

VOLUME II of II

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenville County

Edward W. Miller, Circuit Court Judge

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SC SUPREME COURT

ROBERT M. WATKINS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-002191

APPENDIX

LAURA R. BAER
Appellate Defender

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

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

P. O. Box 11549
Columbia, SC 29211

ATTORNEYS FOR RESPONDENT

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1 to put their hands in their pockets, take the money out
2 and throw it back into a car. To me that's kind --
3 that's concealing. To me that's hiding. That's, to me,
4 being elusive.

5 Q So that's conclusion, mere conclusions you make?

6 A That would be a fact.

7 Q No, that's conclusions. Facts mean you seen these
8 facts. You didn't see, so these are conclusions you made
9 that throwing money on the seat is trying to conceal the
10 money. Concealing the money is trying to get officers to
11 agree or hiding it somewhere and I explained the money
12 that was put on the seat because I thought I was going to
13 jail for not having a license, so she could get me out if
14 I had to pay a fine. She testified she thought ---

15 MR. MARCHANT: Your Honor, object. He's testifying.

16 THE COURT: Okay. You got to ask him questions, Mr.
17 Watkins. Sorry. You got to ask questions at this point.

18 BY MR. WATKINS:

19 Q Okay. Did you ever talk to -- did any other
20 witness you ever tell -- did you ever show -- you said
21 you never -- did you ever show the coat to the witnesses?

22 A No, sir.

23 Q Never showed the coat to the witnesses. Did you
24 actually see the robber in the clothing that the robber
25 was wearing? Did you personally see the robber, the

1 clothing that he was wearing?

2 A No, sir, I wasn't there when the robbery took place.

3 No, sir.

4 Q So you never took the coat and showed it to the
5 victims, and the victims, you heard their testimony,
6 never told you of the description of the coat that was
7 found in the dumpster that they seen, yet you included in
8 your affidavit this is the coat worn by the robber. So
9 where did this information come from?

10 A The information came from the victims that the
11 person -- perpetrator, the defendant had a dark colored
12 coat on. That's where it came from.

13 Q No, but they never identified the coat to you to say
14 the coat. This is a conclusion that you made that the
15 coat matched the coat of the robber. They never told you
16 this. They never said that coat -- you never took the
17 coat to them to show them is this coat worn by the
18 robber? You -- they gave you a description of the coat
19 that didn't match, no white, no nothing, and you knew it
20 had no white and didn't match, yet you drew your own
21 conclusion, yeah, it matched. Did you not?

22 A I hadn't seen the coat, sir, at that time.

23 Q So how you going to say the coat matches the
24 description of the robber?

25 A Because the information came from the officers on

1 the scene. They advised us that they located a coat, a
2 coat by the dumpster and they said the coat did match.
3 That is a dark colored coat that was located.

4 Q Okay. Now -- okay. As the chief investigating
5 officer, is it part of your duty to go beyond to
6 investigate evidence to the source? This is what I'm
7 saying, if your officers told you this, wouldn't it be a
8 proper investigation if you had the witnesses there to
9 ask them the same thing, instead of just taking your
10 officers that was on the scene of the crime because they
11 have to -- we was arrested without an arrest warrant? So
12 you have to establish probable cause for this?

13 A Yes, sir.

14 Q See what I'm saying, so the actions that you didn't
15 see, nobody -- them officers told you, so you're relying
16 on the officers, but you can go back to find out where
17 their information come from when you had the witnesses
18 there.

19 MR. MARCHANT: Your Honor, I object. I don't know
20 what the question is.

21 THE COURT: Okay. I'm going to sustain the
22 objection. You got to ask him clear questions so we can
23 understand the question.

24 MR. WATKINS: Okay.

25 THE COURT: And he can understand it to answer it.

1 BY MR. WATKINS:

2 Q Did you -- did you get any information from the
3 witnesses saying, yeah, that's the coat worn by the
4 robber?

5 A I received information from the witnesses, as well
6 as the officers, that a dark blue coat was located. The
7 witnesses stated that the suspect had a either a dark
8 coat or probably a blue or black. The officers called,
9 stated they had a dark blue coat located in the dumpster.

10 Q So ---

11 A Based on that information ---

12 Q That was your conclusion that it matched?

13 A Based on their information.

14 Q I'm asking you, was that your conclusion that it
15 matched?

16 A Yes, sir, based on their information.

17 Q Okay. You also stated -- let me see. You also
18 stated that moments before the robbery a victim witnessed
19 a black male in a white Ford Taurus at the back of the
20 building surveilling them. Where did you get this
21 information from?

22 A This information came from the officers. They
23 conveyed -- and also from the witnesses. They conveyed
24 that a suspect had been riding through the particular
25 business driving a white Ford Taurus. Also during my

1 investigation I did Mirandize you at that time, and you
2 yourself had told me when I asked you was it a
3 possibility that they had you on video that you could
4 also -- the vehicle you were in would be located in that
5 video. And your statement to me, you told me out of your
6 own mouth, you stated that you had once been there that
7 particular evening. You couldn't give me a time. And I
8 asked you what were you doing there. You said you were
9 there to meet a suspect, you couldn't give us a name of,
10 and you was going to do a drug deal there. That's what
11 you told us. So that also places you there.

12 Q Okay. I don't remember telling you none of that,
13 but ---

14 A It's inside my report.

15 Q All right. I know what your report -- your report
16 says. Right here you said the witnesses said they seen a
17 black male in a white Ford Taurus. You're saying the
18 witnesses told you this. That's what it's saying in your
19 affidavit.

20 A Yes, sir.

21 Q Did you hear the witnesses testify yesterday?

22 A Yes, sir.

23 Q Did you hear any witnesses say they seen a black
24 male in a white Ford Taurus?

25 A The witnesses stated that they -- one witness said

1 they could not see the person inside the vehicle, but the
2 person that came inside of the store was a black male.
3 Also, the person that was located by the dumpster inside
4 the vehicle also was ---

5 Q I'm -- I'm not ---

6 A --- a black male.

7 Q Sir, I'm not asking what conclusions you made. I'm
8 asking you, did the witnesses tell you that they seen a
9 black male in that white Ford Taurus?

10 A No, sir, not inside the Ford Taurus as you speak.

11 Q Well, that's what you put in your affidavit, in
12 your -- and this is under oath.

13 A Yes, sir, because this is -- you take the totality
14 of the circumstances that took place. And -- yes, sir.

15 Q In other words, you got to base it upon facts.
16 You're saying the facts you're -- right here, you're
17 saying the witnesses told you they seen a black male in a
18 Ford Taurus. And when you relayed this message -- this
19 information to the magistrate under oath, she's assuming
20 that if you arrested me that I'm the black male and you
21 put my white Ford Taurus on the scene, that it's me, but
22 you're giving -- you're knowing that the witness never
23 told you this, so you're in reckless disregard for the
24 truth, including false information in your affidavit?

25 A No, sir, there was a black male suspect that was

1 seen inside of the store.

2 Q What ---

3 A Also, there was a black male suspect that was also
4 located in a white Ford Taurus, which also a white Ford
5 Taurus also was seen prior to, a couple days before and
6 at that particular time.

7 Q That's conclusions you're making. I'm asking about
8 the part where you had said the victims witnessed.

9 A Yes, sir.

10 Q This is what you said.

11 A That information came from them, yes, sir.

12 Q And you just testified that no one told you there
13 was a black male that they could identify anybody in the
14 car, but that's what you put in your statement?

15 A No, sir, I told you that one of the victims did
16 state yesterday that they did not see nobody in the car.
17 But the totality of the circumstances and everything, the
18 information we received, yes, sir.

19 Q You still -- I mean, you're saying totally what you
20 received, and that's leading to the conclusion that you
21 made that based upon -- that if they seen a white Ford
22 Taurus it was a black male in that car. That's the
23 conclusions you made. They say they didn't see who was
24 in that car. You said that because they stopped me in
25 the white Ford Taurus, a black male, so you wanted to put

1 me on the scene of the crime?

2 A No, sir.

3 Q So you -- based upon your conclusions, is it not
4 true that you put in your statement that the victims said
5 that?

6 A Yes, sir, just what it states.

7 Q Okay. Thank you. Okay. You said, okay, the robber
8 fled on foot back toward _____ . Where
9 did you get this information from?

10 A That information came from the officers, also came
11 from dispatch.

12 Q Now, did you -- the officers -- you knew the
13 officers was not on the scene to see this. So did you
14 pursue your investigation further, you had the witnesses
15 there, did you ask any other witnesses did you see where
16 this person went?

17 A Yes, sir, no one actually saw the direction the
18 person went outside the store. Officers testified
19 yesterday that they did canvas the area moments after the
20 incident had taken place. If you remember after they
21 stated that they canvassed the entire area and the only
22 white Ford Taurus they saw, the only black male they
23 saw ---

24 Q Excuse me, no, I'm don't -- I'm asking you -- I just
25 want a short answer. It states, the robber fled out the

1 back toward [redacted]. You said the
2 officers told you this. So ---

3 A Yes, sir.

4 Q --- what information from the officers would have to
5 come from the witnesses. You heard the witnesses
6 testify. You had a chance to interview the witnesses.
7 And I'm asking you, prior to you putting this statement
8 in your report, talk to the witnesses, did any of them
9 tell you that the robber fled on foot towards [redacted]
10 [redacted]?

11 A No, sir, that information -- to answer your
12 question, that information came from the officers. No,
13 sir, the victims did not state that he ran toward [redacted]
14 [redacted].

15 Q So now if you know that the victims never said that,
16 where did these officers get this information?

17 MR. MARCHANT: Your Honor, I object. I don't know
18 that he can answer the question what another officer ---

19 THE COURT: I would sustain the objection. He
20 can -- you should just ask questions that he has personal
21 knowledge of.

22 MR. WATKINS: Yes, sir.

23 BY MR. WATKINS:

24 Q Okay. So information you included in your affidavit
25 you really don't have any personal knowledge of?

1 A I wasn't there, sir.

2 Q So ---

3 A The information we obtained came from the officers,
4 as well the victims that was there.

5 Q Is it possible for officers to make mistakes, or
6 mislead, mis- -- is it possible the officers could
7 mislead you to establish probable cause if they were the
8 arresting officer and arrested me without probable cause?
9 Would it be proper to mislead you on information for you
10 to establish probable cause?

11 A No, sir.

12 Q But I'm showing you facts where you heard the
13 witnesses testify, you heard -- you know all your facts
14 had to come from the witnesses. You heard the officers
15 testify and the witnesses statement don't corroborate
16 what the officers was telling you.

17 A Yes, sir, it does corroborate. If you take the
18 totality of the circumstances of everything that took
19 place from beginning to end, yes, sir.

20 Q Your statement doesn't coincide with their
21 statement, but is mere conclusions that the officers are
22 making to establish probable cause. It's not consistent
23 with what the witnesses -- information they're giving, so
24 it's basically like reckless disregard for the truth.
25 You have the truth here ---

1 A No, sir.

2 Q --- but you don't want it because it don't establish
3 probable cause, so you create other probable cause, is
4 that true?

5 A No, sir, that's not true at all.

6 Q Okay. What witnesses told you that I was stopped
7 while driving the same white Ford Taurus that was seen at
8 the back of the business?

9 A Say it again?

10 Q You put in your statement, Robert Max Base was
11 stopped while driving the same white Ford Taurus that was
12 seen at the back of the business.

13 A Ms. Pireda, when we was talking to her, she said
14 that this vehicle that she saw, when they took her back
15 to the apartment complex, is in fact the same vehicle
16 that was seen that came through, the surveillance
17 vehicle, the business the night before, as well as that
18 same night. That's where that came from.

19 Q Did you hear her testimony yesterday under oath
20 where she said, no, she never identified that vehicle?

21 A No, sir, she said she couldn't remember.

22 Q She said she didn't identify it, and then I asked
23 her to read her statement about the one -- she said she
24 seen two people and there was one, she said, oh, oh,
25 that's what I couldn't remember.

1 A No, sir, in my report, we can refer back to it,
2 that's where she told us that.

3 Q I'm saying but yesterday she testified that she
4 identified that -- which I asked her, she know the one he
5 had was a four door and something about how somebody got
6 one or something like that. That's what she testified
7 to.

8 A No, sir. She said she couldn't remember. She said
9 it had been a long time, almost seven years. That's what
10 she stated yesterday.

11 Q I don't remember. Okay. Did she give -- if she
12 told you this, did she give you any identification marks
13 that proved like tag, or -- I ask her if she seen any
14 tags and stuff like -- seeing the tag number and things.
15 Did she tell you there was a tag number on the car,
16 anything like that to give you?

17 A No.

18 Q To show, that identified it?

19 A No, sir, she did not.

20 Q But right here, he's a resident of . . .
21 . . . He had just entered his apartment, and
22 immediately left with his roommate Elena Pelzer. Where
23 did that information come from?

24 A That information came from Officer Jones. He stated
25 that he did observe the black male coming from the

1 apartment buildings, and then enter into the vehicle. At
2 that point in time, as the vehicle started to leave,
3 that's when Officer Thompson stopped you.

4 Q Okay. I have -- do you have copy of Officer Jones'
5 D. E. Jones. If I recall right he testified that he come
6 across the bank at : : front
7 entrance. He never went toward the back. And :
8 -- 1 complex, if he's at the entrance -- can
9 I use this chart?

10 THE COURT: Um-hm.

11 BY MR. WATKINS:

12 Q He said he was here. He went to the embankment
13 right here, the trash dumpster about right here where he
14 seen the trash dumpster. : : building is
15 right around here. How can he possibly be right here and
16 see somebody in the apartment complex way around here
17 when you got all -- he's right up here?

18 A Because he stated yesterday, if you remember, he
19 did go inside the complex. He didn't just stay right
20 there.

21 Q He said he went in the complex and that was
22 right ---

23 A He ---

24 Q He was right here and he seen the car back away, but
25 he don't know what building it was.

1 A No.

2 Q He didn't see the person get out or into the Ford
3 Taurus. That's what he testified to. So no one ever
4 testified that they seen the individual come out of the
5 apartment or go into the apartment.

6 A You were seen coming from the building as you just
7 stated yourself. That's what I just told you.

8 Q Excuse me. But you stated in your -- you stated in
9 your affidavit -- excuse me. Beg the Court's indulgence.
10 Do you have a copy of the search warrant affidavit? I
11 got one. Excuse me. I'm sorry. You stated that he had
12 just entered his apartment and immediately left with his
13 roommate Elena Pelzer. Which officer -- you said D.
14 Jones told you this?

15 A You were seen coming from the building, going back
16 to the vehicle.

17 Q But you said they seen me enter the apartment, to
18 give the magistrate the opinion that if I was the one
19 committed the robbery and I was in the apartment you
20 would believe that the money or whatever would be in the
21 apartment. So this is why you would tell the magistrate
22 that someone seen me enter the apartment.

23 A No, sir, that's not all the information we have.
24 You forget that your own -- you also -- we did Mirandize
25 you, and during your interview you also stated that you

1 was in the apartment, that you came out. You also stated
2 that you got in the vehicle yourself.

3 Q No, no, I give -- my statement doesn't say that that
4 I gave you.

5 A No, sir, that's what you told us verbally.

6 Q No, I didn't tell you ---

7 A You verbally stated that.

8 Q I didn't tell you that verbally. I know what --
9 what you said -- what you told me verbally. You told me
10 give a statement and you would check it out, alibi.

11 A That's what you verbally told us.

12 Q And you used that to -- well, I can go into that
13 when I waive my rights. So -- okay. You put the white
14 Ford Taurus was surveilling but had just left before the
15 robbery occurred. What do you mean by surveilling, the
16 white Ford Taurus was surveilling?

17 A The victim stated they seen the vehicle come through
18 the parking lot as though it was surveilling -- parked as
19 though it was watching the building, as though they were
20 trying to see what they were doing.

21 Q So basically that's mere conclusion in your
22 statement you make, but surveilling what? I mean, in
23 order for somebody to assume something is surveilling,
24 you've got to think that something is getting ready to
25 happen or has happened.

1 A The way they explained it they was assuming that
2 something was unusual about it and they used
3 surveillance.

4 Q Was a call to 911 made?

5 A After the robbery, yes, sir.

6 Q Okay. So -- so you would say that was mere
7 conclusion you're making about the car being a --
8 surveilling the place?

9 A That information was given to us by the victims.

10 Q So you're saying -- you never said it was a mere
11 conclusionary statement?

12 A No, sir. Ms. Pireda also stated that she felt like
13 when she saw the vehicle like it was surveilling the
14 business.

15 Q I have here a copy of your sworn testimony you made.
16 Can you read right here? Just tell me, was that not mere
17 conclusionary statements you made?

18 A Where do you want me to read from?

19 Q I want you to read sign -- right here where it says
20 about asking you questions and then goes and you said,
21 yes, sir. Right here about surveilling -- car
22 surveilling.

23 MR. MARCHANT: Your Honor, if he's asking questions
24 about some prior hearing we had I would ask that he
25 refresh his memory and then answer whatever question he

1 has as opposed to reading.

2 MR. WATKINS: That's what I asked him.

3 THE COURT: If you would just read that to yourself
4 and then answer his question.

5 THE WITNESS: Yes, sir. Yes, sir, they did state
6 that they felt like the car was surveilling the premises.

7 BY MR. WATKINS:

8 Q And what did you say, was it mere conclusionary
9 statement that you then made?

10 A Based off the information, yes, sir. If you read
11 right there you'll see exactly what it says.

12 Q Mere conclusionary statements that's what it says.

13 A Right there, sir, if you read that. Based off the
14 victim's statement.

15 Q And then it says -- but these are conclusions that
16 were made. Yes, sir. And it was conclusions you made.
17 Yes, sir.

18 A Based off of this information, yes, sir. You can't
19 leave out one without the other.

20 Q That's what I'm saying. But there's some mere
21 conclusionary statements, that's what I'm trying to get
22 you to say, it was mere conclusionary statements.

23 A You're trying to get me to say what was true, that's
24 actually two different things. What you asked me to
25 answer your question, yes, sir, based on the victim's

1 information, yes, sir, they did state that they felt like
2 the business was being surveillanced.

3 Q And when you were asked is this mere conclusionary
4 statements that they were making and you made, what was
5 your response, what was your answer, yes or no?

6 A That would be yes, sir.

7 Q Okay. Thank you. Okay. Here's a copy of D. E.
8 Jones' report. Can you show me anywhere where it says he
9 viewed the person coming out of the apartment --
10 apartment complex or going into the apartment complex,
11 where he was at when he arrived on the scene?

12 A No, sir, he did not. His report he just referred to
13 suspect run into the apartment complex, and after
14 locating him inside the vehicle.

15 Q Okay. Nothing in this report about seeing anyone
16 enter the apartment, come out of the apartment, any of
17 that? And you heard his testimony, he never said that he
18 seen any of that. The first time he seen the white Ford
19 Taurus is when he stopped at the dumpster, is that
20 correct?

21 A That was the first time. But yes, sir, he did
22 explain to me that he did see the suspect coming -- going
23 back toward the vehicle and everything. Coming back
24 meaning coming from the building. Now, he didn't
25 describe, say what apartment number, but he did say he

1 saw the suspect going toward it.

2 Q Said the suspect, he viewed the suspect -- he seen
3 the suspect at the dumpster. The building is way here.

4 A Yes, sir.

5 Q So he couldn't see the car by that. He's up in
6 here. And he's here. Which the news broadcast lady he
7 seen and the yellow cab driver he testified to he seen,
8 then he seen the white Ford Taurus coming by the
9 dumpster.

10 A Yes, sir.

11 Q Okay. So did -- he never testified to anything or
12 any statement that he seen anybody by the 700 block
13 building or exit that building?

14 A I've been in that complex, sir. And where you're
15 stating that you was standing right there, yes, sir,
16 by -- near that dumpster, you can see up there near the
17 apartment complex.

18 Q No, you can look here and tell you can't see there.
19 The corner there you can't see that's -- the dumpster.
20 He was up here. He was up around in this area. He said
21 he was right here. He got out of his car and he parked
22 and walked to the embankment right here. And he stopped
23 the car coming out.

24 A Yes, sir.

25 Q If he's right here you can't see ---

1 MR. MARCHANT: Your Honor, I object, to asked and
2 answered.

3 THE COURT: I'll sustain the objection to the
4 question.

5 BY MR. WATKINS:

6 Q Okay. Did you hear Marcus Scarabino testify
7 yesterday that they did not hand roll quarters, nickels
8 or dimes? This money -- Chuck E Cheese doesn't hand roll
9 quarters, nickels and dimes.

10 A Yes, sir, I did hear him say that.

11 Q When you conducted your search of my apartment, did
12 you find any hand rolled nickels, quarters and dimes?

13 A Yes, sir.

14 Q So if they say it's not the property of Chuck E
15 Cheese, and he's saying it's not what they have, why are
16 you collecting it?

17 A He didn't say it wasn't the property of Chuck E
18 Cheese. He said they don't personally hand roll it. He
19 said they do get money from the bank and sometimes it
20 does come hand rolled and sometimes it comes machine
21 rolled.

22 Q They have a machine, machine that hand rolls all of
23 their quarters.

24 MR. MARCHANT: Your Honor, he's testifying.

25 THE COURT: You got to ask questions, Mr. Watkins.

1 You're limited to that right now.

2 BY MR. WATKINS:

3 Q Did you see any -- in State's Exhibit Number 9, do
4 you see any hand rolled quarters and dimes and nickels?

5 A Yes, sir, I do.

6 Q Did you hear Elena Pelzer testify yesterday about
7 the change and stuff that I had in possession?

8 A Yes, sir.

9 Q Okay. Did they mention anything about pennies being
10 involved in the robbery?

11 A What do you mean?

12 Q Like pennies, pennies?

13 A I don't understand what you're asking here.

14 Q Like pennies, pennies, money, coins, pennies, was
15 that a part of your investigation to obtain pennies that
16 they say came from part of the robbery of Chuck E Cheese?

17 A Yes, sir, if it says pennies, then we would obtain
18 pennies.

19 Q Okay. But is there anywhere where they say they was
20 missing any pennies?

21 A Not to my recollection, sir.

22 Q So you're taking personal property that you know
23 it's not evidence and including it with property that you
24 consider evidence and it's being introduced into evidence
25 in the trial today?

1 A We collected all the moneys that was located inside
2 the drawer, sir. I don't remember per se pennies.

3 Q But you collected two pennies -- did you not collect
4 two pennies and there was a jar of pennies -- let me see.
5 I think -- okay. Here's State's Exhibit Number 19. Did
6 you collect this money that was on the floor right here?

7 A Yes, sir.

8 Q Pennies and everything? Pennies was part of the
9 crime too?

10 A All -- since all of it was together, yes, sir, we
11 collected it.

12 Q Okay. All the exhibits over here? I'm showing
13 you what's been as marked Defense Exhibit Number 7. Did
14 you -- was that jar of pennies ever collected?

15 A Right here?

16 Q Um-hm.

17 A No, sir, it wasn't.

18 Q Were those pennies right there collected?

19 A No, sir, not to my knowledge, no, sir.

20 Q Do you know roughly how much in total coming out of
21 the apartment was collected?

22 A Yes, sir. If I'm not mistaken total moneys there
23 was -- I'm saying total money should have been \$558.07 we
24 have written down here.

25 Q So was this money over all included with the \$328

1 that was taken out of my vehicle?

2 A I don't remember the total amount that was taken out
3 of the vehicle right now.

4 Q Was all the money compiled together led you to
5 believe that this was the money of the robbery in total,
6 it was close to the amount they say, this is what led you
7 to believe that it was the money from the robbery?

8 A If I'm not mistaken, sir, it should be off by a few
9 dollars.

10 Q Okay. How much, like five dollars?

11 A A few dollars, five or six dollars if I'm not
12 mistaken.

13 Q Okay. Tell me what you have written right here?
14 Eleven rolls of quarters. Show the jury. This is -- I
15 can't show it to you. Right here where you have written
16 11 rolls of quarters?

17 A Yes, I see what you're saying. That's just a
18 miscalculation.

19 Q But if you add all the money up, and the total of
20 the money, and you give a calculation of the money, but
21 you're \$40 off?

22 A I -- that's just a miscalculation and everything in
23 quarters.

24 Q So now it's no longer five or six dollars off?

25 A No, sir, that was an error on my part as far as

1 calculation of quarters.

2 Q Okay. Can you tell me where you found the eight
3 rolls of nickels? And what is the particular place in
4 the apartment you found the eight rolls by this report?
5 Can you tell exactly where you found each ---

6 A No, sir, on here it does not state -- it won't state
7 where I found them on here.

8 Q Okay.

9 A The large stuff -- the large amount of coins that
10 was located came out of the kitchen drawer.

11 Q Okay. I just wondered if you can be able to tell by
12 that right there.

13 A No, sir, you can't tell by this. This just lists
14 all the items we took out of the apartment. As far as
15 said money. It don't list everything as far as location.
16 As far as this roll of nickels came out of this draw, it
17 doesn't state that on this form. That's a property and
18 evidence sheet, is what that is.

19 Q Okay. That's a property and evidence sheet. So can
20 you tell me, since you located all the money, where the
21 10 assorted rolls of the quarters came from?

22 A Okay. The quarter rolls and everything, I'm saying
23 came out of the kitchen drawer.

24 Q And -- are you sure?

25 A Yes, sir. The majority of the money that I remember

1 at this time, the quarters and such as that, should have
2 came out of the kitchen drawer. I can't tell you where
3 every -- every roll came from, which area, but I know if
4 you look at the photo you'll see the quarter rolls should
5 be in there. There was some money that was found inside
6 the closet, should be the majority of the bills.

7 Q Can you -- were you the one that found the money in
8 the closet?

9 A No, sir. I did not find all the money.

10 Q So other officers -- each officer was doing their
11 own finding different evidence in the apartment?

12 A Yes, sir.

13 Q All right. Any officer here today to be able to
14 testify where the money found? Other officers.

15 A Officer Johnson was also the other officer, sir.

16 Q Is he in here today?

17 A No, sir, he's not in here.

18 Q What about officer Tonya -- Tonya Ebeneer, is she
19 here today?

20 A No, sir, she works with the FBI now, sir. She
21 actually was the scribe that wrote everything down.

22 Q Okay. In dealing with evidence, are you supposed to
23 dispose of the evidence before the case is adjudicated?
24 If I needed the evidence, the tangible evidence, like you
25 have the gun here.

1 A Yes, sir.

2 Q The tangible evidence for the jury to be able to
3 look at the money, count it, see what's hand rolled, sort
4 it out, look at it, how can they do that with pictures?
5 What is the normal procedure when you have evidence to
6 keep in the evidence room until a case is done away with?

7 A That money was agreed to be disbursed by the
8 attorney at that time to the proper victims.

9 Q Is there a procedure where you can give money to a
10 person in a fund or something and keep the actual
11 evidence in property and evidence until the trial and you
12 can give them other money and replace that money back?
13 They have a fund or something where the officers take
14 money -- if they believe it's money of a crime and the
15 crime they give it back to the people, they want the
16 money back, but the actual evidence they keep in
17 evidence?

18 A Say your question again?

19 Q Is there a procedure ---

20 MR. MARCHANT: Your Honor, I object. May we
21 approach.

22 THE COURT: I would sustain the objection. Okay.

23 The testimony is they gave the money back to the victim.

24 That's what he's testified to and that's what he did. So

25 I sustain the objection to the question.

1 MR. WATKINS: All right. At this time, Your Honor,
2 I need to ask you a question. Approach the bench and ask
3 you.

4 THE COURT: You can talk -- discuss it with Mr.
5 Henry it's a procedural question. Okay.

6 (Mr. Watkins talked to Mr. Henry.)

7 MR. WATKINS: Your Honor, I have a matter to take up
8 outside the jury's presence.

9 THE COURT: Okay. Give y'all a short recess. I'm
10 going to let y'all order lunch. They got a couple three
11 places they normally order from. Y'all can choose
12 whichever one you want. I don't like to dictate to y'all
13 what you want to eat. But -- okay.

14 (The jury exited the courtroom at 10:15 a.m.)

15 THE COURT: All right, Mr. Watkins.

16 MR. WATKINS: Your Honor, I would like at this time
17 put in a motion for a mistrial for destruction of
18 evidence. They are not supposed to get rid of this
19 evidence. It's very important for the jury to be able to
20 see this evidence, to be able to count it, be able to --
21 you know, see what's in the bag. You can't see it in the
22 bag. They weren't supposed to dispose of that evidence.
23 They destroyed the evidence. I can't -- and it's very
24 important because my -- one of my defenses is that this
25 is not -- this is my money. This is not the money of the

1 crime, and they need to be able to see where the
2 witnesses -- they heard the witnesses testify. They need
3 to be able to see this money is not hand rolled -- I
4 mean, bank rolled. They need to know what is bank
5 rolled, what is not bank rolled, if it's the actual
6 amount of money the officers are saying they claim and
7 put in their reports that I want to introduce evidence.
8 They can't do that.

9 MR. MARCHANT: Your Honor, the money was returned to
10 the victims after the guilty verdict in the first trial.
11 I think -- that's why I objected initially because we're
12 treading on light grounds here that if we get into why
13 the money was returned they're going to have to know that
14 he was found guilty and the money was returned after the
15 guilty verdict. The officer would be able to testify
16 that they were returned it after the case was disposed
17 of. Now, obviously it's come back on appeal and that's
18 why we're here now. But that's why the money was
19 photographed. That's how it was introduced into evidence
20 in the first trial. And he's already testified that
21 that's the same money.

22 MR. WATKINS: The original evidence was introduced
23 in the first trial. The particular ---

24 THE COURT: All right. I deny the motion for a
25 mistrial. The pictures, he's testified that that's what

1 he found. And I'll overrule the motion for a mistrial.

2 MR. WATKINS: I object.

3 THE COURT: Now, the -- you need to discuss it with
4 Mr. Henry, Mr. Watkins, it's not going to be an issue for
5 the jury, we spent a lot of time on it, as to the
6 validity of that search warrant. They're not going to
7 determine whether they had probable cause or not. That
8 is not a factual question for the jury. You can discuss
9 it with Mr. Henry if you want to. I have never seen that
10 submitted in South Carolina to a jury. That is a legal
11 question as to whether or not he could -- the search
12 warrant was appropriate. And ---

13 MR. WATKINS: I was trying to show ---

14 THE COURT: And Mr. Marchant is giving you a lot of
15 leeway, and that's fine with me, but that's where we are.

16 MR. WATKINS: The information goes towards the
17 credibility, his credibility as far as whether or not
18 he's giving false statement and stuff like that. It goes
19 to the credibility. So the search warrant is part of him
20 giving testimony under oath whether or not that
21 information is truthful.

