've got a struggle over the gun, you get involuntary
9 manslaughter. And I recognize the respondent's argument
10 that -- that, you know, perhaps that Mr. Riley may not have
11 wanted to present this testimony. It wasn't his choice. It
12 was the defendant's choice. It was the applicant's choice
13 whether or not to go to trial, and he did not get the full
14 and proper advice from his defense attorney that if he went
15 to trial and argued -- even taking aside the fact, you know,
16 sale of the gun and that sort of thing, there was a struggle
17 over the gun that Tisdale and Casey say you get it.

18 And if you take into account the struggle over the
19 gun -- if you take into account what Mr. Hough testified
20 occurred, that he went up there with the intent to sell the
21 weapon, even if he didn't have the intent to sell the weapon,
22 and that that is -- that is unlawful activity. I don't
23 disagree that it was an unlawful activity, but it's not
24 something that ordinarily leads to death. Sales --
25 unfortunately, unlawful sales and distributions of guns

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1 happen all the time in this state, and they don't lead to
2 people getting killed every single time. And so for that
3 reason, Your Honor, we would argue that defense counsel was
4 ineffective.

5 He admits he told him voluntary. That's the best you
6 can do. It's there in black and white. It's in his letter.
7 That was his advice to the defendant. He did not tell him
8 about involuntary manslaughter. Casey and Tisdale state you
9 get involuntary manslaughter with a struggle over the gun.
10 We would submit that defense counsel was ineffective for
11 failing to advise the applicant that he could get an
12 involuntary manslaughter charge. As ridiculous as the story
13 may be, it's his choice to present it. It's not Mr. Riley's
14 choice to present it.

15 And for all those reasons, Your Honor, we would argue
16 again that Mr. Riley was ineffective, that the plea of guilty
17 was not knowingly, voluntarily, and intelligently entered and
18 that Mr. Hough is entitled to a new trial. The State's
19 motion to dismiss should be denied.

20 **Mr. Petrano:** I have a two-part reply very briefly.
21 One: He's entirely correct. As ridiculous as the story is,
22 any evidence is the standard. So if he did get up there, he
23 being the applicant, and tell that story, no matter how
24 ridiculous it is, that would technically require an
25 involuntary manslaughter general instruction.

1 However, look at Tisdale. Look at Casey. Unless I'm
2 skipping something here, I don't see anything about them
3 being convicted felons and not unlawfully armed. And I do
4 submit that the sale of firearms is an activity that does
5 naturally tend to cause death or great bodily harm when it's
6 done improperly, i.e. being on crack.

7 The Court: Your client is looking at life without
8 parole?

9 Mr. Thompson: Yes, Your Honor.

10 Mr. Hough: Excuse me?

11 Mr. Thompson: Life without parole?

12 Mr. Petrano: For the prior armed robbery, yes, Your
13 Honor.

14 Mr. Thompson: I don't think I covered that with him.
15 If you want me to, I can. Do you understand that they served
16 L-WOP notice on you the first time and they can serve it on
17 you again?

18 Mr. Hough: Yes.

19 Mr. Thompson: And you could be sentenced to mandatory
20 life. Do you understand that?

21 Mr. Hough: Yes, sir.

22 Mr. Thompson: Do you still want to go forward?

23 Mr. Hough: Yes, sir.

24 The Court: All right.

25 Mr. Petrano: And finally when the advice was given that

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1 the best he could get was voluntary, as has been explained,
2 there was no mention of a struggle. You had different
3 stories. First there was an alibi, and then, oh, yeah, I
4 went there to sell it. Excuse me. I went there to rob him,
5 and I pointed it at his head and it just went off. That's
6 all I've got, Judge.

7 Mr. Thompson: And just in brief response.

8 The Court: Well, no. We're not -- we're not going back
9 and forth, back and forth.

10 Mr. Petrano: Your Honor, I stand corrected. I do want
11 to correct myself. As the applicant had pointed out,
12 Applicant's number 1 does indicate a struggle, nothing about
13 a sale.

14 The Court: All right.

15 Mr. Thompson: Thank you, Your Honor.

16 The Court: I'll be in touch.

17 Mr. Thompson: Thank you, Your Honor.

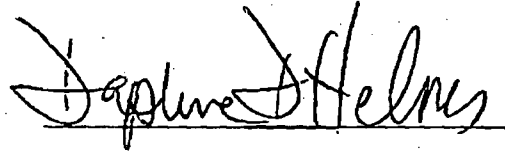
18 Mr. Petrano: Thank you.

19 (Whereupon, the proceedings were concluded.)
20
21
22
23
24
25.

I, the undersigned Daphne D. Helms, 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 all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the circuit court for Richland County, South Carolina, on the 7th of June, 2011.

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

September 19, 2011

A handwritten signature in cursive script, reading "Daphne D. Helms", written over a horizontal line.

Daphne D. Helms, court reporter

THE STATE OF SOUTH CAROLINA



PUBLIC DEFENDER
FIFTH JUDICIAL CIRCUIT

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July 17, 2009

Michael Anthony Hough
Kershaw County Detention Center
101 Bramblewood Plantation Road
Camden, South Carolina 29020-4224

Dear Mr. Hough:

Thank you for your letter postmarked July 15. Your honesty and candor have cleared up a lot of my questions.

Not a day has gone by that I haven't planned to meet with you. I'll see you on July 20, no matter what. As of right now, the Markell Reid trial is scheduled for the week of July 27.

Please remember that, as you've told me, [1] you went to Rodney's house with a gun; [2] you had the gun out and it went off in a struggle; and [3] a man died. If the prosecution can prove those three things, as I believe they can, the jury will have no choice but to convict you of at least voluntary manslaughter, which the State has offered.

See you Monday, and thanks.

Sincerely,

Neil J. Riley

NJR/

— COPY —

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STATE OF SOUTH CAROLINA

JUDGMENT IN A CIVIL CASE

COUNTY OF KERSHAW

CASE NO: 2009-CP-28-1346

IN THE COURT OF COMMON PLEAS

Michael Anthony Hough vs. State of South Carolina

FILED FOR RECORD
JULY 22 AM 11:38
CLERK OF COURT
KERSHAW COUNTY, S.C.

CHECK ONE:

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON):
 - ☐ Rule 12(b), SCRPC;
 - ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
 - ☐ Rule 43(k), SCRPC (Settled);
 - ☐ Other: _____
- ☐ ACTION STRICKEN (CHECK REASON):
 - ☐ Rule 40(j) SCRPC;
 - ☐ Bankruptcy;
 - ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 - ☐ Other: _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
 - ☐ Affirmed;
 - ☐ Reversed;
 - ☐ Remanded;
 - ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order; ☐ Statement of Judgment by the Court;

Dated at Camden, South Carolina, this _____

Court Reporter: _____

PRESIDING JUDGE _____

This judgment was entered on the 22nd day of July, 2011, and a copy mailed first class this 22nd day of July, 2011, to attorneys of record or to parties (when appearing pro se) as follows:

Jeremy Adam Thompson Law Office of Tara D. Shurling
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P.O. Box 12891 29211

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ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Joyce McDonald

Joyce McDonald, Clerk of Court

STATE OF SOUTH CAROLINA)

COUNTY OF KERSHAW)

MICHAEL A. HOUGH, #255832,)

Applicant.)

STATE OF SOUTH CAROLINA)

Respondent.)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

CASE NO. 09-CP-28-1346

ORDER

JOYCE McDONALD
CLERK OF COURT
KERSHAW COUNTY, S.C.

2011 JUL 22 AM 11:35

FILED FOR RECORD

THIS MATTER comes before the Court by way of an Application for Post-Conviction Relief filed November 20, 2009. The State made its Return on March 19, 2010. An evidentiary hearing was convened in this case on June 7, 2011. The Applicant was present and was represented by Jeremy A. Thompson, Esquire. The State was represented by Brian T. Petrano, Assistant Attorney General.

I.
PROCEDURAL HISTORY

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Kershaw County Clerk of Court's orders of commitment. The Kershaw County Grand Jury indicted the Applicant at the October 8, 2008, term of General Sessions for Murder (08-GS-28:847). On July 28, 2009, the Applicant pleaded guilty to the lesser-included offense of voluntary manslaughter. He was represented at this proceeding by Cornelius "Neil" Riley, Esquire, with the Kershaw County Public Defender's Office. The Honorable G. Thomas Cooper, Jr., presiding circuit judge, sentenced the Applicant to twenty-three years imprisonment. The Applicant did not appeal his conviction or sentence.

ATTEST True, Correct & Certified

Copy of Original on File in this

Court

Joyce McDonald

Clerk of Court, Kershaw County

II. ALLEGATIONS RAISED

In his Application for Post-Conviction Relief, the Applicant alleged that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel; and
2. Involuntary guilty plea.

He alleged generally that his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14, of the South Carolina Constitution, were violated prior to and during his plea.

In a short memorandum of law accompanying his Application, the Applicant stated that there was "error and coercion" that led to his plea because of defense counsel's failure to advise him that "[e]vidence of a struggle between a defendant and a victim over a weapon is sufficient for submission of an involuntary manslaughter instruction to the jury." At the evidentiary hearing convened in this case, the Applicant proceeded on this argument.

III. EVIDENCE BEFORE THE COURT

At the Post-Conviction Relief hearing held in this case on June 7, 2011, the Applicant presented his own testimony, as well as testimony from defense counsel Neil Riley, Esquire. In addition to this testimony, this Court has before it a transcript of the guilty plea proceeding, a transcript of the aborted trial held June 22-25, 2009, a copy of the records of the Kershaw County Clerk of Court regarding the subject convictions, a copy of the Applicant's records with the South Carolina Department of Corrections, and the exhibits submitted by the parties in this case. What follows below are the findings of fact and rulings of law made by this Court in

accordance with the Uniform Post-Conviction Procedure Act, S.C. Code Ann. §17-27-10 *et seq.* (1985).

