

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
L. Casey Manning, Circuit Court Judge

Appellate Case No. 2011-187273
Lower Court Case No. 2007-CP-40-4259

DUSHUN STATEN, #282328,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

**APPENDIX
TO
PETITION FOR WRIT OF CERTIORARI**

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INDEX

Index	i
Trial Transcript dated February 25-March 1, 2002	1
Motion to Quash Indictments.....	15
Jury Selection.....	24
Motion to Suppress Statement	68
Paul Mead	
In Camera Direct by State.....	71
In Camera Cross by Mr. Strickler	89
In Camera Cross by Mr. Taylor	97
In Camera Redirect by State	103
Dushun Staten	
In Camera Direct by Mr. Taylor	108
In Camera Cross by State.....	110
In Camera Redirect by Mr. Taylor.....	113
Motion to Suppress Identification.....	116
Alonzo Shuler	
In Camera Direct by State.....	119
In Camera Cross by Mr. Strickler	136
In Camera Cross by Mr. Taylor	140
Anthony “Tony” Kennedy	
In Camera Direct by State.....	146
In Camera Cross by Mr. Strickler	165
In Camera Cross by Mr. Taylor	169
Rashon Loggins	
In Camera Direct by State.....	170
In Camera Cross by Mr. Strickler	180
Jean Dabady	
In Camera Direct by State.....	186
In Camera Cross by Mr. Strickler	196
In Camera Cross by Mr. Taylor	201

Andrew Britt

In Camera Direct by State	204
In Camera Cross by Mr. Strickler	211
In Camera Cross by Mr. Taylor	215

Paul Mead

In Camera Direct by State	216
--	-----

Motion to Exclude Third Party Guilt Evidence	235
--	-----

Pre-Trial Instructions to the Jury	254
--	-----

State's Opening Statement.....	257
--------------------------------	-----

Opening Statement by Mr. Strickler	274
--	-----

Opening Statement by Mr. Taylor	278
---------------------------------------	-----

Taurus Sanders

Direct by State.....	284
Cross by Mr. Strickler.....	288
Cross by Mr. Taylor.....	296

Geri Steedley

Direct by State.....	299
Cross by Mr. Strickler.....	317
Cross by Mr. Taylor.....	325

Rachel Boyd

Direct by State.....	327
Cross by Mr. Strickler.....	335
Cross by Mr. Taylor.....	344

Odell Sumter

Direct by State.....	349
Cross by Mr. Strickler.....	359
Cross by Mr. Taylor.....	362
In Camera Direct by Mr. Taylor	366
In Camera Cross by State.....	370

Andrew Britt

Direct by State.....	377
Cross by Mr. Strickler.....	410
Cross by Mr. Taylor.....	429
Redirect by State	442

Rashon Loggins

Direct by State.....	447
Cross by Mr. Strickler.....	473
Cross by Mr. Taylor.....	487
Redirect by State.....	493

Anthony “Tony” Kennedy

Direct by State.....	496
Cross by Mr. Strickler.....	539
Cross by Mr. Taylor.....	574
Redirect by State.....	581

Phillip Manny Perdue

Direct by State.....	586
Cross by Mr. Strickler.....	607
Cross by Mr. Taylor.....	617
Redirect by State.....	622

Larry Mason

Direct by State.....	624
Cross by Mr. Strickler.....	628
Cross by Mr. Taylor.....	630

Kerry Applegate

Direct by State.....	633
Cross by Mr. Strickler.....	637
Cross by Mr. Taylor.....	639

Kevin Pate

Direct by State.....	641
Cross by Mr. Taylor.....	647

Joe Smith

Direct by State.....	648
----------------------	-----

Shawn Swicegood

Direct by State.....	660
----------------------	-----

Amanda Fallow

Direct by State.....	664
----------------------	-----

Ammar Abass

Direct by State.....	667
----------------------	-----

Bryan Dowdy

Direct by State.....	670
----------------------	-----

Dr. Clay Nichols

Direct by State.....	676
Cross by Mr. Strickler.....	686

Karl Kenley

Direct by State.....	690
Cross by Mr. Strickler.....	702

Paul Mead

Direct by State.....	710
Cross by Mr. Strickler.....	777
Cross by Mr. Taylor.....	810
Redirect by State.....	842

Mark Vinson

Direct by State.....	849
Cross by Mr. Strickler.....	852

James Potash

Direct by State.....	856
----------------------	-----

Joseph Powell

Direct by State.....	861
Cross by Mr. Strickler.....	872
Cross by Mr. Taylor.....	877

Brandon McCants

Direct by Mr. Strickler.....	886
Cross by Mr. Taylor.....	912
Cross by State.....	915
Redirect by Mr. Strickler.....	946

Directed Verdict Motions.....	951
-------------------------------	-----

Lucius Staten

Direct by Mr. Strickler.....	953
Cross by Mr. Taylor.....	1012
Cross by State.....	1026
Redirect by Mr. Strickler.....	1075

Phillip Ruggles

Direct by Mr. Strickler.....	1077
------------------------------	------

David MacDougall

Direct by Mr. Strickler.....	1082
------------------------------	------

Garrett Copeland	
Direct by Mr. Strickler	1088
Cross by State	1098
James McNaughton	
Direct by Mr. Strickler	1099
Cross by Mr. Taylor	1101
Janice Gable	
Direct by Mr. Strickler	1102
Charise Glivens	
Direct by Mr. Taylor	1106
Cross by State	1109
Redirect by Mr. Taylor	1110
Paul Mead	
Direct by Mr. Taylor	1111
Cross by State	1114
Latisha Davis	
Direct by Mr. Taylor	1134
Colloquy on Jury Charge	1141
State's Closing Argument on the Law	1165
Closing Argument by Mr. Strickler	1174
Closing Argument by Mr. Taylor	1193
State's Closing Argument	1211
Charge to the Jury	1269
Verdict	1285
Sentencing	1296
Final Brief of Appellant	1308
Final Brief of Respondent	1335
Court of Appeals Opinion filed March 7, 2005	1386
Supreme Court Opinion filed June 11, 2007	1416

Remittitur dated June 27, 2007	1418
Application for Post-Conviction Relief filed July 12, 2007	1419
State's Return dated February 14, 2008.....	1426
Clerk of Court Records	1431
SCDC Records.....	1438
Amended Application for Post-Conviction Relief filed March 30, 2009.....	1443
PCR Hearing Transcript dated April 1, 2009.....	1445
 David Taylor	
Direct.....	1450
Cross	1500
Redirect.....	1504
 Dushun Staten	
Direct.....	1509
 John Wood	
Direct.....	1519
Cross	1521
Redirect	1523
Recross.....	1524
Redirect.....	1525
 Willie Gilmore	
Direct.....	1527
Cross	1528
Colloquy on Allegations	1529
Order of Dismissal filed July 23, 2009	1542
Rule 59(e) Motion filed August 10, 2009.....	1560
Order Denying Rule 59(e) Motion filed February 17, 2011	1565
Notice of Appeal filed March 9, 2011	1569
Petition for a Writ of Certiorari	1571

Return to Petition for Writ of Certiorari	1591
Reply to Return to Petition for a Writ of Certiorari.....	1605
Court of Appeals Order Granting Certiorari Petition filed March 12, 2014.....	1612
Brief of Petitioner	1613
Brief of Respondent	1644
Court of Appeals Opinion filed September 30, 2015	1666
Petition for Rehearing	1672
Court of Appeals Order Denying Petition for Rehearing filed December 18, 2015.....	1678

1 fluidity of the trial, did you see any reason to
2 object?

3 A No, I didn't.

4 Q All right. The State's case was -- and their
5 witnesses, the entire purpose of their witnesses,
6 was to say that your client was with the shooter,
7 right?

8 A Yeah.

9 Q And your witnesses and your defense was the
10 opposite, correct?

11 A Right.

12 Q And I think you've stated on direct that it's
13 still your opinion that the identity of the
14 shooter is relevant, is that a correct
15 interpretation?

16 A That's still my opinion, yes, sir.

17 Q And you argued that to the best of your ability,
18 right?

19 A I hope I did, I sure got tired of arguing it but I
20 kept arguing it for about a week.

21 Q And even considering everything you've heard here
22 today, is there any other way you would have tried
23 to do that?

24 A No, sir.

25 Q Whose idea -- sorry, whose decision was it for Mr.

1 Staten -- for Dushun, I just don't want to confuse
2 the two, not to testify?

3 A That was his decision.

4 Q All right. And I don't want to put words in your
5 mouth but in think the message I got during your
6 direct was you were alluding to that his story had
7 kind of changed and if he was to testify, based on
8 what Lucius had said, he might be changing his
9 story that he had told you originally. Is that
10 was I got?

11 A Yes.

12 Q And so in effect, if that's what would have played
13 out in your mind, you would have been supporting
14 perjury?

15 A Yes.

16 Q I'm going to go back to the plea offer now, that
17 was five to 15 for lynching, right?

18 A Yes.

19 Q They would have nolle prossed the murder?

20 A Yes.

21 Q The Applicant would have had to admit his guilt
22 though, right?

23 A Yes.

24 Q Did he ever do that to you?

25 A No.

1 Q And did he ever indicate that he was willing to
2 do that?

3 A No.

4 Q And was there an Alford offer? Sorry for the
5 ---

6 A Was there a what?

7 Q An offer pursuant to North Carolina versus Alford?

8 A No, no.

9 Q Okay. And did he ever admit to you that he was
10 with Mr. Sanders?

11 A That night?

12 Q Yeah.

13 A Did he ever admit to me that he was with Mr.
14 Sanders that night, I don't believe he did.

15 Q What was his statement?

16 A His statement about what?

17 Q About being with Mr. Sanders that night, the
18 statement he gave to the police?

19 A It's in his written statement.

20 Q And that's when he went ---

21 A That -- that is his only official statement is the
22 police statement.

23 Q Okay.

24 A That you have.

25 Q And he does reference Mr. Sanders in that?

1 A I -- could I see it? I'm not -- I'm missing the
2 point.

3 Q I'll just strike the whole thing, never mind.

4 (Pause.)

5 MR. PETRANO: Thank you, I've got nothing
6 further.

7 THE COURT: Ms. Shurling.

8 REDIRECT EXAMINATION

9 BY MS. SHURLING:

10 Q Mr. Taylor, looking back at 1238 again, starting
11 at line four -- actually starting at line seven.
12 If you remember the testimony of Rashon and Tony
13 Kennedy, is that he was hanging back out, hanging
14 back, so was Shakeem Wilson, their cousin. And
15 then he goes on to say, that's why they're not
16 charged with murder but accessory after the fact.

17 Is it your testimony that you think it's not
18 clear who they were?

19 A Well, hold on one second.

20 (Pause.)

21 A Well, my interpretation is that likely he would
22 say that my client and Lucius were standing back
23 or said they were standing back or something to
24 that effect. But I can't be for sure the way it's
25 phrased.

1 Q Okay. Well, when you were arguing to introduce
2 the testimony of the three gentlemen in the
3 beginning of the case who purportedly had heard
4 Moe Sanders confess, did you consider arguing that
5 that testimony was necessary to corroborate the
6 testimony of another witness you would seek to
7 introduce later in the trial, Michelle Buff?