22 THE COURT: Well, he testified it was based on
23 information given to him by the police officers and the
24 witnesses. And you have gone into his affidavit which he
25 did sign and -- and you've covered that for impeachment

1 purposes, I agree with that. And if it was an affidavit
2 signed by him you could question him about it. But --
3 and it could come in for impeachment purposes. But as
4 far as whether or not they had probable cause to get the
5 search warrant and make the arrest is a question for the
6 Court, and I have ruled on that.

7 MR. WATKINS: Okay. And I was -- in the prior trial
8 I noticed that the proceeding that the motion was
9 reserved and as the trial went on it was reserved under
10 Frank versus Delaware and he -- my prior lawyer was --
11 obtained information to show that it was false
12 information. And then he said based upon all the facts
13 entered in the record. Now, I renew my motion based upon
14 this prior -- what's the name now that we have all the
15 evidence and all of the facts, and renew the motion. Now
16 that can support on appeal, now all the facts are in the
17 record whether or not that hearing should be given if --
18 you see what I'm saying, if it's been denied on a new
19 trial.

20 THE COURT: I've heard all the evidence and I'm
21 convinced more so now than I was before that they had
22 probable cause.

23 MR. WATKINS: Okay. I just want to make sure I'm
24 preserved for appeal -- appeal purposes.

25 THE COURT: Well, I'm not even going to comment on

1 the evidence outside the presence of the jury. But we'll
2 be in recess until 10:30.

3 MR. WATKINS: Okay.

4 THE COURT: Okay.

5 (A discussion was held off the record.)

6 THE COURT: Okay. The officer asked me about
7 reading the testimony from the prior trial. And I have
8 told him not to say that it was from a prior trial, he
9 can just -- it's just sworn testimony under oath, if
10 y'all want to phrase it that way. Okay. All right.

11 (A short recess was taken, after which, the trial
12 continued as follows:)

13 THE COURT: Okay.

14 (The jury entered the courtroom at 10:43 a.m.)

15 THE COURT: Okay. Mr. Watkins, you ready?

16 BY MR. WATKINS:

17 Q Detective Bruce, during your investigation did you
18 try to investigate any other witnesses, like the
19 employees or the personnel that left the back door open,
20 the cleaning people, did you try to further your
21 investigation?

22 A In what manner are you speaking?

23 Q In as far as Chuck E Cheese and they told you that a
24 cleaning company came in, did you seek to investigate who
25 the men were in the cleaning company, or why the door was

1 left open, who left the door open, possibly did they see
2 anybody come in there, or anything? Did you investigate
3 that matter?

4 A We checked into it as far as the -- talking to the
5 victims. The victims stated there was a black male. We
6 do know the employees was supposed be -- in the cleaning
7 company was supposed to have been all white. As far as
8 anything further, no, sir.

9 Q Okay. So if someone had been involved or they had
10 been involved in it, you would not know because you never
11 investigated them? Just because they was white doesn't
12 mean they don't have black friends or Chinese friends, so
13 wouldn't it be important to investigate them, especially
14 if they left the back door open?

15 A We didn't have any lead that would implicate them in
16 anything, no, sir.

17 Q But they were involved in leaving the back door
18 open, they were part of the reason if -- if the person
19 would come through, that's what the testimony was, the
20 back door was left open. Wouldn't that be suspicious for
21 them to leave the back door open?

22 A We didn't know for sure who actually left the back
23 door open.

24 Q Did you try to obtain the information from the
25 employee to find out who the company they had contracted

1 with in cleaning the place up?

2 A I can't remember the name of the company, but yes,
3 we did ask those questions. But we don't know for sure
4 who left the back door open. Given the circumstances
5 that we had and the totality of the evidence which is an
6 alarming amount of evidence we had against you, at that
7 time we didn't see any evidence that anyone else there
8 could possibly have done it.

9 Q The only thing at that time you had against me that
10 I was stopped in a white Ford Taurus, you had \$328 and a
11 coat that ain't have nothing to do with the crime. So
12 how is that overwhelming evidence?

13 A The overwhelming evidence would be -- would have
14 been that when the incident first took place the
15 information that was given to dispatch, the information
16 the officers received as a description of the vehicle
17 that was seen prior to as well as the vehicle that was
18 located prior after, the information also where you also
19 were located in the vehicle matching that description of
20 a white Ford Taurus, along with money that was located
21 inside of a vehicle and the action of you actually
22 throwing money back inside the car, and the information
23 that we also talked to the officers and ---

24 Q Okay. I don't -- that's enough. I just want you
25 answer my question. You going into a whole -- everything

1 that took place that you didn't -- your whole
2 investigation. I didn't ask you what your investigation
3 was as far as the car and as far as all that. I asked
4 you based upon ---

5 MR. MARCHANT: Your Honor, I'd object. He asked him
6 what the overwhelming evidence he had against him, and
7 he's explaining what the evidence was. Ask that he be
8 allowed to answer the question.

9 MR. WATKINS: I asked him ---

10 THE COURT: Okay.

11 MR. WATKINS: I asked him ---

12 THE COURT: Let him answer the question, Mr.
13 Watkins. Go ahead, Officer.

14 THE WITNESS: Thank you, Your Honor. Along with
15 that information that we received, taking the totality of
16 the information, along with the items we also located
17 with the search warrant, the ski mask, also the hand gun,
18 all that particular ---

19 MR. WATKINS: I object, Your Honor.

20 THE WITNESS: --- information we have, gave us no
21 indication before, during, and after that the implication
22 could be anyone else other than the person that was
23 sought after, which would have been you.

24 BY MR. WATKINS:

25 Q What I'm saying, you didn't have the search warrant

1 then. You didn't have the evidence out of the apartment.
2 I'm saying at the time when investigating on the scene,
3 you got employees, you got the people that left the door
4 open, the workers, you got an employee -- the employee
5 that's hiding the witness, and so much going on in there,
6 but the only -- the only thing you saw was a black male,
7 a white Ford Taurus, \$328, and a coat was falsified and
8 used as evidence to say I committed the crime. And from
9 there you searched apartment and now you're saying this
10 evidence. Okay. Let me ask you this, you heard
11 testimony of the person the State used to say this --
12 that was the gun used in the crime, but she -- did she
13 not testify to that if the gun has two holes in the
14 barrel that is not the gun that I seen that night? Did
15 she say that?

16 A I don't recollect her saying that, if it had two
17 holes or not.

18 Q She testified that the gun has two holes -- said --
19 see only see one hole in the barrel. All the witnesses
20 said one hole in the barrel, one witness said that it
21 could have been a pipe, could be, he really don't know.

22 A Yes, sir.

23 Q Can you tell me, they got it bolted down, how many
24 holes ---

25 A It's supposed to be.

1 Q How many holes it has in it?

2 A There actually are only two holes in it, sir.

3 Q Okay. Thank you. So if the witness say the gun
4 that she saw that night has one hole, and then she said
5 that gun has two holes, that's not the gun, then how is
6 this the gun that was used in the robbery?

7 MR. MARCHANT: Your Honor, I object. That's
8 argumentative at this point.

9 THE COURT: Okay. It's an argumentative question.
10 I would sustain the objection.

11 BY MR. WATKINS:

12 Q Do you know the exact amount of money that was
13 obtained out of this drawer?

14 A Not right off hand, sir, no, sir.

15 Q You don't have it here so you can count it, so -- do
16 you know the exact amount of money that's in this bag,
17 this exhibit right here, 22?

18 A That would be the same amount that I told you
19 earlier, \$558.70.

20 Q So wouldn't -- if somebody could count this money it
21 wouldn't add up to that, would it?

22 A If you go by the clerical errors, sir, of the 11
23 roll of quarters, yes, sir.

24 Q No, but I'm just, you're saying it's clerical error,
25 but what you put down, what you counted it as \$150 in 11

1 rolls of quarters?

2 A Yes, sir, that's a mathematical error.

3 Q Okay. And they testified that was 11 rolls of
4 factory rolled quarters?

5 A Yes, sir.

6 MR. MARCHANT: Your Honor, objection, it's a
7 mischaracterization of the evidence, there was some
8 testimony that was provided earlier.

9 THE COURT: Okay. State your question again, Mr.
10 Watkins.

11 BY MR. WATKINS:

12 Q Okay. How many rolls of factory quarters do you see
13 in there? With the brown -- they said it was originally
14 an orange wrapper but they said it was brown wrapped.

15 A Okay. If you're looking at those, all -- but the
16 money being inside of the drawer you can actually see
17 four.

18 Q So that's not 10?

19 A No, sir, you can see four inside the drawer from
20 that picture.

21 Q Can you tell me how much money is in Exhibit Number
22 23?

23 A Not by just looking at it, sir. It's been sealed.
24 I can't tell you that. I think Lieutenant Skardon, I
25 think, can testify and tell you the dollar amount that he

1 had in there.

2 Q You said that you came in the apartment, and
3 after -- you testified that State Exhibit Number 15 that
4 you lifted up two yellow jackets?

5 A Yes, sir.

6 Q Okay. And you discovered that gun?

7 A Yes, sir.

8 Q Are you aware of which officer found the money in
9 the top of the closet?

10 A Not right off hand, sir. Is that Officer Johnson's
11 report?

12 Q Yes, sir.

13 A Okay.

14 Q I want you to read that and tell me anywhere in this
15 report if he walked in the room did he say in the report
16 about a gun being on the floor, or a jacket, anything
17 being on the floor?

18 A No, sir, he didn't say anything about that.

19 Q Okay.

20 A But what's your question now?

21 Q I'm trying to figure out how the gun got there. If
22 he's the officer going to -- in the place, he's giving a
23 statement, he's getting money and searching the room, if
24 he's the investigating officer going to the report, how
25 is it that he gives a report, he doesn't say anything

1 about a gun, he says something about money in the top of
2 closet that he found, how is it that ---

3 MR. MARCHANT: Your Honor, I'd object. He's asking
4 questions about what another officer wrote in his report
5 and asking this officer to explain why that officer wrote
6 what he did.

7 MR. WATKINS: He's the investigating officer.
8 He's ---

9 THE COURT: Well, I sustain the objection about what
10 the other officer said. He can ask him what he did, or
11 what he knows about the gun.

12 BY MR. WATKINS:

13 Q Okay. Do you have any knowledge of how the money
14 from the top of the closet got down on the floor next to
15 the other evidence that you collected, because you
16 collected all the evidence? Do you have any way to know
17 how it got from the top of the closet and also
18 photographed in a different position on the floor along
19 with some IDs that were taken out of my wallet in
20 different areas of the apartment?

21 A Do you want me to answer the first question first
22 about ---

23 Q Answer the first one, how did the money from the top
24 of the ---

25 A Well, your first question you asked me, sir, about

1 the jackets and about the gun.

2 Q Okay.

3 A That would have been me. And if you read my report,
4 I also put in my report where when I actually went into
5 that room, this would have been the first room to your
6 left, when I first walked in the room there was two
7 yellow jackets there. After lifting the jackets, I gave
8 you that statement earlier, that I saw a dark colored
9 stocking cap, mask, with the area of the eyes was cut
10 out. After first picking it up I felt something heavy in
11 there. That's when the gun was first discovered. Now,
12 to answer your second question about the money inside the
13 closet. That money was located inside the closet. When
14 we first went in the room after we located that, Officer
15 Johnson went in the closet. I also went in the closet
16 also. The money was located then. The money was taken
17 out of the closet for forensics and everything so they
18 could properly take photographs in the area so it could
19 properly be photographed. It wasn't disturbed, or wasn't
20 misused in any kind of way, other than just taking
21 photographs for forensics.

22 Q So you're saying it was moved for forensics but --
23 but it appears to me that forensic already took a picture
24 of it up on top of the closet, so that wasn't the
25 purpose. Showing the jury Defense Exhibit Number 14, the

1 one in the top of the closet. So that couldn't have been
2 the purpose, but you saying that was the purpose so they
3 can take pictures of it?

4 A Yes, sir. If you look at it from this particular
5 view that you're showing, you can only see the side of
6 it. And at no point in time can you actually see the
7 very tip top of one of the five dollar bills. You can't
8 see any of other moneys when you're standing like that.
9 But when they collected the money they did lay the money
10 out properly so they could photograph it.

11 Q So when you find evidence, the normal procedure is
12 to do forensic testing?

13 A Yes, sir, that would be the forensics department.

14 Q So if you're touching the money and moving evidence,
15 you can't do forensic testing?

16 A When forensics is doing an investigation they
17 normally use gloves. So if there's anything that would
18 be on there wouldn't be no fingerprints of ours.

19 Q Was forensic testing done on the money, or the gun,
20 or anything?

21 A You would have to contact the forensic officers and
22 ask them what procedures they used.

23 Q The gun that was found, what did you do with the gun
24 after you collected it?

25 A That goes -- collected and placed in property and

1 evidence.

2 Q What time did you place it in property and evidence?

3 A I have a copy here, but I can't really see the time
4 on this copy that well.

5 Q But you did place it in property and evidence,
6 secure it in property and evidence?

7 A Yes, they would, also with the mask. It shows where
8 it was also signed in by the person that was working in
9 property and evidence that particular day.

10 Q Okay. So right here I have the property report, you
11 did not collect the gun? You did not collect the gun nor
12 did you put it in property and evidence?

13 A Yes, I collected the gun. The gun actually -- what
14 you're speaking of was taken by the forensics. I
15 collected it. You asked me that.

16 Q All right. You collected the gun. Who put it in
17 property and evidence? You say yes, I put it in property
18 and evidence, and it was collected, put in by the
19 forensic technician. That's what you just said.

20 A Yes, sir. Also when we took the money and
21 everything down there, the technician, I went there with
22 him. That's what I'm speaking of. When everything was
23 turned in, sir, we went down there together.

24 Q So you turned it into property and evidence?

25 A Yes, sir. We took it because -- we took the gun and

1 all of it. We took the cash and money. We took this
2 evidence at the same time, turned it in to property and
3 evidence.

4 Q Okay. Now, what day was the gun collected?

5 A On the 19th.

6 Q What day was it put in property and evidence?

7 A Shows here on the 19th.

8 Q I got the property and evidence sheet right here.
9 Can you tell me what date you put it in property and
10 evidence right here? That's the day it was collected.

11 A The date you're speaking of apparently shows also
12 when property and evidence took it back out. I don't
13 know if they did the investigation that day ---

14 Q No, I didn't ask you that. I asked you what date
15 was it received by the technician, the custodian of
16 property and evidence?

17 A Received on the 19th, when we first took it in.

18 Q It was collected on the 19th.

19 A Yes, sir, that's what I'm telling you.

20 Q All right.

21 A We went down there that day, we took everything down
22 there, but it does show here another day and time
23 received and everything on the 31st. It shows on the
24 30th, 31st, and then October. It was taken out several
25 different times.

1 Q Okay. So the gun was collected on the 19th from my
2 apartment?

3 A Yes, sir.

4 Q But it wasn't turned into property and evidence
5 until December the 30th, 11 days later?

6 A Apparently, sir, it was taken out, I guess to do
7 testing or whatever they did with it. But we all went
8 down there that day when we turned in everything.

9 Q I got the papers. But no forensic testing was ever
10 done on the gun?

11 A I don't know, sir. You've got to ask them, sir.

12 Q I know. I know. Okay. I received the paper from
13 Department of Public Safety, criminal record division
14 saying everything was put in property and evidence, and
15 none of it was forensic -- was tested. I don't have it
16 here today. Okay. And then -- okay. On the 12/30 it
17 was sealed. See, it was sealed. Okay. Who checked it
18 out between 12/30 0500, or five o'clock in the morning?
19 Who checked it out?

20 A What do you mean who checked it out?

21 Q Because it's resealed -- it's resealed twice. It's
22 checked out on the 12/30/01, then it says it was sealed.
23 No one shows they checked it out again, and then it was
24 resealed on 12/31/01?

25 A That would be Mr. Eddie Hicks.

1 Q So you got two custodians receiving the evidence,
2 but you have no one checking it out, signing for it out,
3 but it's out because it had to be reup back in. So who
4 was getting the evidence out of the evidence room? It
5 isn't showing that, and they're not checking the --
6 signing they checking it out.

7 A It just shows here, sir, for storage. It doesn't
8 say that it was checked out for anything.

9 Q Okay. But when you check it out for the court ---

10 A Yes, sir.

11 Q Okay. But it tells you ---

12 A I don't know. You'll have to ask Mr. Hicks. I
13 don't know. I know he works there.

14 Q But I'm just saying, it's evidence that's being
15 checked out and nobody signing for it, it's evidence that
16 it's been held in police possession for 11 days, don't
17 have the document right now, but that no forensic testing
18 or anything was done. You don't have anything to connect
19 me with the gun forensically to say at the time that I
20 had possession of that gun at the time and date the crime
21 happened.

22 A I don't know what testing they did or didn't do.
23 You have to talk to the officers that ---

24 Q So I'm just asking you, do you as officers -- as an
25 officer in investigation part, if you've got evidence,

1 you bring your evidence forth, do you have anything even
2 from the forensic officer showing forensic tests of me
3 being the person that committed the crime inside the
4 Chuck E Cheese, or that the money ---

5 MR. MARCHANT: Your Honor, I object. He's asked and
6 answered this question several times already.

7 MR. WATKINS: I didn't ask about the forensic
8 testing, is there any -- do you have any evidence, or
9 fingerprints being on the money to match the people at
10 Chuck E Cheese, or any other suspects, or anything?

11 THE COURT: Was there any forensic evidence that you
12 know about?

13 THE WITNESS: Nothing I know of, Your Honor.

14 THE COURT: Okay. He doesn't know about any.

15 MR. WATKINS: I'd like to introduce this into
16 evidence.

17 MR. MARCHANT: Can I see what it is?

18 MR. WATKINS: It's the property report that shows
19 that the gun was ---

20 MR. MARCHANT: I would object. We need to approach,
21 Your Honor.

22 THE COURT: Okay.

23 (A bench conference was held.)

24 THE COURT: He's consulting with Mr. Henry.

25 (Mr. Watkins talked to Mr. Henry.)

1 MR. WATKINS: Your Honor ---

2 (A bench conference was held.)

3 MR. WATKINS: Your Honor, I'm going -- I want to
4 introduce this.

5 THE COURT: All right. I'm going to admit that in
6 subject to what we discussed up here.

7 MR. WATKINS: Okay.

8 (Defendant's Exhibit Number 10 was marked and
9 filed.)

10 BY MR. WATKINS:

11 Q When you issued the warrant for Elena Pelzer, did
12 you have any information dealing with a female being
13 involved in the crime?

14 A What do you mean, sir?

15 Q My co-defendant, did you have any information about
16 her being involved in the crime that took place at Chuck
17 E Cheese?

18 A No, sir.

19 Q So why was she charged with armed robbery?

20 A Due to the information that we received from the
21 officer that she was also along with you, and that a
22 robbery had taken place, the evidence and everything,
23 that money was taken, so she was also charged also.

24 Q So no witness ever mentioned a female, two suspects,
25 or anything, she's in the car, and she's charged with

1 armed robbery too?

2 A Yes, sir.

3 Q Did any -- did you receive any information that the
4 suspect that committed the crime got into a white Ford
5 Taurus? Is there any connection with the person that
6 committed the crime of Chuck E Cheese and the white Ford
7 Taurus that was seen in the parking lot? Did anybody
8 give you any information that they seen the person that
9 committed the crime get into the white Ford Taurus?

10 A This information we received about the white Ford
11 Taurus was that it was seen prior to the incident.

12 Q No, I asked you, did anybody tell you, you receive
13 any information from any of the four witnesses that the
14 robber got into a white Ford Taurus? That a black male,
15 the robber got into a white Ford Taurus?

16 A No, sir, we didn't get that information that the
17 robber got into a white Ford Taurus, but we did receive
18 information prior to ---

19 Q Okay.

20 A --- that a white Ford Taurus was seen surveilling
21 the area.

22 Q So it was ---

23 A We received information also that that vehicle was
24 seen days before.

25 Q Okay. Okay. I asked you, did the witnesses, not

1 prior to, when you were doing your investigation, did
2 they ask you -- they can't tell you whether or not the
3 robber went, prior to, if the robbery hasn't occurred yet
4 (sic)? So you can't give me information prior to if the
5 robbery hasn't occurred yet. I'm asking you when the
6 robbery occurred did -- and the robber supposedly had
7 left out of the place, did any of the witnesses say they
8 seen the robber get into a white Ford Taurus?

9 A No, sir, not got into, not afterwards.

10 Q So between the white Ford Taurus seen prior to the
11 robbery, nobody seen nobody in it, and prior to a black
12 male exiting the -- committing the crime at Chuck E
13 Cheese, nobody knowing where it's going, so who made --
14 it's just conclusions that's been made. Who made the
15 conclusion that that person, the black male committed the
16 crime, had something to do with the white Ford Taurus?

17 A It would stand to reason that if you had the vehicle
18 that was surrounding the area of a business and people
19 felt though that was suspicious, and you had a black male
20 suspect come in and rob the place, you give that
21 information to dispatch and it's disseminated, moments
22 after officers locate a vehicle that fits the same
23 description, and the suspect inside that vehicle, and you
24 have moneys inside the vehicle and everything, they can
25 be moneys that come from a robbery, yes, sir, that would

1 be enough.

2 Q Okay. I'm trying to get a connection here. I'm
3 trying to find out where the connection come in. You got
4 a black male that committed a robbery. The witnesses
5 never said to you they seen a black male get into a white
6 Ford Taurus. You have a white Ford Taurus prior to the
7 robbery and seen -- and nobody knows who was in that car.
8 Okay. That car leaves.

9 MR. MARCHANT: Your Honor, I object.

10 THE COURT: I sustain the objection. That's not a
11 question and ---

12 MR. WATKINS: I'm going to ask him.

13 THE COURT: I sustain the objection as to the form
14 of the question.

15 BY MR. WATKINS:

16 Q Okay. No one told you a white -- a black male got
17 in a white Ford Taurus?

18 THE COURT: He's answered that. We've heard -- the
19 jury has heard that.

20 BY MR. WATKINS:

21 Q So was it mere conclusions based upon circumstances
22 was made that there was a connection?

23 A With the totality of the circumstances, yes, sir.

24 Q So there was a conclusion made by whom?

25 A Based on the information given by the victims and

1 also by the officers, yes, sir.

2 Q I'm saying who made this conclusion?

3 A The victims and the officers based on their
4 information.

5 Q No, they gave you the information. Based upon
6 information who made the conclusion that ---

7 THE COURT: The conclusion for what, Mr. Watkins?

8 MR. WATKINS: The conclusion that the white Ford
9 Taurus was involved in the crime, that I was involved in
10 the crime because I was a black male, based upon \$323,
11 and that's it.

12 THE WITNESS: Based on what you just stated, yes,
13 sir.

14 BY MR. WATKINS:

15 Q Okay. So did anybody ever come to the scene and
16 identify the money that was on the scene? Are you aware
17 of that?

18 A No, sir, I'm not aware. I wasn't there.

19 Q Okay. So when the witnesses came to the scene and
20 you talked to the officer and they provide their
21 statement, or supplemental reports that no one could
22 identify me as the person being the person who had
23 committed the robbery. You heard the same description of
24 my clothing that didn't match when they seen me and all
25 that. They made mistakes and ---

1 MR. MARCHANT: Your Honor, I object.

2 THE COURT: I sustain the objection. That's
3 argumentative. He's testified that everything that
4 pretty much he knows, Mr. Watkins. But you can ask him a
5 question.

6 MR. WATKINS: I was asking him did he hear this as
7 far as this testimony -- as far as this testimony that
8 said that, I was going to round off with the question.

9 THE COURT: What is your question?

10 MR. WATKINS: That there's nobody identified -- the
11 fact that he heard the other day, how did he come to the
12 conclusion that I was the suspect if there's people that
13 said I wasn't the suspect?

14 MR. MARCHANT: And Your Honor ---

15 THE COURT: I would sustain the objection as to the
16 form of question. The jury has heard the testimony from
17 all the witnesses, and he's testified as to what he
18 knows and why he did it. Now, if you can ask him a
19 different -- and you were arrested apparently from what
20 his testimony is and ---

21 MR. WATKINS: So -- where's his statement?

22 THE COURT: Okay.

23 BY MR. WATKINS:

24 Q Okay. When you moved the coat off this hat, this
25 gun, what did you do with the yellow jackets?

1 A They was still inside the apartment.

2 Q Okay. All the clothing in exhibit number 15, I
3 don't -- do you see a yellow jacket in there?

4 A You're facing the door, that's just a straight shot
5 angle going straight into the apartment. That apartment
6 goes all the way back toward the right also. But no,
7 sir, in this photo you don't see it, but it's listed in
8 my report.

9 Q Exhibit number 15, no yellow jacket. Tell me do you
10 see a yellow jacket in exhibit number 13?

11 A No, sir. No yellow. I see some red but I don't
12 know what that is.

13 Q Exhibit number 15, yellow jacket hanging up. Here's
14 exhibit number 11. State's Exhibit Number 11, showing
15 the whole floor area. Do you see a yellow jacket on the
16 floor where you say you ---

17 A Still that's not the whole entire floor area as
18 going from one apex to the opposite apex of the door, but
19 no, sir.

20 Q All right. Well, I've got a picture where the whole
21 room is going to be covered. Exhibit number 10, starting
22 from the closet to the door, do you see that yellow
23 jacket?

24 A This is a close up version of the same picture, but
25 no, sir.

1 Q Showing more of the room?

2 A No, sir, it's the same picture, just a close up
3 version of the pile of clothes that's on the floor.

4 Q Showing you exhibit number 10. This exhibit you're
5 saying it's a closer up version. Here's another version
6 close up. Exhibit number 11, showing the room.

7 MR. MARCHANT: Your Honor, he's making arguments to
8 the jury, I'd object.

9 MR. WATKINS: I'm just showing the evidence.

10 THE COURT: Okay. You can -- you can do that at the
11 conclusion of the case, Mr. Watkins.

12 BY MR. WATKINS:

13 Q During the interrogation, when you were
14 interrogating me, you took a statement from me. Do you
15 recall telling me that when I requested a lawyer that I
16 wasn't under arrest yet?

17 A No, sir, I don't remember you even asking for an
18 attorney.

19 Q Do you remember telling me that I was not arrested
20 yet, there was no need for an attorney, I wasn't under
21 arrest yet?

22 A No, sir, I don't remember ever telling you that.

23 Q Do you remember telling me give a statement of my
24 whereabouts, and want to investigate it, and if
25 everything checked out I was free to go?

1 A No, sir.

2 Q Okay. Did I give you a statement of my whereabouts?

3 A You wrote down a brief statement of what you told
4 us, yes, sir.

5 Q Did you investigate it?

6 A The statement that you gave us was very short, very
7 brief.

8 Q I don't want you to read it. I want you to tell me
9 whether or not you investigated it.

10 A As far as to what? I mean, you really didn't ---

11 Q When you asked me to give a statement, you led me to
12 believe that you was going to investigate it. I'm asking
13 you, did you investigate -- when I first gave you a
14 statement, did you investigate it to see if it was true
15 or not?

16 A What part of it was true?

17 Q To my whereabouts. To where if the statement say I
18 was with Patricia Owens and you said you was going to
19 investigate it, did you ever talk to a Patricia Owens?

20 A No, sir, I didn't talk to a Patricia Owens, no, sir.

21 Q So you never investigated anything on my behalf?
22 Everything you investigated was to build a case against
23 me?

24 A What you do mean?

25 Q In -- when a person -- you have a person you

1 actually think was innocent or until proven guilty, or
2 you investigate both angles, you just don't -- I'm
3 assuming, do you investigate both angles? Do you think
4 it was positive and also negative, do you see all angles?

5 A The angle that you gave us and what actually took
6 place, the person that you was with, we didn't
7 investigate, we talked to her, and she said you did come
8 into the apartment.

9 Q She said what?

10 A That you did come into the apartment, and when she
11 woke up you were there.

12 Q Okay. So that's what she told you?

13 A Yes, sir.

14 Q All right. I have -- well, hold on. I got his
15 statement. I got his statement. Okay. Bear with me.
16 Can you read right here, is what she told you that you
17 put in your supplemental report, and tell me if it says
18 that I was not there?

19 A What do you want me to read? What's your question?

20 Q Right there where Elena Pelzer where you --
21 disclosed information that Elena Pelzer provided to you.

22 A I mean, where at specifically?

23 Q I'm asking you, you just said she said I came back,
24 that I wasn't there, that's the reason you had this
25 information like I wasn't at the apartment. But that

1 ain't the information she gave you.

2 A No, sir, that's not what I said. I said that when
3 interviewing her and talking to her, she said when she
4 woke up you was there in the apartment.

5 Q Okay. So if she said I was there in the apartment,
6 and you knew the time that Jenna Pirelly (phonetically),
7 said the crime happened, based upon her statement, which
8 was what time?

9 A The incident was supposed to took place shortly
10 before 1:00, or right at one o'clock in the morning.

11 Q So if I'm with Elena Pelzer, and no one says
12 anything about a female committing a crime, where did she
13 place me at the time the crime occurred?

14 A During the approximate time when the crime took
15 place there would have been enough time for you to be
16 able to leave and to get to that apartment and then come
17 back out.

18 Q No, I asked you, what time did she -- did the person
19 say the robber came into the place, and what time did she
20 say I was at home?

21 A Ms. Pelzer stated between -- she said 12:50 and one
22 o'clock. She said somewhere between that time frame.
23 She said it could have been 20 minutes, it could have
24 been 30 minutes. She stated that yesterday.

25 Q That's what she stated when I was showing that she

1 said in her statement after she was charged. Before she
2 was charged what time ---

3 MR. MARCHANT: Your Honor, object to the form of the
4 question.

5 THE COURT: I sustain the objection as to the
6 question. Ms. Pelzer has testified.

7 MR. WATKINS: Okay. What ---

8 THE COURT: She testified under oath in front of the
9 jury. You have to ask him questions in regard to her
10 testimony.

11 BY MR. WATKINS:

12 Q Okay. I can ask him pertaining to the evidence.
13 I'm asking him, pertaining to the evidence that you and
14 Fuller received, at what time was I in the apartment?