IV. FINDINGS OF FACT

The facts in this case are not in significant dispute. According to the Applicant, on April 17, 2008, he and two other individuals planned to rob the home of Rodney Baskins, a known drug dealer. They went by the house but saw that there were people at the home, so they left and planned to come back when the home was unoccupied. When they returned, they saw that there were people still in the home. The Applicant told the others that he would just go up to the home and rob Baskins. However, on his way up to the home, the Applicant thought better of his plan and decided he was going to sell his gun. Before he reached the home, the Applicant encountered Francis "Puddin'" Horton, the victim in this case, and offered to sell him the gun. The victim asked to examine the gun, but the Applicant refused. The victim then grabbed the gun and a struggle ensued. During the struggle, the victim was fatally shot.¹ The Applicant testified that he did not know who pulled the trigger and that he did not mean to shoot the victim.

At the time of the incident, the Applicant was on community supervision. Following the Applicant's arrest, his community supervision was revoked and he was placed back into SCDC custody. For the bulk of the Applicant's service of this sentence, he was housed at Lieber Correctional Institution in Ridgeville, South Carolina. The Applicant was released from SCDC custody on April 1, 2009, and was returned to the Kershaw County Detention Center, where he remained until his plea. Although the Applicant was scheduled to proceed to trial the week of June 22, 2009, defense counsel had only met with the Applicant for a total of three to four hours on a few occasions prior to that date. See 6/22/09 Tr. p. 4 at 23-25. At the outset of that trial, the

¹ Although the State's witnesses would have disagreed with the Applicant as to how the incident began, the State informed the plea court that a struggle over the gun did occur. See Guilty Plea Tr. p. 8, lines 2-6.

Applicant attempted to have defense counsel relieved, but the motion was denied. The trial was ultimately continued after a juror obtained the Applicant's criminal record and shared it with the other jurors. See 6/22/09 Tr. p. 66, lines 12-22; p. 72, lines 3-22.

Prior to the aborted trial, the Applicant told defense counsel that he was not present at Baskins' home the night of the shooting and that he had nothing to do with the death of the victim. Following the trial, the Applicant sent defense counsel a letter detailing his involvement in the death of the victim. Defense counsel sent a letter back to the Applicant stating

Please remember that, as you've told me, [1] you went to Rodney's house with a gun; [2] you had the gun out and it went off in a struggle; and [3] a man died. If the prosecution can prove those three things, as I believe they can, the jury will have no choice but to convict you of at least voluntary manslaughter, which the State has offered.

Letter to Applicant dated July 17, 2009.² Defense counsel testified before this Court that while he did not recall the Applicant telling him about the attempted sale of the firearm, the letter to the Applicant effectively summarized his advice to the Applicant about accepting a plea deal. The Applicant testified that defense counsel never advised him that evidence of a struggle over the gun could be used to argue for the lesser-included offense of involuntary manslaughter at trial. The Applicant further testified that had he known that the jury could have been instructed on the crime of involuntary manslaughter, he would have proceeded to trial.

V. STANDARD OF REVIEW

The burden of proof is on the Applicant in a Post-Conviction Relief proceeding to prove the allegations raised in his Application for Relief and at his Post-Conviction Relief proceeding. Bell v. State, 321 S.C. 238, 467 S.E.2d 926 (1996); Rule 71.1(e), SCRCP. In order to prevail in a PCR action challenging the effective assistance of guilty plea counsel, the operative question is

² This letter was admitted as an exhibit during the hearing.

whether a defendant, but for counsel's errors and omissions, would have exercised his right to trial. Hill v. Lockhart, 474 U.S. 52 (1985). Further, the Applicant must show that there is a reasonable probability that he would have insisted on proceeding to trial on the matter instead of pleading guilty. Stalk v. State, 383 S.C. 559, 681 S.E.2d 592 (2009). In other words, a defendant who pleads guilty on the advice of counsel may collaterally attack the voluntariness of his plea only by showing (1) that counsel was ineffective; and (2) that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty. Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997).

VI. CONCLUSIONS OF LAW

The Applicant contends that defense counsel was ineffective for failing to advise him that if he proceeded to trial, he could receive an instruction on the lesser-included offense of involuntary manslaughter. Furthermore, the Applicant argues that had he known he could receive such an instruction, he would have proceeded to trial instead of pleading guilty. Accordingly, the Applicant argues that he is entitled to a new trial. This Court agrees.

A. Defense Counsel's Deficient Performance

Involuntary manslaughter is defined as (1) the unintentional killing of another without malice, but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm; or (2) the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others. State v. Rivera, 389 S.C. 399, 404, 699 S.E.2d 157, 159 (2010). "Evidence of a struggle between the defendant and the victim over a weapon supports submission of an involuntary manslaughter charge." Tisdale v. State, 378 S.C. 122, 125, 662 S.E.2d 410, 412 (2008); see also Casey v. State, 305 S.C. 445, 447, 409 S.E.2d 391, 392 (1991) (same).

Defense counsel's failure to advise a client of an applicable lesser-included offense constitutes deficient conduct. See Pelzer v. State, 381 S.C. 217, 672 S.E.2d 790 (Ct. App. 2009). If the client would have gone to trial had he been given the proper advice regarding the lesser-included offense, then the proper remedy is a new trial. See Kerrigan v. State, 304 S.C. 561, 406 S.E.2d 160 (1991).

This Court finds that defense counsel's performance in this case was deficient. Defense counsel testified before this Court that he advised the Applicant that the best result at trial he could receive was voluntary manslaughter, despite the fact that the Applicant had informed defense counsel that there was a struggle over the gun. Since evidence that there was a struggle over the gun gives rise to a charge on involuntary manslaughter, see Tisdale, supra, then defense counsel's advice to the Applicant was incorrect as a matter of law. Consequently, defense counsel's performance unquestionably "fell below prevailing professional norms." Pelzer, supra, at 223, 672 S.E.2d at 793.

During the PCR hearing, the Respondent argued that, despite the struggle over the gun, the Applicant's conduct did not meet the test for involuntary manslaughter. While this Court disagrees with the Respondent's contention that a struggle over the gun, standing alone, does not give rise to a charge of involuntary manslaughter, this Court finds that the Applicant's conduct meets the test for involuntary manslaughter. The Applicant testified that he offered to sell the gun to the victim in this case; that the victim grabbed the gun from him, and that a struggle ensued in which the victim was shot and killed. This conduct meets involuntary manslaughter's first definition: the unintentional killing of another without malice, but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm. The Applicant was not allowed to be in possession of a firearm and would not have been allowed to legally sell the

gun to the victim. Since the unlawful sale of a firearm is not an activity that naturally tends to cause death or great bodily harm, the Applicant was "engaged in an unlawful activity not naturally tending to cause death or great bodily harm," and would have been entitled to a charge on involuntary manslaughter through his testimony.

This Court notes that there was a dispute between defense counsel and the Applicant at the hearing as to whether or not the Applicant had given the full version of events to defense counsel prior to the plea. Assuming, *arguendo*, that defense counsel was correct that the Applicant had never told him about the sale of the gun, this Court finds that defense counsel's deficient performance was the reason for the lack of forthrightness from the Applicant. By his own admission, defense counsel, prior to the Applicant's scheduled trial for murder, had spent approximately three to four hours meeting with the Applicant. While the Applicant was housed at Lieber Correctional Institution for some period of time during the course of the representation, he had returned to the Kershaw County Detention Center almost three months prior to the trial. Defense counsel should have had ample time to meet with the Applicant and prepare him for trial. The record is clear that he did not do so. His failure to sufficiently communicate with the Applicant led to a breakdown in the attorney/client relationship that resulted in the Applicant holding back information from defense counsel. Had defense counsel properly represented with the Applicant, he would have been provided the full story. Accordingly, this Court finds that if the Applicant did hold back information from defense counsel, it was defense counsel's ineffective assistance that caused the difficulties.

In summary, this Court finds that defense counsel did not advise the Applicant that he could receive a charge of involuntary manslaughter. The Applicant would have been entitled to a charge on involuntary manslaughter had he proceeded to trial because evidence of a struggle

over the weapon meets involuntary manslaughter's requirements. If, as the Respondent contends, a struggle over the weapon is insufficient to obtain a charge on involuntary manslaughter, then this Court finds that the Applicant's testimony about the sale of the firearm meets involuntary manslaughter's requirements. Defense counsel's testimony that he did not know about the sale of the firearm does not change this Court's findings, since defense counsel's deficient performance directly led to his not being told about the sale of the firearm. Consequently, defense counsel's performance fell below prevailing professional norms, and the Applicant has met Strickland's first prong.

B. Prejudice

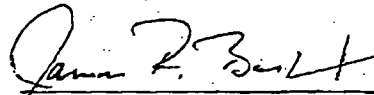
Having met Strickland's requirement of deficient performance, this Court must now resolve the question of whether or not there is a reasonable probability that the Applicant would have insisted on proceeding to trial had he been properly advised of the lesser-included offense of involuntary manslaughter. This Court finds that this query is easily answered.