8 MR. PETRANO: I'm going to have to object.
9 This is going outside of cross. Thank you.

10 THE COURT: You can answer it.

11 A Did I think about it, yeah. You know, when I
12 started the trial, that's exactly what I intended
13 to do. Unfortunately, when those witnesses turned
14 and went south, I didn't have that argument
15 anymore, it was gone.

16 Q But you'd already argued extensively about this at
17 a point in time when you believed that they were
18 going to testify that Moe Sanders had confessed?

19 A That's right, it went just exactly as I told you a
20 little while ago.

21 Q And my question is, why didn't you argue as part
22 of why their testimony would be relevant that it
23 was necessary to corroborate the still to come
24 testimony of Michelle Buff?

25 A Well, we never got to the question of whether or

1 not they'd be allowed to testify. So there was no
2 argument to make at any point during the trial
3 because between the time that they got here and I
4 talked to Judge McKellar and made my open argument
5 and all of that and talked to those people, they
6 had already changed their mind.

7 Q Okay. And you agree that Shakeem Wilson had
8 invoked the Fifth?

9 A Yes.

10 Q And you disagree that the portion of the argument
11 I've been referring to on 1238 refers to
12 prosecution decisions being made about him, at
13 least in part based on matters not ~~on the~~ record?

14 A I -- I -- I don't know how to interpret that as I
15 sit here looking at this -- the dry record now.
16 But at the time that I heard it, I didn't think
17 there was anything wrong with what he said. And
18 Mr. Strickler who was there, a very qualified
19 lawyer as well, didn't see anything wrong with it.
20 Neither of us raised an objection because it just
21 didn't seem objectionable.

22 Q And your theory that Maurice Sanders -- your
23 theory for the defense, at least in significant
24 part, was that Maurice Sanders was the shooter?

25 A Yes.

1 Q And you disagree that this portion of the closing
2 argument strongly infers that the reason Maurice
3 Sanders was not being prosecuted was due in part
4 to matters not before the jury?

5 A I don't know that he's talking about Moe Sanders
6 here. He doesn't mention his name anywhere.

7 (Pause.)

8 MS. SHURLING: I have no further questions,
9 Your Honor.

10 THE COURT: Mr. Petrano?

11 MR. PETRANO: Nothing else, Your Honor, thank
12 you.

13 THE COURT: All right, you may step down, sir.
14 (The witness leaves the witness stand.)

15 MS. SHURLING: May I have one moment, Your
16 Honor.

17 THE COURT: Yes, ma'am.

18 MR. PETRANO: Your Honor, may this witness be
19 excused.

20 THE COURT: Sure, if there's no objection.

21 MR. PETRANO: I think we both subpoenaed him,
22 that's why I'm asking.

23 THE COURT: Any objection, Ms. Shurling?

24 MS. SHURLING: None whatsoever, Your Honor.

25 THE COURT: Back to -- is it West Columbia or

1 Lexington?

2 THE WITNESS: Lexington.

3 THE COURT: What's the difference?

4 THE WITNESS: A quarter of a mile.

5 THE COURT: Okay.

6 (Pause.)

7 THE COURT: You need some more time?

8 MS. SHURLING: Sir?

9 THE COURT: You need ---

10 MS. SHURLING: No, sir, Your Honor. I'm going
11 to call the Applicant to the stand.

12 THE COURT: Okay. Come around, Mr. Stanton,
13 Staten, Staten.

14 MS. SHURLING: Staten, Your Honor.

15 THE COURT: Like Staten Island.

16 Just stop and place your left hand on the
17 Bible, place your left hand on the Bible.

18 (Pause.)

19 THE COURT: Well, just put your hand on the
20 Bible anyway, I'll help you out.

21 (DUSHUN STATEN, having first been duly sworn,
22 testified as follows:)

23 THE COURT: All right. I don't have a Koran.
24 Let the record show that the witness has affirmed
25 rather than sworn on the Bible.

1 MS. SHURLING: Thank you, Your Honor.

2 DIRECT EXAMINATION

3 BY MS. SHURLING:

4 Q Mr. Staten, I've had a number of conversations
5 with you at your correctional institution, is that
6 correct?

7 A Yes, ma'am.

8 Q And I've told you several times that I anticipate
9 having a problem with you in Court about what?

10 THE COURT: Talking loud, right?

11 Q You're soft spoken, okay.

12 A Yes, ma'am, I'm sorry. It's because of the small
13 environment I'm in. The sound bounces off the
14 walls so we just speak with a low tone.

15 THE COURT: I beg your pardon?

16 A I said it's because of the environment I'm in.
17 The sound, it bounces off the walls in the cell,
18 that's why I speak low ---

19 THE COURT: Just pull the microphone a little
20 closer to you. That's fine.

21 MS. SHURLING: I told him, in all my years as
22 a defense attorney, he was the first person to ever
23 give me a factual basis for why the tendency -- inmates
24 often have a tendency to speak softly.

25 Q But please bear in mind my admonitions before in

1 our conversations. The nice lady sitting beside
2 you has to write down every word you say. And the
3 Judge has to be able to understand you or it won't
4 do you any good be here.

5 THE COURT: The only other question is whether
6 the lady beside you is a nice lady.

7 Go ahead, Ms. Shurling.

8 Q You understand that?

9 A Yes, ma'am.

10 Q So just speak up a little bit, all right? All
11 right.

12 Now, you've heard the testimony of your trial
13 attorney here today. How much time would you say
14 you spent with David Taylor before your case went
15 to trial?

16 A No more than two visits.

17 Q And each one of those visits would have lasted for
18 about how long?

19 A 20 to 30 minutes.

20 Q And you were facing charges of murder and
21 lynching?

22 A Yes, ma'am.

23 Q Did he go over all the discovery materials with
24 you prior to your trial?

25 A No, ma'am, nor did I have a copy of it.

1 Q Okay. During your trial, do you recall
2 discussions about possible witnesses who might
3 testify to confessions made by Moe Sanders?

4 A Yes, ma'am.

5 Q There was also an effort to introduce testimony
6 from a Michelle Buff, do you recall that?

7 A Yes, ma'am.

8 Q Okay. Now the State's theory of the case was that
9 you were at the Benedict parking lot with whom?

10 A The State's theory was that I was at the Benedict
11 College campus with Maurice Sanders and also some
12 other gentlemen. That was the State's theory.

13 Q Including Lucius and Shakeem Wilson?

14 A Yes, ma'am.

15 Q Who's Lucius?

16 A My brother.

17 Q And also your co-defendant?

18 A Yes, ma'am.

19 Q And Shakeem was your cousin?

20 A Yes, ma'am.

21 Q And Shakeem Wilson took the Fifth, correct?

22 A Yes, ma'am.

23 Q Okay. Now, what, if any, testimony, can you
24 recall, did the State introduce to prove that you
25 were at this parking lot with Maurice Sanders?

1 Let me qualify that. I don't mean that you were
2 both in the same parking lot. I mean that you
3 either came together or had agreed in advance to
4 meet up there or -- what, if any, testimony did
5 they introduce that went beyond merely showing
6 that he was there when you were there?

7 A There wasn't any, ma'am.

8 Q There wasn't any?

9 A (Negative response.)

10 Q And you were alleged to have left the scene with
11 whom?

12 A By the State's theory?

13 Q Yes.

14 A With Maurice Sanders, Shakeem Wilson, Limel Sims,
15 everybody.

16 Q Well, the State's theory was that everyone
17 scattered and ran at the same time?

18 A Yes, ma'am.

19 Q Correct? But there was no direct testimony of
20 your leaving the scene with Maurice Sanders, was
21 there?

22 A No, ma'am. It was testimony to the very opposite.

23 Q Okay. There was testimony to the effect that you
24 actually left with your bother?

25 A Yes, ma'am.

- 1 Q And your statement was the reason you left with
2 your brother was because your cousin had the key
3 to the car?
- 4 A Yes, ma'am and the doors were locked.
- 5 Q So when the shooting broke out, did you try to go
6 back to the car?
- 7 A Yes, ma'am, that's the first thing I did.
- 8 Q And the doors to the car were locked.
- 9 A Yes, ma'am.
- 10 Q Was Shakeem Wilson anywhere to be seen?
- 11 A No, I didn't see him.
- 12 Q And so that's when you and your brother left on
13 foot?
- 14 A Yes, ma'am.
- 15 Q Okay. Now, you heard your lawyer testify about
16 your decision not to present testimony at your
17 trial?
- 18 A Yes, ma'am.
- 19 Q Here today?
- 20 A Yes.
- 21 Q Did you want to testify?
- 22 A Yes, ma'am, I did.
- 23 Q From the beginning, was your statement that you
24 gave to law enforcement consistent with that given
25 by your brother Lucius?

1 A Yes, ma'am.

2 Q Did you ever tell David Taylor anything that was
3 not factually consistent with your statement or
4 with Lucius's testimony?

5 A No, ma'am.

6 Q Now, you had a drug prior from New York?

7 A Yes, ma'am.

8 Q Did you have discussions with your attorney about
9 what would happen concerning that drug prior if
10 you took the stand?

11 A No, ma'am.

12 Q You did not?

13 A No.

14 Q What was your understanding as to whether or not
15 the State was going to be able to use that drug
16 conviction to impeach you if you took the stand?

17 A It would make me look very bad. I was advised not
18 to get on there.

19 Q Okay. In retrospect, you don't believe that was
20 the right decision?

21 A No, ma'am.

22 Q Why not?

23 A Because from looking at it now it looks like it
24 almost implies guilt that I didn't speak out for
25 myself. Although it wasn't until my brother had

1 testified, right after that I was supposed to
2 still get on the stand and testify and my lawyer
3 said that he had pretty much covered everything.
4 That he didn't want me to get up there and look
5 bad. I was still willing to testify and still
6 wanted to even until that point.

7 Q Well, the thing that the Judge needs to understand
8 is how is it that you believe Mr. Taylor
9 improperly influenced you not to testify?

10 A He made me believe that it would hurt me.

11 Q Pardon?

12 A He made me believe that me testifying would not be
13 to my benefit.

14 Q Did he discuss with you the fact that it would be
15 helpful for your testimony to be presented to
16 corroborate Lucius's and vice versa?

17 A Excuse me?

18 Q Did he discuss with you the fact that it would be
19 helpful for yours and Lucius's testimony to be
20 consistent with one another?

21 A Yes, ma'am.

22 Q But he still advised you not to testify?

23 A Yes, ma'am.

24 Q Okay. I'm not trying to be difficult, what do you
25 think he did that was not proper in that regard?

1 A I think that my voice should have been heard
2 because I was a defendant and I needed to defend
3 myself as well as him assisting me.

4 Q And why do you believe that the decision that was
5 made including signing those pieces of paper was
6 not voluntary?

7 A Because I was believing that it was not going to
8 be to my benefit, that it was going to harm me
9 taking on the stand and that it would make me look
10 guilty for some reason.