15 A This is Detective Fuller's report.

16 Q And it says who named -- when they was interviewing
17 her, were you present?

18 A Yes, sir.

19 Q Okay. So in his supplemental he was saying you and
20 him was interviewing her, and that at one o'clock ---

21 MR. MARCHANT: Your Honor, I object.

22 THE COURT: I sustain the objection.

23 MR. MARCHANT: The question -- he's asking him to
24 testify about ---

25 THE COURT: You can ask him what he knows ---

1 MR. MARCHANT: --- Detective Fuller's statement.

2 THE COURT: --- and not anything about Detective
3 Fuller, or what his statements were. You can ask him
4 about what he knows.

5 MR. WATKINS: Yeah, that's what I'm asking. He --
6 see, he was ---

7 THE COURT: I sustain the objection, Mr. Watkins.
8 Let's move along.

9 BY MR. WATKINS:

10 Q Did you know the same thing she told Detective
11 Fuller, you were present so you knew the same thing?

12 A If you can tell me what you're speaking of, you can
13 show me what you're talking about.

14 Q That's what I was trying to do. They sustained it.

15 A I don't know. Your question -- I don't know what
16 your question is.

17 Q Right here. At the time -- did you hear her say
18 this right here?

19 A I'm not sure what you're talking about. It's not
20 speaking in the same context that you're talking about.

21 Q Yes, it is.

22 A Show me exactly what your saying. See if I can
23 help you out. That's not -- if you read right there,
24 it's not ---

25 THE COURT: Wait, wait. Y'all can't talk to each

1 other. The question was, did you hear her say that, just
2 yes or no. Did you hear her say that, just answer that.

3 THE WITNESS: Yes, sir. Yes, sir.

4 BY MR. WATKINS:

5 Q Okay. So you're aware that at the time that the
6 robbery was taking place that Elena Pelzer basically
7 established an alibi, based upon that information?

8 A No, sir, I don't think so. She gave a time frame.
9 And that's a wide time frame there, if you look at it.

10 Q Okay. So I'm trying -- okay. Are you aware of the
11 deal that Elena Pelzer received?

12 A No, sir.

13 Q You're not? Okay. So you're not aware that she
14 received -- or she was indicted for accessory after the
15 fact?

16 A Later on I was, sir, but I wasn't privy to any of
17 that information prior to that, or during that. That was
18 the solicitor's office.

19 Q So you later realized it was dropped to a
20 misdemeanor?

21 A Yes, sir, through the solicitor's office.

22 Q Okay. And -- but you initially charged her with
23 armed robbery?

24 A Yes, sir.

25 Q And you had no information from the people at Chuck

1 E Cheese about a female being involved with the armed
2 robbery? You had no evidence to actually connect her to
3 the crime yet, ask you a question, you had no tangible
4 evidence to connect her to the crime?

5 A As a co-defendant, yes, sir, we did.

6 Q As a co-defendant in ---

7 A An armed robbery had just taken place. The money
8 taken in the robbery was located in the vehicle she was
9 in. The person that we believe committed the robbery was
10 also with her.

11 Q So the witnesses never said I committed the robbery.
12 Well, did the witnesses ever say I committed the robbery?

13 A They didn't call you by name, no, sir.

14 Q Did they identify me as the robber?

15 A They gave a physical description of a person, sir,
16 that matched your physical description.

17 Q No, they came to ---

18 A That was yesterday.

19 Q I'm asking you, did they come to the scene ---

20 MR. MARCHANT: Objection, that's argumentative.

21 THE COURT: Mr. Watkins, we've been over this.

22 MR. WATKINS: I changed -- I stopped ---

23 THE COURT: The jury has heard the testimony. Now,
24 let's move on. You're being repetitive now.

25 MR. WATKINS: Okay. No further questions. No

1 further questions. Okay.

2 MR. MARCHANT: I have no other -- further questions
3 for this officer. I'd ask that he step down, Your Honor.

4 THE COURT: All right. Officer, you can step down.

5 MR. MARCHANT: With that the State rests.

6 THE COURT: Okay.

7 MR. WATKINS: I have some motions.

8 THE COURT: All right. The -- that's all the
9 evidence and testimony from the State. I'll give you a
10 short recess and then we'll bring you back in. Okay.

11 (The jury exited the courtroom at 11:37 a.m.)

12 MR. WATKINS: Your Honor, I have some motions.

13 THE COURT: All right, sir.

14 MR. WATKINS: Judge, I would ask for a motion of a
15 direct verdict on the grounds that the State failed to
16 prove its case beyond a reasonable doubt, to prove that I
17 was actually the one that committed the crime, to prove
18 the elements in the indictment.

19 THE COURT: Okay. I'm going to deny the motion.
20 There is direct evidence about how the robbery occurred.
21 The mask, there's a mask in evidence. I don't weigh the
22 evidence, but there is substantial circumstantial
23 evidence that follows that, and there is -- I have to
24 submit the case to the jury. I'm sorry. Thank you.
25 Anything else?

1 MR. WATKINS: Yes, sir, I have a motion to -- renew
2 all my motions under Frank versus Delaware, what the
3 evidence in the motions (sic). Also, I guess I -- I
4 don't know if it's the same, but a motion to dismiss the
5 case due to the State failed to prove the indictment,
6 also on the grounds that alibi was my defense and that in
7 the indictment it doesn't officially state -- it states
8 on or about, and that doesn't officially state the date
9 and time which the crime occurred. There's a case
10 dealing with that State versus Riley where they have to
11 give me precise notice of the exact time the crime took
12 place so I can prepare for the trial. They never exactly
13 established the time or the date that the crime actually
14 happened according to the indictment.

15 THE COURT: Okay. Looking at the indictment, and
16 I'm familiar with the case law as far as putting someone
17 on notice of the date and time. It says on or about the
18 19th of December, 2001. And under the law, Mr. Watkins,
19 that's sufficient to put you on notice as to when the
20 crime allegedly occurred.

21 MR. WATKINS: Dealing with alibi? Because if I give
22 my alibi on or about a date and they present different
23 evidence then it's impossible for my alibi to sustain a
24 defense based upon the wrong on or about. That's dealing
25 with State versus Riley.

1 THE COURT: You've raised the defense of alibi, even
2 with the alibi on or about is sufficient in this case.
3 You're talking about -- we've heard all the evidence. We
4 understand it. The time frame is somewhere maybe between
5 12:30, 12:45. I'm not sure there's any exact time for
6 anybody that looked at their watch, except for the
7 testimony of Ms. Pelzer who said that she looked and
8 knows the exact time they were stopped. And I believe it
9 was 1:10. That's the only testimony I've heard from
10 anyone who actually look at their watch. But they've
11 alleged the robbery, and we've all heard the testimony of
12 the approximate times. And that's just going to be a
13 question of fact for the jury as to when. So I deny your
14 motion.

15 MR. WATKINS: Okay. I have some charges for the
16 jury. I think there's an inference charge to be charged
17 with. I think it's with facts -- two facts -- facts can
18 be -- fact -- based upon the facts and evidence that
19 facts and evidence can prove toward guilt or toward
20 innocence with the same facts, I'm entitled to a verdict
21 of innocent. Let me see. I got it.

22 THE COURT: They have to prove beyond a reasonable
23 doubt, and I'll explain to them what a reasonable doubt
24 is, that you would be guilty of the crime charged, and I
25 would charge them that.

1 MR. WATKINS: Can I get the hesitate to act charge?

2 THE COURT: I'm going to charge the hesitate to act.
3 If they're firmly convinced that you -- if there's a real
4 possibility that you didn't commit the crime I'm going to
5 charge that. And -- okay.

6 THE COURT: How about with respect to circumstantial
7 evidence the defendant is entitled to every inference in
8 his favor that can be reasonably drawn from the evidence,
9 and where two inferences can be drawn from the same facts
10 one consistent with guilty and one consistent with
11 innocence the defendant is entitled to the inference
12 that's consistent with his innocence.

13 THE COURT: Well, I don't know. We might be getting
14 the cart before the horse here by going over these
15 instructions. But -- I don't know if you intend to call
16 any witnesses or if you intend to testify. But I need to
17 cover your right to testify, whether you want to testify
18 or not.

19 MR. WATKINS: Yes, sir. I want also alibi
20 instruction pursuant to, I think that's ---

21 THE COURT: Are you going to offer any evidence?

22 MR. WATKINS: Yes, sir. We have -- do you have the
23 motion that he had, as far as my prior convictions? Are
24 you going to address that?

25 THE COURT: Okay. It is the appropriate time to

1 address that.

2 MR. MARCHANT: Your Honor, I have presented you with
3 three or four cases. Specifically referring to Jones v.
4 Cunningham was a Supreme Court case which was a case that
5 was on habeas corpus review. In that case the petitioner
6 was incarcerated and was challenging his sentence. He
7 was released and was on parole. At that time he was
8 attempting to add the parole board in his petition of his
9 case. The Supreme Court ruled that because he was on
10 parole that is equivalent of being in custody and that
11 therefore fell within the ability of him to add the
12 parole board to his case. Okay.

13 We then move to State v. Scott which references
14 Jones and Cunningham. Again, they dealt with this issue.
15 State v. Scott, 40 4 SE 2nd 110, where specifically they
16 stated an individual who was paroled in 1980 did not
17 alter the fact that the sentence remained in effect until
18 1986 because they were on parole therefore in custody
19 which encompasses us in that 10 year time frame.

20 THE COURT: On the -- are we addressing the burglary
21 charges now?

22 MR. MARCHANT: Well, Your Honor, I believe that the
23 last burglary charge he had which he plead guilty to on a
24 negotiated plea in front of Judge Floyd on 10/28/97, he
25 was sentenced to five years provided on the service of

1 two years and probation for three years. The sentence
2 became effective on 4/21/97. So if you just give him the
3 benefit of even making parole on the same date that he
4 was sentenced, and not taking into consideration ---

5 THE COURT: Wait, wait, 4/21/97?

6 MR. MARCHANT: Yes, sir.

7 THE COURT: He was convicted?

8 MR. MARCHANT: No, sir. You Honor, he pled guilty
9 on 10/28/97.

10 THE COURT: 10/28/97?

11 MR. MARCHANT: He was given credit backdated to
12 4/21/97.

13 THE COURT: Okay.

14 MR. MARCHANT: So if you will just ---

15 THE COURT: How much time did -- he was sentenced to
16 two years?

17 MR. MARCHANT: He got five years provided upon the
18 service of two years and then three years of probation.

19 THE COURT: Okay.

20 MR. MARCHANT: So he would have had to serve his two
21 years and then come out on probation and parole. And my
22 argument is that even if you go back to 4/21/97, and if
23 he made parole on that date, I'm giving him the benefit
24 of going six or seven months back from his actual plea
25 date, if you add the three years of probation on top of

1 '97, that brings us to the year 2000. Here we are in
2 2008, we're well within the 10 year period. That's
3 giving him every benefit of the time period with respect
4 to that sentence.

5 THE COURT: When was he released from confinement?

6 MR. MARCHANT: Your Honor, Department of Corrections
7 doesn't provide those records after -- or they're not
8 available to us after they're released. You're able to
9 pull them up while they're incarcerated, but I don't have
10 the specific date when he was released on this sentence.

11 THE COURT: All right. Mr. Watkins?

12 MR. WATKINS: Those cases he's dealing with
13 basically deal with parole. And I was never on parole.
14 Parole and probation are two different things in dealing
15 with these cases. Consequently the Court interpreted
16 rule 609 of South Carolina rules of evidence. How should
17 the 10 year rule be interpreted for conviction that is
18 more than 10 years old then term of probation is extended
19 beyond the 10 year period. The State has offered four
20 cases in support of the position of the 10 years
21 extending until the term of probation has been completed.
22 The case does not support the use of prior convictions to
23 impeach my credibility if I take the stand.

24 The State versus -- Jones versus Cunningham (sic)
25 case cited by the Supreme Court in 1963 was not a rule --

1 not a rule 609 decision. It was a habeas corpus action.
2 This issue therefore was whether a parole prisoner was
3 still in custody under the habeas corpus rule. This is
4 not the same issue before the Court today.

5 State versus Sarvis and State versus Scott are both
6 South Carolina Supreme Court cases -- Supreme Court
7 appeal cases that deal with parole and means defendants
8 not sentenced to probation. Parole is different from
9 probation since a prison sentence has -- involved --
10 since the parole is considered a continuing on the
11 imprisonment.

12 Although State versus Muller is a rule 609 decision,
13 does involve probation instead of parole, it was decided
14 before South Carolina adopted rule 609. It is not an
15 interpretation of rule 609. No cases have been presented
16 by the State involving both rule 609 and a straight
17 probation sentence. It is a straight -- it is a stretch
18 to consider a straight probationary sentence confinement
19 under rule 609. The Court should be careful in this
20 situation since the effect on the cases is so great.

21 MR. MARCHANT: Your Honor ---

22 THE COURT: I understand that. The question is when
23 was he released from confinement.

24 MR. MARCHANT: I got it.

25 THE COURT: We have to know that before I can rule.

1 MR. WATKINS: I have -- I was going to finish. I
2 haven't finished.

3 THE COURT: I'm sorry?

4 MR. WATKINS: I was going to finish the -- my -- I
5 have more to add to it.

6 THE COURT: Okay. Well, I understand your motion.
7 And to be honest I don't disagree with you. It was
8 parole and you're talking about probation.

9 MR. MARCHANT: Well, Your Honor, if we're talking
10 about probation, I would point the Court of State versus
11 Muller, which in the very last note, footnote eight,
12 cites the Sarvis case. While it says the federal rules
13 may provide guidance, the admissibility of conviction
14 still remains within the discretion of the trial Court.
15 In this Muller case, evidence of prior convictions was
16 brought in when that witness was on probation, and they
17 said it was not an abuse -- it not an abuse of discretion
18 in admitting the evidence of a conviction where the
19 witness was on probation and thus under supervision
20 during the 10 year period preceding the trial. I would
21 liken probation and parole, I would state to the Court
22 that essentially that the Court is saying that it is
23 custody. He does not have or did not have freedom of
24 movement to do with what he liked. If he had the --
25 wanted to leave the state he would have had to get

1 permission. He had to report on a weekly, monthly,
2 bi-monthly basis, depending on how his probation was set
3 up. So he's not a free man. He is in custody. It's
4 just not behind bars. So I would ask the Court to allow
5 us to use the 1997 burglary convict for impeachment
6 purposes.

7 MR. WATKINS: Your Honor, the Court has discretion
8 as to whether to omit the conviction under rule 609. The
9 cases to allow the old conviction to be used to impeach
10 my testimony would effectively prevent me from taking the
11 stand in my own defense. The presence of the cases
12 outweighs the State's need to impeach my credibility.

13 THE COURT: Okay. I believe that confinement means
14 confinement. And when the people wrote the statute, I
15 have looked at it and looked at it, and that number two
16 talks about crimes of moral turpitude. It talks about
17 the 10 years. But anyway, I don't see that you can
18 separate B from paragraph one, but I don't know the date
19 he was released on the two year sentence, whether it's
20 within the 10 years or not. And until y'all find that
21 out for me I can't rule.

22 MR. MARCHANT: Your Honor, my investigator is going
23 to attempt to call the Department of Corrections and see
24 if she can locate his release date.

25 THE COURT: If he was confined within the 10 year

1 period then you can use it for impeachment purposes. But
2 if he was not confined within the 10 year period -- five
3 years probation is all you can give anybody and ---

4 MR. MARCHANT: Your Honor, if he was given credit --
5 if that's Your Honor's ruling, he has to be confined 10
6 years from today's date, is that what I'm understanding?

7 THE COURT: Yep.

8 MR. MARCHANT: And he was given a five year sentence
9 in April of '97. I ---

10 THE COURT: He had to serve two at least, but -- he
11 had to serve two active years?

12 MR. MARCHANT: Correct. So I have no way of
13 knowing ---

14 THE COURT: That would have made it '99 if he served
15 every day.

16 MR. MARCHANT: If.

17 THE COURT: And that would put you within the -- so
18 I don't know. You're going to have to let me know when
19 he was released. But I can -- I'll give y'all a few
20 minutes, 10, 15 minutes to do that.

21 MR. MARCHANT: Thank you, Your Honor.

22 THE COURT: I mean, but I can't rule until I know
23 that.

24 MR. MARCHANT: Can we go ahead and go over his
25 rights to testify, whether or not he -- voir dire him on

1 that?

2 THE COURT: Okay. Still, Mr. Watkins, and I feel
3 certain that you probably have discussed this with Mr.
4 Henry, who is your standby counsel and has been in the
5 courtroom throughout the proceedings. Procedurally you
6 were able to consult with him at times. I'm not sure it
7 was in the record or whatnot, but at one time it was.
8 But I can tell you just straight up that normally most
9 everybody says the most important decision that you have
10 to make in a criminal trial, and in this trial, is
11 whether or not you testify under oath, like everyone
12 else. You'll be sworn and testify. And then you would
13 be subject to cross-examination by the State. And you
14 would have to respond to their questions.

15 Now, you have a Constitutional right to testify.
16 You have a Constitutional right to invoke your right not
17 to testify. You do not have to testify.

18 If you chose not to testify I would instruct the
19 jury that you do not have to testify, and that cannot be
20 considered and must not be considered against you under
21 any circumstances, or in any manner. The fact that you
22 do not take the witness stand in your own behalf does not
23 create any presumption against you. And I would instruct
24 the jury that they could not let the fact that you did
25 not testify, if you didn't, and I'm not indicating what

1 you should do, then that fact could not weigh in the
2 slightest degree against the defendant, against you, if
3 you exercised your Constitutional right not to testify,
4 nor could they even discuss that in their deliberations
5 in the jury room.

6 Under the Constitution of South Carolina and the
7 United States it is your prerogative to testify or to
8 remain silent. The burden of proof is always upon the
9 State of South Carolina to establish your guilt by
10 competent testimony beyond a reasonable doubt.

11 Now, I do not know whether or not they have a
12 conviction they can use against you, but if you decided
13 to testify and any evidence about a prior record that you
14 may have was presented, or if you were asked about that,
15 that is admitted for a limited purpose and a limited
16 purpose only. And I would instruct the jury that they
17 could not consider that, if you had a prior record, as
18 any evidence of your guilt in this particular case. It's
19 only admitted as it would bear on your credibility or
20 believability. And if they concluded that you had a
21 prior record it would be -- they could evaluate it on
22 credibility or believability only, and for no other
23 purpose.

24 They cannot and must not consider a prior record, if
25 any, of your guilt in this particular case, if you had a

1 prior record and chose to testify. They could give that
2 evidence whatever weight they wanted to on the issue of
3 credibility or believability, but not on any evidence of
4 guilt of armed robbery in this case.

5 Now, have you thought about this and discussed this
6 fully with your standby counsel, Mr. Henry?

7 MR. WATKINS: Yes, sir. Yes, Your Honor.

8 THE COURT: You have? All right. Have you made a
9 decision as to whether you're going to exercise your
10 Constitutional right to testify or your Constitutional
11 right to remain silent?

12 MR. WATKINS: To testify.

13 THE COURT: You're going to testify? Okay. Very
14 good.

15 MR. MARCHANT: Your Honor?

16 THE COURT: Yes, sir?

17 MR. MARCHANT: I realize we don't have the prior
18 conviction matter resolved yet, but I would like to know
19 how the Court is going to handle him testifying?

20 THE COURT: I'm going to let him stand up and
21 testify. I mean, I -- we're going to put him under oath
22 and let him testify. And then ---

23 MR. MARCHANT: I would just ask that he be
24 instructed that he can only say, you know, what he knows.
25 I don't -- don't just want to appear to interfere with

1 his direct examination of himself, I guess.

2 THE COURT: Okay.

3 MR. MARCHANT: I don't -- I appreciate he's got
4 something to say. I just want to be sure we keep it to
5 what he knows himself as opposed to getting into more of
6 a closing argument.

7 THE COURT: All right. You can testify as to what
8 you know yourself and what you know of your own
9 knowledge. And at this particular time you cannot
10 argue about what other witnesses may have concluded, and
11 what -- he's got to make the appropriate objections, but
12 you can't essentially make a closing argument now. You
13 have to do that at the conclusion of the case. Any
14 inferences that can be drawn from the evidence -- any
15 reasonable inferences that can be drawn from the
16 evidence, both sides can argue that to the jury. But you
17 need to testify as to the facts that you know and --
18 about on that night in question. And that's what we're
19 going to do, Mr. Watkins. You understand that?

20 MR. MARCHANT: Your Honor, the information I've just
21 received is that he was paroled on 7/5 of '98.

22 THE COURT: 7/5 of '98.

23 MR. MARCHANT: So having not had the delay in this
24 case through no fault of the State, the last time we
25 would have been clearly within the 10 years. So I would

1 ask that the Court take discretion and use its discretion
2 and allow the State to impeach him with that prior
3 record.

4 MR. WATKINS: Your Honor ---

5 THE COURT: Well -- okay.

6 MR. WATKINS: I would like to see the document that
7 you got facts, something, showing that you -- the release
8 date.

9 MR. MARCHANT: Your Honor, all I can do is offer my
10 investigator and place her under oath that she made the
11 phone call and that's the date she received, if that's
12 what the Court wants.

13 THE COURT: Mr. Marchant ---

14 MR. MARCHANT: I have no document in hand so ---

15 THE COURT: Okay. Well, I'm not ---

16 MR. WATKINS: I object to that. I understand
17 there's a document. I got documents when I was arrested.

18 THE COURT: Well, he -- I mean the 7/5/98 is not
19 within the 10 year period. So I don't know what you're
20 arguing about.

21 MR. WATKINS: Okay. Thank you.

22 THE COURT: But nobody knows anymore than you do as
23 to when you were released from prison, if you were. I
24 don't know anything about what your background is, Mr.
25 Watkins. But I had the first dean of the law school made

1 a statement to us, and he talked procedure. He handled
2 Brown versus Board of Education, Dean Figg. He was the
3 circuit solicitor in Charleston County for a number of
4 years. He told us if he could not convict the defendant
5 of the crime for which he was charged he never tried to
6 convict him on any other crimes either he committed. So
7 he never used it.

8 So Mr. Marchant, you're just going to have to go
9 forward with what you got on this particular offense.
10 I'm not -- I think confinement clearly means confinement.
11 I believe -- there's a difference between parole and
12 probation in my opinion.

13 And just as a side matter, this particular issue was
14 discussed widely on the web serve between the circuit
15 judges this week. And I think if the Legislature had
16 meant, or the judicial department had meant probation
17 they would have put probation in there. So they said
18 confinement. And the way I construe confinement means
19 incarceration. Okay.

20 MR. MARCHANT: Thank you, Your Honor.

21 THE COURT: All right.

22 MR. WATKINS: Thank you, Your Honor.

23 THE COURT: So you're going to testify next, right?

24 MR. WATKINS: Yes, Your Honor.

25 THE COURT: And you fully understand that you will

1 be cross-examined by Mr. Marchant?

2 MR. WATKINS: Yes, Your Honor.

3 THE COURT: Okay. And you've fully discussed this
4 procedural and important decision with your standby
5 counsel?

6 MR. WATKINS: Yeah, I'm going to discuss it further,
7 but we have went over it a little bit.

8 THE COURT: Okay. You talk to him some more. Mr.
9 Henry, you come back and talk to him about that. That's
10 an important decision.

11 MR. HENRY: Yes, sir.

12 THE COURT: And you've been here the whole trial and
13 know what the evidence and testimony is.

14 MR. HENRY: I also know whose decision it is, Judge.

15 THE COURT: Huh?

16 MR. HENRY: I also know whose decision it is.

17 THE COURT: I know. It's his decision, that's for
18 sure. It's your decision, Mr. -- you -- I meant to tell
19 you that. You have to make this decision not Mr. Henry.
20 Okay.

21 MR. HENRY: Thank you, Judge.

22 THE COURT: Okay. Let's take about -- let's start
23 back about 10 after 12:00 or 15 after 12:00. He may have
24 to go to the bathroom or something, and then we'll start
25 back and try to get his testimony in before lunch. Okay.

1 MR. HENRY: Yes, sir.

2 (A short recess was taken, after which, the trial
3 continued as follows:)

4 THE COURT: Okay. Oh, I'm sorry, hold the door just
5 one second. On the document that we discussed at a bench
6 conference, we will white out the word verdict that shows
7 the evidence. And then we'll make a copy of it. And
8 therefore it will show everything except that word and it
9 won't be whited out, and that was what everybody agreed
10 to. Okay?

11 MR. MARCHANT: Yes, Your Honor. I presume from that
12 comment that we won't argue and charge until after lunch?

13 THE COURT: After lunch, right.

14 (A discussion was held off the record.)

15 (The jury entered the courtroom at 12:23 p.m.)

16 THE COURT: All right, Mr. Watkins.

17 THE CLERK: Mr. Watkins, please place your left hand
18 on the Bible and raise your right hand.

19 ROBERT WATKINS

20 Having been first duly sworn, testified as follows:

21 THE COURT: All right. Mr. Watkins, you can testify
22 to the jury under oath and then you will be subject to
23 some questions by Mr. Marchant if he wants to ask you
24 some questions.

25 MR. WATKINS: Okay. Thank you. On December the

1 18th that day I was with my girl all day. We went
2 shopping and had a little -- went and visited Tony
3 Operman and things like that. I did not commit that
4 robbery at Chuck E Cheese. I don't know how they come to
5 that conclusion, but based upon what they said, but I did
6 not commit that robbery.

7 I worked for Auto Body Auto Crown on Poinsett
8 Highway with my uncle Terry. The white Ford Taurus I was
9 driving was a rental car that I received because my Park
10 Avenue was being fixed because it had got hit on the
11 side. My uncle works on cars as far as doing the auto
12 body work. I detail the cars later. I have a lot of
13 clients at Stax Omega. I had Eastern Cotton Company
14 (sic) off Poinsett Highway. I had a couple people from I
15 think it's Pendleton Building off of Broad Street. It's
16 a big building down there. I had customers there. And
17 we had -- we used to do Bruce's Auto Action. So I had
18 jobs. I cut hair on the side. So I had money. I did
19 little things like odd little things to make other money.
20 So I don't understand how my money can be, you know,
21 taken from me like that, and I'm trying to be here today
22 to defend myself and prove my innocence.

23 Oh, I had -- my alibi that night, like they say that
24 crime happened they never told me the time or nothing
25 like that, so I was explaining to them where I was at

1 that day. So that's why I wanted to use my girlfriend as
2 my alibi but they never gave me -- gave me the evidence
3 to be able to prepare, you know, how I wanted to prepare
4 my defense, everything was here for me, so it was
5 complicated. So I'm just here today trying to prove my
6 innocence. That's all I have to say.

7 THE COURT: All right, Mr. Marchant.

8 MR. MARCHANT: Court's indulgence? I have no
9 questions, Your Honor. Thank you.

10 MR. WATKINS: May I say one more thing?

11 THE COURT: All right. Then he might have a
12 question about that, but I'll let you say one more thing.

13 MR. WATKINS: Okay. I wanted to explain to you the
14 gun that was at my apartment. That gun, my aunt son had
15 it and she asked me get that gun from him. I got that
16 gun from him. It was put in the apartment to keep it
17 away from him so he wouldn't -- she was supposed to come
18 and testify but she didn't show up today. And that's why
19 the gun was in my possession. The money belongs to me.
20 Thank you.

21 MR. MARCHANT: Nothing, Your Honor.

22 THE COURT: Thank you, Mr. Watkins, you can come
23 down. Okay. Anything else? Mr. Watkins, you have
24 anything else, any other witnesses or anything?

25 MR. WATKINS: I don't have any witnesses.

1 THE COURT: Okay.

2 MR. MARCHANT: Nothing further from the State, Your
3 Honor.

4 THE COURT: All right. That's all the evidence and
5 testimony. And that was a little bit faster than I
6 anticipated. The next thing will be closing statements
7 and then I'll go over the law before you go back and
8 deliberate. We'll take our lunch break now. I need to
9 go over the law and what I will charge as to the law with
10 the lawyers and Mr. Watkins. And we will -- we will get
11 started back in an hour or hour and 15 minutes. And
12 y'all will have your sandwiches and everything during
13 that time.

14 So the -- the 12 of you that were first picked, but
15 the alternates are still jurors now because still
16 something could happen. The others might not be there.
17 But from the 12 of you, y'all have gotten to know each
18 other a little bit, if y'all would select a foreperson.
19 If you can't I'll appoint someone, but -- and usually I
20 do that in short cases where you don't know each other
21 that well. But y'all have had lunch today and you'll do
22 it again. But if y'all can -- someone -- every person
23 gets an equal vote, an equal voice, and equal input into
24 the verdict, and -- but someone just kind of has to
25 preside back there, and that's what the foreperson's role

1 is. But the verdict has to be unanimous as I'll tell you
2 later on. But do not discuss the case now. But if the
3 12 of you can decide on a foreperson, let me know. If
4 you can't I'll be happy to pick someone. Okay. Y'all
5 can step back. We'll take our lunch break. And most of
6 the time Mr. Bond gets here a little early, so maybe he
7 will today. Okay.

8 (The jury exited the courtroom at 12:29 p.m.)

9 THE COURT: Okay. In regard to the charges, we
10 didn't completely get into those, and the -- as I
11 understand the law, Mr. Henry can discuss it with Mr.
12 Watkins, under State versus Grippon, the holding there
13 was if there is a proper reasonable doubt instruction
14 given, a jury need not be instructed that circumstantial
15 evidence must be so strong as to exclude every reasonable
16 hypothesis other than guilt. And the holding there was,
17 we hold in Grippon that Grippon is the sole remaining
18 charge to be utilized by the Courts of this state in
19 instructing juries in cases relying in whole or in part
20 on circumstantial evidence. We hold that the recommended
21 language in Grippon is the sole and exclusive charge to
22 be given in circumstantial evidence cases along with a
23 proper reasonable doubt instruction.

24 I give the State charge on a doubt that would cause
25 a reasonable person to hesitate to act. And I also give

1 the Supreme Court case written by Justice Ginsburg about
2 if you're firmly convinced the defendant is guilty you
3 have to find him guilty, and if there's a real
4 possibility he's not guilty you must find him not guilty.
5 I paraphrased that last part, but I read from the Supreme
6 Court instructions on the State versus Grippon charge. I
7 -- and I read that to say that that's the only charge on
8 circumstantial evidence that I can give now. I'll be
9 glad to hear from y'all on that.

10 MR. WATKINS: Is -- is there probably a way I can
11 get that charge on State Versus Littlejohn,
12 circumstantial evidence charge, sir?