The Applicant was explicitly advised by his attorney that the best result at trial that he could hope for was a guilty verdict for voluntary manslaughter. The Applicant testified that had he received the proper advice, he would have never pleaded guilty. This Court finds the Applicant credible on this issue. Furthermore, in light of the Supreme Court's holding that the "prejudice prong ordinarily requires more than simply a defendant's assertion that but for counsel's deficient performance he would not have pled but would have gone to trial," this Court finds that proper advice about the possible results at trial, instead of the improper advice which was given, would have resulted in this case ending at trial, not at a plea. Stalk, supra, at 563, 681 S.E.2d at 595. Accordingly, this Court finds that the Applicant has met his burden of proof under Strickland's second prong. The Applicant is entitled to a new trial.

VII.
CONCLUSION

This Application for Post-Conviction Relief is hereby granted. The Applicant's conviction and sentence are vacated, and this matter is remanded to the Kershaw County Court of General Sessions for a new trial.

IT IS SO ORDERED.



James R. Barber, III
Presiding Circuit Judge
Fifth Judicial Circuit

This 17th day of July, 2011.

Columbia, South Carolina.

STATE OF ~~SOUTH~~ CAROLINA

IN THE COURT OF GENERAL SESSIONS

176

COUNTY OF KERSHAW
STATE

VS.

INDICTMENT/CASE# 2008-GS-28-00847

Michael Anthony Hough

A/W#: K143977

AKA:

Date of Offense: 04/17/2008

Race: B

Sex: M

Age: 44

S.C. Code §: 16-03-0010, 0020

DOB: 01/30/1965

SS#: [REDACTED]

CDR Code #: 0116

Address: [REDACTED]

City, State, Zip Bethune, SC 29009

SENTENCE SHEET

DL#

SID#

In disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☒ PLEADS

TO: Voluntary Manslaughter

In violation of § 16-3-50 of the S.C. Code of Laws, bearing CDR Code # 217

☐ NON-VIOLENT☒ VIOLENT☐ SERIOUS☐ MOST SERIOUS☐ Mandatory GPS☐ \$17

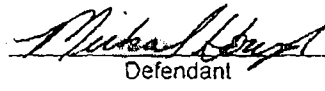
(CSC w/minor 1st or Lewd Act)

The charge is: ☐ As Indicted,☒ Lesser Included Offense,☐ Defendant Waives Presentment to Grand Jury

(defendant initial)

The plea is: ☐ Without Negotiations or Recommendation,☒ Negotiated Sentence,☐ Recommendation by the State.

ATTEST:


Solicitor70203
SC Bar #
Defendant
Attorney for Defendant61
SC

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 23 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 p of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____ months/years; an subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporate 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. (4-17-08)☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C. Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

PTUP

Total: \$ _____ plus 20% fee: \$ _____

_____ days/hours Public Service Employ

Payment Terms: _____

Obtain GED ☐☐ Set by SCDPPPS _____

Attend Voc. Rehab. Or Job Corps. _____

Recipient: _____

May serve W/E beginning _____

Substance Abuse Counseling ☐

*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

\$56-1-286 (DUI Breath Test)

\$25

\$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

\$90.11 TP (SCCJA Surcharge)

\$5

3% to County (if paid in installments)

TOTAL

\$ 133.40

Random Drug/Alcohol Testing ☐

Fine may be pd. in equal, consecutive weekly/

pmly. of \$ _____

ATTEST True, Correct & Beginning _____

Copy of Original on File in this _____

Other Court _____

Clerk of Court Kershaw Co.

☐ Appointed PD or appointed other counsel

\$35.13 TP, requires \$500 be paid to Cler

during probation.

Presiding Judge 

Judge Code: _____

Sentence Date: _____

Clerk of Court/ Deputy Clerk _____

Court Reporter _____

WITNESSES:

Tisdale, KCSD

FILED FOR RECORD

2008 OCT -8 PM 1:02

JOYCE McDONALD
CLERK OF COURT
KERSHAW COUNTY, S.C.

The State of South Carolina

County of Kershaw

COURT OF GENERAL SESSIONS

October TERM 2008

ARREST WARRANT NUMBER

K143977

ACTION OF GRAND JURY

For person of Grand Jury
Date

VERDICT

For person of Petit Jury
Date

THE STATE
vs.

Michael Anthony Hough

Indictment for

MURDER

SC Code: 16-3-10
CDR Code: 0116
Class FEL/EXM(V)

177
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.

ATTEST True, Correct & Certified
Copy of Original on File in this
Court

JOYCE McDONALD
Clerk of Court Kershaw County

STATE OF SOUTH CAROLINA)
COUNTY OF KERSHAW

INDICTMENT

At a Court of General Sessions, convened on October 8, 2008, the Grand Jurors of Kershaw County present upon their oath:

MURDER

That Michael Anthony Hough did in Kershaw County on April 17, 2008, feloniously, willfully and with malice aforethought, kill one Francis Horton by shooting him and that the said victim died as a proximate result thereof. All in violation of SC Code of Laws § 16-3-10

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

W. B. Giese
Warren B. Giese, SOLICITOR

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of
Kershaw

 THE STATE
 against:
Michael Anthony Hough
 Address: Bethune, SC 29009

 Phone: SSN: [REDACTED]

 Sex: M Race: B Height: 5'7" Weight: 130

 DL State: SC DL #: [REDACTED]

 DOB: 1/30/1965 Agency OR#: SC0280000

 Prosecuting Agency: Kershaw County Sheriff's Office

 Prosecuting Officer: Lt. Eric Tisdale

 Offense: Murder

 Offense Code: 116

 Code/Ordinance Sec: 16-3-10

 This warrant is CERTIFIED FOR SERVICE in the
☐ County/ ☐ Municipality of

 The accused
 is to be arrested and brought before me to be
 dealt with according to law

Signature of Judge

(L.S.)

Date:

RETURN

 A copy of this arrest warrant was delivered to
 defendant Michael Hough
 on 4-17-08

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

Kershaw
 Personally appeared before me the affiant Lt. Eric Tisdale who
 being duly sworn deposes and says that defendant Michael Anthony Hough
 did within this county and state on April 17, 2008 violate the criminal laws of the
 State of South Carolina (or ordinance of ☒ County/ ☐ Municipality of Kershaw)
 in the following particulars:
 DESCRIPTION OF OFFENSE: Murder

 I further state that there is probable cause to believe that the defendant named above did commit
 the crime set forth and that probable cause is based on the following facts: That on April 17, 2008
between 12:00am and 01:03am the Defendant Michael Anthony Hough
did with Malice aforethought cause the death of Francis
Horton by shooting him with A handgun. This incident
took place at 420 Calvert Drive Bethune, in Kershaw
County South Carolina.

Signature of Affiant

Lt. Eric Tisdale

Affiant's Address

821 Ridgeway RoadBethune, SC 29078

Affiant's Telephone

803-425-1512

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of
Kershaw

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 April 17, 2008 defendant Michael Anthony Hough
 did violate the criminal laws of the State of South Carolina (or ordinance of

☒ County/ ☐ Municipality of Kershaw

DESCRIPTION OF OFFENSE:

Murder
 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 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 4-17-08
 Signature of Issuing Judge
[Signature] (L.S.)

 Judge Code: 562

Judge's Address

Judge's Telephone

Issuing Court:

☐ Magistrate☐ Municipal☐ Circuit

ORIGINAL

Case# 2008 - 1527

 APR 22 PM 3
 CLERK OF COURT
 KERSHAW COUNTY, SC

 ATTEST True, Certified
 Copy of Original on File in this
 Court
[Signature]Clerk of Court Kershaw Co

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

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS
RECORD SUMMARY REPORT DATED 12/11/09

181

C023

DOUG, MICHAEL - FBI # 421396X6 SJD# SC00359947 SCDC 255832
FENDER TYPE: ADULT-STRAIGHT SENTENCE
INSTITUTION: MCCORMICK CORR INST DORM: F101298
SECURITY/CUST: 3 MINIMUM IN RACE: B SEX: M
CURR INCARC SENT: 23 YRS 0 MOS 0 DYS PROJ MAXDU DATE: 03/05/2028
CENTRAL MONITORING: YES SEPREQ PROJ PAROL DATE: 03/05/2028
SOCIAL SECURITY #: [REDACTED] EUC JOB: GENERAL WORKER
EUC PM: NO CURR EDUC PROGRAM
EUC LEVEL: F5 EEC LEVEL:
ASSIGNMENT: BLDING DETAIL BLDG.