11 Q And you now believe that that was erroneous
12 advice?

13 A Absolutely.

14 Q Okay. Now, you got a sentence of what?

15 A 30 years.

16 Q You and I have discussed the fact that you were
17 looking at potentially life plus 15, correct?

18 A Yes, ma'am.

19 Q And although 30 years is a very long time, it's
20 not LWOP, you understand that?

21 A Yes, ma'am.

22 Q Have you and I discussed the fact that if His
23 Honor concludes that you have met your burden of
24 proof with regard to your Sixth Amendment claims,
25 that the remedy he can give you is a new trial?

1 A Yes, ma'am.

2 Q And have I explained to you that at such a new
3 trial you would be facing a potentially much
4 harsher sentence than the one you have now?

5 A Yes, ma'am.

6 Q And not withstanding that risk, you still want
7 your new jury trial?

8 A Yes, ma'am.

9 Q Now, I spent a long time going over what I believe
10 are the salient arguments in your case with
11 Mr. Taylor. Did I raise everything that you
12 wanted me to raise concerning the errors and
13 omissions made by Mr. Taylor in his representation
14 of you?

15 A Yes, ma'am.

16 Q I've explained to you, have I not, that this is
17 your one and only PCR hearing and that you are not
18 likely to ever have those rare circumstances that
19 would justify another PCR on these same judgments
20 and sentences?

21 A Yes, ma'am.

22 Q So if there is anything I've left out, you need to
23 speak up. Have I left out anything specific you
24 wanted to argue?

25 A No, ma'am.

1 Q Okay. Now, a lot of what I've argued here today
2 is based on legal arguments. Are you satisfied
3 that those legal arguments have already been fully
4 made on your behalf?

5 A Yes, ma'am.

6 Q With the exception of argument at that end. I'm
7 not saying that I am through arguing the point but
8 I've raised them sufficiently?

9 A Yes, ma'am.

10 Q Okay. If you will please listen very carefully to
11 the questions put to you by Brian Petrano and
12 answer them truthfully, please.

13 A Yes, ma'am.

14 MR. PETRANO: No questions.

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

16 sir.

17 (The witness leaves the witness stand.)

18 MS. SHURLING: I call John Patrick Wood to the
19 stand.

20 (JOHN PATRICK WOOD, having first been duly
21 sworn, testified as follows:)

22 THE COURT: Please take a seat. Tell us your
23 full name, spell your last name for the record.

24 THE WITNESS: John Wood.

25 MR. PETRANO: Your Honor, at this point before

1 we get started, just so I don't interrupt. I just want
2 to renew my objection on relevance as to this Applicant
3 -- or this witness may testify as to who the actual
4 shooter was.

5 Thank you, Your Honor.

6 THE COURT: All right. State your name again,
7 I did not hear. Spell your last name for the record,
8 sir.

9 THE WITNESS: John Wood. My last name is
10 spelled W-o-o-d.

11 DIRECT EXAMINATION

12 BY MS. SHURLING:

13 Q Mr. Wood, you've heard testimony today concerning
14 the fact that you were brought to the Courthouse
15 to be a potential witness in the murder trial of
16 Dushun Staten. Is that correct?

17 A Yes, it is.

18 Q And where were you brought from?

19 A Kershaw -- Kershaw Correctional.

20 Q Okay. And you're still in the custody of the
21 Department of Corrections, correct?

22 A Yes, I am.

23 Q What are you serving time for?

24 A Armed robbery and distribution of crack cocaine.

25 Q And how much longer have you got to go on your

1 sentence?

2 A About 20 -- about 25, 26 months, something like
3 that.

4 Q Okay. Prior to being transported from Kershaw
5 Correctional to this Courthouse for Dushun
6 Staten's trial, had you been interviewed by David
7 Taylor?

8 A Repeat the question one more time for me.

9 Q Had the lawyer that we've been talking to for the
10 last hour and a half or so, had he ever come to
11 Kershaw Correctional to talk to you?

12 A No, ma'am.

13 Q When you got to this Courthouse and you were
14 downstairs in the holding cell, did he ever come
15 downstairs and talk to you?

16 A No, ma'am, I never spoke to anyone.

17 Q How long were you left sitting in the cell
18 downstairs?

19 A Three, maybe four hours, four and half hours,
20 something like that.

21 Q Did anyone come and offer any explanation to you
22 as to why you were not being called as a witness?

23 A The officer downstairs didn't even know what I was
24 there for.

25 Q Okay. Did you know at the time what you were

DUSHUN STATEN V. THE STATE OF SOUTH CAROLINA

1 there for?

2 A I was pretty sure what I was there for.

3 Q Okay. Now, it's your testimony that you were
4 never spoken to by Mr. Taylor, that's clear?

5 A I never spoke to Mr. Taylor.

6 Q Okay. And you were never brought upstairs to
7 testify?

8 A Never brought upstairs.

9 Q Do you know Dushun Staten?

10 A Yes, I know him.

11 Q Were you present the night of the shooting?

12 A No, ma'am.

13 Q Okay. So you would not have been an eyewitness to
14 the events that transpired that evening?

15 A No, ma'am.

16 MS. SHURLING: Okay. Thank you I have no
17 further questions.

18 THE COURT: Mr. Petrano.

19 MR. PETRANO: Yeah, really briefly.

20 CROSS-EXAMINATION

21 BY MR. PETRANO:

22 Q You said that you had an idea you knew why you
23 were there, right?

24 A Yeah, I knew why I was there.

25 Q And what was that?

DUSHUN STATEN V. THE STATE OF SOUTH CAROLINA

1 A To speak on behalf of Mr. Staten there.

2 Q And what were you going to say?

3 A What was I going to say?

4 Q What -- you were going to speak on behalf, what do
5 you mean?

6 A I was supposed to be there to speak on his behalf.

7 Q What do you mean, you were going to say he was a
8 nice guy, what?

9 A What was I going to say?

10 THE COURT: He's asking you what were you
11 brought to the Courthouse -- that day that Mr. Staten
12 was on trial, what were you brought there to testify
13 to, as you understood it?

14 A I was brought there to testify that I was in the
15 holding cell with gentlemen when they were holding
16 a conversation about the murder.

17 Q What gentlemen, what murder?

18 A I'm not -- I'm not -- what is his name, I'm not
19 sure what names ---

20 Q Okay, and when ---

21 A --- by street names, I'm sorry.

22 Q Well, what street names, tell us?

23 A I don't think that's necessary, Mr. Staten and his
24 brother and the dead guy.

25 Q And when was this -- when were you in the cell

1 with these other people that you won't name?

2 A I was going to -- I think it was preliminary
3 hearing, a bond hearing, something of that nature.

4 Q What day?

5 A What date?

6 Q Yeah.

7 A You talking nine years ago, I ---

8 Q Give me a month?

9 A I can't do that.

10 Q Okay.

11 MR. PETRANO: I've got nothing further of this
12 witness.

13 THE COURT: All right. Anything further, Ms.
14 Shurling?

15 REDIRECT EXAMINATION

16 BY MS. SHURLING:

17 Q Back at the time of the trial in 2002, would you
18 have remembered a little clearer when you were in
19 the cell with Maurice Sanders?

20 A I'm pretty sure I would have.

21 Q But you're positive you were in a holding cell
22 with Maurice Sanders?

23 A Yes -- yes, ma'am, I'm positive.

24 MR. PETRANO: I object. He never testified to
25 being in a cell with Maurice Sanders.

1 Q Were you in a holding cell with Maurice Sanders?

2 MR. PETRANO: Now we're going beyond cross.

3 THE COURT: Let him answer.

4 MR. PETRANO: Thank you, Judge.

5 Q Were you in a holding cell with Maurice Sanders?

6 A Yes, I was.

7 Q And you're positive of that fact?

8 A Definitely positive of that.

9 Q And that's what you were brought to Court to
10 testify?

11 A Yeah.

12 MS. SHURLING: Thank you, no further
13 questions.

14 THE COURT: Well, the witness testified he
15 didn't know who he was in the holding cell with
16 earlier, but go ahead, Mr. Petrano.

17 RECROSS EXAMINATION

18 BY MR. PETRANO:

19 Q Okay. Now that we've established that you were in
20 a cell with Mr. Sanders, what did he say?

21 A What did who say?

22 Q What were you going to testify about Sanders?

23 A I wasn't there to testify what he said.

24 MR. PETRANO: Thank you.

25 THE COURT: Anything further of this witness?

RE-REDIRECT EXAMINATION

BY MS. SHURLING:

Q What was your understanding you were there to testify about?

A To testify that I was in the holding cell with these gentlemen when they were holding this conversation about the murder.

Q So you were to testify to what you had overheard in a conversation?

A Yes.

Q As opposed to what he said to you personally?

A Yes.

MS. SHURLING: Thank you, no further questions.

THE COURT: Anything further, Mr. Petrano?

MR. PETRANO: No, Your Honor.

THE COURT: All right, you may step down, Mr. Wood.

(The witness leaves the witness stand.)

MS. SHURLING: Your Honor, I call Mr. Gilmore to the stand.

THE COURT: Is that the first name? We'll find out.

(WILLIE A. GILMORE, having first been duly sworn, testified as follows:)

1 THE CLERK: Please, Mr. Gilmore, tell us your
2 full name and spell your last name for the record, sir.

3 THE WITNESS: My name is Willie Gilmore, G-i-
4 l-m-o-r-e.

5 THE COURT: And that's your full name? What's
6 your full name?

7 THE WITNESS: Willie Gilmore.

8 THE COURT: Really?

9 THE WITNESS: Yes.

10 THE COURT: No middle initial?

11 THE WITNESS: A.

12 THE COURT: All right. Let's back up. What is
13 your full name and spell your last name for the record.

14 THE WITNESS: Willie A. Gilmore.

15 THE COURT: What does the A stand for?

16 THE WITNESS: Albert.

17 MR. PETRANO: It's Anthony, Your Honor.

18 THE COURT: Wait, you say Anthony, you say
19 Albert, I don't know. If we can, get your full name.
20 I'm not upset with you but that's all right. That's
21 why I say it every time because it's confusing.

22 THE WITNESS: My name is Willie Albert
23 Gilmore, G-i-l-m-o-r-e, not Anthony.

24 THE COURT: All right. Thank you, sir. Ms.
25 Shurling -- this is April 1st, go ahead.

DUSHUN STATEN V. THE STATE OF SOUTH CAROLINA

DIRECT EXAMINATIONBY MS. SHURLING:

Q Mr. Gilmore, do you recall being brought to the Courthouse in February 2002 and/or early March, the trial went into March 1st, 2002, as a witness for Dushun Staten?

A I can't remember that far back. I just can't remember. Like I told them, I told you today, I don't remember.

Q Okay. The lawyer that's been on the stand for about the last two hours?

A Yeah.

Q Have you ever seen that man in your life before today?

A Never.

Q Now, let's be fair, you're saying you can't remember?

A I know I never seen him before.

Q Okay. So you don't remember the part about being brought to Court but you're positive you never saw David Taylor?

A No, ma'am.

Q Okay. Were you ever interviewed by anyone in Mr. Taylor's office, to your recollection, concerning statements that may have been made to you by a

DUSHUN STATEN V. THE STATE OF SOUTH CAROLINA

1 gentleman named Maurice Sanders?