13 THE COURT: State versus what?

14 MR. WATKINS: Littlejohn.

15 THE COURT: What is that, do you know?

16 MR. WATKINS: It's a circumstantial evidence charge.

17 THE COURT: The only one I can give on
18 circumstantial evidence, which I was just ruling is State
19 versus Grippon, which is that there are two types of
20 evidence generally presented, either direct evidence and
21 circumstantial evidence. Direct evidence is the
22 testimony of a person who appears to have claims to have
23 actual knowledge of the fact, such as an eye witness.
24 And circumstantial evidence is proof of a chain of facts
25 and circumstances indicating the existence of a fact.

1 The law makes absolutely no distinction between the
2 weight or value to be given to either direct or
3 circumstantial evidence, nor is a greater degree of
4 certainty required of circumstantial evidence than of
5 direct evidence. You should weigh all of the evidence in
6 the case. After weighing all the evidence if you're not
7 convinced of the guilt of the defendant beyond a
8 reasonable doubt, you must find him not guilty. Under
9 the law right now, Mr. Watkins, I'm confined to that
10 charge. And that's all I can give them.

11 MR. WATKINS: Then one dealing with State versus
12 Edwards that deals with circumstances must be proven --
13 be consistent and be proven beyond a reasonable doubt?

14 THE COURT: The Court has instructed us not to do
15 that now under State versus Grippon case and State versus
16 Cherry. All right.

17 MR. WATKINS: Okay. Will you instruct the jury on
18 what the elements are in the indictment, because they
19 might not know actually what the element are, that they
20 have to be proven in the indictment by the State, so they
21 would have to be ---

22 THE COURT: I'm going to tell -- I'm going to
23 charge them the elements of the crime of armed robbery.
24 And the -- well, I'm going to send a separate verdict
25 form back to the jury. I will charge them the elements

1 that they have to prove beyond a reasonable doubt, that
2 you in Greenville County were armed with a deadly weapon
3 on the night -- on or about the 19th of December, 2001,
4 while armed with a deadly weapon. And -- well, I can
5 give you the exact -- and just before I charge them if
6 you want to I can give you the elements of armed robbery.
7 I have to define robbery, which is taking someone --
8 property of another and from -- with the intent to
9 permanently deprive them of that property through force
10 or intimidation. I'm paraphrasing that now. But I'm
11 going to charge them the elements of armed robbery.

12 What else do you want me to do?

13 MR. WATKINS: And charge on alibi defense.

14 THE COURT: Okay. I will charge alibi defense.
15 Okay. Mr. Marchant?

16 MR. MARCHANT: The State has nothing to add, Your
17 Honor.

18 THE COURT: Okay. Very good. And I will see y'all
19 back in -- at 15 minutes until 2:00. Can y'all -- is
20 that all right?

21 MR. MARCHANT: Fine with the State, Your Honor.

22 THE COURT: Okay. Can y'all handle everything? All
23 right. We'll start back at quarter 'til 2:00.

24 Now, Mr. Watkins, you'll make the first argument to
25 the jury. And then he gets to make the next argument.

1 Okay. And then I'll charge the jury. And then they'll
2 go back and deliberate. I'm going to write out on a
3 separate sheet of paper as to armed robbery we find the
4 defendant guilty or we find the defendant not guilty, and
5 as to possession of a weapon during the commission of
6 violent crime either guilty or not guilty. All right.
7 Thank you.

8 MR. WATKINS: All right.

9 (A short recess was taken, after which, the trial
10 continued as follows:)

11 THE COURT: Mr. Faulkner -- got a note, Mr. Faulkner
12 will be the foreperson. Better wait until he comes out.
13 Let Mr. Henry look out it. I don't think that makes any
14 difference. I think the verdict is what was the most
15 important part of it.

16 (Mr. Watkins entered the courtroom.)

17 THE COURT: Okay. Yeah. Let Mr. Watkins see that
18 document where we blanked out the verdict part. You can
19 discuss it -- let Mr. Henry look at it too. We were
20 showing it to him right before you walked in. They won't
21 know what that is. Okay. Without objection the exhibit
22 10 is -- we took the word verdict out and both sides
23 agree it's okay. And neither side will make any
24 reference to that during the closing arguments.

25 (Defendant's Exhibit Number 10 was remarked and

1 filed.)

2 (Court's Exhibit Numbers 2 and 3 were marked and
3 filed.)

4 MR. MARCHANT: Yes, Your Honor.

5 THE COURT: Okay. All right. Mr. Watkins, you
6 ready?

7 MR. WATKINS: Yes, sir, Your Honor.

8 THE COURT: Okay. Mr. -- the jury sent me a note.
9 The bailiff brought it in. The foreperson is Hugh
10 Faulkner. And I don't -- I'm really not sure which one
11 that is. They elected the foreman.

12 (The jury entered the courtroom at 1:50 p.m.)

13 THE COURT: All right, Mr. Watkins.

14 MR. WATKINS: Good afternoon, ladies and gentlemen
15 of the jury. I appreciate your time and your patience
16 with me. I want you to know this is my first time that
17 I've gotten a chance to really be heard. And I
18 appreciate your ears and your hearts that have listened
19 to the evidence and can determine my guilt or innocence.
20 My liberty is in your hands.

21 As you have heard from all the witnesses testify
22 that they were eye witnesses to the armed robbery. The
23 testimony only two pieces of evidence was shown to one
24 witness, that was Jeannie Pireda. You heard the
25 testimony that was -- that what was the State's

1 exhibit -- what was the State's Exhibit ---

2 COURT REPORTER: The gun is the box.

3 MR. WATKINS: --- State's Exhibit Number 21, you
4 heard Jeannie Pireda testify State's Exhibit Number 21
5 being that the gun the State introduced she assured it
6 had -- was the gun. Then I asked her on
7 cross-examination how is she sure, and she said it only
8 had one hole in the barrel. Then I asked her how many
9 holes does that gun -- that gun she saw -- she saw the
10 robber with have in it and she said one. I asked her if
11 she is 100 percent sure and she said yes. I asked her
12 then if the gun has two holes in the barrel would that be
13 the gun and she said no. The evidence will show that the
14 gun that they introduced has two holes in the barrel. So
15 based upon her testimony the gun wouldn't be the gun that
16 she saw the robber use during the crime.

17 Okay. I cross-examined the State's witness Jimmy
18 Skelton and Marcus Scarabino about the gun. They said --
19 Jimmy Skelton testified that he really didn't know what
20 it was. He said also it had one hole in the barrel. I
21 asked him could he have been a pipe (sic). He said yes.
22 Then he really didn't know. Marcus Scarabino couldn't
23 hardly memorize anything (sic) so the gun -- that the gun
24 has two holes in the barrel. What does that evidence of
25 Jennifer Pireda's testimony say? It's not the gun.

1 I asked each witness could they identify me as the
2 person who committed the robber at Chuck E Cheese. You
3 heard them all say no. Is it funny how the State has all
4 the -- all of this Chuck E Cheese money, so they say, but
5 shows none of it to Marcus Scarabino who -- to see if he
6 can identify the money being -- being taken from Chuck E
7 Cheese? That's the evidence from Chuck E Cheese. If you
8 got money that you -- the person said that he handed, and
9 you have it in possession, why not present that money to
10 him, since he's seen the money, to get him to identify
11 the money? The evidence doesn't show the State did this.

12 The evidence of Chuck E Cheese doesn't make their
13 own -- okay. The money at Chuck E Cheese doesn't match
14 up with the money that they claim that they taken from my
15 apartment dealing with the dimes, the nickels and the
16 quarters that was hand rolled. You'll see that in the
17 evidence. The evidence shows that. It doesn't match up.
18 The evidence show there was hand rolled, nickels were
19 hand rolled, and the dimes were hand rolled. Why wasn't
20 that money shown to the witnesses?

21 Excuse me. I'm just nervous. Of course all the
22 evidence points to me, it's my property. The State has
23 to prove beyond a reasonable doubt that the money that
24 was taken from apartment 708 belongs to Chuck E Cheese.
25 They haven't done that. They never showed any of the

1 evidence as far as the money to Chuck E Cheese.

2 They showed the gun. The girl has two holes, which
3 y'all see when you get the evidence. It doesn't have
4 the -- she said it had one hole, it doesn't have. It
5 have two holes. So that shows that's not evidence. Yet
6 they raise a suspicion, but suspicion is not proof beyond
7 a reasonable doubt to obtain a conviction.

8 You heard the witnesses, they all told law
9 enforcement that a black man robber wore a black coat
10 with a white -- the black robber wore a dark blue coat
11 with a hood. They didn't say it had white stripes down
12 the length of the sleeve. They didn't identify the --
13 describe the coat that they said was the coat used in the
14 robbery. They didn't describe that coat.

15 They never -- the law enforcement officer -- the
16 witness never told law enforcement officer that the
17 robber fled on foot toward [redacted].
18 They never told law enforcement they saw a black male
19 in a white Ford Taurus. They never told that they saw
20 a robber getting into the white Ford Taurus -- the
21 robber get into a white Ford Taurus. This -- this --
22 they -- they used this to build a conclusionary
23 statements by law enforcement when they stopped the black
24 male in a white Ford Taurus. The evidence according to
25 the law enforcement states I can be a black -- state that

1 the evidence in, according to the law enforcement, states
2 I cannot be a black man with \$382 in a white Ford Taurus
3 at night. I can't put money on the seat when I'm asked
4 to step out of the car. Does this show that law
5 enforcement had probable cause to arrest me? Does the
6 evidence show this?

7 Do the evidence show probable cause to arrest Elena
8 Pelzer? Does the evidence show probable cause to arrest
9 me? The evidence does not show I had -- the evidence
10 does show I had a valid driver's license that you will
11 see in evidence.

12 The evidence -- I had \$73 in my pocket. The
13 evidence will show I had \$73 in my pocket. I also took a
14 five dollar bill from somewhere else and added that money
15 in my pocket and testified before -- that he received it
16 out of my pocket and then later changed it up. The
17 evidence show that he put the money -- got the money from
18 somewhere else. It's falsified in his documents.

19 The witnesses at Chuck E Cheese testimony does not
20 collaborate with the -- with what the law enforcement
21 officers testified to. I -- in court it's called false
22 testimony. But outside of court we know what false
23 testimony is called under oath when you testify it's
24 called -- and the trial judge will instruct on elements
25 that State will have to prove beyond a reasonable doubt

1 to the charge -- the -- he will charge you on the
2 elements that you have to prove beyond a reasonable
3 doubt. He will charge you on circumstantial evidence.

4 He will also alibi defense (sic). The evidence
5 shows that for some reason the State did not want to
6 introduce a time in which the crime occurred, when the
7 robber entered the building. Yet Jeannie Pireda
8 testified and she returned that 12:50 with food, that's
9 the State's own witness. Elena Pelzer testified alibi
10 defense, that I was her at 12:00 a.m. at the same time
11 the witness returned with the food said the person came
12 in the place. But they don't want to determine --
13 establish the time frame.

14 The evidence show that she was falsely charged with
15 armed robbery. I believe the evidence defense -- I
16 believe -- no defense -- I believe they -- how and why --
17 I believe y'all understand why and how she was charged
18 once she gave evidence of alibi. I'm sure today you all
19 heard testimony from individuals that you thought are
20 supposed to be honest. I know you see different.

21 This case is based on evidence and facts from
22 witness -- it's not based on evidence and fact from the
23 witness of the crime but law enforcement real
24 conclusionary statements and the facts and false
25 evidence.

1 I ask the jury could be first -- could it be fair to
2 convict -- I ask the jury would it be fair for you to
3 convict a man with his own property that the victims
4 never identified as a part of the crime? The State says
5 it is. Yet the State won't allow the witness to see the
6 evidence -- evidence to identify it. And when the gun is
7 showed to Jeannie Pireda it was stripped down into --
8 strapped down into a box on its side so she couldn't see
9 the two holes in the barrel. So when they showed the gun
10 to her she could not see two holes in the barrel because
11 it's strapped so tight down. You could only see the side
12 of the gun.

13 Evidence shows that -- the evidence shows there is
14 no connection between the robber and the white Ford
15 Taurus. The evidence shows that everything incriminating
16 was introduced into evidence by the law enforcement was
17 not supported by the witnesses. So you have a case where
18 the witnesses is not given you evidence to incriminate
19 me, it's more like the law enforcement officers based
20 upon their conclusion was trying to incriminate me even
21 though the witnesses is saying no, that is not the
22 evidence. You have evidence here. Show it to the
23 witnesses so they can determine, show the jury, yeah,
24 that's evidence.

25 You haven't got that conclusion today. You haven't

1 been -- I haven't been proven beyond a reasonable doubt
2 that I was the one that committed the crime. I asked the
3 witnesses. Nobody could identify me. I asked them a
4 description of size. None of them could identify me.
5 Everything you heard today comes from the law
6 enforcement. Nothing to convict me coming from the
7 witnesses and the actual victims of the robbery.

8 Thank you for your time and patience. I appreciate
9 it.

10 THE COURT: Mr. Marchant.

11 MR. MARCHANT: May it please the Court, Mr. Watkins?

12 Ladies and gentlemen of the jury, Mr. Watkins would
13 lead you to believe that this is some big conspiracy
14 against him, that law enforcement has manipulated the
15 facts and evidence in this case to prove him guilty, or
16 to ask you to find him guilty of a crime which he says he
17 didn't commit. If you believe him and evidence doesn't
18 support it, I submit to you you got to turn him loose. I
19 would ask you to turn him loose. That would be your
20 duty.

21 Now, let's talk about what the evidence does show.
22 I submit to you after you look at the evidence you will
23 be firmly convinced beyond a reasonable doubt that he did
24 commit this crime. And when I had my opening I told you
25 I believed there were two issues in this case, did a

1 robbery occur. I submit that's been answered and hasn't
2 been denied by the defense.

3 Now, the only question I say is left before you is
4 did he do it. What do we have? We have employees of
5 Chuck E Cheese who have testified that on the night, or
6 morning of December the 19th of 2001, they were working
7 and they were working special cleaning because they had
8 some higher management coming in to do a visit the next
9 day.

10 Two of those witnesses, Ms. Pireda and Mr. Skelton
11 have told you they saw a white Ford Taurus that drew
12 their attention outside. Ms. Pireda tells you she saw it
13 that night. Mr. Skelton tells you he saw it. Ms. Pireda
14 also told you she saw it three days prior. So it was
15 fresh in their mind a couple of days before the robbery
16 occurred. Mr. Watkins got on the stand in his testimony
17 he told you he was in possession of a white Ford Taurus
18 because his other vehicle was broken.

19 What happened that night? The carpet cleaners were
20 there cleaning. There's testimony that the carpet
21 cleaners were white. A man comes in the back door
22 brandishing a gun. Walks up to the employees and says,
23 where's the money. Okay. Has a robbery occurred?

24 He carries them back to the safe and takes money
25 that does not belong to him without their permission. A

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1 approximate times. He'd ask you to believe that he was
2 at home in building 700, which is only a couple hundred
3 yards from the back door of the Chuck E Cheese.

4 He'd ask you to believe that he has an alibi. What
5 information did he present to you on the stand? I work
6 detailing cars. I cut hair on the side. I have been
7 with my girl all day. I didn't rob it. And oh, by the
8 way, the gun and the mask that y'all found, that's my
9 uncle's. He wants you to get hung up on all the
10 discrepancies which he's claiming.

11 And the money. You can look at the pictures when
12 you get back there. Look at how the ones are bound.
13 Look at the number of quarters. Listen to the testimony.
14 What did Lieutenant Hamilton say he found in the vehicle
15 that was stopped within at least -- excuse me, at the
16 most 20 minutes after this robbery occurred, which Ms.
17 Pelzer testified would have been 1:10? Lieutenant
18 Hamilton said there was \$100 in fives. Okay. There's
19 testimony from the apartment that there were \$200 in
20 fives found. It's \$300 in five dollar bills. Mr.
21 Scarabino and Mr. Skelton both testified \$300 in five
22 dollars bills were removed from Chuck E Cheese.

23 How many rolls of quarters did Detective Bruce get
24 out of the apartment? Eleven. How many were taken from
25 the Chuck E Cheese? Eleven. Some were hand rolled.

1 Some were bank rolled. Was there any markings or
2 identification whatsoever that Chuck E Cheese wrote on
3 the money? They told you, no. They had no reason to
4 mark it because it was used in house. Never turned it
5 over to the bank. So is it reasonable to believe that
6 that money came from the Chuck E Cheese? I submit to you
7 it is.

8 He talks about couldn't have been him because he was
9 somewhere else. Did he tell you on the stand where he
10 was? No, he didn't. Ms. Pelzer told you he didn't come
11 home for approximately four hours while he was supposed
12 to be out getting her something to eat. A reasonable
13 conclusion you can make is that he was at the Chuck E
14 Cheese.

15 Now, whether or not his vehicle was used as the
16 getaway car, and I submit to you the getaway car from the
17 Chuck E Cheese parking lot we don't know because no
18 witness saw where he went when he went out the back door.

19 I submit to you a reasonable conclusion you can draw
20 is he went from the Chuck E Cheese to the apartment, went
21 inside. Ms. Pelzer is fuming because it's 1:00 in the
22 morning. He -- she ain't had dinner yet. He is the only
23 source of income, food, rent, whatever for her. She is
24 totally dependent upon him. She gets mad. She leaves.
25 Goes and gets in the car. Where is he? He's still

1 inside. Conclusion you can draw from that is he changed
2 clothes, took his gun, put it in the mask, took ---

3 MR. WATKINS: Your Honor, I object. I object to
4 that because that's not in the evidence. That's
5 conclusions he's making to introduce it into evidence.
6 That's not in evidence.

7 THE COURT: I'd overrule the objection. Any
8 reasonable inferences that may be drawn, if it's a
9 reasonable inference you may argue it.

10 MR. MARCHANT: Takes the gun, puts it in the mask,
11 put clothes on top of the gun, empties his pockets. Puts
12 some of it in the kitchen. Puts the rest of it on -- in
13 his closet in his bedroom on the shelf. He then leaves.
14 Gets in the vehicle. And attempts to take her to get
15 some dinner.

16 Now, the issue before you is whether or not the
17 search was proper, whether or not the stop was proper
18 (sic). The issue before you is did he rob the Chuck E
19 Cheese, and did he use a hand gun while he did it.

20 Law enforcement was called and within minutes the
21 place is surrounded. There's one way in, one way out.
22 You heard Officer Jones testify he saw three cars. One's
23 a cab. The other is a news vehicle. And then along
24 comes Mr. Watkins.

25 Mr. Watkins gets stopped. What happens? Starts

1 throwing money down in the car. A reasonable conclusion
2 that he was trying to hide it? I submit to you that it
3 is. He's arrested. He gave a false name. Goes down to
4 the station. He's talked with Detective Bruce and
5 Detective Fuller. And you heard from the stand, he told
6 Detective Bruce, yeah, maybe I was in the back parking
7 lot doing a drug deal.

8 Ladies and gentlemen, I submit to you the evidence
9 is overwhelming. I would ask you to go back into your
10 jury room, and I would ask you to consider it seriously.
11 But I submit that once you do deliberate and you take
12 time to look at this evidence, there can be no question,
13 and there can only be one unanimous verdict, and I submit
14 to you that that verdict is guilty. And I would ask you
15 to return it. Thank you.

16 THE COURT: Madam Bailiff, would you pull that back
17 just a little bit?

18 Mr. Foreman, ladies and gentlemen, you've heard the
19 evidence and testimony in the case, now it's my
20 responsibility to go over the law with you and you'll go
21 back and determine the facts that you can find and apply
22 the facts to the law.

23 This case comes to us on this indictment which I
24 hold in my hand. And the State of South Carolina charges
25 Robert Max Watkins with armed robbery and possession of a

1 weapon during the commission of a violent crime.

2 Now, this indictment is simply the charges against
3 Mr. Watkins. This is not evidence in the case. The fact
4 that someone has been charged and arrested is not any
5 evidence of their guilt and should not be considered as
6 any evidence of guilt in the case. This is just simply
7 the vehicle that brings the case to court, and eventually
8 you will report your verdict on the back of this
9 indictment and we'll file it as part of the court
10 records.

11 Now, as I said, to these charges Mr. Watkins pleads
12 not guilty. Ladies and gentlemen, the plea of not guilty
13 by Mr. Watkins places the burden of proof upon the State
14 of South Carolina to prove the defendant guilty beyond a
15 reasonable doubt. A person charged with committing a
16 criminal offense in South Carolina is never required to
17 prove himself innocent.

18 Now, ladies and gentlemen of the jury, that is a
19 cardinal and an important rule of law of evidence in a
20 criminal trial. No matter what the seriousness of the
21 charges are, the defendant is always presumed innocent of
22 the crime for which he's indicted unless his guilt has
23 been proven by evidence that satisfies you of guilt
24 beyond a reasonable doubt.

25 Now, ladies and gentlemen, that's not a mere legal

1 theory or legal phrase, that is a substantial right which
2 all of us are entitled to, and that is the presumption of
3 innocence until you the jury hears evidence that
4 satisfies of guilt beyond a reasonable doubt.

5 Now, as jurors in this case, you have certain
6 functions and responsibilities that are totally different
7 from mine. You -- I am prohibited by the Constitution
8 from discussing the facts with you, and I would not do
9 that. And I will tell you that I would not do anything
10 to infringe upon your responsibility to determine the
11 facts, and I wouldn't expect you to allow me to do that.
12 You are the sole judges of the facts.

13 In that regard, if I have done anything during the
14 course of this trial, if I have said anything, the tone
15 of my voice or anything to indicate to you that I have a
16 feeling about this case, either for the defendant or for
17 the State, you disregard that. If I did anything I
18 didn't mean to do that. You, ladies and gentlemen, are
19 the sole judges of the facts of this case.

20 Just as you're the judges of the facts I have to
21 make rulings on the law, and I have to explain to you the
22 law when the case is over. You must accept the law as I
23 give it to you, apply the facts that you can find to the
24 law and write a verdict in this case that speaks the
25 truth.

1 Now, it's your duty and yours alone to pass upon the
2 credibility and the believability of any witness that
3 takes this witness stand, or any testimony or portions of
4 the testimony. You, ladies and gentlemen, pass upon the
5 credibility, the believability of the witnesses, the
6 testimony, and all the evidence.

7 Now, ladies and gentlemen, I know you would not do
8 this lightly. These witnesses have testified in your
9 presence under oath. You have observed the demeanor of
10 the witnesses, their facial expressions. You can ask
11 yourself, was there any reason for the witness to be
12 biased or prejudiced? Was there other evidence in the
13 case to make the testimony of that witness stronger or
14 weaker.

15 Ladies and gentlemen, you can believe everything a
16 witness tells you, or you could disbelieve everything a
17 witness told you. You can believe part of what a witness
18 told you, and disbelieve part of what a witness told you.
19 You can believe one witness as against several, or
20 several witnesses as against one. I mention those things
21 to you to emphasize the weight you see fit to give to the
22 credibility and the believability of the witnesses and
23 all of the evidence in the case is your sole -- is for
24 your sole determination.

25 Now, ladies and gentlemen, there are two types of

1 evidence which are generally presented during a trial.

2 There is a direct evidence and circumstantial evidence.

3 Direct evidence is the testimony of a person who asserts
4 or claims to have actual knowledge of a fact, such as an
5 eye witness. Circumstantial evidence is proof of a chain
6 of facts and circumstances that indicates the existence
7 of a fact.

8 The law makes absolutely no distinction between the
9 weight to be given, or the value to be given to either
10 direct or circumstantial evidence, nor is a greater
11 degree of proof required of circumstantial evidence than
12 direct evidence. You should weigh all the evidence in
13 the case. After weighing all the evidence, if you are
14 not convinced of the guilt of the defendant beyond a
15 reasonable doubt, you must find him not guilty.

16 The State has the burden of proving each and every
17 element of the crime beyond a reasonable doubt. Any
18 reasonable doubt you have should be resolved in favor of
19 the defendant. He is entitled to any reasonable doubt.
20 A reasonable doubt may exist because of the evidence and
21 testimony you have heard or the lack of evidence and
22 testimony in the case. If you have a reasonable doubt as
23 to the guilt of the defendant as to any charge, or any
24 element of any charge, he would be entitled to that doubt
25 and would be entitled to acquittal, or a verdict of not

1 guilty.

2 What is a reasonable doubt? A reasonable doubt is
3 the kind of doubt that would cause a reasonable person to
4 hesitate to act. Now, some of you may have served in
5 civil court. And in the civil court you would be told
6 that the burden of proof is by the greater weight of the
7 evidence, or that a fact is more likely true than not
8 true. In criminal cases the government's proof is more
9 powerful than that. It's beyond a reasonable doubt.
10 Proof beyond a reasonable doubt is proof that leaves you
11 firmly convinced of the defendant's guilt.

12 Now, there are very few things in this world that we
13 can know with absolute certainty and the -- in criminal
14 cases the law does not require proof that overcomes every
15 possible doubt. If based on your consideration of the
16 evidence you are firmly convinced that the defendant is
17 guilty of the crime charged, you must find him guilty. If
18 on the other hand, you think there is a real possibility
19 that he is not guilty, you must give him the benefit of
20 the doubt and find him not guilty.

21 Now, ladies and gentlemen, in this case the
22 defendant, Robert Max Watkins, is charged with armed
23 robbery, which he has pled not guilty to. The
24 allegations are that he, in Greenville County, on or
25 about the 19th day of December of 2001, while armed with

1 a deadly weapon, either by action, or words, or both, and
2 representing the use of that weapon, that he by force,
3 threats, or intimidation took property that belonged to
4 Chuck E Cheese in violation of the laws of this state,
5 namely United States currency. They allege that was
6 armed robbery. The State must prove each and every
7 element that they've alleged beyond a reasonable doubt.

8 They have also charged that he was in possession of
9 a weapon during the commission of a violent crime. And I
10 will charge you that -- I'm not indicating anything that
11 you should find, but I'll tell you that under our law
12 armed robbery is a violent crime.

13 Now, in this case in order to prove this offense the
14 State must prove beyond a reasonable doubt that the
15 defendant took personal property from the person or
16 presence of another person. Property is in the presence
17 of a person if it is within that person's reach, his
18 inspection, his or her observation or control, so that
19 that person could, if not overcome with violence or
20 prevented by fear, keep possession of that property.

21 The State must also prove beyond a reasonable doubt
22 that the defendant carried the property away, intending
23 to permanently deprive the owner of that property and
24 keep the property for his own use.

25 Now, the taking and carrying away of the property

1 must have been done with violence, by putting the owner
2 of the property in fear of violence, and that must be
3 proven beyond a reasonable doubt.

4 Finally, the State must prove beyond a reasonable
5 doubt that the defendant was armed with a deadly weapon
6 during the robbery. A deadly weapon is any article,
7 instrument, or substance which is likely to cause death
8 or great bodily harm. Whether an instrument has been
9 used as a deadly weapon depends on the facts and
10 circumstances of each case. And you have to be -- you
11 are the sole finders of facts and circumstances. Under
12 our law examples of deadly weapons are a pistol, shotgun,
13 knife, and things of that nature.

14 Now, you have to determine, ladies and gentlemen, if
15 the State has proven beyond a reasonable doubt all the
16 elements of that offense.

17 And in this particular case the defendant has raised
18 the defense of alibi. In order to establish an alibi it
19 must be shown that the defendant was at another specified
20 place at that time. The crime was -- that he was
21 somewhere else or elsewhere when a crime was committed,
22 and it was therefore impossible for the defendant to have
23 been at the scene of the crime.

24 Now, there is no burden on the defendant to prove an
25 alibi. The burden is on the State to prove beyond a

1 reasonable doubt that the defendant was actually present
2 at the scene, actually participated in it, and was not
3 somewhere else. Alibi means elsewhere. In other words,
4 the State has the burden of disproving the defendant's
5 alibi defense.

6 Now, ladies and gentlemen, you should consider, and
7 I have written out the verdict form, we the jury by
8 unanimous consent find as to armed robbery the defendant
9 either guilty or not guilty. If the State has proven
10 each and every element of the crime of armed robbery,
11 your verdict would be guilty. If the State has failed to
12 prove any element of the crime of armed robbery, your
13 verdict would be not guilty.

14 Now, you will then next consider the charge of
15 possession of a weapon during the commission of a violent
16 crime. I will charge you that the State must prove
17 beyond a reasonable doubt that the defendant was in
18 possession of a firearm, or visibly displayed what
19 appeared to be a firearm during the commission of a
20 violent crime. In order to find the defendant guilty of
21 possession of a weapon during the commission of a violent
22 crime, you must first find the defendant guilty of
23 committing a violent crime.

24 Now, ladies and gentlemen of the jury, I would ask
25 you to consider each verdict separately, and your verdict

1 as to each charge must be unanimous. All 12 of you have
2 to agree.

3 I told you earlier, every person has an equal voice
4 and equal input as to what the verdict should be, but
5 someone must preside and that would be your
6 responsibility, sir.

7 Now, when you go back to the jury room I'll go over
8 my charge with the attorneys and Mr. Watkins. If you
9 have anything else they want me to tell you about the
10 law, or if I misstated something I'll bring you back out.
11 If not I'll send word back with the bailiff that you can
12 begin your deliberations. And I'll send all of the
13 evidence that's been marked and introduced into evidence
14 back for your consideration.

15 If y'all would step back to the jury room I'll go
16 over my charges and send word when you can begin
17 deliberations.

18 Ladies and gentlemen, if y'all have any questions
19 about the law or anything of that nature, write it out,
20 give it to the bailiff and she'll bring it back into the
21 courtroom, or he will, whichever one is there, and
22 present it to me and then I will respond to whatever
23 inquiries that you may have. Okay. And everyone go
24 back. If the two alternates would just wait outside for
25 me. Okay.

1 (The jury exited the courtroom at 2:32 p.m.)

2 THE COURT: Okay. Any additions or ---

3 MR. MARCHANT: Nothing else from the State, Your
4 Honor.

5 MR. WATKINS: Regarding your charge, Your Honor?

6 THE COURT: Yes, sir.

7 MR. WATKINS: No, Your Honor, I think that was the
8 appropriate charge.

9 THE COURT: I'm sorry?

10 MR. WATKINS: I think that was the appropriate
11 charge.

12 THE COURT: Okay. Thank you very much. All right.
13 We'll be in recess until they reach a verdict.

14 MR. WATKINS: Your Honor, I don't have to file any
15 motions now, renew any motions now do I?

16 THE COURT: Talk to Mr. Henry about that.

17 (Mr. Watkins talked to Mr. Henry.)