EVIDIOUS NUMBERS:

NO PREVIOUS NUMBERS **

CURRENT OFFENSES	SENTENCE	YRS	MOS	DYS	COUNTY	SENTENCE	START	V/VU	CATEGORY
VOLUNTARY MANSLAUGHTER	23	0	0	0	KERSHAW	4/17/20	8	V	4
ARMED ROBBERY	0	6	0	0	KERSHAW	8/23/20	7	V	4
ARMED ROBBERY	10	0	0	0	KERSHAW	7/30/1998	V		4

EVIDIOUS SCDC OFFENSES (COMPLETE)	SENTENCE	YRS	MOS	DYS	COUNTY	SENTENCE	START	V/VU	CATEGORY
ARMED ROBBERY	1	0	0	0	KERSHAW	4/17/20	8	V	4
ASSAULT BATTERY-HIGH&AGG. NA	1	0	0	0	KERSHAW	8/23/20	7	N	3
DRIVING INFLUENCE LIQUOR	0	0	30	CHESTERFIE	8/10/1998	N		2	

FOR COMMITMENTS OVER 90 DAYS:

NO PRIOR COMMITMENTS OVER 90 DAYS

DETAINERS (HOLD, WANTED, NOTIFY):

NO DETAINERS

ESCAPES:

NO ESCAPE HISTORY

MINOR CHARGES:

NO CRIMINAL CHARGES HISTORY

ASSAULTIVE DISCIPLINARIES:

1/24/ 2 STRIKING AN INMATE WITH/ NOT GUILTY MAJOR INMATE WEAPON

NON-ASSAULTIVE DISCIPLINARIES:

5/18/ 8 POSSESSION OF CONTRABAND	CONVICTED	ADMIN
8/29/ 6 SEXUAL MISCONDUCT	CONVICTED	MAJOR
1/11/ 6 SEXUAL MISCONDUCT	CONVICTED	MAJOR
1/ 1/ 5 STEALING	CONVICTED	ADMIN
5/ 3/ 5 STEALING		OTHER
2/ 5/ 4 POSSESSION OF CONTRABAND		OTHER
3/31/ 4 VIOLATIONS WRITE/POST IN		OTHER
3/15/ 3 SEXUAL MISCONDUCT	DROPPED	MAJOR
3/ 1/ 3 FIGHTING WITHOUT A WEAPON	DROPPED	MAJOR
1/ 8/ 2 POSSESSION OF CONTRABAND	CONVICTED	MAJOR
4/18/ 2 VIOLATIONS WRITE/POST IN		OTHER
5/15/ 1 FIGHTING WITHOUT A WEAPON	CONVICTED	MAJOR
3/15/ 0 GAMBLING AND LOAN SHARK	CONVICTED	MAJOR
3/28/ 0 THREATENING TO INFLECT H	CONVICTED	MAJOR

HISTORY OF MOVEMENTS:

9/ 8/ 9	MCCORMICK	INCARCERATED	ADMINISTRATIVE
8/ 6/ 9	KIRKLAND	INCARCERATED	NEW ADMISSION
4/ 1/ 9	UNK	RELEASE	EXPIRATION OF SENTENCE
3/31/ 9	KERSHAW CO	AUTH ABSENCE (AWL)	TO COURT
3/26/ 9	LIEBER	INCARCERATED	MEDICAL
3/26/ 9	RICHLAND CO	AUTH ABSENCE (AWL)	MEDICAL
2/18/ 9	LIEBER	INCARCERATED	RETURN FROM COURT
2/18/ 9	KERSHAW CO	AUTH ABSENCE (AWL)	TO COURT
7/ 7/ 8	LIEBER	INCARCERATED	ADMINISTRATIVE

HOUGH, MICHAEL - FBI # 621396X6 SID# SC00359947 SCDC # 255832 182 CONTINUE

DATE	NAME	STATUS	REASON
6/ 3/ 8	LEE	INCARCERATED	ADMINISTRATIVE
5/ 2/ 8	KIRKLAND	INCARCERATED	COMMUNITY SUPERVISIO
2/29/ 8	KERSHAW CO	COMMUNITY SUPERVISIO	RELEASED TO PROBATIO
2/ 5/ 8	BROAD RIVER	INCARCERATED	ADMINISTRATIVE
11/ 9/ 7	KIRKLAND	INCARCERATED	COMMUNITY SUPERVISIO
12/29/ 6	KERSHAW CO	COMMUNITY SUPERVISIO	RELEASED TO PROBATIO
1/25/ 6	KERSHAW	INCARCERATED	LOU UP-ADJUSTMENT CO
1/11/ 6	MANNING	INCARCERATED	LOU UP-ADJUSTMENT CO
6/26/ 5	WALDEN	INCARCERATED	ADMINISTRATIVE
6/26/ 5	DARLINGTON CO	AUTH ABSENCE (AUL)	TO FUNERAL
4/ 6/ 5	WALDEN	INCARCERATED	ADMINISTRATIVE
7/17/ 3	MANNING	INCARCERATED	ADMINISTRATIVE
11/25/ 2	KERSHAW	INCARCERATED	ADMINISTRATIVE
11/ 7/ 2	KIRKLAND	INCARCERATED	ADMINISTRATIVE
6/28/ 2	KERSHAW CO DF	INCARCERATED	ADMINISTRATIVE
5/21/ 1	MANNING	INCARCERATED	ADMINISTRATIVE
5/21/ 1	KERSHAW CO	AUTH ABSENCE (AUL)	RETURN FROM COURT
4/ 8/99	MANNING	INCARCERATED	TO COURT
1/29/99	KIRKLAND	INCARCERATED	ADMINISTRATIVE
			NEW ADMISSION

HISTORY OF EARNED WORK CREDIT ASSIGNMENTS:

JOB DESCRIPTION	START DATE	END DATE	TERMINATION REASON
GENERAL WORKER	09/17/09	0/ 0/ 0	
GENERAL WORKER	06/05/08	7/ 7/ 8	INSTIT TRANSFER
STOP PROGRAM	02/08/08	2/29/ 8	RELEASED/PAROLED
STOP PROGRAM	02/06/08	2/ 7/ 8	MI ELIGIBLE FOR LEVEL 2
WARDKEEPER	09/26/06	12/29/ 6	RELEASED/PAROLED
WARDKEEPER	09/08/06	9/25/ 6	CUSTODY REVIEW
WARDKEEPER	07/14/06	9/ 7/ 6	ASLT/DRUG/MAJOR DISC
WARDKEEPER	07/06/06	7/13/ 6	MI ELIGIBLE FOR LEVEL 2
WARDKEEPER	03/29/06	7/ 5/ 6	CUSTODY REVIEW
WARDKEEPER ASSISTANT	11/03/05	1/11/ 6	PLACED IN ST/SP CUSTODY
STOREKEEPER	09/21/05	11/ 1/ 5	UNSAT JOB PERFORM
CONSTRUCTION WORKER	08/16/05	9/20/ 5	LATERAL TRANSFER
GENERAL WORKER	05/12/05	8/15/ 5	LATERAL TRANSFER
MACHINE OPERATOR	09/05/03	5/ 3/ 5	UNSAT JOB PERFORM
SENIOR CUSTODIAN	07/24/03	9/ 4/ 3	INMATE REQUEST
WARDKEEPER	05/23/03	7/17/ 3	INSTIT TRANSFER
WARDKEEPER	12/09/02	5/22/ 3	MI ELIGIBLE FOR LEVEL 2
DESIGNATED FACILITY	06/29/02	11/ 7/ 2	INSTIT TRANSFER
MACHINE OPERATOR	02/05/02	6/28/ 2	INSTIT TRANSFER
GENERAL WORKER	12/18/01	1/24/ 2	PLACED IN ST/SP CUSTODY
GENERAL WORKER	06/26/01	12/17/ 1	CUSTODY REVIEW
SENIOR WARDKEEPER	06/06/01	6/15/ 1	PLACED IN ST/SP CUSTODY
WARDKEEPER ASSISTANT	02/28/01	6/ 5/ 1	PROMOTION
GENERAL WORKER	02/16/01	2/27/ 1	PROMOTION
GENERAL WORKER	04/18/00	2/15/ 1	MI ELIGIBLE FOR LEVEL 2
WARDKEEPER	11/03/99	3/28/ 0	PLACED IN ST/SP CUSTODY
MACHINE OPERATOR	04/13/99	11/ 2/99	INMATE REQUEST

HISTORY OF EARNED EDUCATION CREDITS:

ECC DESCRIPTION	START DATE	END DATE	TERMINATION REASON
BONUS 4-7 HRS/WK	04/08/02	6/ 3/ 2	INMATE REQUEST
BONUS 4-7 HRS/WK	07/03/01	1/24/ 2	PLACED IN ST/SP CUSTODY
BONUS 4-7 HRS/WK	04/19/00	6/15/ 1	PLACED IN ST/SP CUSTODY
BONUS 4-7 HRS/WK	04/19/99	3/28/ 0	PLACED IN ST/SP CUSTODY

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

CMT1330D SCDC OFFENDER MANAGEMENT SYSTEM 12/11/09
OMCOMITA RELEASE DATE SCREEN C023981
SCDC# > 255832 LOC: MCCORMICK
HOUGH, MICHAEL SCDC CLASSIFICATION... VIOLENT
OFFENDER TYPE ... ADULT-STRAIGHT SENTENCE SEXUAL REGISTRY... N
SEXUAL PREDATOR... NOT APP
DNA STATUS... COMPLETED
GPS REQUIREMENT... N
PREA DECISION....
CURRENT SENTENCE: 023-00-000 CONSECUTIVE SENTENCE... N
023-00-000 CURRENT SENT START DATE: 04/17/2008
PROJECTED COMPLETION DATES
MAXOUT DATE... 03/05/2028 CURRENT EWC... 2 F 5
YOA SIX YEAR DATE: / / CURRENT EEC... NOT CURRENTLY EARNING EEC
INITIAL PAROLE DATE: 03/05/2028 NEXT PAROLE HEARING DATE: 03/05/2028
TOTAL GT DAYS EARNED... 000000 LABOR CREW/WORK PROG DATE: 99/99/9999
TOTAL EARNED WORK CREDITS... 000044 LABOR CREW DISQ REASON:
TOTAL EDUCATION CREDITS... 000000 CATEGORY 4 OR 5 OFFENSE
TOTAL EXTRA EARNED CREDITS... 000
TOTAL SERVICE TIME EARNED... 000474

PFKEYS: 5. HISTORY OF DATE CHANGES

4-0 1 Sess-1 167 7:50:33 SCDC1468 3/11

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF KERSHAW
STATE

INDICTMENT/CASE# 2008-GS-28-00847

VS.