2 A No, ma'am.

3 Q No one?

4 A I can't place him.

5 Q Okay. And do you here today have any recollection
6 of any statements that were ever made to you by
7 Maurice Sanders concerning the crime that Dushun
8 Staten was tried for?

9 A No.

10 Q Might you have remembered it more clearly back in
11 2002 than you do today?

12 A Excuse me there?

13 Q If you had had conversations with Maurice Sanders
14 about this case ---

15 A I don't know Maurice Sanders.

16 Q Okay. And my question is would your memory of the
17 events in 2000, 2001 have been clearer in 2002
18 that it is today?

19 A Yeah.

20 MS. SHURLING: No further questions.

21 THE COURT: Mr. Petrano.

22 CROSS-EXAMINATION

23 BY MR. PETRANO:

24 Q You're incarcerated for what, Mr. Gilmore?

25 A Criminal sexual conduct.

DUSHUN STATEN V. THE STATE OF SOUTH CAROLINA

1 Q And you've got a burglary second and a
2 shoplifting, right?

3 A Yeah.

4 Q Who represented you on that burglary second?

5 A Douglas Strickler.

6 MR. PETRANO: Thank you. Nothing further,
7 Your Honor.

8 MS. SHURLING: Nothing further, Your Honor.

9 THE COURT: All right, you may step down,
10 Willie Albert -- Albert?

11 THE WITNESS: Albert.

12 THE COURT: Okay, Albert, thank you, Mr.
13 Gilmore.

14 (The witness leaves the witness stand.)

15 MS. SHURLING: Thank you. Your Honor, I would
16 -- a moment's indulgence.

17 THE COURT: Take your time.

18 MS. SHURLING: I'm sorry. In addition to the
19 issues that are addressed in the amended application, I
20 would assert additional allegations as relating to
21 testimony that was adduced here during the hearing
22 today, those being the failure of defense counsel to
23 discuss with his client the possibility that
24 prosecution for lynching and murder would constitute
25 simultaneous jeopardy in violation of the Constitution,

1 the failure of defense counsel to make a motion for
2 election by the State as to which charge they were
3 proceeding against the Defendant for or -- or for
4 alternative for a jury instruction advising the jury
5 that they could find the Defendant guilty of one or the
6 other but not both.

7 Also, Your Honor, we would make note of the
8 comments of the Court of Appeals in Footnote 4 of the
9 appellate decision and specifically argue that trial
10 counsel was ineffective for failing to argue that the
11 testimony of Andrew Britt concerning comments made by
12 the decedent prior to his death were not only hearsay
13 but that they impacted the character evidence rule and
14 were improper evidence of prior bad acts. The Court of
15 Appeals of course found that that issue argued by
16 appellate counsel was not preserved for appellate
17 review.

18 We additionally submit that defense counsel
19 was ineffective for failing to object to Andrew Britt
20 being allowed to interpret the statements made by the
21 deceased. The statements made by the deceased were
22 recalled as being simply, that the small kid pulled out
23 a gun and asked, what's up now. Andrew Britt was
24 allowed to extrapolate and interpret that to mean a
25 reference to little brother Dushun, referencing the

DUSHUN STATEN V. THE STATE OF SOUTH CAROLINA

1 Defendant without any objection from the Defense and we
2 would assert that that was improper.

3 Your Honor, we would assert that trial counsel
4 was ineffective for failing to properly argue the
5 relevance issue with regard to the testimony of
6 Michelle Buff. Counsel simply argued that it was
7 evidence of third party guilt without making
8 appropriate and specific arguments concerning the fact
9 that it might be irrelevant who pulled the trigger
10 among the parties that the State had directly tied
11 together by evidence adduced at trial. But that if the
12 evidence tended to show that a third party whom the
13 State had not tied to the Defendant pulled the trigger,
14 that accomplice liability would not in fact attach and
15 the Defendant would not be liable for the actions of an
16 individual he was not acting in concert with.

17 In fact, a jury charge on mere presence was
18 given at trial, I believe, but defense counsel did not
19 argue why Michelle Buff's testimony was indeed
20 extremely relevant to the assertion of third party
21 guilt. And for that reason, we would assert that
22 defense counsel was ineffective for failing to argue
23 that the evidence proffered, both Michelle Buff's
24 testimony and the testimony of the other individuals
25 was potentially extremely relevant because it went to

1 the assertion that another individual who had not been
2 tied to the Defendant as an individual he was acting in
3 concert with was in fact the shooter.

4 We would also argue ineffective assistance of
5 counsel on appeal in that the appellate counsel did not
6 argue the issue of the relevance of Michelle Buff's
7 testimony as it directly pertains to the legal standard
8 for the introduction of evidence of third party guilt.
9 And for that standard I would bring the Court's
10 attention to the decision of the Supreme Court just
11 last year in Bruce Randall Miller versus the State at
12 379 S.C. 108, 665 S.E.2d 596.

13 Your Honor, this has been a lengthy hearing
14 and we've covered a lot of ground today. I would ask
15 for permission for the parties to submit Memorandums in
16 support of their respective positions in the form of
17 proposed Orders and that we be given 30 days to do so.

18 THE COURT: Thank you, ma'am.

19 Mr. Petrano.

20 MR. PETRANO: Thank you, Your Honor. I'll
21 start with the allegations real briefly here. The
22 application itself, the State submits, is entirely
23 vague and has no value whatsoever as far as the
24 underlying allegations of ineffective assistance of
25 counsel. In fact, we filed a motion for a more

1 definite statement which in reply we got a couple of
2 days ago an amended application.

3 One, we've got defense counsel was ineffective
4 for failing to proffer the testimony of potential
5 witnesses. All right, let's do that.

6 Those two, I don't know what that was supposed
7 to be so I don't understand the relevance of how ---

8 THE COURT: For the record, you need to say
9 who those two were, Mr. Gilmore ---

10 MR. PETRANO: And Mr. Wood. Thank you, I'm
11 going to get to that in just a moment.

12 THE COURT: --- and Mr. Wood.

13 MR. PETRANO: Thank you, Your Honor. And then
14 as far as Ms. Buff, I think that the record is
15 extremely clear. I could go through line by line, but
16 I'm not going to waste this Court's time, how trial
17 counsel did indeed try to get that in there.

18 Number two, appellate counsel, ineffective for
19 failing to argue whether the ---

20 THE COURT: So they're asserting that Mr.
21 Dudek was ineffective?

22 MR. PETRANO: Well and that's kind of my point
23 here on number two. I don't think that was anything
24 that was ever developed here so I think that would
25 waive.

1 THE COURT: All right.

2 MR. PETRANO: We could say it was modified to
3 this later one which I'll get to in just a moment.

4 Number three here, defense counsel was
5 ineffective for failing to object to the Solicitor's
6 closing argument. I think that testimony was clear by
7 trial counsel that he did not see any reason to object
8 and he articulated that and he didn't see any reason.

9 And B, he said oftentimes when you do object during
10 closing it could backfire and he articulated that very
11 properly. In fact, I'm not even sure what the -- I'll
12 use the word bad argument was, based on the record.

13 Number four, defense counsel was ineffective
14 for failing to properly advise the Applicant about
15 testifying at trial. Once again, I think ---

16 THE COURT: He offered but didn't submit
17 without any objection two signed -- apparently signed
18 statements from the Defendant saying that he didn't
19 want to testify. Go ahead.

20 MR. PETRANO: Thank you, Your Honor. And
21 regarding the amended applications brought up just now,
22 we've got the failure to discuss the double jeopardy
23 issue. The State submits that that's brand new. I had
24 no opportunity to review that. I would like an
25 opportunity to review that. I submit that's totally

1 frivolous. But nonetheless -- we've heard no case law
2 or anything just a baseless allegation.

3 We've got a failure for motion to -- oh,
4 sorry, that one goes with the double jeopardy.

5 We've got the prior bad acts, the violation, a
6 supposed violation and whether trial counsel was
7 ineffective for not preserving that to be used later on
8 appeal. The State submits, again, that's just an empty
9 allegation. I don't see what the prior bad act was. I
10 think there was a reference to the pointing and
11 presenting. But I think that there was also evidence
12 that could suggest that that may have been a self-
13 defense. So again, I don't know what the prior bad act
14 would have been to object to, to preserve.

15 Oh, regarding whether witness Britt, Andrew
16 Britt -- trial counsel was ineffective to not object
17 when Britt elaborated and explained who the little
18 person was. I think that there was nothing wrong with
19 that explanation. In fact, I'm not even sure what the
20 objection would have been. The allegation is that
21 trial counsel should have objected. I don't see what
22 the objection should have been specifically.

23 Failure to argue the relevance of false
24 testimony. Once again, I think the Supreme Court has
25 been through this issue. It's not relevant and I don't

1 see how the argument here has changed, developed or in
2 any way been enhanced as far as how that would be
3 relevant.

4 And the ineffective assistance of appellate
5 counsel to better argue the -- again, that goes back to
6 Buff's testimony and how that's relevant. Whether that
7 be trial counsel or appellate counsel, I don't see how
8 it could have been better argued. I don't see how that
9 allegation has been expanded beyond what the Supreme
10 Court has already ruled.

11 Thank you, Your Honor.

12 MS. SHURLING: Your Honor, I will with the
13 Court's leave expound own that in my Memorandum. But I
14 would just note that the Court of Appeals finding was
15 based on the relevance argument articulated by defense
16 at trial. And that is at the heart of our allegation
17 that defense counsel had not prepared to present the
18 appropriate standard for the introduction of evidence
19 of third party guilt and that he did not properly argue
20 why the testimony of Ms. Buff was relevant.

21 THE COURT: All right.

22 MS. SHURLING: And the Court of Appeals ruling
23 was based on the arguments made by defense counsel
24 which were deficient.

25 MR. PETRANO: If I could just very briefly.

1 Once again, what should he have argued? I've not seen
2 that part, you were just criticizing him.

3 And then if I may, the Court of Appeals did
4 say, this was regarding the relevance, but I think we
5 need to incorporate the Supreme Court ruling which
6 basically vacated the portion of the Court of Appeals
7 ruling that had anything to do with Crawford which I
8 think may have -- which may overlap as to what we're
9 talking about here and I just wanted to incorporate
10 those two together and not leave that part out because
11 nothing that had to do with Crawford exists anymore in
12 that Court of Appeals ruling.

13 Thank you.

14 THE COURT: All right. Now, the only other
15 question I have, Mr. Petrano, you've got to help me
16 understand how can -- and this is maybe too simplistic.
17 The Defendant was tried for both lynching and murder
18 and convicted on both and both of the indictments
19 alleged that he died as the proximate -- I mean, he
20 could have died twice, that's my simple observations.
21 So you've got lynching that said he died and you've got
22 murder that said he died. I mean -- and he was
23 convicted on both.