18 MR. WATKINS: Thank you, Your Honor.

19 THE COURT: Okay. I'll do a plea if you want. Mr.
20 Marchant, I'm going to dismiss the alternates.

21 MR. MARCHANT: Yes, sir.

22 THE COURT: I don't know of any authority in South
23 Carolina that if one of them were to drop out after
24 deliberations if we could put the alternate back in, one
25 of the alternates in. Some judges keep them. That's

1 not -- hasn't been my practice.

2 MR. MARCHANT: That's fine, Your Honor.

3 THE COURT: Okay. I'm going to let them go if they
4 want to go. They may want to stay and hear the verdict.
5 Okay. We'll be in recess until they reached a verdict.
6 And then I'll take the guilty pleas. Let me speak to the
7 alternates first.

8 (The jury began their deliberations at 2:35 p.m.)

9 THE COURT: Y'all have a seat. Okay. I have a
10 handwritten communication from the jury which I'm
11 required to publish in open court, dated 9/24/08. Is
12 there a statement by Officer Bruce or the defendant which
13 we can read from today's testimony regarding the
14 defendant admitting, or the officer stating the defendant
15 said he admitted he had been in the CEC parking lot on
16 the night of the robbery. Hugh Faulkner, Jr., number
17 167, the foreperson.

18 MR. MARCHANT: Your Honor ---

19 THE COURT: What does -- do you want to confer with
20 Mr. Henry, Mr. Watkins? I'll consider this a procedural
21 matter or a question of law, and he can consult with his
22 standby counsel.

23 (Mr. Watkins talked to Mr. Henry.)

24 THE COURT: All right. Mr. Marchant, you want to go
25 first?

1 MR. MARCHANT: Well, Your Honor, there is a -- the
2 report is not in evidence. Obviously they don't have it
3 back there to look at it. And Mr. Watkins' statement is
4 not in evidence. So I think the answer to the question
5 is there's not a document that they're able to view
6 because it's not in evidence, but I would advise them or
7 request that they know that they can come back and listen
8 to the testimony if that what would clear up anything.

9 MR. WATKINS: Your Honor?

10 THE COURT: Yeah.

11 MR. WATKINS: Your Honor, I object to that. They
12 asked for a statement ---

13 THE COURT: What now, sir? I'm sorry?

14 MR. WATKINS: Object to them about a tape. They
15 asked for a statement.

16 THE COURT: Is there a statement which we can read.

17 MR. MARCHANT: Well, Your Honor, there is one, but I
18 don't think they can read it.

19 THE COURT: Well, there's -- well, everything --
20 they can consider that anything that's been introduced
21 into evidence but no more evidence can be introduced, if
22 any. I don't know. I mean, I just can't remember. We
23 marked a lot of exhibits and I don't know what was marked
24 and what wasn't marked. A lot of questions were asked
25 about statements. I remember the verbal testimony by the

1 officer, but I have no idea where it came from. I have
2 to respond, and either bring the jury in and respond or
3 else I can send a note back by the agreement of the
4 parties. We've done everything on the record in open
5 court and -- how about -- and you talk to Mr. Henry.

6 The Court cannot comment on the existence or
7 non-existence of evidence in answer to your question.
8 You can only consider the evidence which has been
9 introduced and the testimony which you have heard. That
10 way I'm not telling -- they asked me is there a statement
11 by either the officer or the defendant which they can
12 read. I don't think I can tell them there is or is not a
13 statement. I don't think I should -- I should -- in
14 answer to their question if I bring them in here I cannot
15 comment on whether there is evidence or not any evidence.

16 And the second part they have to decide this case
17 based on the evidence and testimony that's been
18 introduced into the record, evidence and testimony that's
19 been introduced.

20 MR. MARCHANT: Your Honor, I ask that you go one
21 further and, you know, if they have questions I would ask
22 that you let them know that they have the ability to come
23 back and listen to the testimony if that would be
24 beneficial to their decision making process.

25 MR. WATKINS: Your Honor, I object to that. They

1 want to see a document, that's an affidavit or statement,
2 that's probably sworn to. That saying that one doesn't
3 exist and for allowing some officer to say something I
4 didn't say would be very prejudicial to me.

5 THE COURT: Well, I can't decide -- he said you said
6 it. You said you didn't say it. It's up to the jury
7 whom they believe, you or the officer. That's a question
8 for them, not for me. I don't know if it's in a written
9 report or not. I haven't seen it. The officer says it's
10 in a written report. I have no idea what's in a lot of
11 those reports because I didn't read them. Talk it over
12 with Mr. Henry and -- Mr. Watkins, talk it over with Mr.
13 Henry and see. I'm a little bit hesitant about
14 commenting on listening to the transcript because they
15 haven't asked to do that.

16 MR. MARCHANT: Your Honor, that's my point. I don't
17 know if they know they have that avenue.

18 (Mr. Watkins talked to Mr. Henry.)

19 THE COURT: Well, there's 12 of them that heard the
20 testimony that you and I heard, so I believe --- what --
21 did you discuss it with Mr. Henry?

22 MR. WATKINS: Yes. I object to any word testimony.

23 THE COURT: I'm sorry?

24 MR. WATKINS: I object to word testimony, any type
25 of word testimony. And they specifically asked they

1 wanted a statement and they didn't say anything about
2 word testimony. The have received the evidence that was
3 already introduced so to give something outside of that
4 would be very prejudicial.

5 THE COURT: Okay. Is there any objections to me
6 writing a response saying that the Court cannot comment
7 on the existence or non-existence of any evidence in
8 answer to your question? He's asking is there a
9 statement which they can read. So I better limit it to
10 that and tell them that they have to decide the case
11 based on the evidence and testimony that's been
12 introduced.

13 MR. WATKINS: On the evidence, not the testimony.

14 THE COURT: I'm sorry?

15 MR. WATKINS: Yes, sir, on the evidence but not the
16 testimony.

17 THE COURT: Well, the testimony is evidence.

18 MR. WATKINS: Okay. If you -- the first one you
19 said you was going to -- let me refer to my lawyer again,
20 my standby counsel.

21 MR. HENRY: Whatever.

22 THE COURT: Okay.

23 (Mr. Watkins talked to Mr. Henry.)

24 MR. WATKINS: Yes, sir. I agree in order to stop at
25 the word evidence and doesn't add the word testimony in

1 it.

2 THE COURT: Okay. I can't do that. They got --
3 they must -- they mentioned from today's testimony.
4 Okay. I'm going to mark the -- we can't reach an
5 agreement. I'll just have to do it. And I'm going to
6 mark this into the record and tell them essentially what
7 I've gone over with you. I'm going -- I'll bring them in
8 here and do it. I don't know whether it helps or hurts
9 for me to bring them in and answer their question or me
10 to write it out. I would write out what I've gone over
11 with you. If y'all will not agree for me to write it out
12 then I'm going to bring them in, and I think I have to
13 give them that answer that I just covered with you.

14 (Mr. Watkins talked to Mr. Henry.)

15 MR. WATKINS: It's okay if you write it. I have no
16 objection if you write it or bring them in.

17 THE COURT: Okay. And how do feel about it?

18 MR. MARCHANT: Your Honor, I'm comfortable with you
19 writing what you just stated. If you would just read it
20 one time before you send it back to make sure we're all
21 clear I would appreciate it.

22 THE COURT: Okay. Y'all can come up and look. Yeah
23 come up and look at this. Here you go. Mary. Let them
24 review it, Mary.

25 MR. MARCHANT: No objection from the State, Your

1 Honor.

2 MR. WATKINS: Your Honor, I object to this right
3 here. Oh, I'm reading the wrong part. Excuse me. Let
4 me read this part. Okay. I'm sorry, Your Honor. I
5 apologize. I was reading the top part. Okay. Thank
6 you.

7 (Another note was brought out from the jury.)

8 THE COURT: Okay. I have question, 9/24/08, two
9 questions -- not two questions, two requests, I guess.
10 Please provide a copy of the warrant to show, list the
11 amount of money, ie, rolls of coins, dollars, five, tens,
12 et cetera, found in the apartment. Please provide the CE
13 Cheese inventory of money taken by the robber along with
14 total amount, ie, number of rolls of nickels, dimes,
15 quarters, and groups of bills. Hugh Faulkner, number
16 167. Okay. There can't be any other evidence
17 introduced. I say, you must decide the case on the
18 evidence and testimony introduced. Pretty much what I've
19 already to them.

20 MR. WATKINS: Yes, Your Honor. I have no problem,
21 yes, sir.

22 THE COURT: No objection. And if you'll mark this
23 we will return both of the questions back to them. Y'all
24 read verbally from that, but they don't have the
25 documents. That's the whole thing and I'm trying to

1 answer their questions as best I can. All right. We'll
2 wait until we hear from them again. Mark this one, Mary.

3 (Court's Exhibit Numbers 4 and 5 were marked and
4 filed.)

5 (A discussion was held off the record.)

6 (The jury continued their deliberations.)

7 (A short recess was taken, after which, the trial
8 continued as follows:)

9 THE COURT: Okay. Keep your seat. They tell me
10 that they've got a verdict.

11 THE BAILIFF: Yes, sir.

12 THE COURT: Okay. You can bring them in.

13 (The jury entered the courtroom at 6:03 p.m.)

14 THE COURT: Mr. Foreman, you've reached a verdict?

15 MR. FAULKNER: Yes, Your Honor, we have.

16 THE COURT: Okay. Would you give it to the bailiff,
17 please? Thank you, sir.

18 (The bailiff handed the verdict form to the Court.)

19 THE COURT: Okay. Madam Clerk, would you publish
20 the verdict, please?

21 THE CLERK: All right. Your Honor, this is case
22 2002-GS-23-1063, the State of South Carolina versus
23 Robert Max Watkins. On the charge of armed robbery, we
24 the jury by unanimous decision consent -- consent find
25 the defendant guilty. On the charge of possession of a

1 weapon during a violent crime, we the jury by unanimous
2 consent find the defendant guilty. These are signed by
3 Hugh Faulkner, our foreperson.

4 Ladies and gentlemen of the jury, if you agree these
5 are the verdicts you reached in your deliberation room,
6 would you please raise your right hand?

7 (All jurors raised their right hand.)

8 THE CLERK: Thank you.

9 THE COURT: Okay. Any question as to the form of
10 the verdict?

11 MR. MARCHANT: None from the State, Your Honor.

12 THE COURT: Mr. Watkins, any question as to the form
13 of the verdict?

14 MR. WATKINS: Yes, sir, I disagree with the verdict.

15 THE COURT: Okay. Any question about the form of
16 the verdict? Just the form of the verdict.

17 MR. WATKINS: No questions.

18 THE COURT: Okay. Ladies and gentlemen, I
19 appreciate your service this week. Since you served I'm
20 not going to require y'all to come back. You've given us
21 three days, so I will excuse you tonight. If you need a
22 statement to show your employer that you were here, the
23 clerk can provide that to you. Mary?

24 THE CLERK: Yes, sir.

25 THE COURT: You can?

1 THE CLERK: Yes, sir.

2 THE COURT: Okay. And a check will be -- you will
3 get a check in the mail, that check in the mail thing,
4 but you will get a check in the mail for your services.
5 Now, the Court -- and no one has any -- we don't have any
6 control. We don't set the amount y'all get paid for jury
7 service. County Council does that. So whatever it is
8 it's not going to be a lot, but you'll get a check for
9 that, and your mileage. And I appreciate y'all
10 performing jury service. And y'all are excused for the
11 evening. Thank you so much.

12 (The jury exited the courtroom at 6:05 p.m.)

13 THE COURT: All right, Mr. Watkins.

14 MR. WATKINS: May I make my motions?

15 THE COURT: Yeah.

16 MR. WATKINS: At this time, Your Honor, I would like
17 to make -- Your Honor, at this time I would like to plead
18 double jeopardy. South Carolina, article 112, and the
19 United States Constitution 514, to sentence me to any
20 time -- to confine me in violation of South Carolina 1976
21 code of laws 16-11-330 and 16-24-490 for armed robbery,
22 possession of a weapon during a violent crime on
23 indictment, OG-23-1063 (sic), would be subjecting me to
24 the same offense I was convicted back in 2002, October
25 2002, of the date the 25th, by the court of general

1 sessions, the Honorable Judge Victor C. Pyle, to be twice
2 put in jeopardy of life, limb, and liberty.

3 THE COURT: Okay. Based on that motion your
4 conviction was set aside and you were given a new trial.
5 So I would deny that motion, double jeopardy.

6 MR. WATKINS: I object to you denying it.

7 THE CLERK: Thank you, sir.

8 MR. WATKINS: Your Honor, in reference to -- I want
9 reference to the double jeopardy as far as the case law
10 that I read. It deals with the criminal proceeding, when
11 the criminal proceeding is adjudicated, as far as on
12 direct appeal, they deal direct appeals, doesn't deal
13 with after -- like on civil, civil procedures, when the
14 case is overturned in civil it deals with criminal
15 proceeding, it still continues so the first conviction is
16 not considered a conviction if you get it reversed on
17 direct appeal, because the appeal is the last criminal
18 proceedings. But once you go to direct appeal and if
19 they found a decision, that's a final judgment, and then
20 by me being sentenced and serving time on there, then get
21 my case overturned on civil proceedings, for a
22 constitutional violation I don't think that applies to
23 the criminal as far as a directed verdict, as far as
24 double jeopardy don't apply.

25 THE COURT: Okay. I'm going to deny that motion for

1 double jeopardy. All right, Mr. ---

2 MR. WATKINS: I got one more.

3 THE COURT: All right.

4 MR. WATKINS: I got a motion for a direct verdict
5 not withstanding the verdict of the jury on the grounds
6 of evidence that was presented by the State did not prove
7 its case beyond a reasonable doubt as far as sufficient
8 evidence, insufficient evidence, or prove the elements
9 in the indictment. These are written motions. I don't
10 have -- do I have to file the written motions or can I
11 make them in court?

12 THE COURT: Well, you really need to make them in
13 open court.

14 MR. WATKINS: Okay. I make a motion for directed
15 verdict not withstanding the verdict. Do I need to state
16 the grounds?

17 THE COURT: You can, but I'll tell you procedurally
18 the Court cannot grant a judgment not withstanding the
19 verdict. The only recourse at this point that I can do
20 is grant a new trial. In a criminal case I can't grant a
21 judgment JNOV.

22 MR. WATKINS: Okay. Can you grant a direct verdict,
23 or do I have to go to the Court of Appeals for a direct
24 verdict? Can I get a new trial based on destruction of
25 the evidence that the jury wouldn't be able to look at

1 all the evidence, like the money and stuff like that?

2 THE COURT: Okay. I would accept that motion and
3 state that the clear testimony was -- and -- from the
4 police that it had been given back to the victim, and
5 that's the facts, and we'll just have to live with that.
6 I don't know of any case in point on that right now at
7 this particular point. The State hasn't pointed me out.
8 But my feeling from -- is and my ruling would be that I
9 would have to deny that motion for a new trial based on
10 the fact that the money -- the money was returned to the
11 victim.

12 MR. WATKINS: Okay. Can I notice my petition to
13 appeal with the Court now?

14 THE COURT: You can do that after the sentencing.

15 MR. WATKINS: Okay.

16 THE COURT: Y'all want to come up for the
17 sentencing? Okay. What -- anything else you want to
18 tell me, other than just refresh me on his prior record?

19 MR. MARCHANT: Your Honor, if I could add a few
20 things to the record. 1994, forgery times two; 1996,
21 receiving stolen goods and forgery; 1996, burglary third;
22 1997, burglary second.

23 Your Honor, this case was tried back in 2002. From
24 speaking with the prosecutor at that time she dismissed a
25 burglary charge as well as a forgery charge against Mr.

1 Watkins after the jury returned a verdict of guilty on
2 this case. Just for your information. I do not know
3 whether that factored into Judge Pyle's sentence which he
4 did receive the maximum sentence. It's the State's
5 position that was a fair sentence at the time and
6 reasonable under the circumstances. We ask that that
7 sentence be imposed. Thank you.

8 THE COURT: All right. Mr. Watkins, I'll hear from
9 you before I sentence you. Anything you want to tell me
10 in regard -- anything you want to say before I sentence
11 you?

12 MR. WATKINS: Yes, Your Honor. I think a sentence
13 of 30 years is real harsh being that I'm 43 years, be
14 like a life sentence. And I ask that you show some
15 mercy.

16 THE COURT: Okay. And you served how much time?

17 MR. WATKINS: Six years, Your Honor.

18 THE COURT: Okay. All right. The Court has heard
19 all the evidence and testimony, and the jury heard the
20 evidence and testimony. And what -- they made their
21 findings of fact, and I heard -- and I have to sentence
22 also based on what I heard in the case. And this -- this
23 is a serious crime. And what bothers me is these people
24 were -- two of them -- well, at least one of them and
25 another one, one of them testified that the gun was

1 placed to her head. And it was a serious armed robbery.
2 That's all I have to say about it, Mr. Watkins. I think
3 you're a very intelligent man, and -- but you -- you
4 don't have a good record. I'm only taking into
5 consideration the -- what you were convicted of. I know
6 nothing about anything that was dismissed. For -- and I
7 understand the entire case.

8 For the armed robbery I'm going to sentence you to
9 the State Department of Corrections for 25 years. And
10 for the possession of a weapon during the commission of a
11 violent crime I'm going to sentence you to five years
12 consecutive to the 25 years. Thank you very much.

13 MR. MARCHANT: Thank you, Your Honor.

14 - - -END OF TRANSCRIPT OF RECORD- - -
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C E R T I F I C A T E

I, the undersigned Mary E. DiGirolamo, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Greenville County, South Carolina, on the 22 through 24th days of September, 2008.

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

April 24, 2009

Mary DiGirolamo

Mary E. DiGirolamo

Official Court Reporter

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Larry R. Patterson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROBERT WATKINS,

APPELLANT

FINAL BRIEF OF APPELLANT

ELIZABETH A. FRANKLIN-BEST
Appellate Defender

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

ATTORNEY FOR APPELLANT.

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STATEMENT OF ISSUES ON APPEAL

I. Did the trial court judge abuse his discretion by allowing Watkins to represent himself at trial, after having vacillated on the issue in the months leading up to the trial, and after having selected a jury and introducing Watkins' then-attorney to the jurors? Did the judge abuse his discretion because he did not exercise his discretion, and was the prejudicial impact of his decision heightened when the judge placed the issue of Watkins' representation before the jury?

II. Did the judge err by not recusing himself from the trial of this matter when he also presided over Watkins' post-conviction relief evidentiary hearing?

STATEMENT OF THE CASE

Robert Watkins was convicted of armed robbery and possession of a weapon after a jury trial held before the Honorable C. Victor Pyle, Jr. on October 23-25, 2002 in Greenville County. He was sentenced to 30 years for the armed robbery and 5 years for possession of a weapon.

Watkins appealed his conviction and it was dismissed by the Court of Appeals pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967). State v. Watkins, Op. No. 2004-UP-406 (filed June 22, 2004).

Watkins then filed an application for post-conviction relief on October 22, 2004. An evidentiary hearing was held on April 8, 2005 before the Honorable Larry R. Patterson. On January 17, 2006, Judge Patterson issued an order denying and dismissing Watkins' application for post-conviction relief.

The South Carolina Supreme Court then granted Watkins' petition for writ of certiorari, and reversed Judge Patterson's order. See Watkins v. State, Memorandum Opinion No. 2008-MO-001 (filed January 14, 2008).

The case was then remanded, and after several pre-trial hearings, his case was retried before Judge Patterson on September 22-24, 2008. He was again convicted and sentenced to 30 years incarceration.

This appeal timely follows.

ARGUMENT

I. The trial court judge abused his discretion by allowing Watkins to represent himself at trial, after having vacillated on the issue in the months leading up to the trial, and after having selected a jury and introducing Watkins' then-attorney to the jurors. The judge abused his discretion because he did not exercise his discretion, and the prejudicial impact of his decision was heightened when the judge placed the issue of Watkins' representation before the jury.

The issue of Watkins' representation had been an on-going concern since his case was remanded for trial by the South Carolina Supreme Court. Watkins initially had been represented by an attorney for his first trial. He was convicted, and sentenced to 30 years. After the South Carolina Court of Appeals dismissed his Anders¹ brief, he filed an application for post-conviction relief alleging ineffective assistance of counsel. Judge Patterson denied Watkins relief after an evidentiary hearing, and Watkins appealed that decision. The South Carolina Supreme Court reversed Judge Patterson, and the case was remanded. The case was then re-tried before Judge Patterson, over objection by Watkins. In any event, Watkins did not wish to be represented by anyone associated with the Greenville County Public Defenders Office, and the Public Defenders Office did not wish to represent him. See Hearing transcript, dated March 27, 2008, Public Defenders Motion to be Relieved.

At this March 27, 2008 hearing, Watkins first suggested that he would want to represent himself. ROA p. 26, l. 23— p. 27, l. 11. The State's position was that they believed Watkins should be represented. ROA p. 28, l. 8-9. The judge concluded that he

"would probably let [Watkins] do it if that's what [Watkins wants]. ROA p. 28, ll. 17-18.

He reiterated that he would probably let him represent himself. ROA p. 30, ll. 6-13.

On April 18, 2008, Watkins was back before Judge Patterson on a motions hearing. Watkins asked for a lower bond and for Judge Patterson to recuse himself from his trial. The issue of Watkins's representation was raised again. It appears that Watkins did not have any representation at this hearing, and that he was, in fact, representing himself *pro se*:

MR. WATKINS: . . . All I want to do is ask for a fair chance to represent myself.

THE COURT: You got a fair change (sic) to represent yourself. We're going to do the trial— . . .

MR. WATKINS: Can I get a continuance?

THE COURT: No, sir. Everything is in place. You got a transcript. And there is no reason to keep putting this case off. It's something that happened in 2002. We're not going to do it. They're going to bring the witnesses in from out of state. And we're going to conduct this trial. And you're going to represent yourself.

I'm going to appoint a real good lawyer to sit behind you and help you a little bit, but he cannot be responsible for your trial. You cannot file an ineffective assistance of counsel or anything against him. You're going to be representing yourself.

ROA p. 54, ll. 3-22.

On May 30, 2008, another hearing was held before Judge Patterson. At this hearing, Watkins asked for a continuance based on the fact that he received new discovery in this case that he did not have for his previous trial. ROA p. 63, ll. 8-22. At this point, he asked for an attorney to represent him because of the new material that he had received. ROA p. 63, ll. 17-20. Specifically, Watkins obtained a copy of the 911 tape. Watkins could not

¹ State v. Watkins, Op. No. 2004-UP-406 (S.C. Ct. App. filed June 22, 2004).

listen to the tape himself down at the detention center ROA p. 64, l. 3— p. 68, l. 25. The importance of this tape became apparent at trial because it uncovered the existence of a 5th witness at the scene of the crime who had been secreted by the other victims from the police. Watkins reiterated that he needed a lawyer because of the new evidence the State produced. ROA p. 68, ll. 1-2. The court responded:

Listen, you cannot play around with the Courts and I made that perfectly clear. The people in South Carolina want you to have a fair trial, Mr. Watkins. And I want you to understand that. You told me before you didn't want Mr. Mauldin. He is one of the best defense lawyers in Greenville County. He's a State employee now, or he was up until the Governor vetoed the budget yesterday, but—I mean, these people nothing would please them more—I mean, nobody believes in the Constitution any more than Mr. Henry back there and Mr. Mauldin, and a lot of the lawyers you've had.

And I tried to emphasize to you the last hearing we had that you should have a lawyer to represent you. And you told me that you just might need a lawyer to do preliminary investigation for you and you were talking to Mr. Warder and—or something to that effect. I don't remember everything that was said. But we can't be—the Supreme Court sent this thing back for a trial. And this thing has been pending since 2001. And the Court just will not tolerate letting us sit here and not do anything about your case and you just sit down in the Greenville County jail. Your case has got to go to trial.

ROA p. 68, ll. 14-25.

Watkins again asked for counsel. ROA p. 78, ll. 15-16. The judge granted his request and gave him a lawyer, but told him he would not be allowed to relieve him:

THE COURT: We're going to see that everything is taken care of. Now, he's your lawyer. And he's going to speak for you from now on. Do you understand that? He will not be relieved. And I'm going to try your case, so just get ready.

MR. WATKINS: Let me ask you this.

THE COURT: That's it for the day. You talk to him and everything goes through him.

MR. WATKINS: I have a motion.

THE COURT: You're not representing yourself any more.

MR. WATKINS: I know, but I got—

THE COURT: You wanted a lawyer. You've got one. You're not representing yourself. So you cannot address the Court. We can't have two people representing you. You can't do it alone with Mr. Henry. You've got to follow his advice.

MR. WATKINS: But State versus—I mean Foretta (sic)—

THE COURT: He can explain all that and he's going to speak.

MR. WATKINS: -- versus—Foretta (sic) versus California—

THE COURT: Take him away.

ROA p. 81, l. 9— p. 82, l. 6.

The judge did not have him taken immediately away, but did inform him that he had had his "chance" to represent himself. ROA p. 82, ll. 21-23.

At a hearing on September 11, 2008, Watkins again requested to be allowed to proceed *pro se*. Watkins told the judge that he believed a conflict of interest existed because Mr. Henry was on the Board of Directors for the Defender Corporation which oversees the Greenville County Public Defenders office. He believed this conflict accounted for the fact that Mr. Henry was not filing the motions that he wanted filed in his case. ROA p. 90, l. 1— p. 97, l. 10. The motion was denied.

On the morning of trial, Watkins filed a motion to relieve his attorney. ROA p. 93, ll. 13-18. Before he conducted a *Faretta* colloquy, the judge stated:

But you can represent yourself. I'm going to have to conduct a hearing and ask you a lot of questions, but I've got to know—the reasons you've given me right now as far as you getting more in and can do more than Mr. Henry can, it's just not an accurate statement. ROA p. 97, ll. 6-10. The judge then proceeded to ask Watkins the following questions:

Faretta² Colloquy

The judge asked Watkins general questions about his background. ROA p. 108, ll. 4-25. He asked him whether he had taken any medications, drugs or alcohol in the past 24 hours. He asked him if there were any competency issues; any physical, emotional, or nervous problems, or anything else that would affect his ability to understand what he was doing. ROA p. 109, ll. 4-25. He asked if he had any formal training in law. He did not. ROA p. 110, ll. 1-3. He asked if he had any other experiences with criminal trials. He did not. ROA p. 110, ll. 4-9. Watkins testified he understood the charges contained in the indictment. ROA p. 110, ll. 10-18. He understood the range of possible punishments. ROA p. 110, ll. 19-25.

Then, when the judge asked if he knew the elements of the crime, Watkins responded that he did not. ROA p. 111, ll. 1-6. The judge did not inquire further. He asked if Watkins was familiar with the rules of criminal procedure. Again, Watkins replied he was not. Watkins was not familiar with what he may or may not be able to say in opening statements. ROA p. 112, l. 13—p. 113, l. 2. The judge did not inquire further.

The judge asked if he understood that he would need to make proper objections to preserve issues for appeal; and he reviewed his right to testify. ROA p. 113, ll. 11- p. 114, l.

23. They discussed prior convictions. ROA p. 115, ll. 7-10. The judge told Watkins he believed it was unwise for him to represent himself. ROA p. 116, ll. 8-22.

At the end of this colloquy, Watkins decided not to represent himself. ROA p. 117, ll. 14-22.

The Trial

At the end of the colloquy, Watkins did not choose to represent himself, and the trial started. The court heard pre-trial motions, including making a motion for a continuance based on the newly discovered witness referenced on the 911 tape. ROA p. 118, l. 1—p. 129, l. 17; ROA p. 130, l. 23—p. 136, l. 15. The jury was selected. The parties discussed prior convictions which may be used for impeachment purposes. Watkins' attorney then made a motion to suppress the fruits of the search warrant executed in this case. ROA p. 137, l. 4—p. 191, l. 25.

At the conclusion of the substantive motions, Watkins then made another motion to proceed *pro se*. ROA p. 192, ll. 6-13. After again telling Watkins that he was likely to make mistakes, and informing him again that he would not be allowed to file an ineffective assistance of counsel claim against himself, the judge responded:

THE COURT: I'm not spending any more time on this issue. He's going to represent himself *pro se*. And I don't want to be faced with this issue again. And I mean I—this is really trying—kind of trying the patience of the Court. But you have a Constitutional right to do that. Mr. Henry can be standby counsel and sit behind you, and you can represent yourself. Okay.

ROA p. 193, l. 25—194, l. 6.

After the jury was sworn, the judge addressed the jury:

² 422 U.S. 806 (1975).

Now, I informed you yesterday, and I introduced Mr. Henry as Mr. Watkins' lawyer. Mr. Watkins has chosen to exercise his Constitutional right and represent himself, and not be represented by Mr. Henry, who's in the courtroom here.

ROA p. 197, ll. 8-12.

After opening arguments, and before the jury, the judge said this:

I need to put in the record that I did have a hearing, and I found affirmatively that it was implied that Mr. Watkins knowingly, intelligently and voluntarily waived his right to council (sic) and decided to proceed with himself. And I find that he did it knowingly, voluntarily and intelligently. I want to put that in the record. Okay.

ROA p. 200, ll. 7-13.

Argument

The judge abused his discretion by allowing Watkins to proceed *pro se* because he did not exercise his discretion in making the decision. State v. Smith, 276 S.C. 494, 280 S.E.2d 200 (1981). Rather, the judge granted Watkins' request simply because he was frustrated with Watkins. That the judge did not exercise his discretion is evidenced by the following: (1) the fact that Watkins had initially been allowed to proceed *pro se* prior to the judge's even conducting a Faretta colloquy. As referenced above, at the March 27th hearing, the judge had already decided that he would "probably" let Watkins represent himself. By the time of the April 18th hearing, Watkins was appearing in court on his own motions. The court was quite clear that Watkins was representing himself at that point, but no Faretta colloquy had been conducted at that time. The court had no difficulty allowing him to represent himself at trial at that point, although it did later, and after an attorney was appointed to represent Watkins; (2) the fact that the judge then denied Watkins' request to

proceed *pro se* at the September 11th hearing is further evidence of the lack of discretion exercised by the judge. Once Watkins was assigned an attorney, the judge would not allow him to relieve that attorney until after the jury had been sworn. If the judge believed that Watkins had the unfettered constitutional right to represent himself he should have allowed Watkins the right to relieve his attorney on September 11th. Instead, he summarily denied the motion; (3) the fact that the judge did not provide his reasons for changing his mind on the record. There were no additional facts brought to the judge's attention between the September 11th date and the trial date that would have justified the judge's granting the request at that late point, but not at an earlier time. This point strongly suggests that the judge did not predicate his decision on anything other than his frustration. It is also notable that the judge granted the request after the jury had been selected and Watkins' attorney introduced to them. It would have been well within the judge's discretion to have denied Watkins' request at that point based on the timing of the request. See State v. Fuller, 337 S.C. 236, 523 S.E. 2d 168 (1999); State v. Reed, 332 S.C. 35, 503 S.E.2d 747 (1998). Instead, he granted it at that late point, and then brought the matter to the jury's attention. Additionally, the judge published to the jury the fact that there had been a hearing on the matter, and to which they were not privy. The judge's actions brought the issue of representation to the forefront of the jurors' minds. Certainly they would have wanted to know why Watkins started off with an attorney and then no longer had one. This was improper.