Michael Anthony Hough

AW#: K143977

AKA:

Date of Offense: 04/17/2008

Race: B

Sex: M

44

S.C. Code §: 16-03-0010, 0020

DOB: 01/30/1965

SS#:

CDR Code #: 0116

Address:

City, State, Zip Bethune, SC 29009

DL#

SID#

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☒ PLEADS

TO Voluntary Manslaughter

In violation of § 16-3-30 of the S.C. Code of Laws, bearing CDR Code # 217

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS ☐ \$

(CSC w/minor 1st or Lewd Act)

The charge is: ☐ As Indicted, ☒ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury, ☐ (defendant in

The plea is: ☐ Without Negotiations or Recommendation, ☒ Negotiated Sentence, ☐ Recommendation by the State

ATTEST:

[Signature]
Solicitor

7003 *[Signature]*
SC Bar # Defendant

[Signature]
Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 23 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 of \$, plus costs and assessments as applicable, the balance is suspended with probation for months/years a subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

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☒ 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. 4-17-08

☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C. Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☒ Def. Waives Hearing ☐ Ordered

PTUP

Total: \$ plus 20% fee: \$

days/hours Public Service Employment

Payment Terms:

Obtain GED ☐

☐ Set by SCDPPPS

Attend Voc. Rehab. Or Job Corps:

Recipient:

May serve W/E beginning

Substance Abuse Counseling ☐

*Fine

\$14-1-206 (Assessments 107.5%)		\$
\$14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ 100.00
\$14-1-211(A)(2) (DUI Surcharge)	\$100	\$
\$56-5-2995 (DUI Assessment)	\$12	\$
\$56-1-286 (DUI Breath Test)	\$25	\$
\$35.13 (Public Def/Prob)	\$500	\$
\$73.3, 1B TP (Law Enforce. Funding)	\$25	\$ 25.00
\$33.7, 1B TP (Drug Court Surcharge)	\$100	\$
\$50-21-114(BUI Breath Test Fee)	\$50	\$
\$56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
\$90.11 TP (SCCJA Surcharge)	\$5	\$ 5.00
3% to County (if paid in installments)		\$ 3.90
TOTAL		\$ 133.90

Random Drug/Alcohol Testing ☒

Fine may be pd. in equal, consecutive weekly/ prmts. Of \$ Beginning \$ paid to Public Defen

Other:

☐ Appointed PD or appointed other counsel \$35.13 TP, requires \$500 be paid to Clerk during probation

Clerk of Court/ Deputy Clerk: *[Signature]*
Court Reporter: *[Signature]*

Presiding Judge: *[Signature]*
Judge Code: 2126
Sentence Date: 7/28/09

STATE OF SOUTH CAROLINA
In The Court of Appeals

CERTIORARI TO KERSHAW COUNTY
Court of Common Pleas

The Honorable James R. Barber, III, Circuit Court Judge

Case No. 2009-CP-28-01346
Appellate Case No. 2011-196568

Michael A. Hough,.....Respondent,

v.

State of South Carolina,.....Petitioner.

BRIEF OF PETITIONER

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STATEMENT OF ISSUES ON APPEAL

- I. No probative evidence exists to support the PCR court's finding that Counsel was ineffective for advising his client that Involuntary Manslaughter would not apply considering the factual scenario relayed to him by his client.**
- II. No probative evidence exists to support the PCR court's finding that Counsel was ineffective for advising his client that Involuntary Manslaughter would not apply considering the new version of events as told during the PCR hearing.**

STATEMENT OF THE CASE

The Respondent is incarcerated with the South Carolina Department of Corrections pursuant to the Kershaw County Clerk of Court's order of commitment. The Kershaw County Grand Jury indicted the Respondent at the October 8, 2008, term of the General Sessions for Murder (2008-GS-28-847). The State noticed the Respondent that they were seeking Life Without Parole. (App. p. 96). On July 28, 2009, Respondent pled guilty to the lesser-included offense of voluntary manslaughter. Prior to the plea the Respondent began a trial (App. p. 1-85). He was sentenced by the Honorable G. Thomas Cooper, Jr. to confinement for twenty-three years.

Respondent then brought this action seeking post-conviction relief filed November 20, 2009. Petitioner made its return on or about March 22, 2010. An evidentiary hearing was convened before the Honorable James R. Barber, III, on June 7, 2011, at which Respondent alleged ineffective assistance of counsel. A timely notice of intent to appeal was filed on July 27, 2011. Petitioner filed a Petition for Writ of Certiorari on September 26, 2011. Respondent filed a Return to Petition for Writ of Certiorari on March 8, 2012. By Order filed November 14, 2013, the South Carolina Court of Appeals granted Writ of Certiorari. This Brief of Petitioner follows.

STATEMENT OF THE FACTS

The Respondent approached the victim, put a gun toward his face and demanded money. (App. p. 92). The victim fought back and there was a struggle for the gun. (App. p. 93). The victim was shot in the chest and the Respondent fled the scene. (App. p. 93). The Respondent admits he was high on crack, and that this was not an armed robbery but that he was (although high on crack) merely brandishing the weapon to the victim in an attempt to offer it for sale. (App. p. 134-135). The Respondent acknowledged that he, as a convicted felon, was not lawfully in possession of the firearm. (App. p. 145). The Respondent explained that he did not stay and help the victim, that he fled the scene because he was scared when the gun went off. (App. p. 145).

The facts in this case are not in significant dispute. According to the Respondent, on April 17, 2008, he and two other individuals planned to rob the home of Rodney Baskins, a known drug dealer. They went by the house but saw that there were people at the home, so they left and planned to come back when the home was unoccupied. When they returned, they saw that there were people still in the home. The Respondent told the others that he would just go up to the home and rob Baskins. However, on his way up to the home, the Respondent claims he thought better of his plan and decided he was going to sell his gun. Before he reached the home, the Respondent encountered Francis "Puddin'" Horton, the victim in this case, and offered to sell him the gun. The Respondent claimed that the victim asked to examine the gun, but the Respondent refused. The victim then grabbed the gun and a struggle ensued. During the struggle, the victim was fatally shot.¹ The Respondent testified that he did not know who pulled the trigger and that he did not mean to shoot the victim.

¹ Although the State's witnesses would have disagreed with the Respondent as to how the incident began, the State informed the plea court that a struggle over the gun did occur. See Guilty Plea Tr. p. 8, lines 2-6.

At the time of the incident, the Respondent was on community supervision. Following the Respondent's arrest, his community supervision was revoked and he was placed back into SCDC custody. For the bulk of the Respondent's service of this sentence, he was housed at Lieber Correctional Institution in Ridgeville, South Carolina. The Respondent was released from SCDC custody on April 1, 2009, and was returned to the Kershaw County Detention Center, where he remained until his plea. Although the Respondent was scheduled to proceed to trial the week of June 22, 2009, defense counsel had only met with the Respondent for a total of three to four hours on a few occasions prior to that date. At the outset of that trial, the Respondent attempted to have defense counsel relieved, but the motion was denied. The trial was ultimately continued after a juror obtained the Respondent's criminal record and shared it with the other jurors.

Prior to the aborted trial, the Respondent told defense counsel that he was not present at Baskins' home the night of the shooting and that he had nothing to do with the death of the victim. Following the trial, the Respondent sent defense counsel a letter detailing his involvement in the death of the victim. Defense counsel sent a letter back to the Respondent stating

Please remember that, as you've told me, [1] you went to Rodney's house with a gun; [2] you had the gun out and it went off in a struggle; and [3] a man died. If the prosecution can prove those three things, as I believe they can, the jury will have no choice but to convict you of at least voluntary manslaughter, which the State has offered.

Letter to Respondent dated July 17, 2009.² Defense counsel testified before this Court that while he did not recall the Respondent telling him about the attempted sale of the firearm, the letter to the Respondent effectively summarized his advice to the Respondent about accepting a plea deal.

² This letter was admitted as an exhibit during the hearing.

The Respondent testified that defense counsel never advised him that evidence of a struggle over the gun could be used to argue for the lesser-included offense of involuntary manslaughter at trial. The Respondent further testified that had he known that the jury could have been instructed on the crime of involuntary manslaughter, he would have proceeded to trial.

STANDARD OF REVIEW

In a post-conviction relief (PCR) action, the PCR applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The findings of the PCR court will not be upheld when they are not supported by probative evidence. Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624, 626 (1989).

ARGUMENT

- I. **No probative evidence exists to support the PCR court's finding that Counsel was ineffective for advising his client that Involuntary Manslaughter would not apply considering the factual scenario relayed to him by his client.**

In the instant case, Respondent argues Counsel was ineffective for advising him that the lesser included offense of Involuntary Manslaughter was not possible given the factual context relayed to him by Respondent. However, this allegation is without merit as no probative evidence exists to support this allegation.

The PCR Court found counsel was deficient because he advised Respondent that at best could receive a voluntary manslaughter, despite the fact that the Respondent had informed him that there was a struggle over the gun. (App. p. 172). The PCR court found that evidence of a struggle over the gun is sufficient for a charge of involuntary manslaughter charge. (App. p. 172) Tisdale v. State, 378 S.C. 122, 125, 662 S.E.2d 410, 412 (2008).