24 I mean, how can we have that, I don't
25 understand?

1 MR. PETRANO: And again, I may not be able to
2 articulate myself on the fly. This is the first ---

3 THE COURT: Look, I just raise that question.

4 MR. PETRANO: Yeah.

5 THE COURT: I'm going to give you both 30
6 days, take your time.

7 MR. PETRANO: But if I may ---

8 THE COURT: Yeah.

9 MR. PETRANO: --- right off the bat, I would
10 say that there's no real prejudice in the sen -- and
11 this isn't going to be a great argument, the sentence
12 ---

13 THE COURT: All right.

14 MR. PETRANO: What the sentence was concurrent
15 so it's not as though he was sentenced ---

16 THE COURT: Yeah, but you can't say that he --
17 we shot him and he died, we stabbed him and he died. I
18 mean, he died once. Did he die from the stabbing --
19 did he die from the lynching or from the ---

20 MR. PETRANO: Well, there could be ---

21 THE COURT: Anyway, I want you to address
22 that.

23 MR. PETRANO: Thank you, Your Honor. And I
24 think that ---

25 THE COURT: And I'm not trying to pick on you

1 but that bothers me a little bit.

2 MR. PETRANO: Thank you, Your Honor, and I'll
3 try to do my best in ---

4 THE COURT: Both you address that. The
5 indictment says, lynching he died and -- you've got two
6 indictments that he died. He died once. I -- you know
7 -- and you can footnote it however you want but address
8 it in some way.

9 MR. PETRANO: And if I may just clarify.

10 THE COURT: Yes.

11 MR. PETRANO: You want basically just a
12 Memorandum on an issue or proposed Orders from both on
13 ---

14 THE COURT: Proposed Orders. I mean,
15 Memorandums are proposed Orders as a practical matter.
16 So it makes it easier for everybody to have some
17 argument on appeal.

18 MR. PETRANO: I will submit that via e-mail,
19 Your Honor.

20 THE COURT: All right. Is 30 days good
21 enough? I know you're busy, I know you're busy. If
22 you need longer than 30 days -- Ms. Shurling can
23 probably get hers. If you need a little bit longer,
24 just let me know.

25 MR. PETRANO: Thank you, Your Honor.

1 THE COURT: All right.

2 MR. PETRANO: I will.

3 THE COURT: Thank you all, everyone here. And
4 I guess we'll see y'all in the morning.

5 MS. SHURLING: Thank you. Your Honor, with
6 response to one issue. My only request would be that
7 we submit our proposed Orders simultaneously. I don't
8 want to be put in a position of ---

9 THE COURT: Please, please, please. That's
10 what we always do. Like I said, if he can't finish his
11 in 30 days, he'll call you, not me, and you hold yours
12 until his is finished.

13 MR. PETRANO: If it comes, I won't open it.

14 THE COURT: That's right.

15 MR. PETRANO: Thank you, Your Honor.

16 ----- END OF TRANSCRIPT OF RECORD -----
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1 CERTIFICATE OF REPORTER

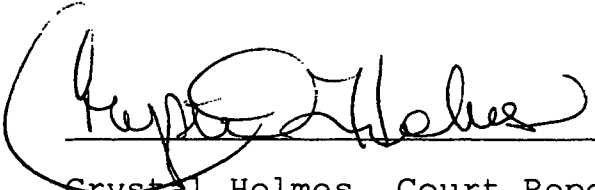
2
3 STATE OF SOUTH CAROLINA)

4 COUNTY OF RICHLAND)

5
6 I, Crystal Holmes, Official Court Reporter for
7 the Fifth Judicial Circuit of the State of South
8 Carolina, do hereby certify that the foregoing is a
9 true, accurate and Complete Transcript of Record of
10 the proceedings had and evidence introduced in the
11 hearing of the captioned case, relative to appeal,
12 in the Court of Common Pleas for Richland County,
13 South Carolina, on the 1st day of April, 2009.

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

16
17 June 13, 2011

18
19 
20 Crystal Holmes, Court Reporter

21
22
23
24
25
DUSHUN STATEN V. THE STATE OF SOUTH CAROLINA

STATE OF SOUTH CAROLINA
 COUNTY OF RICHLAND
 IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
 CASE NO: 2007CP4004259

Dushun #282328 Staten

vs.

State of South Carolina

Plaintiff

Defendant

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 and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ 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: _____

RICHLAND COUNTY
 FILED
 2009 JUL 23 PM 2:51
 JEANETTE W. McBRIDE
 C.C.P. & G.S. 41(a)

☐ **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 Columbia, South Carolina, this _____ day of _____, 2009.

PRESIDING JUDGE

This judgment was entered on the _____ day of _____, 2009, and a copy mailed first class this 27th day of July, 2009, to attorneys of record or to parties (when appearing pro se) as follows:

Dushun # 282328 Staten
 Tara D Shurling
 Dushun # 282328 Staten

State of South Carolina
 Brian T Petrano
 State of South Carolina

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

SCRPC APP-24/FORM 4

JUL 29

Clerk of Court

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Richland County. The Applicant was represented by David E. Taylor, Esquire. On March 4, 2002, after a jury trial with the Honorable L. Henry McKellar, the Applicant was convicted and sentenced to the following:

Case No.	Charge	Charge Description	Term	CC	No
1-02	2002GS401148	0116 16-03-0020 * 30 - L/D * Murder / Murder (victim: Phillip Lee Jr.)	30	CC	No
1-02	2002GS400786	0312 16-03-0210 * 5-40 * Lynching - First degree (victim: Phillip Lee Jr.)	10	CC	No

A timely Notice of Appeal was filed on Applicant's behalf, the South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Staten, 364 S.C. 7, 610 S.E.2d 823 (S.C. App. Ct. 2005) decided March 07, 2005, rehearing denied August 26, 2005.²

In his Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. INEFFECTIVE ASSISTANCE OF COUNSEL
 - a. COUNSEL FAILED TO PROTECT MY 6TH AND 14TH AMEND. RIGHTS, TO DUE PROCESS
2. VIOLATION OF U.S. CONST. AMEND. 6TH
 - a. DENIED A FAIR TRIAL AND THE RIGHT TO PRESENT WITNESS
3. VIOLATION OF U.S. CONST. AMEND. 14TH
 - a. DEPRIVED OF THE LAWS OF DUE PROCESS

On March 30, 2009, the Applicant filed an Amended Application for Post-Conviction Relief making the following allegations:

1. Defense counsel was ineffective for failing to proffer the testimony of potential witnesses who heard Maurice Sanders confess to killing the victim;

² On Certiorari the South Carolina Supreme Court held: "We vacate that portion of the opinion discussing Crawford v. Washington, 541 U.S. 36 (2004), as unnecessary to the disposition of this case and dismiss the writ of certiorari." Opinion No. 26336, June 11, 2007, remittitur date June 27, 2007. State v. Staten, 374 S.C. 9, 647 S.E.2d 207 (2007).

2. Appellate counsel was ineffective for failing to argue that defense counsel sufficiently proffered the testimony of those witnesses;
3. Defense counsel was ineffective for failing to object to the solicitor's closing argument where the solicitor referred to facts not in the record;
4. Defense counsel was ineffective for failing to properly advise the Applicant about testifying at trial.

In addition, the Applicant alleged that his conviction and sentence was improper because it was a double jeopardy violation, in that both murder and lynching in the first degree revolve around the death of the victim.

The Court of Appeals summarized the facts of the case as follows:

On January 15, 2001, Phillip Lee, Jr., a student of Benedict College and a reputed gang member of the Crips, was gunned down on Benedict's campus. Brothers Lucius and Dushun Staten were indicted for the offenses of murder and lynching in the first degree for this crime. They were tried together in 2002. The jury found Dushun and Lucius guilty of lynching in the first degree, but only Dushun guilty of murder. The trial court declared a mistrial on Lucius's charge for murder. The trial court sentenced Lucius to fifteen years, suspended upon the service of eight years for lynching. The court sentenced Dushun to thirty years for murder and ten years for lynching, to run concurrently.

Staten, 364 at 7, 14-15, 610 S.E.2d at 826 – 827.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

1

The Applicant testified that he only met with trial counsel on two occasions for approximately twenty (20) to thirty (30) minutes. The Applicant testified that he never went over his discovery materials. The Applicant testified that he recalls discussing the testimony of witness Buff with his trial counsel. The Applicant testified that the State's theory was that he was with Sanders and the group at the college. The Applicant testified that he took issue with any testimony that implied that he left with his brother following the shooting; the Applicant explained that the doors to the car automatically locked, and that he could not open the door. The Applicant testified that he gave a statement, but that statement was consistent to co-defendant Lucius' statement. The Applicant testified that in retrospect it appears to imply guilt because he did not testify. The Applicant testified that trial counsel advised him that testifying would not be beneficial. The Applicant testified that his voice should be heard.

Trial counsel testified that he recalls his representation of the Applicant, that at the time of the trial he had approximately twenty-eight (28) years of experience as a lawyer, with about 60% of his practice devoted to criminal law. Trial counsel testified that prior to private practice he was a private investigator for law firms. Trial counsel testified that this was a joint trial with the two brothers; and that Douglas Strickler, as chief deputy public defender, represented the co-defendant. Trial counsel testified that there were plea offers, the best of which was a plea to the lynching only for negotiated range of five (5) to fifteen (15) years and the murder charge would be *not prossed* in exchange for the plea; however the Applicant rejected that offer. Trial counsel testified that has never considered whether a conviction for murder AND first-degree lynching could be a double-jeopardy violation. Trial counsel testified that he was unsuccessful in subpoenaing witnesses who would testify that Sanders "did it." Trial counsel referenced page 230 in the transcript and indicated that he thought some detention center inmates would be able

to present favorable testimony regarding the corroboration issue as it related to the introduction of the testimony of witness Buff. Trial counsel testified that he initially thought he would be able to produce three (3) witnesses that corroborated that Sanders admitted to the killing but that the witnesses never materialized and/or recanted. Trial counsel testified that for strategic reasons he did not call the jailhouse witnesses in an effort to prevent the State from muddying the waters with defense witnesses who testify to nothing. Trial counsel testified that witness Buff's testimony was not allowed but was proffered and that the Solicitor stipulated to what the testimony would have been, and her statement was made a part of the record.