It is also worth noting that the Faretta colloquy that was conducted was unrelated to the judge's decision-making in this case. He never engaged in the colloquy prior to initially allowing Watkins to represent himself, nor did he engage in it prior to his decision to not

allow Watkins to represent himself. For some reason, he only seemed to believe that he needed to give the warnings on the day of trial. This strongly suggests that the judge was merely attempting to sanitize his actions by going through the motions, but without an appreciation of the values to be protected by the colloquy. Further evidence of the *pro forma* quality of the colloquy is the fact that Watkins gave negative responses to the judge's inquiries, but the judge never followed up. Respectfully, Watkins asks this Court to reverse his convictions and remand his case for trial.

II. The judge erred by not recusing himself from the trial of this matter when he also presided over Watkins' post-conviction relief evidentiary hearing.

At the April 18, 2008 hearing, Watkins asked the judge to recuse himself because of his participation in his post-conviction relief proceeding. The judge was ultimately reversed by the South Carolina Supreme Court. The judge summarily denied the motion:

"I'm not going to recuse yourself (sic). I'd see that you got the fairest trial of anybody on the bench. You're going to get your witnesses. You're going to get it all done. And I deny the motion to recuse myself. I've got nothing against you whatsoever."

ROA p. 38, l. 25- p. 39, l. 7.

Indeed, the judge had been reversed a mere 4 months prior to this exchange. *See Watkins v. State*, Memorandum Opinion No. 2008-MO-001 (filed January 14, 2008). This was error because the judge should have recused himself pursuant to Floyd v. State, 303 S.C. 298, 400 S.E.2d 145 (1991) and Canon 3(C)(1) of the Code of Judicial Conduct. In Floyd, the South Carolina Supreme Court held that there is now a *per se* rule of recusal in

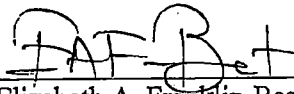
cases where a judge presides over both a trial and post-conviction matters. The rule enunciated in Floyd "eliminate[s] even the suggestion of partiality." Id. 298.

Pursuant to Canon 3(C)(1) of the Code of Judicial Conduct, a judge shall diligently discharge her administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration and should cooperate with other judges and court officials in the administration of court business. SCACR, Rule 501. The considerations of the appearance of impartiality that directed the decision in Floyd are no less present in this case where the trial judge had actually been reversed by the South Carolina Supreme Court with respect to this same criminal matter. For this reason, Watkins respectfully asks this Court to reverse his convictions and remand his case for trial.

CONCLUSION

For the preceding reasons, Watkins asks this Court to reverse his convictions and remand his case for trial.

Respectfully submitted,


Elizabeth A. Franklin-Best
Appellate Defender

ATTORNEY FOR APPELLANT.

This 30th day of December, 2009.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Larry R. Patterson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROBERT WATKINS,

APPELLANT

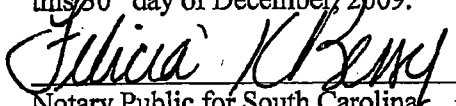
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon William M. Blitch, Jr., Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 30th day of December, 2009.


Elizabeth A. Franklin-Best
Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 30th day of December, 2009.

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Notary Public for South Carolina
My Commission Expires: August 15, 2010.

STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY

Larry R. Patterson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROBERT WATKINS,

APPELLANT

FINAL BRIEF OF RESPONDENT

HENRY DARGAN MCMASTER
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General
Office of the Attorney General
PO Box 11549
Columbia, SC 29211

ROBERT M. ARIAIL
Solicitor, Thirteenth Judicial Circuit
Greenville County Courthouse
305 E. North Street, Suite 325
Greenville, SC 29601-2185
(864) 467-8282

ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. The trial court did not err in allowing Appellant to proceed *pro se* at trial.
- II. The trial judge did not err in refusing to recuse himself from presiding over this case.

STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

While working at Chuck E. Cheese in December 2001, Jeannie Pireda saw a white Ford Taurus slowly driving around the restaurant and stop at the back exit from the kitchen. After a couple of minutes, the vehicle drove the remainder around the building and left the parking lot. (9/22T.227-228; R. 243-244). On December 19, 2001, Pireda and a coworker were leaving after the restaurant closed to pick up food for the five employees who had stayed late to clean. (9/22T.230; R. 246). Pireda again saw the white Ford Taurus in the Chuck E. Cheese parking lot, and this time she was able to see two people inside the vehicle. (9/22T.230-232; R. 246-248).

Pireda and her coworker returned and the employees began eating. Shortly thereafter, Appellant, wearing a dark jacket or hooded sweatshirt, dark pants, boots, and something covering his face, entered the restaurant and demanded money. (9/22T.233-235; R.249-251). He carried a small gun, which fit in the palm of his hand. (9/22T.237; R. 253). Appellant made one of Pireda's coworkers empty the safe and he left through the back emergency door. (9/22T.236-237; R. 252-253). Appellant left with cash and rolled coins. (9/22T.182; R. 219).

Appellant and his roommate were stopped in a white Ford Taurus leaving an apartment complex directly behind the Chuck E. Cheese that was robbed. Appellant had been seen throwing what turned out to be a dark hooded into the trash dumpster. (9/22T.263-264; 345; R.275-276; 324). Appellant was stopped and initially gave a false identification and reported he had no drivers license. (9/22T.275-276; R.277-278). As Appellant was removed from the vehicle, he reached into his pocket and threw "hands full of cash" into the

car. Appellant's roommate tried to pick up the cash and stuff it into the passenger door pocket. (9/22T.277-278; R. 279-280).

Investigator Fuller and Detective Bruce obtained a search warrant for Appellant's residence. (9/22T.306; 387; R. 285; 325). They located a stocking cap in which a small, derringer style handgun was concealed. (9/22T.390-391; R. 328-329). The stocking cap had two eye holes cut out. (9/22T.391; R.329). Additionally, they found some money in the apartment, including rolled coins. (9/22T.391-392; R. 329-330).

Numerous pretrial motions were filed by Appellant's counsel and by Appellant *pro se*, including several to relieve appointed counsel. (3/27T.3; 9/11T.3; R. 13; 90). Appellant proceeded to trial on September 22-24, 2008. He began trial with Stephen Henry as appointed counsel. However, after jury selection and several pre-trial motions, he again sought to proceed *pro se*. (9/22T.7-8; 138; R. 100-101; 192). Appellant was allowed to proceed *pro se* at trial. (9/22T.140-142; R. 194-196). The jury found Appellant guilty of armed robbery and possession of a weapon during commission of violent crime. (9/22T.522-523; R. 374-375). He was sentenced to twenty-five years for armed robbery and five years, consecutive, for possession of a weapon. (9/22T.529; R. 380).

ARGUMENT

I. The trial court did not err in allowing Appellant to proceed *pro se* at trial.

Appellant contends the trial court erred in allowing him to proceed *pro se* during his trial. The trial court conducted a proper Faretta¹ inquiry prior to allowing Appellant to proceed *pro se* at trial. Even if the Faretta colloquy was insufficient, the record clearly demonstrates Appellant has a sufficient background to understand the dangers of self-representation, was made aware of the pitfalls prior to his proceeding *pro se*, and knowingly and voluntarily elected to proceed *pro se*.

“The Sixth and Fourteenth Amendments of our Constitution guarantee that a person brought to trial in any state or federal court must be afforded the right to the assistance of counsel before he can be validly convicted and punished by imprisonment.” Faretta v. California, 422 U.S. 806, 807 (1975). A defendant may waive the right to counsel. “It is the trial court’s responsibility to determine whether there was a knowing and intelligent waiver by the accused.” State v. Bryant, 383 S.C. 410, 414, 680 S.E.2d 11, 13 (Ct. App. 2009). “To effectuate a valid waiver, the accused must (1) be advised of the right to counsel and (2) be adequately warned of the dangers of self-representation.” Id. (citing State v. McLauren, 349 S.C. 488, 493-94, 563 S.E.2d 346, 348-49 (Ct. App. 2002)); see also, Faretta, 422 U.S. at 835.

Faretta requires a defendant “be made aware of the dangers and disadvantages of self-representation so that the record will establish he knows what he is doing and his choice

¹Faretta v. California, 422 U.S. 806 (1975)).

is made with eyes open.” 422 U.S. at 835. “While a specific inquiry by the trial judge expressly addressing the disadvantages of a *pro se* defense is preferred, the ultimate test is not the trial judge’s advice but rather the defendant’s understanding.” Wroten v. State, 301 S.C. 293, 294, 391 S.E.2d 575, 576 (1990). If the trial court fails to explicitly address the disadvantages of proceeding *pro se*, as required by the second prong of Faretta, this Court may look to the record to determine whether petitioner had sufficient background to understand the dangers of self-representation or was apprised of his rights by some other source. See Watts v. State, 347 S.C. 399, 402, 556 S.E.2d 368, 370 (2001).

Factors this Court considers in determining if an accused had sufficient background to understand the disadvantages of self-representation include:

- (1) the accused’s age, educational background, and physical and mental health;
- (2) whether the accused was previously involved in criminal trials;
- (3) whether he knew of the nature of the charge and of the possible penalties;
- (4) whether he was represented by counsel before trial or whether an attorney indicated to him the difficulty of self-representation in his particular case;
- (5) whether he was attempting to delay or manipulate the proceedings;
- (6) whether the court appointed stand-by counsel;
- (7) whether the accused knew he would be required to comply with the rules of procedure at trial;
- (8) whether he knew of legal challenges he could raise in defense to the charges against him;
- (9) whether the exchange between the accused and the court consisted merely of pro forma answers to pro forma questions; and

(10) whether the accused's waiver resulted from either coercion or mistreatment.

See State v. Cash, 309 S.C. 40, 43, 419 S.E.2d 811, 813 (Ct. App. 1992); see also, Bryant, 383 S.C. at 415, 680 S.E.2d 11 at 14.

Further, a defendant's right to waive the assistance of counsel is not unlimited. The request to proceed *pro se* must be clearly asserted by the defendant prior to trial. If the request to proceed *pro se* is made after trial has begun, the grant or denial of the right to proceed *pro se* rests within the sound discretion of the trial judge. State v. Fuller, 337 S.C. 236, 241, 523 S.E.2d 168, 170 (1999) (citations omitted).

In the instant case, the trial court conducted a Faretta inquiry prior to allowing Appellant to proceed *pro se* at trial. The trial court determined Appellant understood his right to counsel as well as the dangers of self-representation. The trial court explained Appellant would be bound by the same rules as a lawyer. (9/22T.10; R. 103). Further, Appellant's counsel explained to the court that Appellant seriously believed it was in his interest to represent himself and allow counsel to remain as standby counsel. (9/22T.11-12; R. 104-105). Counsel articulated he and Appellant talked about some of the procedures at trial as well as the making of objections. (9/22T.14; R. 107).

The trial court determined Appellant's background as well as his understanding of the charges and possible sentences he faced. (9/22T.15-18; R. 108-111). Appellant was questioned regarding the rules of evidence and how to conduct proper questioning and indicated he understood he would be required to comply. (9/22T.19-20; R. 112-113). The trial court concluded by strongly urging Appellant to consider allowing counsel to represent

him due to the difficulties he would face in self-representation. (9/22T.23-24; R. 116-117).

At that point, Appellant decided not to proceed *pro se*. (9/22T.24; R. 117).

After jury selection, and pre-trial motions, Appellant's counsel indicated Appellant's desire to renew his request to proceed *pro se*. Counsel stated Appellant was "prepared to follow the rules, understands them, and wants to once again be assigned *pro se* representation and he ask that I be allowed to be standby counsel." (9/22T.138; R. 192). The trial court reminded Appellant of the Faretta hearing previously conducted, and reiterated the dangers of self-representation. (9/22T.138-139; R. 192-193). The trial court explained Appellant would be responsible for the conduct of his trial and could not rely on the judge or standby counsel to conduct the trial. Finally, the trial court explained this request was one of multiple requests made by Appellant to represent himself in this case. (9/22T.139; R. 193). The trial court granted Appellant's request to proceed *pro se* and appointed standby counsel to assist with procedural questions. (9/22T.140-141; R. 194-195).

It was within the trial court's discretion to allow Appellant to proceed *pro se* for the remainder of his trial. The trial court clearly explained the dangers of self-representation and there is no doubt Appellant proceeded *pro se* with his eyes wide open. Accordingly, the trial court did not err in allowing Appellant to represent himself at trial, and once that determination was made, the jury needed to be so instructed so it would understand the reason Appellant's counsel was no longer involved in the trial.

In addition, even if this Court finds the Faretta warning was insufficient or was not given in a timely manner, the record clearly indicates Appellant had a sufficient background

to understand the dangers of self-representation, was warned of the difficulties he faced, and knowingly and voluntarily waived his right to counsel.

Attorney John Mauldin was originally appointed to represent Appellant. Appellant and Mauldin both filed motions to relieve counsel and the Greenville County Public Defender's Office. The trial court held a hearing on March 27, 2008.² Mauldin and Appellant explained the significant history that existed between Appellant and the Greenville County Public Defender's Office. (3/27T.3-13; R. 13-23). Appellant was represented in a prior trial on these same charges by an attorney from the Public Defender's Office. The relationship was contentious and continued to be contentious through the current appointment of Mauldin. (3/27T.4-7; 14-15; R. 14-17; 24-25).

The trial court explained Appellant either had to have an attorney or had to represent himself because his trial was going to go forward. The trial court asked about appointing Appellant an attorney and he responded his mother had contacted an attorney about representing him for at least part of the proceedings. (3/27T.15-16; R. 25-26). Appellant also stated "I think I'm prepared to represent myself." (3/27T.16; R. 26). He explained he studied the law while in prison and knew the relevant case law, his rights, and how to best defend himself. (3/27T.17; R. 27).

The trial court then warned:

[S]ometimes that's not the best thing in the world and the judge can't try your case for you. . . . And you can't go outside the rules of evidence. He's going to hold you to that. And I know you've probably read a lot of law and cases and

²It should be noted the same trial judge presided over the pre-trial hearings as well as Appellant's trial and became extremely familiar with Appellant and his background.

what not, but there's some things you just can't do in court. You're pretty much stuck with the facts and what people know firsthand about what happened on the date and time in question, and whatever evidence they have.

(3/27T.18-19; R. 28-29). The trial court relieved Mauldin and the Public Defender's Office and left open the question of whether Appellant would represent himself, be appointed counsel, or retain the attorney contacted by his mother. (Order Relieving Mauldin dated April 14, 2008).

At this point in the case, Appellant had already been warned of the dangers of self-representation, was made aware of the necessity to follow the rules of evidence and procedural rules, and was instructed he would be held to the same standard as an attorney. Further, the trial court knew Appellant had previously been tried on the same charges, so he was aware of possible defenses, the facts and evidence to be presented at trial, and the possible sentence upon conviction. In addition, his prior experience in going through both a trial and post conviction relief demonstrates at least a basic level of familiarity with criminal trials, procedures, and his rights. Additionally, Mauldin expressed Appellant's desire to represent himself and his desire to control the strategy of his own case. (3/27T.6-7; R. 16-17). Accordingly, after this pre-trial hearing, it was clear Appellant knew the dangers of self-representation and, after considering the Cash factors, his waiver of the right to counsel was knowing and voluntary.

Appellant filed several *pro se* motions with the trial court and a hearing was held on April 18, 2008.³ Appellant appeared *pro se* at this hearing. After discussing several of

³Appellant's filing of a motion to reduce bond as well as a motion to suppress evidence indicate his knowledge of the proceedings and ability to represent himself. Further, he moved during the

Appellant's motions, the trial court cautioned Appellant needed a lawyer and needed to listen to a lawyer. (4/18T.12; R. 44). The trial court later explained: "You needed to have a good lawyer. But you're a smart man and you can represent yourself. But I'm not sure that's in your best interest." (4/18T.21; R. 53). Appellant made an unequivocal request to represent himself by responding: "All I want to do is ask for a fair chance to represent myself." (4/18T.22; R.54).

At his next hearing in May 2008, Appellant requested counsel after realizing the voluminous amount of evidence involved in the case as well as a new tape recording. (5/30T.7; 12 R. 63; 68). The trial court explained to Appellant that he could not play games with the court. The trial court noted the fact he "emphasized to [Appellant] the last hearing we had that you should have a lawyer represent you. And you told me that you just might need a lawyer to do preliminary investigation for you and you were talking to Mr. Warder and - - or something to that effect." (5/30T.12; R. 68). After further discussion of the evidence and Appellant's alibi defense, Appellant expressed his desire to exercise his constitutional right to counsel. (5/30T.22; R. 78). The trial court then appointed Stephen Henry to represent him and made it clear that everything would need to be filed and handled through Henry from that point forward. (5/30T.24-25; R. 80-81).

On September 11, 2008, Appellant moved again to relieve his counsel. He expressed his long-running dissatisfaction and contemptuous relationship with the Greenville County Public Defender's Office and the fact Henry is on the board of the Defender's Corporation

hearing to recuse the trial judge, again indicating his comprehension of the proceedings and procedure.

charged with overseeing the Public Defender's office. (9/11T.3-9; R. 90-96). The trial court found no conflict of interest existed justifying Appellant's motion to relieve counsel. (9/11T.10; R. 97). Appellant did not ask to proceed *pro se* at this hearing.

Finally, Appellant began trial with Henry as his attorney. After making the motion to proceed *pro se*, Appellant was fully advised of his rights and the dangers of self-representation. By this time in the proceedings, the Cash factors have been clearly established and even if the Faretta colloquy the trial court engaged in with Appellant was insufficient, there was no abuse of discretion in allowing Appellant to proceed *pro se*. (9/22T.6-21; R. 99-114). Appellant was able to conduct cross-examination, make proper motions and objections, and engage in appropriate conversations with the court and opposing counsel. (9/22T. 146-148; 179-180; 190-191; 245-246; 308-317; 327; 339-342; 393-394; 429-432; 464-498; 524-527; R. 198-200; 216-217; 227-228; 261-262; 287-296; 306; 318-321; 331-332; 335-338; 339-373; 376-379). This demonstrates his familiarity with trial process and procedure. Further, it shows he had the requisite background to understand the dangers of self-representation and the willingness to accept those dangers and proceed *pro se*. At all times and during all proceedings in which he proceeded *pro se*, Appellant knew the dangers of self-representation and the record demonstrates his decision to represent himself was made knowingly, voluntarily and with full disclosure by the trial court.

perceived bias or impartiality in his hearing Appellant's second trial, even where his ruling on post-conviction relief was reversed.

Additionally, Canon 3(C)(1) of the Code of Judicial Conduct, Rule 501, SCACR, states: "A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and should cooperate with other judges and court officials in the administration of court business." "A judge must exercise sound judicial discretion in determining whether his impartiality might reasonably be questioned." State v. Cheatham, 349 S.C. 101, 111, 561 S.E.2d 618, 624 (Ct. App. 2002). "Absent evidence of judicial prejudice, a judge's failure to disqualify himself will not be reversed on appeal." Id. "A motion to recuse may not be predicated on the judge's rulings in the case before him or on rulings in a related case, nor on his demonstrated tendency to rule in any particular manner, or on a particular judicial leaning or attitude derived from his experience on the bench." Mallett v. Mallett, 323 S.C. 141, 146-147, 473 S.E.2d 804, 808 (Ct. App. 1996) (emphasis added) (citing, inter alia, United States v. Grinnell Corp., 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966); Berger v. United States, 255 U.S. 22, 31, 41 S.Ct. 230, 232, 65 L.Ed. 481 (1921)).

Appellant does not allege Judge Patterson was partial, maintained a bias, or acted improperly in presiding over his trial. The record indicates nothing about the previous proceedings which would have affected the trial judge's impartiality. Appellant merely asserts a *per se* rule of recusal should be created when a trial judge previously presided of the defendant's post-conviction relief action. Such a rule is not necessary and is certainly not mandated by the holding in Floyd.

Finally, Floyd does not make recusal automatic, but requires it only upon motion of a party. As a result, the request to recuse the judge may be waived by the parties if it is not raised at the appropriate time. In the instant case, if Appellant sought for Judge Patterson to recuse himself from the trial of the case, he should have offered or renewed his motion for recusal at the beginning of trial. Otherwise, the issue should be considered waived by Appellant's acceptance of Judge Patterson presiding at his trial.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

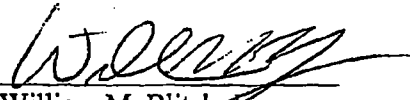
SALLEY W. ELLIOTT
Assistant Deputy Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General

ROBERT M. ARIAIL
Solicitor, 13th Judicial Circuit

305 E. North Street, Suite 325
Greenville, South Carolina 29601-2185
(864) 467-8647

BY:


William M. Blitch, Jr.

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

December 30, 2009

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Greenville County
Hon. Larry R. Patterson, Circuit Court Judge

The State,

Respondent,

v.

Robert Watkins,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General

ROBERT M. ARIAIL
Solicitor, 13th Judicial Circuit

305 E. North Street, Suite 325
Greenville, South Carolina 29601-2185
(864) 467-8647

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Greenville County
Hon. Larry R. Patterson, Circuit Court Judge

The State,

Respondent,

v.

Robert Watkins,

Appellant.

PROOF OF SERVICE

I, ELLEN DuBOIS, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Elizabeth A. Franklin-Best, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.
This 30th day of December, 2009.



ELLEN DuBOIS
Legal Assistant
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

666
THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS
PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Robert Watkins, Appellant.

Appeal From Greenville County
Larry R. Patterson, Circuit Court Judge

Unpublished Opinion No. 2011-UP-091
Submitted February 1, 2011 – Filed March 8, 2011

REVERSED

Appellate Defender Elizabeth Franklin-Best, of Columbia, for
Appellant.

Attorney General Alan M. Wilson, Chief Deputy Attorney
General John W. McIntosh, Assistant Deputy Attorney
General Salley W. Elliott, and Assistant Attorney General
William M. Blich, Jr., all of Columbia; and Solicitor Robert
M. Arial, of Greenville, for Respondent.

PER CURIAM: Robert Watkins appeals his convictions for armed robbery and possession of a weapon during the commission of a violent crime. His trial resulted from a grant of post-conviction relief (PCR) by the South Carolina Supreme Court. The judge of that new trial was the same judge who presided over Watkins's PCR hearing. On appeal from the new trial, Watkins argues the trial judge erred in (1) denying Watkins's recusal motion and (2) granting Watkins's motion to proceed pro se. We reverse.[1]

Generally, "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned" Canon 3(E)(1), CJC, Rule 501, SCACR. In Floyd v. State, 303 S.C. 298, 400 S.E.2d 145 (1991), the South Carolina Supreme Court granted a defendant a new PCR hearing because the judge who presided over his PCR hearing also presided over the trial from which PCR was sought. Id. at 299, 400 S.E.2d at 146. The court held that "in all [PCR] hearings . . . , a judge shall, upon motion, recuse himself if he was the judge who presided at the guilty plea, criminal trial, or probation revocation proceeding for which relief is being sought." Id. The Floyd court emphasized that "a per se rule of recusal . . . will eliminate even the suggestion of partiality." Id.

Here, we find Floyd's reasoning is equally applicable to the situation presented by Watkins's new trial. As held in Floyd, a judge must grant a recusal motion made during a new trial arising from a PCR hearing in which the judge also sat. Accordingly, the trial judge erred in denying Watkins's motion for recusal.

Because we reverse the trial court on the above issue, we do not address Watkins's remaining argument. See State v. Taylor, 388 S.C. 101, 124 n.23, 694 S.E.2d 60, 72 n.23 (Ct. App. 2010) (holding that an appellate court need not address remaining issues when a decision on a prior issue is dispositive).

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

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Greenville County
Hon. Larry R. Patterson, Circuit Court Judge

The State,

v.

Petitioner,

Robert Watkins,

Respondent.

Opinion No. 2011-UP-091 (S.C. Ct. App. filed March 8, 2011)

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

W. WALTER WILKINS, III
Solicitor, 13th Judicial Circuit

305 E. North Street, Suite 325
Greenville, South Carolina 29601-2185
(864) 467-8647

ATTORNEYS FOR PETITIONER

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II. The Court of Appeals failed to address the issue of whether the trial court properly allowed Respondent to proceed pro se at trial. Because this Court should reverse the decision of the Court of Appeals regarding Judge Patterson's recusal, the trial court's decision allowing Respondent to proceed pro se should be addressed and affirmed.9	
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CERTIFICATION OF COUNSEL

Counsel for Petitioner hereby certifies that a Petition for Rehearing was filed in the South Carolina Court of Appeals on March 21, 2011, and denied by Order filed April 21, 2011. Remittitur was issued on June 2, 2011, and was recalled by the Court of Appeals on June 30, 2011 because the State never received notice of the denial of the State's Petition for Rehearing.

STATEMENT OF QUESTIONS PRESENTED

- I. The Court of Appeals erred in concluding Judge Patterson was required to recuse himself from presiding at Respondent's trial because he previously served as a judge in a prior Post-conviction Relief hearing.
- II. The Court of Appeals failed to address the issue of whether the trial court properly allowed Respondent to proceed *pro se* at trial. Because this Court should reverse the decision of the Court of Appeals regarding Judge Patterson's recusal, the trial court's decision allowing Respondent to proceed *pro se* should be addressed and affirmed.

STATEMENT OF THE CASE

Procedural History

Respondent was convicted of armed robbery and possession of a weapon after a jury trial before the Honorable Victor Pyle, Jr. on October 23-25, 2002 in Greenville County. He was sentenced to thirty years for armed robbery and five years for possession of a weapon.

Respondent appealed his conviction and it was dismissed by the Court of Appeals pursuant to Anders v. California, 386 U.S. 73 (1967). See State v. Watkins, Op. No. 2004-UP-406 (filed June 22, 2004). Respondent filed an application for post-conviction relief on October 22, 2004 and a hearing was held April 8, 2005, before the Honorable Larry R. Patterson. On January 17, 2006, Judge Patterson issued an order denying and dismissing the application for post-conviction relief. This Court granted Respondent's Petition for Writ of Certiorari and reversed Judge Patterson's order. See Watkins v. State, Op. No. 2008-MO-001 (filed January 14, 2008).

The case was remanded for trial, and after several pre-trial hearings, the case was retried before the Judge Patterson on September 22-24, 2008. The jury found Respondent guilty and the trial court sentenced him to thirty years in prison.

Respondent appealed to the South Carolina Court of Appeals, which reversed his conviction and remanded for a new trial. See State v. Watkins, Op. No. 2011-UP-091 (S.C. Ct.App. filed March 8, 2011). The State timely filed a Petition for Rehearing on March 21, 2011. The Petition was apparently denied by

Order filed April 21, 2011. Remittitur was issued on June 2, 2011, but was recalled by the Court of Appeals on June 30, 2011, because the State never received notice of the denial of the State's Petition for Rehearing. This Petition for Writ of Certiorari follows.

Factual Background

While working at Chuck E. Cheese in December 2001, Jeannie Pireda saw a white Ford Taurus slowly driving around the restaurant and stop at the back exit from the kitchen. After a couple of minutes, the vehicle drove the remainder around the building and left the parking lot. (9/22T.227-228; R. 243-244). On December 19, 2001, Pireda and a coworker were leaving after the restaurant closed to pick up food for the five employees who had stayed late to clean. (9/22T.230; R. 246). Pireda again saw the white Ford Taurus in the Chuck E. Cheese parking lot, and this time she was able to see two people inside the vehicle. (9/22T.230-232; R. 246-248).

Pireda and her coworker returned and the employees began eating. Shortly thereafter, Respondent, wearing a dark jacket or hooded sweatshirt, dark pants, boots, and something covering his face, entered the restaurant and demanded money. (9/22T.233-235; R.249-251). He carried a small gun, which fit in the palm of his hand. (9/22T.237; R. 253). Respondent made one of Pireda's coworkers empty the safe and he left through the back emergency door. (9/22T.236-237; R. 252-253). Respondent left with cash and rolled coins. (9/22T.182; R. 219).

Respondent and his roommate were stopped in a white Ford Taurus leaving an apartment complex directly behind the Chuck E. Cheese that was robbed. Respondent had been seen throwing what turned out to be a dark hooded into the trash dumpster. (9/22T.263-264; 345; R.275-276; 324). Respondent was stopped and initially gave a false identification and reported he had no drivers license. (9/22T.275-276; R.277-278). As Respondent was removed from the vehicle, he reached into his pocket and threw "hands full of cash" into the car. Respondent's roommate tried to pick up the cash and stuff it into the passenger door pocket. (9/22T.277-278; R. 279-280).

Investigator Fuller and Detective Bruce obtained a search warrant for Respondent's residence. (9/22T.306; 387; R. 285; 325). They located a stocking cap in which a small, derringer style handgun was concealed. (9/22T.390-391; R. 328-329). The stocking cap had two eye holes cut out. (9/22T.391; R.329). Additionally, they found some money in the apartment, including rolled coins. (9/22T.391-392; R. 329-330).

ARGUMENT

- I. **The Court of Appeals erred in concluding Judge Patterson was required to recuse himself from presiding at Respondent's trial because he previously served as a judge in a prior Post-conviction Relief hearing.**

The Court of Appeals erred in addressing Respondent's argument regarding Judge Patterson's refusal to recuse himself because the issue is not preserved for review on appeal. Further, the Court of Appeals' reliance upon Floyd v. State, 303 S.C. 298, 400 S.E.2d 145 (1991) was misplaced as the case is not applicable under the current facts and circumstances. The Court of Appeals ultimately erred in finding Judge Patterson should have recused himself from presiding over Respondent's trial absent a finding of judicial bias or prejudice.