However, involuntary manslaughter is either 1) the killing of another without malice and unintentionally, but while one is engaged in the commission of some unlawful act *not amounting to a felony* and not naturally tending to cause death or great bodily harm, or 2) the killing of another without malice and unintentionally but while engaged in the doing of a *lawful act* with a reckless disregard of the safety of others. Bozeman v. State, 307 S.C. 172, 414 S.E.2d, 144 (1992) (emphasis added). In State v. Tucker, 324 S.C. 155, 478 S.E.2d. 260 (1996), the South Carolina Supreme court found that "because Appellate was engaged in committing burglary, kidnapping and armed robbery at the time of the shooting occurred (all felonies), he was not entitled to have (charge of involuntary manslaughter). Tucker, 324 S.C. at 170, 478 S.E.2d. at 268; See also State v. Reese, 370 S.C. 31, 633 S.E.2d 898 (2006) (holding that defendant was

“pointing or presenting a firearm, a felony, which would preclude an involuntary manslaughter charge”).

In State v. Young, 319 S.C. 33, 459 S.E.2d. 84 (1999), Young asserted the trial court should have charged the jury on the elements of involuntary manslaughter. Young, 319 S.C. at 39, 459 S.E.2d. at 87. According to Young’s version of facts, his Co-Defendant, Bell, grabbed the Victim’s necklace from around his neck. Id. When the Victim came towards Bell, Young aimed the gun at Victim’s head. Subsequently, Bell asked Victim for his money. Id. After an argument, Victim tossed his wallet towards Bell and “kinda swung” at Young and the gun just went off. Id. Bell then took the gun and shot the Victim in the head. Id. The South Carolina Supreme Court held, “Young was engaged in the commission of an armed robbery, a felony under § 16-1-10, at the time of the shooting. As such, he was not entitled to an involuntary manslaughter charge.” Young, 319 S.C. at 40, 459 S.E.2d at 88.

In the instant case, Counsel explained that Respondent never mentioned to him the story about selling the gun to the Victim (App. p. 156 line 4). Counsel testified Respondent had instead, written him a letter admitting to pulling out a gun, intending to rob the Victim, the Victim fought back, and the gun went off (App. p. 155 line 22—p. 156 line 1). Counsel further stated the State was prepared to call two co-defendants to testify that Respondent intended to rob the Victim. (App. p. 154 lines 22-25; p. 154 lines 11-14). Counsel concluded that there was no realistic chance to even get a judge to charge the jury on involuntary manslaughter due to the fact that Respondent admitted to committing an attempted armed robbery. Counsel’s advice under those facts – an attempted armed robbery gone bad – was correct because involuntary manslaughter would not apply. State v. Young, 319 S.C. 33, 459 S.E.2d. 84 (1999). Furthermore, Counsel explained that he could have had a problem putting the Respondent on the

stand and eliciting testimony from him because of potential perjury due to the Respondent's shifting and inconsistent version of events [including first claiming an alibi]. (App. p. 152, 156-157). Lucas v. State, 572 S.E.2d 274 (2002).

Therefore, the PCR court erred in finding Counsel was ineffective for advising Respondent that he would not be entitled to an involuntary manslaughter charge due to the fact that he admitted to attempting to rob the Victim at gun point.

II. No probative evidence exists to support the PCR court's finding that Counsel was ineffective for advising his client that Involuntary Manslaughter would not apply considering the new version of events as told during the PCR hearing.

In the instant case, Respondent argues Counsel was ineffective for advising him that the lesser included offense of Involuntary Manslaughter was not possible given the factual context stated during the PCR hearing. However, this allegation is without merit as no probative evidence exists to support this allegation.

Assuming there was a trial and the Respondent took the stand and explained his new version of events as he had at the PCR hearing, involuntary manslaughter would still not be a valid jury charge. The PCR court erred in finding otherwise. A PCR court should be reversed if the decision is controlled by an error of law. Pierce v. State, 338 S.C. 139, 526 S.E.2d 222 (2000). The Respondent admitted to being high on crack cocaine and illegally in possession of the firearm when he approached the victim to present the gun for potential sale. (App. p. 134-135, 145).

Involuntary manslaughter is either 1) the killing of another without malice and unintentionally, but while one is engaged in the commission of some unlawful act *not amounting to a felony* and not naturally tending to cause death or great bodily harm, or 2) the killing of another without malice and unintentionally but while

engaged in the doing of a *lawful act* with a reckless disregard of the safety of others.

Bozeman v. State, 307 S.C. 172, 414 S.E.2d, 144 (1992) (emphasis added). In State v. Tucker, 324 S.C. 155, 478 S.E.2d. 260 (1996), the South Carolina Supreme court found that “because Appellate was engaged in committing burglary, kidnapping and armed robbery at the time of the shooting occurred (all felonies), he was not entitled to have (charge of involuntary manslaughter). Tucker, 324 S.C. at 170, 478 S.E.2d at 268; See also State v. Reese, 370 S.C. 31, 633 S.E.2d 898 (2006) (holding that defendant was “pointing or presenting a firearm, a felony, which would preclude an involuntary manslaughter charge”; See also State v. Young, 319 S.C. 33, 459 S.E.2d. 84 (1999), (holding Young was engaged in the commission of an armed robbery, a felony under § 16-1-10, at the time of the shooting. As such, he was not entitled to an involuntary manslaughter charge”).

Furthermore, under S.C. Code Ann. § 16-23-410, it is unlawful for any person to present or point at another person a loaded or unloaded firearm. Any person who violates the provisions of this section is guilty of a *felony*. (emphasis added). Additionally, under S.C. Code Ann. § 16-23-30, it is unlawful for any person who has been convicted of a crime of violence in any court of the United States... to possess or acquire handguns within this State. S. C. Code Ann. § 16-23-410 (emphasis added). A person who violates the provision...is guilty of a *felony*. S.C. Code Ann. § 16-23-50 (emphasis added).

The law to be charged must be determined from the evidence presented at trial. State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). A trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence. State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). In determining whether the evidence requires a charge on a lesser included offense, the court views the facts in a light most favorable to the

defendant. See Knoten, 347 S.C. at 302, 555 S.E.2d at 394.

In the instant case, Respondent testified that he has one prior conviction for armed robbery.³ (App. p. 98 line 14-16; p. 145 line 4-7). Respondent testified he is not lawfully allowed to carry a firearm. (App. p. 145 line 10-11). Respondent testified he approached Victim with the pistol and stated the weapon was for sale. (App. p. 135 lines 9-11). Respondent stated, Victim took the gun from Respondent and a struggle ensued. (App. p. 135 lines 11-15). Respondent stated Victim started to sling him around and “the gun just went off.” (App. p. 135 lines 11-15). Respondent’s act of possessing and/or attempting to sell a firearm amounts to a felony. See S.C. Code Ann. § 16-23-410; See S.C. Code Ann. § 16-23-30; See S.C. Code Ann. § 16-23-50. Because Respondent shot Victim during the commission of a felony – both possessing and selling an illegal handgun – Counsel’s advice that involuntary manslaughter charge would not be applicable given the factual context was correct. State v. Young, 319 S.C. 33, 459 S.E.2d. 84 (1999).

Furthermore, there is no evidence whatsoever that the Respondent was engaged in self-defense when he was “struggling” over the weapon with the victim. Being high on crack cocaine and brandishing an illegal gun in an attempt to sell it is not a lawful activity. The Respondent admits he was engaged in an unlawful activity. (App. p. 160, line 23). The ultimate issue would be whether; (1) being high on crack cocaine, (2) while in possession of an unlawful handgun, (3) approaching a stranger and, (4) brandishing the gun accompanied with an unsolicited offer to sell the gun is an activity “not naturally tending to cause death or great bodily harm.” Brandishing an illegal weapon while high on crack cocaine can cause bodily harm. See State v. Rivera, 389 S.C. 399 (2010) (reversing the Court of Appeals and finding that involuntary manslaughter did not

³ During the guilty plea, the Solicitor stated Respondent had an additional conviction for Assault and Battery of a high and aggravated nature in 2007. (App. p. 98 line 19-22).

apply because brandishing of a weapon was unlawful conduct naturally tending to cause death or great bodily harm). The victim's death was a direct consequence of the Respondent being high on cocaine while handling a loaded illegal weapon. "There can be no doubt of the general rule of law that a person engaged in the commission of an unlawful act is legally responsible for all the consequences which naturally or necessarily flow from it..." State v. Williams, 189 S.C. 19, 199 S.E. 906, 908 (1938).

On a final note, the PCR court relied on case law that is inapplicable to the facts at hand. There is no evidence whatsoever that the Respondent was engaged in self-defense when he was "struggling" over the weapon with the victim. The PCR court based its conclusions of law that involuntary manslaughter applies whenever there is a "struggle" over the weapon on the following cases: State v. Rivera, 389 S.C. 399 (2010); Tisdale v. State, 378 S.C. 122 (2008); Casey v. State, 305 S.C. 445 (1991). (App. p. 171). Because there is no evidence of self-defense as to the Respondent, the above cases are inapplicable as each involves a struggle accompanied with self-defense issues as related to an involuntary manslaughter charge.

CONCLUSION

For the reasons stated above, this Court should reverse the post-conviction relief court's grant of post-conviction relief.

Respectfully submitted,

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By: 

ATTORNEYS FOR THE RESPONDENT

February 18, 2014

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Kershaw County
The Honorable James R. Barber, III, Circuit Court Judge
Case No. 2009-CP-28-1346
Appellate Case No. 2011-196568

STATE OF SOUTH CAROLINA,

PETITIONER,

v.

MICHAEL A. HOUGH,

RESPONDENT.

PROOF OF SERVICE

I, Caroline Kaiser, certify that I have served the within **Brief of Petitioner** on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Robert M. Dudek, Esquire
South Carolina Commission on Indigent Defense
Post Office Box 11589
Columbia, SC 29211-1589

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

This 18th day of February, 2014.