Trial counsel testified that the State's position was that it did not matter which individual in the group actually pulled the trigger because the defendants were being tried on accomplice liability. Trial counsel testified in essence, that when the planned witnesses "turned south" it was almost impossible to corroborate witness Buff's statement. Trial counsel testified that the defense was that the Applicant was nowhere near the shooter, but that the State's witnesses testified otherwise. Trial counsel testified that, of the group, there were five (5) others, one invoked his 5th amendment rights, two (2) others pled, and two (2) others claimed they did not know anything about the shooting. Trial counsel testified that it would not serve the Applicant's case to call witnesses who gave worthless testimony. Trial counsel testified that part of the State's case was the Applicant's statement to law enforcement implicating Sanders, and that Brandon McCants also implicated Sanders. Trial counsel was questioned as to why he did not proffer the testimony of some of the witnesses he intended on using, trial counsel replied that he spoke to them at the courthouse and they recanted and indicated they would testify to nothing – so there was no need to proffer nonexistent testimony. Trial counsel testified that he did not advise the Applicant not to testify, but that the Applicant had some problems and he (the

Applicant) was upset that (his brother) the co-defendant's statement and that it was not the way they (the brothers) remembered it happening. Trial counsel testified that the co-defendant did a good job testifying. Trial counsel testified that he informed the Applicant that he (trial counsel) could not suborn perjury and that the Applicant could not start changing his story. Trial counsel testified that he has a statement signed by the Applicant indicating it was the Applicant's decision not to testify. Trial counsel testified that the co-defendant's testimony hurt the case because the fleeing vehicles was an issue and the conflicting versions of events did not appear to be going over well. Trial counsel testified that he objected to the testimony of witness Brit on hearsay grounds and did not argue that it was a prior bad act because the proper objection was hearsay and not prior bad act – trial counsel testified that “the argument” is hearsay. Trial counsel testified that a prior bad act argument would not suffice because the Britt testimony was not really a prior bad act in the classical sense when the State is merely accusing that the Applicant handed the gun to the shooter, and that if the argument was prior bad act, the State would just counter that it went to state of mind, etc. Trial counsel testified that there was nothing worth objecting to regarding the State's closing argument. Trial counsel testified that the written transcript, while technically accurate, does not reflect the tone, nuance, gesturing, or the clever use of pronouns that makes a Johnny Gasser closing argument. Trial counsel testified that, when experiencing the live version of the words transcribed there was nothing improper about the Solicitor's closing; and that objections during closing can backfire – trial counsel testified “I don't see the prejudice to my client.” Trial counsel testified that if he thought there was anything improper he would have objected, but at the time, the live argument was, in trial counsel's opinion, not really worthy of any objection.

In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). When there has been a guilty plea, the applicant must prove that counsel's representation was below the standard of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59 (1985); Alexander v. State, 303 S.C. 539, 542, 402 S.E.2d 484, 485 (1991).

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

Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. As discussed above, the Applicant has failed to carry his burden in this action. Therefore, this Court finds that the application must be denied and dismissed.

This Court finds Applicant's testimony is not credible, while also finding Applicant's counsel's testimony is credible. Accordingly, this Court finds Applicant has failed to prove the first prong of the Strickland test – that counsel failed to render reasonably effective assistance under prevailing professional norms. This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by counsel's performance.

Witness Buff and the identity of the shooter

This Court finds that the Applicant has failed to satisfy his burden of proof and demonstrate that this Court should differ from the South Carolina Court of Appeals [the South Carolina Supreme Court affirmed the relevant portions] that clearly ruled that the identity of the shooter is absolutely irrelevant. "We affirm the trial court's reasoning that, because the State conceded neither Staten brother was the shooter, showing Sanders as opposed to Sims was the shooter did nothing to aid the jury in its decision. The trial court did not abuse its discretion in refusing to admit the testimony." State v. Staten, 364 S.C. 7, 40, 610 S.E.2d 823, 840 (S.C. App. Ct. 2005). Accordingly, any of the witness Buff testimony is irrelevant because her testimony, as alleged at the PCR, only revolved around what Sanders may have done after the shooting and whether he confessed to her that he was the shooter.

The Applicant argues that trial counsel was ineffective for failing to better argue that witness Buff's testimony was important because establishing Sanders as the shooter would allow the Applicant to successfully show his lack of connection to Sanders. This Court finds the

Applicant's claims to be without merit. The Applicant's point focuses on one of the main reasons why his claim fails. As the Court of Appeals reasoned in its opinion, "showing Sanders as opposed to Sims was the shooter did nothing to aid the jury in its decision". Staten, 364 S.C. at 40, 610 S.E.2d at 840. As the appellate courts affirmed, the Solicitor had a valid point when he argued that under the facts of this case whether the shooter was Sanders or Sims was not sufficiently probative of the real issues. (Trial transcript p. 213 – 216). The State conceded throughout the case that neither Staten was the shooter; thus, as long as the State proved the shooter was acting with malice and the Statens were accomplices, showing that Sanders as opposed to Sims was the shooter would do little if anything to exculpate the defendants. See generally Forney, 321 S.C. 353, 468 S.E.2d 641 (vague statements by codefendant did little to exculpate the defendant). Further, and more importantly, there was absolutely nothing at all in the facts of this case to distinguish Sanders from Sims for purposes of the accomplice liability of the Statens. The bulk of the testimony, including from co-defendant Lucius himself as well as witness McCants, was that Sanders and Sims were present together with one another. (Trial transcript p. 870 – 1038). The Applicant first claimed "Mo" shot the victim, and said Mo was at the scene with "Mel" and "Careem". In a photo lineup, the Applicant identified Maurice Sanders as "Mo", and stated that Mo was wearing red boots, a red hat, and red scarves. According to the Applicant, Sanders and the victim were arguing while Lucius tried to break it up. The Applicant did not see the shooting, but he saw the gun in Mo's hand. When told that witnesses were saying a guy in a black Northface jacket shot the victim, the Applicant stated that person was "Mel". The Applicant offered to try to get a first name, and called Tisha Davis. The Applicant said Tisha called Mel's ex-girlfriend Michele Buff who said the full name was Limel Simms. (Trial transcript p. 727-730). Indeed, even the Applicant in his statement and witness Buff in her

statements placed Sims and Sanders together. Either the Statens were associated with these others to the point of accomplice liability, or they were not. Defining one or the other as the triggerperson does nothing to aid the jury in this decision, as unquestionably both were at the scene together. The potential of confusion from such questionable evidence substantially outweighed the limited probative value under the facts of this case. The Applicant did not offer or even identify any "other evidence" separating him from Sanders as opposed to Sims, or even separating Sanders from Sims. Both the Applicant and co-defendant Lucius either told police or testified that Sanders and Sims were together on the day of the incident, and even defense witness McCants stated Sanders and Sims were together arguing with the victim while the Applicant stood off to the side. (Trial transcript p. 870 – 933). Since there was nothing in the evidence to distinguish the relationship of the Applicant to Sims as opposed to the relationship of the Applicant to Sanders, the identity of the "real" shooter was of no consequence as to whether the Applicant was associated with "them" or not.

Instructive on this point is South Carolina's standard for admission of 3rd party guilt evidence – such evidence "must be limited to such facts as are inconsistent with [Applicant's] own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence". Further, there must be "proof . . . as tends clearly to point out such other person as the guilty party". State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941). Under the facts of this accomplice liability case, proving that Sanders as opposed to Sims was the shooter does nothing to show "such facts as are inconsistent with [Applicant's] own guilt" as an accomplice to those two fellows. Exclusion of Buff's testimony is for these reasons not only irrelevant under Rule 403 as well as our third party liability rules, but also harmless.

Having found that trial counsel's representation was not deficient, similarly the Applicant has failed to demonstrate any prejudice regarding any of the testimony of witness Buff; this Court notes that the appellate court(s), in essence, explain that the absence of witness Buff's testimony was harmless error if at all.

Sanders was unavailable to testify due to the exercise of his Fifth Amendment rights. Buff would testify that Sanders confessed to the murder, thereby exposing him to possible further criminal charges. The only corroboration was from the eyewitness testimony of Brandon McCants, who testified that he saw Sanders shoot Lee, and Dushun's statement that he and Lucius withdrew. However, McCants did not come forward with his information until two months after the incident, even though he was questioned by police much earlier; Dushun obviously had motive to lie; and, when arrested shortly after the shooting, Sanders tested negative for gunshot residue. Lastly, but most importantly, Sims, Buff's boyfriend, was charged with the murder as well, and Buff's statement would exculpate him. Therefore, she had motive to make up the story about Sanders' confession.

Staten, 364 S.C. at 39, 610 S.E.2d at 839 – 840.

Prior Bad Act

One of the main issues on appeal was the introduction of the testimony from witness Britt. Witness Britt explained to the jury how the victim relayed another confrontation between the victim and the Applicant. At trial, trial counsel made a hearsay objection, and the direct appeal decision(s) discuss the confrontation issues accordingly. There is a footnote in the direct appeal decision that indicates one of the arguments on appeal was that witness Britt's testimony was an improper introduction of a prior bad act – the appellate court ruled that issue was not preserved.³ Without any specificity the Applicant now makes the generic allegation that trial counsel was ineffective for failing to make such an objection. Despite the Applicant's vague criticism of trial counsel for failing to also object to the introduction of witness Britt's testimony

³ State v. Staten, 364 S.C. at 36, 610 S.E.2d at 838 n. 4.

as an improper prior bad act, this Court finds that the Applicant failed to satisfy his burden of proof and demonstrate how trial counsel's purported inactions were deficient within our professional norms - or how the Applicant was ultimately prejudiced. Specifically, trial counsel testified that he did not make a prior bad act objection because that was not the correct argument. This court agrees. The victim's statement related to the event that caused it - the Applicant pulling the gun on him. As far as hearsay is concerned - which is the objection that was made - it is inconsequential that the act was not the same as the murder. The substance of the statement was admissible for various purposes listed in Rule 404(b), SCRE. The caselaw amply supports introduction of prior confrontations, threats, and fights between the parties, even when they are not so temporally connected with the ultimate murder as they were in this case, by a day or two. Our appellate courts have flatly stated that "[i]n homicide cases, evidence that the accused and the decedent had previous difficulty is admissible. The evidence is admissible to show the animus of the parties and to aid the jury in deciding who was the probable aggressor." State v. Taylor, 333 S.C. 159, 168, 508 S.E.2d 870, 874 (1998). See generally, e.g. State v. Taylor, 689 N.W.2d 116, 125 (Iowa 2004) (collecting cases from various states where evidence of prior assaults on the victim were allowed, especially to counter defenses such as self-defense, accident, or lack of premeditation); State v. Sawtell, 872 A.2d 1013 (N.H. 2005) (evidence of defendant's prior threats to victim with a gun months before murder was admissible as the threats involved the same victim, the same weapon, and similar circumstances); Bhutto v. State, 114 P.3d 1252 (Wy. 2005) (evidence of prior threats and assaults between the parties may be admissible to prove motive and intent, because it helps the jury understand the relationship between the parties, and may counter a defense). Of course, "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity

therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.” Rule 404(b), SCORE; State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). Prior crime evidence must be logically relevant to the particular purpose or purposes for which it is introduced at trial. State v. Derrick Smith, 337 S.C. 27, 522 S.E.2d 598 (1999). Moreover, the victim’s statement is especially relevant to identity and intent in this case of accomplice liability. The evidence of Applicant’s daily confrontations with the victim over their conflicting gang colors is especially relevant to show Applicant’s involvement in and association with the ultimate murder in this case of accomplice liability. See, e.g. United States v. Jefferson, 925 F.2d 1242, 1257-58 (10th Cir. 1991) (testimony about defendants’ prior drug transactions was admissible under Rule 404(b) to show they had knowledge of the drugs in another person’s trunk and were participating in that particular drug transaction). Indeed, the prior confrontations, including the one at the heart of this case, are part of the *res gestae* of the crime, in that they are such a part of the fabric of explaining to the jury how and why confrontations escalated into a senseless murder in the parking lot of a local college.⁴

⁴ While certainly not argued at the PCR hearing, this Court merely notes that there is also nothing to suggest that the purported prior bad act evidence was not clear and convincing. The evidence of prior bad acts must be clear and convincing to be admissible. State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996). Evidence of prior bad acts has been held to be clear and convincing where there was some minimal direct evidence of the crime, such as a defendant’s admission or eyewitness testimony. State v. Dickerson, 341 S.C. 391, 535 S.E.2d 119 (2000) (evidence sufficient where defendant freely admitted to police his drug use). As noted, there was clear and convincing evidence of an incident on Sunday, given that the hearsay statement contains the victim’s own eyewitness account of the incident. Moreover, the other similar events around this time are corroborating evidence of this prior incident between the victim and the codefendants on Sunday.