First, the issue was not properly preserved for review on appeal. While Respondent stated at the April 18 hearing: "I believe that I asked you to step down from hearing my case" this was during a pre-trial hearing and did not express any grounds for the motion to recuse the trial judge. An objection must be made on a specific ground in order to properly preserve the issue for review on appeal. See State v. Stahlnecker, 386 S.C. 609, 617, 690 S.E.2d 565, 570 (2010). Further, neither Respondent nor his counsel renewed the motion during either a May 30 or September 11, 2008 hearing, even though both occurred before Judge Patterson.

Judge Patterson's ruling pre-trial denying the motion to dismiss was not a final ruling, similar to a motion *in limine*. As a result, in order to obtain a final ruling, Respondent needed to raise the motion for Judge Patterson to recuse himself at the

start of trial. The objection was never renewed prior to the start of trial and Judge Patterson was never given an opportunity to make a final ruling regarding his recusal. Therefore, Respondent waived his objection to Judge Patterson presiding over this trial.

On the merits, the Court of Appeals erred in relying on Floyd, 303 S.C. 298, 400 S.E.2d 145 (1991). In Floyd, this Court found, upon motion, the same judge that presided at a defendant's trial should not preside at a subsequent post-conviction relief hearing in which the defendant seeks relief from a conviction. In Floyd, this Court overturned its prior ruling in Henry v. State, 275 S.C. 148, 268 S.E.2d 41 (1980). Id. at 299, 400 S.E.2d at 145-146. The Court found it best to avoid any appearance of impropriety or partiality to require recusal upon motion. Id.

In circumstances such as Floyd, the judge may be called upon to rule on the propriety of her own rulings and whether counsel was ineffective for failing to challenge the judge's rulings. The Court determined this situation could lead to the possibility of an image of partiality.

The circumstance in Floyd are not present at all in this case and it was error for the Court of Appeals to rely solely on Floyd in reaching its decision. This case presents a situation much more akin to one when the original trial judge, who presides over the defendant's conviction and sentence which are later reversed on appeal, also presides at the remanded new trial or when a case is remanded for re-sentencing, which is done by the original trial judge. See e.g. State v. Rich, 269 S.C. 701, 239 S.E.2d 731 (1977); State v. Cannon, 250 S.C. 437, 158 S.E.2d 357 (1967).

In the instant case, Judge Patterson was the post-conviction relief judge and not the trial judge. Accordingly, he was not involved in the original admission of evidence, hearing of testimony, or ruling on motions or objections in the first trial. There should be no perceived bias or impartiality in his hearing Respondent's second trial, even where his ruling on post-conviction relief was reversed. He was called upon to judge the error and prejudice from a trial conducted in front of another judge and not a trial conducted in front of him, accordingly, the perceived bias or partiality that may be argued in Floyd would absolutely be present in the current case.¹

Additionally, Canon 3(C)(1) of the Code of Judicial Conduct, Rule 501, SCACR, states: "A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and should cooperate with other judges and court officials in the administration of court business." "A judge must exercise sound judicial discretion in determining whether his impartiality might reasonably be questioned." State v. Cheatham, 349 S.C. 101, 111, 561 S.E.2d 618, 624 (Ct. App. 2002).

¹The State does not believe the rule in Floyd is necessary as there should be no indication of partiality or bias simply because a judge previously participated in some aspect of the case, even if it was as a trial judge. The traditional rule as found in Mallet v. Mallet, 323 S.C. 141, 146-147, 473 S.E.2d 804, 808 (Ct. App. 1996), should apply unless the defendant is able to demonstrate the bias or actual partiality that has traditionally required recusal. To the extent necessary, the State asks to argue against the precedent of Floyd.

"Absent evidence of judicial prejudice, a judge's failure to disqualify himself will not be reversed on appeal." Id. "A motion to recuse may not be predicated on the judge's rulings in the case before him or on rulings in a related case, nor on his demonstrated tendency to rule in any particular manner, or on a particular judicial leaning or attitude derived from his experience on the bench." Mallett v. Mallett, 323 S.C. 141, 146-147, 473 S.E.2d 804, 808 (Ct. App. 1996) (emphasis added) (citing, *inter alia*, United States v. Grinnell Corp., 384 U.S. 563 (1966); Berger v. United States, 255 U.S. 22, 31 (1921)).

Respondent does not allege Judge Patterson was partial, maintained a bias, or acted improperly in presiding over his trial. The record indicates nothing about the previous proceedings which would have affected the trial judge's impartiality. Respondent merely asserts and the Court of Appeals instituted a *per se* rule of recusal should be created when a trial judge previously presided of the defendant's post-conviction relief action. Such a rule is not necessary and is certainly not mandated by the holding in Floyd.

- II. The Court of Appeals failed to address the issue of whether the trial court properly allowed Respondent to proceed *pro se* at trial. Because this Court should reverse the decision of the Court of Appeals regarding Judge Patterson's recusal, the trial court's decision allowing Respondent to proceed *pro se* should be addressed and affirmed.

Respondent contends the trial court erred in allowing him to proceed *pro se* during his trial. The trial court conducted a proper Faretta² inquiry prior to allowing Respondent to proceed *pro se* at trial. Even if the Faretta colloquy was insufficient, the record clearly demonstrates Respondent has a sufficient background to understand the dangers of self-representation, was made aware of the pitfalls prior to his proceeding *pro se*, and knowingly and voluntarily elected to proceed *pro se*.

"The Sixth and Fourteenth Amendments of our Constitution guarantee that a person brought to trial in any state or federal court must be afforded the right to the assistance of counsel before he can be validly convicted and punished by imprisonment." Faretta v. California, 422 U.S. 806, 807 (1975). A defendant may waive the right to counsel. "It is the trial court's responsibility to determine whether there was a knowing and intelligent waiver by the accused." State v. Bryant, 383 S.C. 410, 414, 680 S.E.2d 11, 13 (Ct. App. 2009). "To effectuate a valid waiver, the accused must (1) be advised of the right to counsel and (2) be adequately warned of the dangers of self-representation." Id. (citing State v. McLauren, 349 S.C. 488,

²Faretta v. California, 422 U.S. 806 (1975)).

493-94, 563 S.E.2d 346, 348-49 (Ct. App. 2002)); see also, Faretta, 422 U.S. at 835.

Faretta requires a defendant "be made aware of the dangers and disadvantages of self-representation so that the record will establish he knows what he is doing and his choice is made with eyes open." 422 U.S. at 835. "While a specific inquiry by the trial judge expressly addressing the disadvantages of a *pro se* defense is preferred, the ultimate test is not the trial judge's advice but rather the defendant's understanding." Wroten v. State, 301 S.C. 293, 294, 391 S.E.2d 575, 576 (1990). If the trial court fails to explicitly address the disadvantages of proceeding *pro se*, as required by the second prong of Faretta, this Court may look to the record to determine whether petitioner had sufficient background to understand the dangers of self-representation or was apprised of his rights by some other source. See Watts v. State, 347 S.C. 399, 402, 556 S.E.2d 368, 370 (2001).

Factors this Court considers in determining if an accused had sufficient background to understand the disadvantages of self-representation include:

- (1) the accused's age, educational background, and physical and mental health;
- (2) whether the accused was previously involved in criminal trials;
- (3) whether he knew of the nature of the charge and of the possible penalties;
- (4) whether he was represented by counsel before trial or whether an attorney indicated to him the difficulty of self-representation in his particular case;
- (5) whether he was attempting to delay or manipulate the proceedings;
- (6) whether the court appointed stand-by counsel;

(7) whether the accused knew he would be required to comply with the rules of procedure at trial;

(8) whether he knew of legal challenges he could raise in defense to the charges against him;

(9) whether the exchange between the accused and the court consisted merely of pro forma answers to pro forma questions; and

(10) whether the accused's waiver resulted from either coercion or mistreatment.

See State v. Cash, 309 S.C. 40, 43, 419 S.E.2d 811, 813 (Ct. App. 1992); see also, Bryant, 383 S.C. at 415, 680 S.E.2d 11 at 14.

Further, a defendant's right to waive the assistance of counsel is not unlimited. The request to proceed *pro se* must be clearly asserted by the defendant prior to trial. If the request to proceed *pro se* is made after trial has begun, the grant or denial of the right to proceed *pro se* rests within the sound discretion of the trial judge. State v. Fuller, 337 S.C. 236, 241, 523 S.E.2d 168, 170 (1999) (citations omitted).

In the instant case, the trial court conducted a Faretta inquiry prior to allowing Respondent to proceed *pro se* at trial. The trial court determined Respondent understood his right to counsel as well as the dangers of self-representation. The trial court explained Respondent would be bound by the same rules as a lawyer. (9/22T.10; R. 103). Further, Respondent's counsel explained to the court that Respondent seriously believed it was in his interest to represent himself and allow counsel to remain as standby counsel. (9/22T.11-12; R. 104-105). Counsel

articulated he and Respondent talked about some of the procedures at trial as well as the making of objections. (9/22T.14; R. 107).

The trial court determined Respondent's background as well as his understanding of the charges and possible sentences he faced. (9/22T.15-18; R. 108-111). Respondent was questioned regarding the rules of evidence and how to conduct proper questioning and indicated he understood he would be required to comply. (9/22T.19-20; R. 112-113). The trial court concluded by strongly urging Respondent to consider allowing counsel to represent him due to the difficulties he would face in self-representation. (9/22T.23-24; R. 116-117). At that point, Respondent decided not to proceed *pro se*. (9/22T.24; R. 117).

After jury selection, and pre-trial motions, Respondent's counsel indicated Respondent's desire to renew his request to proceed *pro se*. Counsel stated Respondent was "prepared to follow the rules, understands them, and wants to once again be assigned *pro se* representation and he ask that I be allowed to be standby counsel." (9/22T.138; R. 192). The trial court reminded Respondent of the Faretta hearing previously conducted, and reiterated the dangers of self-representation. (9/22T.138-139; R. 192-193). The trial court explained Respondent would be responsible for the conduct of his trial and could not rely on the judge or standby counsel to conduct the trial. Finally, the trial court explained this request was one of multiple requests made by Respondent to represent himself in this case. (9/22T.139; R. 193). The trial court granted Respondent's request to proceed *pro*

se and appointed standby counsel to assist with procedural questions. (9/22T.140-141; R. 194-195).

It was within the trial court's discretion to allow Respondent to proceed *pro se* for the remainder of his trial. The trial court clearly explained the dangers of self-representation and there is no doubt Respondent proceeded *pro se* with his eyes wide open. Accordingly, the trial court did not err in allowing Respondent to represent himself at trial, and once that determination was made, the jury needed to be so instructed so it would understand the reason Respondent's counsel was no longer involved in the trial.

In addition, even if this Court finds the Faretta warning was insufficient or was not given in a timely manner, the record clearly indicates Respondent had a sufficient background to understand the dangers of self-representation, was warned of the difficulties he faced, and knowingly and voluntarily waived his right to counsel.

Attorney John Mauldin was originally appointed to represent Respondent. Respondent and Mauldin both filed motions to relieve counsel and the Greenville County Public Defender's Office. The trial court held a hearing on March 27, 2008.³ Mauldin and Respondent explained the significant history that existed between Respondent and the Greenville County Public Defender's Office. (3/27T.3-13; R. 13-23). Respondent was represented in a prior trial on these same charges by an attorney from the Public Defender's Office. The relationship was contentious and

³It should be noted the same trial judge presided over the pre-trial hearings as well as Respondent's trial and became extremely familiar with Respondent and his background.

continued to be contentious through the current appointment of Mauldin. (3/27T.4-7; 14-15; R. 14-17; 24-25).

The trial court explained Respondent either had to have an attorney or had to represent himself because his trial was going to go forward. The trial court asked about appointing Respondent an attorney and he responded his mother had contacted an attorney about representing him for at least part of the proceedings. (3/27T.15-16; R. 25-26). Respondent also stated "I think I'm prepared to represent myself." (3/27T.16; R. 26). He explained he studied the law while in prison and knew the relevant case law, his rights, and how to best defend himself. (3/27T.17; R. 27).

The trial court then warned:

[S]ometimes that's not the best thing in the world and the judge can't try your case for you. . . . And you can't go outside the rules of evidence. He's going to hold you to that. And I know you've probably read a lot of law and cases and what not, but there's some things you just can't do in court. You're pretty much stuck with the facts and what people know firsthand about what happened on the date and time in question, and whatever evidence they have.

(3/27T.18-19; R. 28-29). The trial court relieved Mauldin and the Public Defender's Office and left open the question of whether Respondent would represent himself, be appointed counsel, or retain the attorney contacted by his mother. (Order Relieving Mauldin dated April 14, 2008).

At this point in the case, Respondent had already been warned of the dangers of self-representation, was made aware of the necessity to follow the rules of evidence and procedural rules, and was instructed he would be held to the same

standard as an attorney. Further, the trial court knew Respondent had previously been tried on the same charges, so he was aware of possible defenses, the facts and evidence to be presented at trial, and the possible sentence upon conviction. In addition, his prior experience in going through both a trial and post conviction relief demonstrates at least a basic level of familiarity with criminal trials, procedures, and his rights. Additionally, Mauldin expressed Respondent's desire to represent himself and his desire to control the strategy of his own case. (3/27T.6-7; R. 16-17). Accordingly, after this pre-trial hearing, it was clear Respondent knew the dangers of self-representation and, after considering the Cash factors, his waiver of the right to counsel was knowing and voluntary.

Respondent filed several *pro se* motions with the trial court and a hearing was held on April 18, 2008.⁴ Respondent appeared *pro se* at this hearing. After discussing several of Respondent's motions, the trial court cautioned Respondent needed a lawyer and needed to listen to a lawyer. (4/18T.12; R. 44). The trial court later explained: "You needed to have a good lawyer. But you're a smart man and you can represent yourself. But I'm not sure that's in your best interest." (4/18T.21; R. 53). Respondent made an unequivocal request to represent himself by responding: "All I want to do is ask for a fair chance to represent myself." (4/18T.22; R.54).

⁴Respondent's filing of a motion to reduce bond as well as a motion to suppress evidence indicate his knowledge of the proceedings and ability to represent himself. Further, he moved during the hearing to recuse the trial judge, again indicating his comprehension of the proceedings and procedure.

At his next hearing in May 2008, Respondent requested counsel after realizing the voluminous amount of evidence involved in the case as well as a new tape recording. (5/30T.7; 12 R. 63; 68). The trial court explained to Respondent that he could not play games with the court. The trial court noted the fact he "emphasized to [Respondent] the last hearing we had that you should have a lawyer represent you. And you told me that you just might need a lawyer to do preliminary investigation for you and you were talking to Mr. Warder and -- or something to that effect." (5/30T.12; R. 68). After further discussion of the evidence and Respondent's alibi defense, Respondent expressed his desire to exercise his constitutional right to counsel. (5/30T.22; R. 78). The trial court then appointed Stephen Henry to represent him and made it clear that everything would need to be filed and handled through Henry from that point forward. (5/30T.24-25; R. 80-81).

On September 11, 2008, Respondent moved again to relieve his counsel. He expressed his long-running dissatisfaction and contemptuous relationship with the Greenville County Public Defender's Office and the fact Henry is on the board of the Defender's Corporation charged with overseeing the Public Defender's office. (9/11T.3-9; R. 90-96). The trial court found no conflict of interest existed justifying Respondent's motion to relieve counsel. (9/11T.10; R. 97). Respondent did not ask to proceed *pro se* at this hearing.

Finally, Respondent began trial with Henry as his attorney. After making the motion to proceed *pro se*, Respondent was fully advised of his rights and the dangers of self-representation. By this time in the proceedings, the Cash factors have been clearly established and even if the Faretta colloquy the trial court

engaged in with Respondent was insufficient, there was no abuse of discretion in allowing Respondent to proceed *pro se*. (9/22T.6-21; R. 99-114). Respondent was able to conduct cross-examination, make proper motions and objections, and engage in appropriate conversations with the court and opposing counsel. (9/22T. 146-148; 179-180; 190-191; 245-246; 308-317; 327; 339-342; 393-394; 429-432; 464-498; 524-527; R. 198-200; 216-217; 227-228; 261-262; 287-296; 306; 318-321; 331-332; 335-338; 339-373; 376-379). This demonstrates his familiarity with trial process and procedure. Further, it shows he had the requisite background to understand the dangers of self-representation and the willingness to accept those dangers and proceed *pro se*.

At all times and during all proceedings in which he proceeded *pro se*, Respondent knew the dangers of self-representation and the record demonstrates his decision to represent himself was made knowingly, voluntarily and with full disclosure by the trial court. Because this Court should find the Court of Appeals erred in reversing the trial court's denial of Respondent's motion for recusal, this Court should grant the Petition for Writ of Certiorari and consider this issue which was not determined by the Court of Appeals.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should grant the Petition for Writ of Certiorari to the Court of Appeals.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General

W. WALTER WILKINS, III
Solicitor, 13th Judicial Circuit

305 E. North Street, Suite 325
Greenville, South Carolina 29601-2185
(864) 467-8647

BY: _____
William M. Blitch, Jr.

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

ATTORNEYS FOR PETITIONER

July 14, 2011

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Greenville County
Hon. Larry R. Patterson, Circuit Court Judge

The State,

Robert Watkins,

v.

Petitioner,

Respondent.

Opinion No. 2011-UP-091 (S.C. Ct. App. filed March 8, 2011)

PROOF OF SERVICE

I, ELLEN DuBOIS, certify that I have served the within Petition For Writ of Certiorari to the Court of Appeals by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Elizabeth A. Franklin-Best, Esquire
SC Commission on Indigent Defense
Division of Appellate Defense
P. O. Box 11589
Columbia, South Carolina 29211

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

This 14th day of July, 2011.

ELLEN DuBOIS
Legal Assistant
Office of Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County
Larry R. Patterson, Circuit Court Judge

Opinion No. 2011-UP-091 (S.C. Ct. App. filed 3/8/2011)
02-GS-23-1063

THE STATE,

PETITIONER,

V.

ROBERT WATKINS,

RESPONDENT

RETURN TO PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

ELIZABETH A. FRANKLIN-BEST
Appellate Defender

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

ATTORNEY FOR RESPONDENT

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QUESTIONS PRESENTED

I. The Court of Appeals correctly found that the trial court judge erred when he failed to recuse himself because he improperly presided over this trial that resulted from the grant of post-conviction relief by the South Carolina Supreme Court.

II. The Court of Appeals appropriately declined to address the issue of Watkins's proceeding pro se at his trial when it disposed of the preceding issue. But, had it addressed the issue, the Court of Appeals would have found that Watkins' should not have been allowed to proceed pro se.

STATEMENT OF THE CASE

Robert Watkins was convicted of armed robbery and possession of a weapon after a jury trial held before the Honorable C. Victor Pyle, Jr. on October 23-25, 2002 in Greenville County. He was sentenced to 30 years for the armed robbery and 5 years for possession of a weapon.

Watkins appealed his conviction and it was dismissed by the Court of Appeals pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967). State v. Watkins, Op. No. 2004-UP-406 (filed June 22, 2004).

Watkins then filed an application for post-conviction relief on October 22, 2004. An evidentiary hearing was held on April 8, 2005 before the Honorable Larry R. Patterson. On January 17, 2006, Judge Patterson issued an order denying and dismissing Watkins' application for post-conviction relief.

The South Carolina Supreme Court then granted Watkins' petition for writ of certiorari, and reversed Judge Patterson's order. See Watkins v. State, Memorandum Opinion No. 2008-MO-001 (filed January 14, 2008).

The case was then remanded, and after several pre-trial hearings, his case was retried before Judge Patterson on September 22-24, 2008. He was again convicted and sentenced to 30 years incarceration.

Watkins then appealed his sentence and conviction, and the South Carolina Court of Appeals reversed in an unpublished opinion on March 8, 2011. State v. Watkins, Unpublished Opinion No. 2011-UP-091. The state then filed a petition for writ of certiorari, and this return timely follows.

ARGUMENT

I. The Court of Appeals correctly found that the trial court judge erred when he failed to recuse himself because he improperly presided over this trial that resulted from the grant of post-conviction relief by the South Carolina Supreme Court.

At the April 18, 2008 hearing, Watkins asked the judge to recuse himself because of his participation in his post-conviction relief proceeding. The judge was ultimately reversed by the South Carolina Supreme Court. The judge summarily denied the motion:

I'm not going to recuse yourself (sic). I'd see that you got the fairest trial of anybody on the bench. You're going to get your witnesses. You're going to get it all done. And I deny the motion to recuse myself. I've got nothing against you whatsoever.

ROA p. 38, l. 25- p. 39, l. 7.

Indeed, the judge had been reversed a mere 4 months prior to this exchange. See Watkins v. State, Memorandum Opinion No. 2008-MO-001 (filed January 14, 2008). This was error because the judge should have recused himself pursuant to Floyd v. State, 303 S.C. 298, 400 S.E.2d 145 (1991) and Canon 3(C)(1) of the Code of Judicial Conduct. In Floyd, the South Carolina Supreme Court held that there is now a *per se* rule of recusal in cases where a judge presides over both a trial and post-conviction matters. The rule enunciated in Floyd "eliminate[s] even the suggestion of partiality." Id. 298.

Pursuant to Canon 3(C)(1) of the Code of Judicial Conduct, a judge shall diligently discharge her administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration and should cooperate with other judges and court officials in the administration of court business. SCACR, Rule 501. The considerations of the appearance of impartiality that directed the decision in Floyd are no less present in this case where the trial

judge had actually been reversed by the South Carolina Supreme Court with respect to this same criminal matter. The Court of Appeals correctly held that the trial court judge erred in failing to recuse himself, and respectfully, Watkins asks this Court to deny the state's petition for writ of certiorari.

II. The Court of Appeals appropriately declined to address the issue of Watkins's proceeding *pro se* at his trial when it disposed of the preceding issue. But, had it addressed the issue, the Court of Appeals would have found that Watkins's should not have been allowed to proceed *pro se*.

The Court of Appeals appropriately declined to address Watkins' Faretta¹ claim when it decided the case on the preceding issue. State v. Taylor, 388 S.C. 101, 124 N.23, 694 S.E.2d 60, 72, n.23 (Ct. App. 2010) (holding that an appellate court need not address remaining issues when a decision on a prior issue is dispositive). Had the Court of Appeals addressed the issue, it would have concluded that Watkins's should not have been granted the right to represent himself.

The issue of Watkins' representation had been an on-going concern since his case was remanded for trial by the South Carolina Supreme Court. Watkins initially had been represented by an attorney for his first trial. He was convicted, and sentenced to 30 years. After the South Carolina Court of Appeals dismissed his Anders² brief, he filed an application for post-conviction relief alleging ineffective assistance of counsel. Judge Patterson denied Watkins relief after an evidentiary hearing, and Watkins appealed that decision. The South Carolina Supreme Court reversed Judge Patterson, and the case was remanded. The case was then re-tried before Judge Patterson, over objection by Watkins. In any event, Watkins did not wish to be represented by

¹ Faretta v. California, 422 U.S. 806 (1975).

anyone associated with the Greenville County Public Defenders Office, and the Public Defenders Office did not wish to represent him. See Hearing transcript, dated March 27, 2008, Public Defenders Motion to be Relieved.

At his March 27, 2008 hearing, Watkins first suggested that he would want to represent himself. ROA p. 26, l. 23— p. 27, l. 11. The State's position was that they believed Watkins should be represented. ROA p. 28, l. 8-9. The judge concluded that he "would probably let [Watkins] do it if that's what [Watkins wants]. ROA p. 28, ll. 17-18. He reiterated that he would probably let him represent himself. ROA p. 30, ll. 6-13.

On April 18, 2008, Watkins was back before Judge Patterson on a motions hearing. Watkins asked for a lower bond and for Judge Patterson to recuse himself from his trial. The issue of Watkins's representation was raised again. It appears that Watkins did not have any representation at this hearing, and that he was, in fact, representing himself *pro se*:

MR. WATKINS: . . . All I want to do is ask for a fair chance to represent myself.

THE COURT: You got a fair change (sic) to represent yourself. We're going to do the trial— . . .

MR. WATKINS: Can I get a continuance?

THE COURT: No, sir. Everything is in place. You got a transcript. And there is no reason to keep putting this case off. It's something that happened in 2002. We're not going to do it. They're going to bring the witnesses in from out of state. And we're going to conduct this trial. And you're going to represent yourself.

I'm going to appoint a real good lawyer to sit behind you and help you a little bit, but he cannot be responsible for your trial. You cannot file an ineffective assistance of counsel or anything against him. You're going to be representing yourself.

ROA p. 54, ll. 3-22.

² State v. Watkins, Op. No. 2004-UP-406 (S.C. Ct. App. filed June 22, 2004).

On May 30, 2008, another hearing was held before Judge Patterson. At this hearing, Watkins asked for a continuance based on the fact that he received new discovery in this case that he did not have for his previous trial. ROA p. 63, ll. 8-22. At this point, he asked for an attorney to represent him because of the new material that he had received. ROA p. 63, ll. 17-20. Specifically, Watkins obtained a copy of the 911 tape. Watkins could not listen to the tape himself down at the detention center. ROA p. 64, l. 3— p. 68, l. 25. The importance of this tape became apparent at trial because it uncovered the existence of a 5th witness at the scene of the crime who had been secreted by the other victims from the police. Watkins reiterated that he needed a lawyer because of the new evidence the State produced. ROA p. 68, ll. 1-2. The court responded:

Listen, you cannot play around with the Courts and I made that perfectly clear. The people in South Carolina want you to have a fair trial, Mr. Watkins. And I want you to understand that. You told me before you didn't want Mr. Mauldin. He is one of the best defense lawyers in Greenville County. He's a State employee now, or he was up until the Governor vetoed the budget yesterday, but—I mean, these people nothing would please them more—I mean, nobody believes in the Constitution any more than Mr. Henry back there and Mr. Mauldin, and a lot of the lawyers you've had.

And I tried to emphasize to you the last hearing we had that you should have a lawyer to represent you. And you told me that you just might need a lawyer to do preliminary investigation for you and you were talking to Mr. Warder and—or something to that effect. I don't remember everything that was said. But we can't be—the Supreme Court sent this thing back for a trial. And this thing has been pending since 2001. And the Court just will not tolerate letting us sit here and not do anything about your case and you just sit down in the Greenville County jail. Your case has got to go to trial.

ROA p. 68, ll. 14-25.

Watkins again asked for counsel. ROA p. 78, ll. 15-16. The judge granted his request and gave him a lawyer, but told him he would not be allowed to relieve him:

THE COURT: We're going to see that everything is taken care of. Now, he's your lawyer. And he's going to speak for you from now on. Do you

understand that? He will not be relieved. And I'm going to try your case, so just get ready.

MR. WATKINS: Let me ask you this.

THE COURT: That's it for the day. You talk to him and everything goes through him.

MR. WATKINS: I have a motion.

THE COURT: You're not representing yourself any more.

MR. WATKINS: I know, but I got—

THE COURT: You wanted a lawyer. You've got one. You're not representing yourself. So you cannot address the Court. We can't have two people representing you. You can't do it alone with Mr. Henry. You've got to follow his advice.

MR. WATKINS: But State versus—I mean Foretta (sic)—

THE COURT: He can explain all that and he's going to speak.

MR. WATKINS: -- versus—Foretta (sic) versus California—

THE COURT: Take him away.

ROA p. 81, l. 9—p. 82, l. 6.

The judge did not have him taken immediately away, but did inform him that he had had his “chance” to represent himself. ROA p. 82, ll. 21-23.

At a hearing on September 11, 2008, Watkins again requested to be allowed to proceed *pro se*. Watkins told the judge that he believed a conflict of interest existed because Mr. Henry was on the Board of Directors for the Defender Corporation which oversees the Greenville County Public Defenders office. He believed this conflict accounted for the fact that Mr. Henry was not filing the motions that he wanted filed in his case. ROA p. 90, l. 1—p. 97, l. 10. The motion was denied.

On the morning of trial, Watkins filed a motion to relieve his attorney. ROA p. 93, ll. 13-18.

Before he conducted a *Faretta* colloquy, the judge stated:

But you can represent yourself. I'm going to have to conduct a hearing and ask you a lot of questions, but I've got to know—the reasons you've given me right now as far as you getting more in and can do more than Mr. Henry can, it's just not an accurate statement.

ROA p. 97, ll. 6-10.

The judge then proceeded to ask Watkins the following questions. The judge asked Watkins general questions about his background. ROA p. 108, ll. 4-25. He asked him whether he had taken any medications, drugs or alcohol in the past 24 hours. He asked him if there were any competency issues; any physical, emotional, or nervous problems, or anything else that would affect his ability to understand what he was doing. ROA p. 109, ll. 4-25. He asked if he had any formal training in law. He did not. ROA p. 110, ll. 1-3. He asked if he had any other experiences with criminal trials. He did not. ROA p. 110, ll. 4-9. Watkins testified he understood the charges contained in the indictment. ROA p. 110, ll. 10-18. He understood the range of possible punishments. ROA p. 110, ll. 19-25.

Then, when the judge asked if he knew the elements of the crime, Watkins responded that he did not. ROA p. 111, ll. 1-6. The judge did not inquire further. He asked if Watkins was familiar with the rules of criminal procedure. Again, Watkins replied he was not. Watkins was not familiar with what he may or may not be able to say in opening statements. ROA p. 112, l. 13—p. 113, l. 2. The judge did not inquire further.

The judge asked if he understood that he would need to make proper objections to preserve issues for appeal; and he reviewed his right to testify. ROA p. 113, ll. 11- p. 114, l. 23. They

discussed prior convictions. ROA p. 115, ll. 7-10. The judge told Watkins he believed it was unwise for him to represent himself. ROA p. 116, ll. 8-22.

The Trial

At the end of the colloquy, Watkins did not choose to represent himself, and the trial started. The court heard pre-trial motions, including making a motion for a continuance based on the newly discovered witness referenced on the 911 tape. ROA p. 118, l. 1—p. 129, l. 17; ROA p. 130, l. 23—p. 136, l. 15. The jury was selected. The parties discussed prior convictions which may be used for impeachment purposes. Watkins' attorney then made a motion to suppress the fruits of the search warrant executed in this case. ROA p. 137, l. 4—p. 191, l. 25.

At the conclusion of the substantive motions, Watkins then made another motion to proceed *pro se*. ROA p. 192, ll. 6-13. After again telling Watkins that he was likely to make mistakes, and informing him again that he would not be allowed to file an ineffective assistance of counsel claim against himself, the judge responded:

I'm not spending any more time on this issue. He's going to represent himself *pro se*. And I don't want to be faced with this issue again. And I mean I—this is really trying—kind of trying the patience of the Court. But you have a Constitutional right to do that. Mr. Henry can be standby counsel and sit behind you, and you can represent yourself. Okay.