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100-11111

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Kershaw County

James R. Barber, III, Circuit Court Judge

RECEIVED

MAY 21 2014

S.C. Supreme Court

MICHAEL A. HOUGH,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

BRIEF OF RESPONDENT

Appellate Case No. 2011-196568

RECEIVED

MAY 22 2014

SC Court of Appeals

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1.	
There was evidence to support the PCR court’s finding that defense counsel was ineffective for failing to advise respondent that involuntary manslaughter applied where there was evidence available that the “gun went off” accidentally when the decedent grabbed the gun. Further, the PCR judge correctly found that if defense counsel did not know the full version of the facts that remained the fault of defense counsel given his deficient performance.	11
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There was evidence to support the PCR court’s finding that defense counsel was incorrect in advising that respondent that he simply would not be entitled to an involuntary manslaughter instruction at trial given his version of what occurred in this case.....	14
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STATE'S QUESTIONS PRESENTED

1.

Whether counsel's advice was correct that involuntary manslaughter did not apply considering the factual scenario relayed to him by his client?

2.

Whether counsel's advice was correct that involuntary manslaughter did not apply considering the new version of events as told at the PCR hearing?

COUNTER QUESTIONS PRESENTED

1.

There was any evidence to support the PCR court's finding that defense counsel was ineffective for failing to advise respondent that involuntary manslaughter applied t where there was evidence that the decedent looking at the gun suddenly grabbed it. Further, the PCR judge correctly found that if defense counsel did not know the full version of the facts that remained the fault of defense counsel given his deficient performance.

2.

There was any evidence to support the PCR court's finding that defense counsel was incorrect and ineffective for advising that respondent simply was not entitled to an involuntary manslaughter instruction if he went to trial given his version of what occurred in this case

STATEMENT OF FACTS

Procedural history

The Kershaw County Grand Jury indicted respondent at the October 8, 2008 term of General Sessions for Murder. App. 177-178. The state noticed respondent that it was seeking a sentence of life without parole (LWOP) based on respondent's prior conviction for armed robbery. App. 96.

Respondent's pre-trial motions and jury selection occurred on June 22, 2009 before the Honorable J. Ernest Kinard, Jr. Respondent was represented at these proceedings by Cornelius "Neil" Riley and Jason Kirincich. The state was represented by Assistant Solicitors John Meadors, Jason Anders and Ronald Moak. App. 1-85.

However, it came to light that information about respondent's prior record – on the internet and otherwise -- had been published, and the trial was continued. The trial judge said that he was not "reprimanding the press," but he granted respondent the continuance that was sought. App. 65, l. 24 – 72, l. 23.

On July 28, 2009, respondent appeared before the Honorable G. Thomas Cooper, Jr. He was represented again by Cornelius "Neil" Riley. Assistant Solicitors John Meadors and Jason Anders were the prosecutors. Respondent pled guilty to the lesser-included offense of voluntary manslaughter with a negotiated sentence of twenty-three years imprisonment. The issue in this case was whether respondent was correctly advised that he was not entitled to an involuntary manslaughter instruction had he chosen to go to trial. App. 86-87. Judge Cooper then sentenced respondent to twenty-three years' imprisonment. Respondent did not appeal his conviction or sentence. App. 106.

Respondent filed for post-conviction relief on November 20, 2009. App. 108-113. Respondent asserted that the evidence of the struggle between and decedent and him justified an involuntary manslaughter conviction and he would not have pled guilty [if properly advised]. App. 116.

An evidentiary hearing was held on June 7, 2011 before the Honorable James R. Barber, III. App. 122. Respondent was represented by Jeremy A. Thompson. App. 122. The state was represented by Assistant Attorney General Brian T. Petrano. App. 122.

Judge Barber granted the application for post-conviction relief in an order dated July 22, 2011. The state filed a Petition for Writ of Certiorari with this Court on September 27, 2011. Respondent filed a return to this petition. This Court granted certiorari.

The Incident

During the PCR hearing, respondent told the judge he informed his lawyer “what really happened.” App. 132, l. 9 – 133, l. 11. What occurred on April 17, 2008, sometime after 6:00 p.m., was that respondent went over to the home of two unnamed men who convinced respondent to come with them while they stole property from Rodney Baskins, a known drug dealer. The plan was to wait for Baskins to leave the home and then to go in and steal his money and drugs. App. 133, ll. 8-11. Respondent agreed to go with them. App. 132, l. 22 - 133, l. 14.

They went by Baskins’ house and saw that there were people at the home, so they left and planned to come back when the home was unoccupied. App. 133, l. 20 – 134, l. 2. The three men, including respondent, waited about 75-100 yards away in an old abandoned store yard. App. 134, ll. 1-2.

While they were waiting, the two men gave respondent “a hit of crack.” App. 134, ll. 2-3. Respondent then decided to “just go rob him straight up.” App. 134, ll. 4-5.

However, *respondent changed his mind and decided that instead of attempting to rob Baskins, he would attempt to sell the gun.* App. 134, ll. The two men respondent was with had wanted to sell this .22 revolver earlier in the week. App. 134, ll. 14-15. Abandoning his attempt to rob anyone, including Baskins, respondent took the weapon with him and walked towards Baskins' home. App. 134, l. 15; App. 144, ll. 7-10.

Before he reached the home, respondent encountered Francis "Puddin" Horton, the decedent, and offered to sell him the gun. App. 135, ll. 9-11. Respondent testified that the decedent asked to examine the gun, but that he, the respondent, refused. App. 133-135. The decedent then grabbed the pistol and a struggle ensued. Respondent testified, **"The next thing I know Mr. Horton done grabbed this pistol. He grabbed my hand and he sidestepped me, and Mr. Horton started slinging me, slinging me, and the gun just went off."** App. 135, ll. 8-17. (emphasis added). Respondent confirmed the gun went off as they "were fighting" over the gun respondent had proposed selling to the decedent.

During the guilty plea proceeding Defense Counsel Riley told the judge that there was a significant struggle, in which the decedent grabbed respondent under his right arm and was swinging respondent around trying to dislodge the gun. App. 103, ll. 8-12. During the struggle, the gun inadvertently went off. App. 103, l. 12.

Respondent repeated to the PCR judge that he did not intentionally point the gun at the decedent and fire at him, but rather that the gun went off during the course of the struggle. Respondent did not plan on robbing anyone that night, he did not intentionally point the gun at the decedent, and he confirmed the gun went off during the struggle as shown above. App. 144, ll. 11-17.

It was also revealed during the guilty plea proceeding that a plastic pouch containing .27 grams of cocaine and a “crack pipe” were discovered in the decedent’s pocket after the struggle. App. 101, ll. 10-18. The autopsy conducted on the decedent showed that decedent had a blood alcohol level of .061 and he tested positive for cocaine. In addition, the decedent had in his system a substance known as Cocaethylene, which is formulated in the body only when alcohol and cocaine are ingested simultaneously. App. 101, ll. 10-18.

Furthermore, during the autopsy, the decedent’s hands were tested for gunshot residue (GSR). *The test detected GSR on the decedent’s left palm* “which confirms the fact that there was a struggle during the confrontation between Mr. Hough and Mr. Horton.” App. 101, ll. 19-25.

The Aborted Trial

Respondent was scheduled to proceed to trial the week of June 22, 2009. However, respondent told Judge Kinard that defense counsel had only met with respondent for less than three hours in the year and two months counsel had represented him. App. 4, ll. 23-25. At the outset of that trial, respondent attempted to have defense counsel relieved because he felt counsel “failed to represent me in a way that I feel comfortable to go on with this trial.” App. 3, ll. 15-17.

Respondent’s motion was denied after defense counsel stated he was prepared to proceed. App. 11, ll. 17-18. As seen above, the trial was ultimately continued after a juror obtained respondent’s criminal record and shared it with the other jurors. App. 66, l. 12 – 73, l. 18.

PCR Hearing

Respondent testified at the PCR hearing that defense counsel did not discuss with him the fact his testimony could entitle him to a jury instruction on involuntary manslaughter. App. 140, ll. 8-11. Respondent stated that *he brought up involuntary manslaughter*. However, defense

counsel told him: “[I] didn’t fit that criterion.” App. 140, ll. 12-15. He did not fit that “criteria. . . because of my previous charges.” App. 140, ll. 8-17.

Respondent testified that he had “no other choice” but to plead guilty to voluntary manslaughter because based on the advice of his counsel he understood that voluntary manslaughter was the best result he could receive at trial. App. 140, ll. 18-23.

After he returned to prison and conducted independent research, respondent discovered that evidence of a struggle over a gun *can lead* to an instruction on involuntary manslaughter. App. 140, l. 24 – 141, l. 9. Respondent testified that had he knew the correct law, he would not have pleaded guilty to the crime of voluntary manslaughter. App. 141, ll. 12-19. Respondent, therefore, requested a new trial so that he could testify on his own behalf, and argue that he should only be convicted of involuntary manslaughter. App. 141, ll. 15-22.

During his testimony, defense counsel admitted that he advised respondent that the best he could do was to plead guilty to the charge of voluntary manslaughter. Defense counsel testified that respondent told him that he went there to rob the decedent. Counsel maintained that respondent never told him that he attempted to sell the decedent a gun before a struggle occurred. App. 155, l. 16 – 156, l. 14.

Defense counsel said that he did not think that he could convince a judge to charge the jury on involuntary manslaughter under the facts as he understood them. The PCR judge found respondent’s testimony about the struggle over the gun after the respondent offered to sell the decedent a gun, and where the gun went off, did entitle respondent to a jury instruction on involuntary manslaughter. The PCR judge also found that while there was a dispute over whether respondent told the “full version of events to defense counsel,” that defense counsel’s own admission about the lack as time he spent with respondent was deficient performance. The

judge found defense counsel, whose testimony he heard and whose demeanor he saw, was responsible for respondent not being able to understand the significance of the full version of the facts. App. 172-174.