State's Closing Argument

The Applicant alleged that trial counsel was ineffective for failing to object during the Solicitor's closing arguments. This Court finds that the Applicant has failed to satisfy his burden of proof and demonstrate that counsel's performance was deficient and/or that he was prejudiced. Our courts are understandably wary of second-guessing defense counsel's trial tactics. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). See also Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005) and McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). Specifically, this Court finds trial counsel's testimony convincing that the written transcript, while technically accurate, does not reflect the tone, nuance, gesturing, or the clever use of pronouns that makes a Johnny Gasser closing argument - and that objections during closing can backfire. Trial counsel testified that the live version of the closing argument presented no issues objectionable or worth the risk of an objection backfiring. This Court recognizes trial counsel's explanation regarding viable strategic reasoning to not make questionable objections during closing argument because doing so can and often does backfire. The Applicant has not shown that counsel was deficient in that choice of tactics.

Specifically, the Applicant referenced pages of the trial transcript during the State's closing argument as an example of when trial counsel should have objected to the State's purportedly improper reference to those who were charged with accessory after the fact. The allegation was that the Solicitor was somehow vouching for or bolstering the testimony of one or more of the witnesses.

In State v. Shuler, 344 S.C. 604, 545 S.E.2d 805, cert. denied, 534 U.S. 977, 122 S.Ct. 404, 151 L.Ed.2d 306 (2001), the Court explained that a solicitor:

[C]annot vouch for the credibility of a witness by expressing or implying his personal opinion concerning a witness' truthfulness.... Improper vouching occurs when the prosecution places the government's prestige behind a witness by making explicit personal assurances of a witness' veracity, or where a prosecutor implicitly vouches for a witness' veracity by indicating information not presented to the jury supports the testimony.... 344 S.C. at 630, 545 S.E.2d at 818 (citations omitted).

Gilchrist v. State, 350 S.C. 221, 227, 565 S.E.2d 281, 284 - 285 (2002).

This Court finds that the Applicant's argument fails. Solicitor Gasser did not give personal assurances about the witness' credibility. "Prosecutor's closing argument that 'I would suggest to you that the evidence has shown that [the victim] should be believed by you' was not improper vouching for a witness in a kidnapping prosecution." AMJUR TRIAL § 584; citing State v. Davis, 61 P.3d 701 (Kan.,2003). The content of the Solicitor's closing argument were issues addressed earlier in the trial; and there were no allegations of ineffective assistance of counsel concerning the earlier instances and references of *accessory after the fact*. Attorneys for either party are permitted to comment on and reference what is already in the record. The reference to the other evidence and things done *after* the fact was merely an explanation as to why "they" were (unlike the defendants) charged with accessory after the fact – charges that were referenced earlier in the trial. (Trial transcript p. 250, 832, and 1193, etc.).

Double Jeopardy

The Applicant also alleged that his conviction for both murder and first-degree lynching is a double jeopardy violation. This argument is without merit. "Under traditional double jeopardy analysis, multiple punishment is not prohibited where each offense calls for proof of a fact that the other does not." State v. Cuccia, 353 S.C. 430, 438, 578 S.E.2d 45, 49 (S.C. App. Ct. 2003). The United States Supreme Court and the South Carolina Supreme Court have determined

that in the context of criminal penalties, the Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932) "same elements" test is the sole test of double jeopardy in successive prosecutions and multiple punishment cases. A mere overlap in proof does not constitute a double jeopardy violation. State v. Owens, 309 S.C. 402, 405, 424 S.E.2d 473, 475 (1992). The Applicant failed to demonstrate how the elements of the two crimes consist of the same elements, or that each offense fails to call for proof of a fact that the other does not.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Counsel was not deficient in any manner, nor was Applicant prejudiced by counsel's representation. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

Except as discussed above, this Court finds that the Applicant failed to raise the remaining allegations set forth in his application at the hearing and has, thereby, waived them. As to any and all allegations that were or could have been raised in the application or at the hearing in this matter, but were not specifically addressed in this Order, this Court finds Applicant failed to present any probative evidence regarding such allegations. Accordingly, this Court finds that Applicant waived such allegations and failed to meet his burden of proof regarding them. Accordingly, they are dismissed with prejudice. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the

doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BMI, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address these issue at the hearing indicates a voluntary and intentional relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

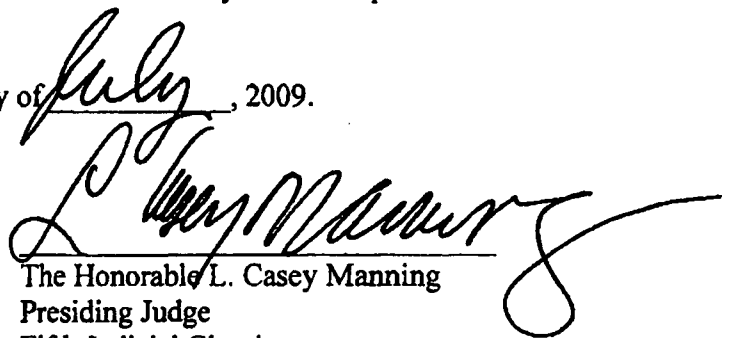
This Court cautions the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant and counsel are directed to Rules 203, 206, and 227 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

IT IS THEREFORE ORDERED:

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

AND IT IS SO ORDERED this 22 day of July, 2009.

Alunisia, South Carolina.


The Honorable L. Casey Manning
Presiding Judge
Fifth Judicial Circuit

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Dushon Staten, 282328

☒ Applicant,

v.

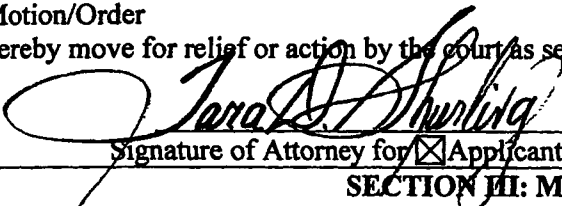
THE STATE OF SOUTH CAROLINA

☐ Respondent.

IN THE COURT OF COMMON PLEAS

CASE NO. 07-CP-40-4259

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Applicant's Attorney: Tara Dawn Shurling, Esq. Bar. No. 5099 Address: 3614 Landmark Drive Suite D Columbia, South Carolina 29204 phone: 803-738-8622 fax: 803-738-1600 e-mail: tdslaw@shurlinglaw.com other:		Respondent's Attorney: Brian Petrano, Asst. Attorney General Bar No. Address: Office of the Attorney General P.O. Box 11549 Columbia, South Carolina phone: 803-734-3737 fax: 734-4113 e-mail: other:	
☐ MOTION HEARING REQUESTED (attach written motion and complete SECTION I and III) ☒ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information			
Nature of Motion: Estimated Time Needed: Court Reporter Needed: ☐ YES / ☐ NO			
SECTION II: Motion/Order Type			
☒ Written motion attached ☐ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.			
Signature of Attorney for ☒ Applicant / ☐ Respondent 			August 10, 2009 Date submitted
SECTION III: Motion Fee			
☐ PAID - AMOUNT: ☒ EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☒ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: ☐ Other:			
JUDGE'S SECTION			
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:		JUDGE: _____	
		CODE: _____ Date: _____	
CLERK'S VERIFICATION			
Collected by: _____		Date Filed: _____	
☐ MOTION FEE COLLECTED: _____ ☐ CONTESTED - AMOUNT DUE: _____			

RICHLAND COUNTY
FILED
2009 AUG 10 PM 3:47
SEANETTE W. McBRIDE
C.C.P. & G.S.

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
DUSHUN STATEN, #282328,	)	CASE NO.: 07-CP-40-4259
	)	
Applicant,	)	
	)	
v.	)	RULE 59(e), SCRCP, MOTION TO
	)	ALTER OR AMEND
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	

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 FILED
 RICHLAND COUNTY
 JEANETTE W. McBRIDE
 C.C.P. & G.S.

NOW COMES the Applicant in the above-captioned action, acting by and through undersigned counsel, respectfully moving, pursuant to Rule 59(e), SCRCP, this Honorable Court to alter or amend its Order of Dismissal filed on July 23, 2009.¹ In support of this motion, the Applicant would show unto this Court the following:

In its Order of Dismissal, this Court addressed four general allegations of ineffective assistance of counsel: (1) trial counsel's failure to adequately argue third party guilt; (2) trial counsel's failure to object to Andrew Britt's testimony regarding the Applicant's prior bad acts; (3) trial counsel's failure to object to the State's closing argument; and (4) trial counsel's failure to object to the sentences imposed on double jeopardy grounds. In so ruling, however, this Court overlooked and failed to address several of the Applicant's additional grounds for relief:

1. Defense counsel was ineffective for failing to properly advise the Applicant about testifying at trial.
2. Defense counsel was ineffective for failing to make a motion to force the State to elect between the lynching and murder charges because convictions on both would constitute double jeopardy;
3. Defense counsel was ineffective for failing to request a jury charge that the jury could find the Applicant guilty of only the murder charge or the lynching charge, but not both;

¹ This order was not received by counsel for the Applicant until July 29, 2009.

4. Defense counsel was ineffective for failing to object to Andrew Britt's opinion that the victim was referring to the Applicant in a statement made to him prior to the shooting; and
5. Appellate counsel was ineffective for failing to argue the correct legal standard for third party guilt and relevancy as it related to Michelle Buff's excluded testimony.

Inasmuch as the Applicant presented evidence on these allegations at the PCR hearing which warrant relief and these allegations are not addressed in this Court's Order of Dismissal, the Applicant would now respectfully request that this Court amend its Order and grant him a new trial.

For all the above reasons, the Applicant now prays that this Court might amend its Order of Dismissal pursuant to Rule 59(e), SCRPC, grant relief and remand the Applicant's case to the Richland County Court of General Sessions for a new trial.

Respectfully submitted,



Tara Dawn Shurling
Attorney and Counselor at Law

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ATTORNEY FOR APPLICANT

This 10th day of August, 2009.