Order Granting Relief

In the order granting PCR, the court noted the definition of involuntary manslaughter is “(1) the unintentional killing of another without malice, but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm; or (2) the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others.” App. 171.

Noting that respondent testified that “he offered to sell the gun to the victim in this case, that the victim grabbed the gun from him, and that a struggle ensued in which the victim was shot and killed,” the court found that respondent’s conduct meets the test for involuntary manslaughter under the first definition. App. 172. Respondent “was not allowed to be in possession of a firearm and would not have been allowed to legally sell the gun to the victim.” App. 172-173. The court held “since the unlawful sale of a firearm is not an activity that naturally tends to cause death or greatly bodily harm, [respondent] . . . would have been entitled to a charge on involuntary manslaughter through his testimony.” App. 173-173.

As seen above, the PCR court noted the evidence was disputed about whether respondent told defense counsel “the version of events” prior to guilty plea. However, and importantly, the PCR court found that “defense counsel’s deficient performance was the reason for the lack of forthrightness” from respondent. App. 173. That is a credibility finding against defense counsel from the PCR court that observed respondent and defense counsel.

The PCR court noted the dispute between defense counsel and respondent prior to the aborted trial and the fact that defense counsel had spent only about three to four hours meeting with respondent. App. 173. The court found that if respondent “did hold back information from defense counsel, it was defense counsel’s ineffective assistance that caused the difficulties.” App. 173. Again, a credibility finding that was made against defense counsel.

The court concluded that defense counsel did not advise respondent that he could receive an instruction on involuntary manslaughter and that respondent would have been entitled to such a charge if he had gone to trial. App. 173. Therefore, the court ruled defense counsel’s performance fell below prevailing professional norms. App. 174. The court found that respondent was prejudiced because, but for the improper advice, the case would have gone to trial, not ended in a guilty plea. App. 174.

ARGUMENT

1.

There was any evidence to support the PCR court's finding that defense counsel was ineffective for failing to advise respondent that involuntary manslaughter applied to the gun went off accidentally fact pattern where there was evidence that the decedent looking at the gun suddenly grabbed it. Further, the PCR judge correctly found that if defense counsel did not know the full version of the facts that remained the fault of defense counsel given his deficient performance.

The proper standard of review of a post-conviction relief evidentiary ruling is whether there is "any evidence of probative value" to sustain the PCR court's finding. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). An PCR applicant must prove that counsel's performance was deficient, and that he was prejudiced by that deficiency to obtain relief. See Hill v. Lockhart, 474 U.S. 52 (1985).

The PCR court correctly found defense counsel ineffective where respondent informed his attorney that the gun went off during a struggle, and defense counsel informed respondent that voluntary manslaughter would be the best that he could do given these facts. Defense counsel was incorrect as a matter of law that involuntary manslaughter was not a verdict option if respondent went to trial. See State v. Light, 378 S.C. 641, 664 S.E.2d 465 (2008); State v. Brayboy, 387 S.C. 174, 691 S.E.2d 482 (Ct. App. 2010); State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (1999).

"Involuntary manslaughter is (1) the unintentional killing of another without malice, but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm; or (2) the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others." State v. Crosby, 355 S.C. 47, 51-52, 584 S.E.2d 110, 112 (2003) (*citing* State v. Chatman, 336 S.C. 149, 519 S.E.2d 100 (1999)). The factual scenario

related to defense counsel by respondent before the plea easily satisfies the first definition of involuntary manslaughter.

“Evidence of a struggle between the defendant and the victim over a weapon supports submission of an involuntary manslaughter charge.” Tisdale v. State, 378 S.C. 122, 125, 662 S.E.2d 410, 412 (2008). The fact that a struggle between respondent and the decedent occurred immediately before the gun went off is not in dispute in this case. Defense counsel knew, in his own words, that a “significant struggle” had occurred between respondent and the decedent before he advised respondent to plead guilty. App. 103, ll. 8-12. Therefore, the PCR court was correct in holding that respondent’s conduct meets involuntary manslaughter’s first definition and that defense counsel’s advice to respondent was incorrect as a matter of law. App. 172. Additionally, the court was correct in concluding that because defense counsel’s advice was incorrect counsel’s performance unquestionably “fell below prevailing professional norms.” App. 172; See Pelzer v. State, 381 S.C. 217, 672 S.E.2d 790 (Ct. App. 2009).

The PCR judge heard defense counsel’s testimony, and he observed his demeanor. As seen above, the PCR judge made credibility findings against defense counsel that he was entitled to make and which this Court should treat with great deference. The PCR court cited defense counsel’s lack of time he spent with petitioner trying to apply the correct defense or lesser-included offense to the full version of the facts.

Petitioner asserts in its brief that since defense counsel asserted that respondent was attempting to rob the decedent at the time the gun discharged, that the judge was incorrect in ruling defense counsel gave deficient and ineffective legal advice. Brief of Petitioner at 9. However, this ignores the fact that the PCR court found that “defense counsel’s deficient performance was the reason for the lack of forthrightness” from respondent. App. 173. Again,

that was a credibility finding against defense counsel from the PCR court that observed respondent and defense counsel.

Further, the PCR court cited the dispute between defense counsel and respondent prior to the aborted trial and the fact that defense counsel had spent approximately three to four hours meeting with respondent. App. 173. The court found that if respondent “did hold back information from defense counsel, it was defense counsel’s ineffective assistance that caused the difficulties.” App. 173. Another credibility finding that was made against defense counsel.

The prejudice in this case is clear. Respondent testified at the PCR hearing that had he received the proper advice, he would have never have pleaded guilty to voluntary manslaughter, and he would have went to trial. See Hill v. Lockhart, 474 U.S. 52 (1985). The PCR Court was correct in finding respondent credible on this issue. App. 174. The PCR court was also correct in finding that proper advice about the possible results at trial, instead of the improper advice which was given, would have resulted in respondent going to trial, not pleading guilty to voluntary manslaughter – the best trial counsel told him was possible. App. 174. See Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 595 (2009).

Since there is evidence to support the PCR court’s ruling it should be affirmed.

There was any evidence to support the PCR court's finding that defense counsel was incorrect and ineffective for advising that respondent simply was not entitled to an involuntary manslaughter instruction if he went to trial given his version of what occurred in this case

The PCR court was correct in holding that defense counsel was ineffective for failing to advise respondent that involuntary manslaughter applied to his case considering the version of events as told by respondent at the PCR hearing. Because of respondent's prior conviction for armed robbery it appears he was not lawfully allowed to possess a firearm and would not have been allowed to legally sale the gun to the decedent. However, that obviously does not end the inquiry, and an issue involved is whether respondent's actions constituted activity "not naturally tending to cause death or great bodily harm." State v. Crosby, 355 S.C. 47, 51-52, 584 S.E.2d 110, 112.

The PCR court was correct that the unlawful sale of a firearm is not an activity that naturally tends to cause death or great bodily harm. The average unlawful sale of a firearm is not a dangerous activity. It happens regularly with no one being injured. It is simply an interaction between two people in which money or some other form of payment is exchanged for a firearm. It is a peaceful encounter where each participating party receives the benefit of the bargain.

As seen, respondent stated that they intended to steal money and drugs when no one was home in this case. That ultimately did not happen and respondent approached the decedent and attempted to sell him a gun. The decedent wanted to inspect the gun, and respondent refused to allow him to do so. The decedent then grabbed the gun. A struggle ensued over the gun. The gun discharged accidentally. This is a classic involuntary manslaughter situation. See State v. Crosby, 355 S.C. 47, 51-52, 584 S.E.2d 110, 112. See, also, State v. Light, 378 S.C. 641, 664 S.E.2d 465

(2008); State v. Brayboy, 387 S.C. 174, 691 S.E.2d 482 (Ct. App. 2010); State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (1999).

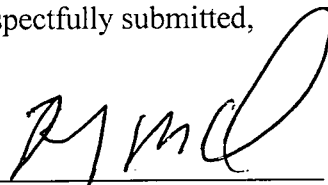
Consequently, the PCR court's conclusion that the unlawful sale of a firearm is not an activity that naturally tends to cause death or great bodily harm was correct and defense counsel was thus ineffective for failing to advise respondent that involuntary manslaughter applied to his case. See Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592. 595 (2009).

Since there was and is evidence to support the PCR court's ruling it should be affirmed.

CONCLUSION

For the forgoing reasons, the order granting post-conviction relief should be affirmed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R. M. Dudek', written over a horizontal line.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR RESPONDENT.

May 21, 2014

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Kershaw County

James R. Barber, III, Circuit Court Judge

MICHAEL A. HOUGH

RESPONDENT,

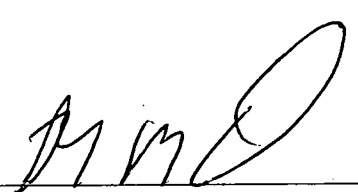
V.

STATE OF SOUTH CAROLINA,

PETITIONER

CERTIFICATE OF SERVICE

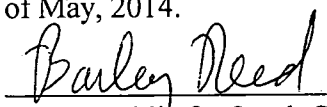
I certify that a true copy of the Brief of Respondent in this case have been served on Brian T. Petrano, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 21st day of May, 2014.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR RESPONDENT

SWORN TO BEFORE ME this 21st day
of May, 2014.


_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 24, 2021