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

DUSHUN STATEN, #282328

Applicant,

STATE OF SOUTH CAROLINA,

Respondent.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

CASE NO.: 07-CP-40-4259

CERTIFICATE OF SERVICE

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

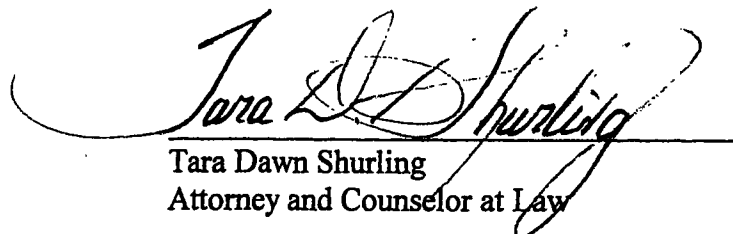
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RICHLAND COUNTY
FILED

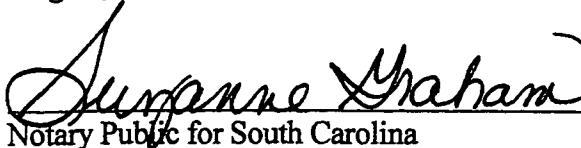
The undersigned hereby certifies that a true copy of the Rule 59(e) Motion to Alter or Amend in the above matter has been served on this 10th day of August, 2009, by hand-delivery to:

The Honorable L. Casey Manning
Presiding Judge, Fifth Judicial Circuit
P.O. Box 192
Columbia, S.C. 29202

The original having been sent to the Richland County Clerk of Court for filing.


Tara Dawn Shurling
Attorney and Counselor at Law

SWORN TO BEFORE ME this 10th day of
August, 2009.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: 3/12/2013

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

DUSHUN STATEN, #282328)

Applicant,)

STATE OF SOUTH CAROLINA,)

Respondent.)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

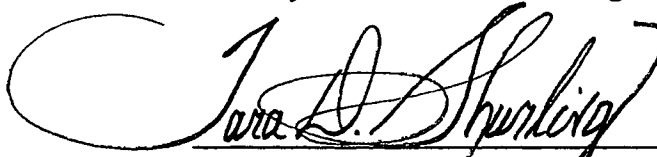
CASE NO.: 07-CP-40-4259

CERTIFICATE OF SERVICE

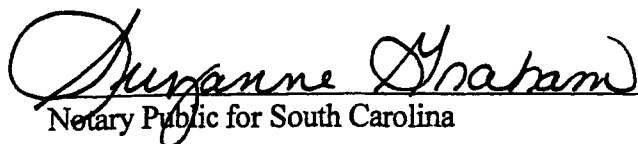
The undersigned hereby certifies that a true copy of the Rule 59(e) Motion to Amend or Amend in the above matter has been served on opposing counsel this 10th day of August, 2009, by mailing one (1) copy in a stamped envelope properly addressed to:

Brian T. Petrano, Assistant Attorney General
Office of the Attorney General
P. O. Box 11549
Columbia, S.C. 29211

The original having been sent to the Richland County Clerk of Court for filing.


Tara Dawn Shurling
Attorney and Counselor at Law

SWORN TO BEFORE ME this 10th day of
August, 2009.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: March 12, 2013

RICHLAND COUNTY
FILED
2009 AUG 10 PM 4:17
JEANETTE W. BRIDGEMAN
C.C.P. & J.

STATE OF SOUTH CAROLINA
 COUNTY OF RICHLAND
 IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2007CP4004259

Dushun #282328 Staten

vs.

State of South Carolina

Plaintiff

Defendant

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 and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(c) SCRPC; ☐ 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 Columbia, South Carolina, this _____ day of _____, 2011.

PRESIDING JUDGE

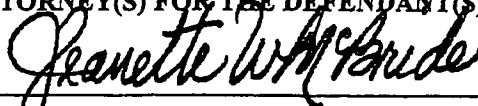
This judgment was entered on the _____ day of _____, 2011, and a copy mailed first class this 22 February 2011, to attorneys of record or to parties (when appearing pro se) as follows:

Dushun # 282328 Staten
 Tara D Shurling

ATTORNEY(S) FOR THE PLAINTIFF(S)

Brian T Petrano

ATTORNEY(S) FOR THE DEFENDANT(S)



Clerk of Court

SCRPC APP-24/FORM 4

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

Dushun Staten, 282328)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

2007-CP-40-4259

ORDER

2011 FEB 17 PM 3:51
JENNIFER W. McBRIDE
C.C.P. & G.S.

RICHLAND COUNTY
FILED

This matter comes before the Court by way of the Applicant's motion to alter or amend pursuant to Rule 59, SCRCP. This matter originally came before the Court by way an Application for post-conviction relief (PCR) filed July 12, 2007. This Court dismissed the Application by written Order dated July 23, 2009.

Applicant now claims in making this Motion that the Order of Dismissal dated July 23, 2009 failed to address several additional grounds for relief raised in the application or at hearing.

Applicant alleges that his claims that Counsel was ineffective for failing to make a motion forcing the State to elect between pursuing the lynching charge or the murder charge on the grounds that convictions on both charges would constitute double jeopardy, and for failing to request a jury charge that Applicant could be found guilty of only one or the other of the two charges were not addressed by the Order of Dismissal and warrant a new trial. The allegation is more thoroughly addressed in the Applicant's Rule 59(e) motion than it was at the hearing; nevertheless, the Applicant failed to satisfy his burden and demonstrate any deficient representation or prejudice.

According to the Supreme Court of South Carolina "[t]he test for determining when a crime is a lesser included offense is whether the greater of the two offenses includes all the elements of the lesser offense." Knox v. State, 340 S.C. 81, 84, 530 S.E.2d 887, 888 (2000)

(overruled on other grounds). Lynching requires an “assemblage of two or more persons”, in addition to premeditation, as a critical element of the offense. Murder does not require a mob or multiple people, merely killing and malice aforethought, and therefore an essential element of the lesser offense (Lynching) is not included in the greater offense (Murder). As such, the offense of Lynching cannot satisfy the test outlined in Knox.

Murder, likewise, cannot satisfy the Knox test as a lesser-included offense to Lynching in the First Degree. Murder requires a showing of malice aforethought. “Malice aforethought is defined as the requisite mental state for common-law murder and it utilizes four possible mental states to encompass both specific and general intent to commit the crime. These four possibilities are intent to kill, intent to inflict grievous bodily harm, extremely reckless indifference to the value of human life (abandoned and malignant heart), and intent to commit a felony (felony murder rule).” State v. Kinard, 373 S.C. 500, 503, 646 S.E.2d 168, 169 (S.C. Ct. App. 2007)(internal quotations omitted) *quoting* Black’s Law Dictionary, 969 (7th ed.1999), *see also* State v. Harris, 340 S.C. 59, 64, 530 S.E.2d 626, 628 (2000) (stating that the dictionary definition of “malice aforethought” comported with the proper law and jury instruction in South Carolina). The element of premeditation required to prove the offense Lynching in the First Degree does not rise to a level that encompasses and proves malice aforethought. Since malice aforethought is an additional element not encompassed by Lynching in the First Degree, Murder cannot be considered a lesser-included offense to Lynching.

As Lynching in the First Degree is not a lesser-included offense of Murder, and Murder is not a lesser-included offense of Lynching in the First Degree, a claim of double jeopardy upon charge for and conviction of both offenses cannot stand. Therefore, the failure of counsel to object or request jury instructions based on double jeopardy resulted in no prejudice to Applicant. The allegation that his convictions for both Murder and Lynching in the First Degree

represent a double jeopardy violation was specifically addressed and dismissed in the Order. The allegation that the counsel was ineffective for failing to make this claim is therefore without merit.

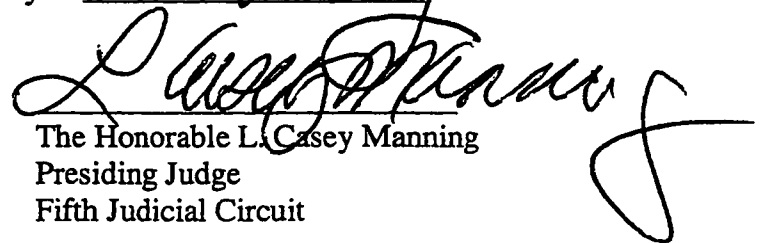
Based upon careful reconsideration of all of the evidence in this case and upon full consideration of the Applicant's motion and supporting memorandum, this Court is not persuaded to alter or amend the judgment. This Court further finds that oral argument would not aid in the reconsideration of the original judgment. The previous order fully comports with the requirements of Rule 52(a), SCRCP.

IT IS THEREFORE ORDERED:

1. That the Applicant's motion to alter or amend judgment is denied and dismissed.

AND IT IS SO ORDERED this 17 day of February 2009.

Cole, South Carolina


The Honorable L. Casey Manning
Presiding Judge
Fifth Judicial Circuit

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
L. Casey Manning, Presiding Judge

07-CP-40-4259

RECEIVED

MAR - 9 2011

DUSHON STATEN, 282328

Applicant,

S.C. Supreme Court

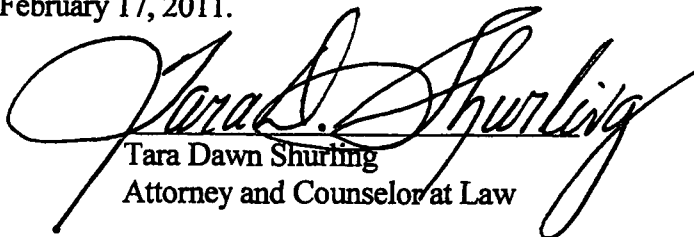
v.

THE STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

NOW COMES the Applicant in the above-captioned Post-Conviction Relief matter, acting by and through his undersigned counsel, giving notice of his appeal from the Order of Dismissal denying his Post-Conviction Relief filed July 23, 2009, and the Order Denying the Applicant's subsequent Motion to Alter or Amend pursuant to Rule 59(e) SCRCP which was filed with the Richland County Clerk of Court on February 17, 2011.



Tara Dawn Shurling
Attorney and Counselor at Law

3614 Landmark Drive, Suite D
Columbia, South Carolina 29204
(803)738-8622
(803)738-1600 FAX

ATTORNEY FOR APPLICANT

This 8th day of March, 2011.

Other Counsel of Record:
Brian Petrano, Assistant Attorney General
P. O. Box 11549
Columbia, SC 29211
Attorney for Respondent
(803) 734-3737

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
L. Casey Manning, Presiding Judge

07-CP-40-4259

RECEIVED

MAR - 9 2011

DUSHON STATEN, 282328

Applicant, S.C. Supreme Court

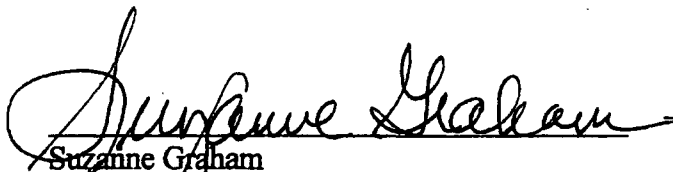
v.

THE STATE OF SOUTH CAROLINA,

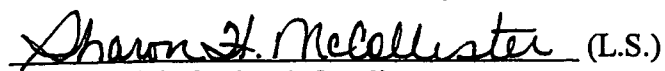
Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Applicant's Notice of Appeal in the above-entitled cause has been served upon opposing counsel, Brian Petrano, Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this 8th day of March, 2010.


Suzanne Graham
Paralegal to Tara Dawn Shurling

SWORN TO BEFORE me this 8th day
of March, 2011.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: Jan 16, 2017