ROA p. 193, l. 25—194, l. 6.

After the jury was sworn, the judge addressed the jury:

Now, I informed you yesterday, and I introduced Mr. Henry as Mr. Watkins' lawyer. Mr. Watkins has chosen to exercise his Constitutional right and represent himself, and not be represented by Mr. Henry, who's in the courtroom here.

ROA p. 197, ll. 8-12.

After opening arguments, and before the jury, the judge said this:

I need to put in the record that I did have a hearing, and I found affirmatively that it was implied that Mr. Watkins knowingly, intelligently and voluntarily waived his right to council (sic) and decided to proceed with himself. And I find that he did it knowingly, voluntarily and intelligently. I want to put that in the record. Okay.

ROA p. 200, ll. 7-13.

Argument

The judge abused his discretion by allowing Watkins to proceed *pro se* because he did not exercise his discretion in making the decision. State v. Smith, 276 S.C. 494, 280 S.E.2d 200 (1981). Rather, the judge granted Watkins' request simply because he was frustrated with Watkins. That the judge did not exercise his discretion is evidenced by the following: (1) the fact that Watkins had initially been allowed to proceed *pro se* prior to the judge's even conducting a Faretta colloquy. As referenced above, at the March 27th hearing, the judge had already decided that he would "probably" let Watkins represent himself. By the time of the April 18th hearing, Watkins was appearing in court on his own motions. The court was quite clear that Watkins was representing himself at that point, but no Faretta colloquy had been conducted at that time. The court had no difficulty allowing him to represent himself at trial at that point, although it did later, and after an attorney was appointed to represent Watkins; (2) the fact that the judge then denied Watkins' request to proceed *pro se* at the September 11th hearing is further evidence of the lack of discretion exercised by the judge. Once Watkins was assigned an attorney, the judge would not allow him to relieve that attorney until after the jury had been sworn. If the judge believed that Watkins had the unfettered constitutional right to represent himself he should have allowed Watkins the right to relieve his attorney on September 11th. Instead, he summarily denied the motion; (3) the fact that the judge did not provide his reasons for changing his mind on the record. There were no additional facts brought to the judge's attention between the September 11th date and the trial date that would

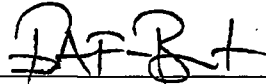
have justified the judge's granting the request at that late point, but not at an earlier time. This point strongly suggests that the judge did not predicate his decision on anything other than his frustration. It is also notable that the judge granted the request after the jury had been selected and Watkins' attorney introduced to them. It would have been well within the judge's discretion to have denied Watkins' request at that point based on the timing of the request. See State v. Fuller, 337 S.C. 236, 523 S.E. 2d 168 (1999); State v. Reed, 332 S.C. 35, 503 S.E.2d 747 (1998). Instead, he granted it at that late point, and then brought the matter to the jury's attention. Additionally, the judge published to the jury the fact that there had been a hearing on the matter, and to which they were not privy. The judge's actions brought the issue of representation to the forefront of the jurors' minds. Certainly they would have wanted to know why Watkins started off with an attorney and then no longer had one. This was improper.

It is also worth noting that the Faretta colloquy that was conducted was unrelated to the judge's decision-making in this case. He never engaged in the colloquy prior to initially allowing Watkins to represent himself, nor did he engage in it prior to his decision not to allow Watkins to represent himself. For some reason, he only seemed to believe that he needed to give the warnings on the day of trial. This strongly suggests that the judge was merely attempting to sanitize his actions by going through the motions, but without an appreciation of the values to be protected by the colloquy. Further evidence of the *pro forma* quality of the colloquy is the fact that Watkins gave negative responses to the judge's inquiries, but the judge never followed up. Respectfully, the Court of Appeals appropriately declined to address this issue when it disposed of the case on other grounds. Had the Court of Appeals addressed this issue, it would have concluded that Watkins's should not have proceeded *pro se* at his trial. Watkins's respectfully asks this Court to deny the state's petition for writ of certiorari.

CONCLUSION

For these reasons, Watkins's respectfully asks this Court to deny the state's petition for writ of certiorari.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'EAF-Best', written over a horizontal line.

Elizabeth A. Franklin-Best
Appellate Defender

ATTORNEY FOR RESPONDENT.

This 14th day of October, 2011

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County
Larry R. Patterson, Circuit Court Judge

Opinion No. 2011-UP-091 (S.C. Ct. App. filed 3/8/2011)
02-GS-23-1063

THE STATE,

PETITIONER,

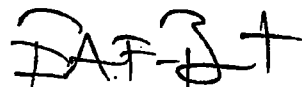
V.

ROBERT WATKINS,

RESPONDENT

CERTIFICATE OF SERVICE

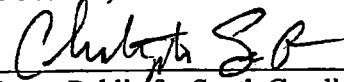
I certify that a true copy of the petition for writ of certiorari to the Court of Appeals in this case has been served on William M. Blitch, Jr., Esquire, and the S.C. Court of Appeals this 14th day of October, 2011.



Elizabeth A. Franklin-Best
Appellate Defender

ATTORNEY FOR RESPONDENT

SWORN TO BEFORE ME this 14th day
of October, 2011.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: May 16, 2021

The Supreme Court of South Carolina

The State, Petitioner,

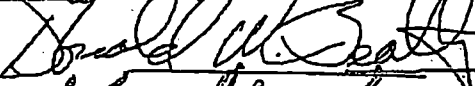
v.

Robert Watkins, Respondent.

Appellate Case No. 2011-195272

ORDER

We grant the petition for a writ of certiorari to review the Court of Appeals' decision in *State v. Watkins*, Op. No. 2011-UP-091 (S.C. Ct. App. filed March 8, 2011). The parties shall proceed to serve and file the appendix and briefs as provided by Rule 242(i), SCACR.

 C.J.
 J.
 J.
 J.

John W. Kittredge, J., not participating.

Columbia, South Carolina

November 6, 2012

cc:

William M. Blitch, Jr.

David Alexander

Robert M. Watkins, 243803

The Honorable Jenny Kitchings

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Greenville County
Hon. Larry R. Patterson, Circuit Court Judge
Appellate Case Tracking No. 2011-195272

ORIGINAL

RECEIVED

JAN 7 - 2013

S.C. Supreme Court

The State,

Petitioner,

v.

Robert Watkins,

Respondent.

Opinion No. 2011-UP-091 (S.C. Ct. App. filed March 8, 2011)

BRIEF OF PETITIONER

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General
S.C. Bar Number 15608
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

ATTORNEYS FOR PETITIONER

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STATEMENT OF ISSUES ON CERTIORARI

- I. The Court of Appeals erred in concluding Judge Patterson was required to recuse himself from presiding at Respondent's trial because he previously served as a judge in Respondent's prior Post-conviction Relief hearing.

- II. The Court of Appeals failed to address the issue of whether the trial court properly allowed Respondent to proceed *pro se* at trial. Because this Court should reverse the decision of the Court of Appeals regarding Judge Patterson's recusal, the trial court's decision allowing Respondent to proceed *pro se* should be addressed and affirmed.

STATEMENT OF THE CASE

Procedural History

Respondent was convicted of armed robbery and possession of a weapon after a jury trial before the Honorable Victor Pyle, Jr. on October 23-25, 2002 in Greenville County. He was sentenced to thirty years for armed robbery and five years for possession of a weapon.

Respondent appealed his conviction and it was dismissed by the Court of Appeals pursuant to Anders v. California, 386 U.S. 73 (1967). See State v. Watkins, Op. No. 2004-UP-406 (filed June 22, 2004). Respondent filed an application for post-conviction relief on October 22, 2004 and a hearing was held April 8, 2005, before the Honorable Larry R. Patterson. On January 17, 2006, Judge Patterson issued an order denying and dismissing the application for post-conviction relief. This Court granted Respondent's Petition for Writ of Certiorari and reversed Judge Patterson's order. See Watkins v. State, Op. No. 2008-MO-001 (filed January 14, 2008).

The case was remanded for trial, and after several pre-trial hearings, the case was retried before the Judge Patterson on September 22-24, 2008. The jury found Respondent guilty and the trial court sentenced him to thirty years in prison.

Respondent appealed to the South Carolina Court of Appeals, which reversed his conviction and remanded for a new trial. See State v. Watkins, Op. No. 2011-UP-091 (S.C. Ct.App. filed March 8, 2011). The State timely filed a Petition for Rehearing on March 21, 2011. The Petition was denied by Order filed April 21, 2011. Remittitur was

issued on June 2, 2011, but was recalled by the Court of Appeals on June 30, 2011, because the State never received notice of the denial of the State's Petition for Rehearing.

The State timely filed a Petition for Writ of Certiorari on July 14, 2011. This Court granted the Petition for Writ of Certiorari and this Brief follows.

Factual Background

While working at Chuck E. Cheese in December 2001, Jeannie Pireda saw a white Ford Taurus slowly driving around the restaurant and stop at the back exit from the kitchen. After a couple of minutes, the vehicle drove the remainder around the building and left the parking lot. (9/22T.227-228; R. 243-244). On December 19, 2001, Pireda and a coworker were leaving after the restaurant closed to pick up food for the five employees who had stayed late to clean. (9/22T.230; R. 246). Pireda again saw the white Ford Taurus in the Chuck E. Cheese parking lot, and this time she was able to see two people inside the vehicle. (9/22T.230-232; R. 246-248).

Pireda and her coworker returned and the employees began eating. Shortly thereafter, Respondent, wearing a dark jacket or hooded sweatshirt, dark pants, boots, and something covering his face, entered the restaurant and demanded money. (9/22T.233-235; R.249-251). He carried a small gun, which fit in the palm of his hand. (9/22T.237; R. 253). Respondent made one of Pireda's coworkers empty the safe and he left through the back emergency door. (9/22T.236-237; R. 252-253). Respondent left with cash and rolled coins. (9/22T.182; R. 219).

Respondent and his roommate were stopped in a white Ford Taurus leaving an apartment complex directly behind the Chuck E. Cheese that was robbed. Respondent

had been seen throwing what turned out to be a dark hooded into the trash dumpster. (9/22T.263-264; 345; R.275-276; 324). Respondent was stopped and initially gave a false identification and reported he had no driver's license. (9/22T.275-276; R.277-278). As Respondent was removed from the vehicle, he reached into his pocket and threw "hands full of cash" into the car. Respondent's roommate tried to pick up the cash and stuff it into the passenger door pocket. (9/22T.277-278; R. 279-280).

Investigator Fuller and Detective Bruce obtained a search warrant for Respondent's residence. (9/22T.306; 387; R. 285; 325). They located a stocking cap in which a small, derringer style handgun was concealed. (9/22T.390-391; R. 328-329). The stocking cap had two eye holes cut out. (9/22T.391; R.329). Additionally, they found some money in the apartment, including rolled coins. (9/22T.391-392; R. 329-330).

ARGUMENT

- I. The Court of Appeals erred in concluding Judge Patterson was required to recuse himself from presiding at Respondent's trial because he previously served as a judge in Respondent's prior Post-conviction Relief hearing.**

The Court of Appeals erred in addressing Respondent's argument regarding Judge Patterson's refusal to recuse himself because the issue is not preserved for review on appeal. Further, the Court of Appeals' reliance upon Floyd v. State, 303 S.C. 298, 400 S.E.2d 145 (1991) is misplaced, as the case is not applicable under the current facts and circumstances. The Court of Appeals ultimately erred in finding Judge Patterson should have recused himself from presiding over Respondent's trial absent a finding of judicial bias or prejudice. Finally, this Court should revisit its ruling in Floyd and find a judge is not required to recuse himself from sitting in a post-conviction relief hearing when he previously sat as the trial judge.

First, the issue was not properly preserved for review on appeal. While Respondent stated at the April 18 hearing: "I believe that I asked you to step down from hearing my case" this was during a pre-trial hearing and did not express any grounds for the motion to recuse the trial judge. An objection must be made on a specific ground in order to properly preserve the issue for review on appeal. See State v. Stahlnecker, 386 S.C. 609, 617, 690 S.E.2d 565, 570 (2010). Further, neither Respondent nor his counsel renewed the motion during either a May 30 or September 11, 2008 hearing, even though both occurred before Judge Patterson.

Judge Patterson's ruling pre-trial denying the motion was not a final ruling, similar to a motion *in limine*. As a result, in order to obtain a final ruling, Respondent

needed to raise the motion for Judge Patterson to recuse himself at the start of trial. The objection was never renewed prior to the start of trial and Judge Patterson was never given an opportunity to make a final ruling regarding his recusal. Therefore, Respondent waived his objection to Judge Patterson presiding over this trial.

On the merits, the Court of Appeals erred in relying on Floyd, 303 S.C. 298, 400 S.E.2d 145. In Floyd, this Court found, upon motion, the same judge that presided at a defendant's trial should not preside at a subsequent post-conviction relief hearing in which the defendant seeks relief from a conviction. In Floyd, this Court overturned its prior ruling in Henry v. State, 275 S.C. 148, 268 S.E.2d 41 (1980). Id. at 299, 400 S.E.2d at 145-146. The Court found it best to avoid any appearance of impropriety or partiality by requiring recusal upon motion. Id.

In circumstances such as Floyd, the judge may be called upon to rule on the propriety of her own rulings and whether counsel was ineffective for failing to challenge the judge's rulings. The Court determined this situation could lead to the possibility of an image of partiality.

The circumstances this Court found necessary to institute the protections in Floyd are not present at all in this case, and it was error for the Court of Appeals to rely solely on Floyd in reaching its decision. This case presents a situation much more akin to one when the original trial judge presides over the defendant's conviction and sentence, which is later reversed on appeal, also presides at the remanded new trial or when a case is remanded for re-sentencing. See e.g. State v. Rich, 269 S.C. 701, 239 S.E.2d 731 (1977); State v. Cannon, 250 S.C. 437, 158 S.E.2d 357 (1967).

In the instant case, Judge Patterson was the post-conviction relief judge and not the trial judge. Accordingly, he was not involved in the original admission of evidence, hearing of testimony, or ruling on motions or objections in the first trial. There should be no perceived bias or impartiality in his hearing Respondent's second trial, even where his ruling on post-conviction relief was reversed. He was called upon to judge the error and prejudice from a trial conducted in front of another judge, and not a trial he conducted. Accordingly, the perceived bias or partiality that may be argued necessitated this Court's ruling in Floyd is absolutely absent in the current case.

Additionally, Canon 3(C)(1) of the Code of Judicial Conduct, Rule 501, SCACR, states: "A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and should cooperate with other judges and court officials in the administration of court business." "A judge must exercise sound judicial discretion in determining whether his impartiality might reasonably be questioned." State v. Cheatham, 349 S.C. 101, 111, 561 S.E.2d 618, 624 (Ct. App. 2002). "Absent evidence of judicial prejudice, a judge's failure to disqualify himself will not be reversed on appeal." Id. "A motion to recuse may not be predicated on the judge's rulings in the case before him or on rulings in a related case, nor on his demonstrated tendency to rule in any particular manner, or on a particular judicial leaning or attitude derived from his experience on the bench." Mallett v. Mallett, 323 S.C. 141, 146-147, 473 S.E.2d 804, 808 (Ct. App. 1996) (emphasis added) (citing, *inter alia*, United States v. Grinnell Corp., 384 U.S. 563 (1966); Berger v. United States, 255 U.S. 22, 31 (1921)).

Respondent does not allege Judge Patterson was partial, maintained a bias, or acted improperly in presiding over his trial. The record indicates nothing about the previous proceedings which would have affected the trial judge's impartiality. Respondent merely asserts, and the Court of Appeals instituted, a *per se* rule of recusal when a trial judge previously presided over the defendant's post-conviction relief action. Such a rule is not necessary, and the *per se* rule is certainly not mandated by the holding in Floyd.

Applying Floyd to this case, and extrapolating it to the logical end reached by the Court of Appeals would mean a judge involved in any proceeding would be required to be recused from participating in any other proceeding in the process. A judge that denied bond would then be precluded from acting as trial judge or post-conviction relief judge. There is simply no basis, even under the analysis of Floyd, to extend the requirement of *per se* recusal beyond the specific facts of Floyd; to do so would stretch the limits of reason and the judiciary's already taxed resources to find "unbiased" and "impartial" judges within the circuit. As a result, this Court should find the Court of Appeals erred in applying the holding of Floyd to the facts of this case, and this Court should reverse the Court of Appeals and affirm the trial court's decision denying the recusal motion.

Additionally, the State believes the precedent set forth by this Court in Floyd should be overturned and the ruling in Henry be reinstated.¹ The State believes the *per se* rule of recusal established in Floyd is not necessary to protect the impartiality of the judiciary and the traditional rule established in cases such as Mallet and Cheatham should be applied.

¹ The State will move to argue against precedent in the event oral argument is granted in this appeal. See Rule 217, SCACR

Participation in an aspect of a defendant's case, whether it be as trial judge, motion judge, bond judge, or post-conviction relief judge should not bar that judge from participating in later hearings or trials related to that defendant solely on the basis of the prior participation. Generally, this Court has required a finding of prejudice or bias in order to require the recusal of a judge. See Koon v. Fares, 379 S.C. 150, 156, 666 S.E.2d 230, 234 (2008) (finding it is not sufficient for a party seeking disqualification to simply allege bias; rather, the party must show some evidence of bias or prejudice); In re Campbell, 379 S.C. 593, 601-602, 666 S.E.2d 908, 912 (2008) (finding recusal proper where probate judge expressed opinions favorable of one party while directing disparaging remarks at the counsel of the other party, thereby manifesting a clear bias); Patel v. Patel, 359 S.C. 515, 524, 599 S.E.2d 114, 118 (2004) ("Under South Carolina law, if there is no evidence of judicial prejudice, a judge's failure to disqualify himself will not be reversed on appeal."); Christensen v. Mikell, 324 S.C. 70, 74, 476 S.E.2d 692, 694 (1996) ("To compel recusal, the alleged bias of the judge must be personal, as distinguished from judicial, in nature."); Murphy v. Murphy, 319 S.C. 324, 461 S.E.2d 39 (1995) (this Court did not require recusal when a trial judge was previously represented by counsel for one of the parties in the trial before him); Burgess v. Stern, 311 S.C. 326, 428 S.E.2d 880 (1993) (this Court did not require recusal of the trial judge after *ex parte* communications with the defense attorney in whose favor the judge ultimately ruled); Rogers v. Wilkins, 275 S.C. 28, 267 S.E.2d 86 (1980) (this Court did not require recusal absent independent evidence of bias or prejudice even when the judge was the subject of a §1983 action by the defendant).

The same rule has traditionally been applied by the Court of Appeals. See Mortgage Elec. Sys., Inc. v. White, 384 S.C. 606, 616, 682 S.E.2d 498, 503 (Ct. App. 2009) (finding it is not sufficient for a party seeking disqualification to simply allege bias; rather, the party must show some evidence of bias or prejudice prior to recusal being necessary); Simpson v. Simpson, 377 S.C. 519, 660 S.E.2d 274 (Ct. App. 2008) (finding no recusal required where a prior relationship existed between judge's husband's law partner and party's counsel); State v. Jackson, 353 S.C. 625, 628, 578 S.E.2d 744, 745 (Ct. App. 2003) (finding the fact the trial judge was a deputy solicitor at the time defendant allegedly committed the crime did not automatically warrant his recusal from the case without evidence of prejudice or bias).

A judge should be presumed to be impartial and unbiased in each case before her. It should be the burden of the party seeking to require recusal to demonstrate some grounds sufficient to overcome this presumption. See Koon, 379 S.C. at 156, 666 S.E.2d at 234; Freshwater v. State, 794 So.2d 274, 278 (Miss. App. 2001). Just as in every other case considered by this Court and the Court of Appeals, a *per se* requirement of recusal is not necessary in light of the framework provided by the Court for establishing bias or prejudice, and especially in light of the presumption which should be in place that judges are and will be impartial and unbiased.

As the United States Supreme Court explained:

As Judge Jerome Frank pithily put it: "Impartiality is not gullibility. Disinterestedness does not mean child-like innocence. If the judge did not form judgments of the actors in those court-house dramas called trials, he could never render decisions." In re J.P. Linahan, Inc., 138 F.2d 650, 654 (CA2 1943). Also not subject to deprecatory characterization as "bias" or "prejudice" are opinions held by judges as a result of what they learned in earlier

proceedings. It has long been regarded as normal and proper for a judge to sit in the same case upon its remand, and to sit in successive trials involving the same defendant.

Liteky v. U.S., 510 U.S. 540, 551 (1994).

Further, the general rule is that “[a] judge hearing a collateral motion to vacate a conviction need not disqualify him or herself based on an allegation that he or she may be prejudiced because the judge presided at the original trial and may have made rulings adverse to the petitioner.” 32 Am.Jur.2d Federal Courts §84. “In the absence of a showing of bias or prejudice, or other distinct grounds for disqualification, the participation of a judge in previous proceedings in the case does not disqualify the judge from presiding at proceedings for post-conviction relief.” 48A C.J.S. Judges §255. These general rules track the usual rule set in place by this Court and the Court of Appeals for recusal of a judge and announce the rule adhered to in Henry.

Finally, a review of the procedure used in federal court is instructive. 28 U.S.C.A. § 2255 controls federal post-conviction relief and is similar to post-conviction relief in this state. The federal courts have established the procedure requiring a post-conviction relief motion be considered by the original trial or sentencing judge. Specifically, Rule 4(a), *Rule Governing Proceedings Under 28 U.S.C.A. §2255*, states: “The clerk must promptly forward the motion to the judge who conducted the trial and imposed sentence or, if the judge who imposed sentence was not the trial judge, to the judge who conducted the proceedings being challenged. If the appropriate judge is not available, the clerk must forward the motion to a judge under the court's assignment procedure.” The commentary regarding the adoption of the procedure in Rule 4(a)

reference Carvell v. U.S., 173 F.2d 348 (4th Cir. 1949). In that case, the Court of Appeals examined the logic behind having the trial judge also hear the post-conviction motion:

Complaint is made that the judge who tried the case passed upon the motion. Not only was there no impropriety in this, but it is highly desirable in such cases that the motions be passed on by the judge who is familiar with the facts and circumstances surrounding the trial, and is consequently not likely to be misled by false allegations as to what occurred. It was to avoid the unseemly practice of having attacks upon the regularity of trials made before another judge through resort to habeas corpus that section 2255 of Title 28 was inserted in the Judicial Code.

Id. at 349. The commentary specifically as to Rule 4(a) indicates it adopts the majority position by allowing the trial judge to first hear the motion. It also acknowledges the movant is not without a remedy as he may move to recuse the judge by demonstrating a bias. Rule 4(a), *Rule Governing* 28 U.S.C.A. §2255, Advisory Committee Notes.

This Court should overrule its holding in Floyd and return to following the general rule regarding the necessity of a judge to recuse himself only when a bias or prejudice has been shown by the moving party. This position would be consistent with the majority position and the reasoning of the federal courts.

- II. The Court of Appeals failed to address the issue of whether the trial court properly allowed Respondent to proceed *pro se* at trial. Because this Court should reverse the decision of the Court of Appeals regarding Judge Patterson's recusal, the trial court's decision allowing Respondent to proceed *pro se* should be addressed and affirmed.

Respondent contends the trial court erred in allowing him to proceed *pro se* during his trial. The trial court conducted a proper Faretta v. California, 422 U.S. 806 (1975), inquiry prior to allowing Respondent to proceed *pro se* at trial. Even if the Faretta colloquy was insufficient, the record clearly demonstrates Respondent has a sufficient background to understand the dangers of self-representation, was made aware of the pitfalls prior to his proceeding *pro se*, and knowingly and voluntarily elected to proceed *pro se*.

"The Sixth and Fourteenth Amendments of our Constitution guarantee that a person brought to trial in any state or federal court must be afforded the right to the assistance of counsel before he can be validly convicted and punished by imprisonment." Faretta v. California, 422 U.S. 806, 807 (1975). A defendant may waive the right to counsel. "It is the trial court's responsibility to determine whether there was a knowing and intelligent waiver by the accused." State v. Bryant, 383 S.C. 410, 414, 680 S.E.2d 11, 13 (Ct. App. 2009). "To effectuate a valid waiver, the accused must (1) be advised of the right to counsel and (2) be adequately warned of the dangers of self-representation." Id. (citing State v. McLauren, 349 S.C. 488, 493-94, 563 S.E.2d 346, 348-49 (Ct. App. 2002)); see also, Faretta, 422 U.S. at 835.

Faretta requires a defendant "be made aware of the dangers and disadvantages of self-representation so that the record will establish he knows what he is doing and his

choice is made with eyes open.” 422 U.S. at 835. “While a specific inquiry by the trial judge expressly addressing the disadvantages of a *pro se* defense is preferred, the ultimate test is not the trial judge’s advice but rather the defendant’s understanding.” Wroten v. State, 301 S.C. 293, 294, 391 S.E.2d 575, 576 (1990). If the trial court fails to explicitly address the disadvantages of proceeding *pro se*, as required by the second prong of Faretta, this Court may look to the record to determine whether petitioner had sufficient background to understand the dangers of self-representation or was apprised of his rights by some other source. See Watts v. State, 347 S.C. 399, 402, 556 S.E.2d 368, 370 (2001).

Factors to be considered in determining if an accused had sufficient background to understand the disadvantages of self-representation include:

- (1) the accused’s age, educational background, and physical and mental health;
- (2) whether the accused was previously involved in criminal trials;
- (3) whether he knew of the nature of the charge and of the possible penalties;
- (4) whether he was represented by counsel before trial or whether an attorney indicated to him the difficulty of self-representation in his particular case;
- (5) whether he was attempting to delay or manipulate the proceedings;
- (6) whether the court appointed stand-by counsel;
- (7) whether the accused knew he would be required to comply with the rules of procedure at trial;
- (8) whether he knew of legal challenges he could raise in defense to the charges against him;
- (9) whether the exchange between the accused and the court consisted merely of pro forma answers to pro forma questions; and

(10) whether the accused's waiver resulted from either coercion or mistreatment.

See State v. Cash, 309 S.C. 40, 43, 419 S.E.2d 811, 813 (Ct. App. 1992); see also, Bryant, 383 S.C. at 415, 680 S.E.2d 11 at 14.

Further, a defendant's right to waive the assistance of counsel is not unlimited. The request to proceed *pro se* must be clearly asserted by the defendant prior to trial. If the request to proceed *pro se* is made after trial has begun, the grant or denial of the right to proceed *pro se* rests within the sound discretion of the trial judge. State v. Fuller, 337 S.C. 236, 241, 523 S.E.2d 168, 170 (1999) (citations omitted).

In the instant case, the trial court conducted a Faretta inquiry prior to allowing Respondent to proceed *pro se* at trial. The trial court determined Respondent understood his right to counsel as well as the dangers of self-representation. The trial court explained Respondent would be bound by the same rules as a lawyer. (9/22T.10; R. 103). Further, Respondent's counsel explained to the court that Respondent seriously believed it was in his interest to represent himself and allow counsel to remain as standby counsel. (9/22T.11-12; R. 104-105). Counsel articulated he and Respondent talked about some of the procedures at trial as well as the making of objections. (9/22T.14; R. 107).

The trial court determined Respondent's background as well as his understanding of the charges and possible sentences he faced. (9/22T.15-18; R. 108-111). Respondent was questioned regarding the rules of evidence and how to conduct proper questioning and indicated he understood he would be required to comply. (9/22T.19-20; R. 112-113). The trial court concluded by strongly urging Respondent to consider allowing counsel to represent him due to the difficulties he would face in self-representation. (9/22T.23-24;

R. 116-117). At that point, Respondent decided not to proceed *pro se*. (9/22T.24; R. 117).

After jury selection, and pre-trial motions, Respondent's counsel indicated Respondent's desire to renew his request to proceed *pro se*. Counsel stated Respondent was "prepared to follow the rules, understands them, and wants to once again be assigned *pro se* representation and he ask that I be allowed to be standby counsel." (9/22T.138; R. 192). The trial court reminded Respondent of the Faretta hearing previously conducted, and reiterated the dangers of self-representation. (9/22T.138-139; R. 192-193). The trial court explained Respondent would be responsible for the conduct of his trial and could not rely on the judge or standby counsel to conduct the trial. Finally, the trial court explained this request was one of multiple requests made by Respondent to represent himself in this case. (9/22T.139; R. 193). The trial court granted Respondent's request to proceed *pro se* and appointed standby counsel to assist with procedural questions. (9/22T.140-141; R. 194-195).

It was within the trial court's discretion to allow Respondent to proceed *pro se* for the remainder of his trial. The trial court clearly explained the dangers of self-representation and there is no doubt Respondent proceeded *pro se* with his eyes wide open. Accordingly, the trial court did not err in allowing Respondent to represent himself at trial, and once that determination was made, the jury needed to be so instructed so it would understand the reason Respondent's counsel was no longer involved in the trial.

In addition, even if this Court finds the Faretta warning was insufficient or was not given in a timely manner, the record clearly indicates Respondent had a sufficient

background to understand the dangers of self-representation, was warned of the difficulties he faced, and knowingly and voluntarily waived his right to counsel.

Attorney John Mauldin was originally appointed to represent Respondent. Respondent and Mauldin both filed motions to relieve counsel and the Greenville County Public Defender's Office. The trial court held a hearing on March 27, 2008. Mauldin and Respondent explained the significant history that existed between Respondent and the Greenville County Public Defender's Office. (3/27T.3-13; R. 13-23). Respondent was represented in a prior trial on these same charges by an attorney from the Public Defender's Office. The relationship was contentious and continued to be contentious through the current appointment of Mauldin. (3/27T.4-7; 14-15; R. 14-17; 24-25).

The trial court explained Respondent either had to have an attorney or had to represent himself because his trial was going to go forward. The trial court asked about appointing Respondent an attorney and he responded his mother had contacted an attorney about representing him for at least part of the proceedings. (3/27T.15-16; R. 25-26). Respondent also stated "I think I'm prepared to represent myself." (3/27T.16; R. 26). He explained he studied the law while in prison and knew the relevant case law, his rights, and how to best defend himself. (3/27T.17; R. 27).

The trial court then warned:

[S]ometimes that's not the best thing in the world and the judge can't try your case for you. . . . And you can't go outside the rules of evidence. He's going to hold you to that. And I know you've probably read a lot of law and cases and what not, but there's some things you just can't do in court. You're pretty much stuck with the facts and what people know firsthand about what happened on the date and time in question, and whatever evidence they have.

(3/27T.18-19; R. 28-29). The trial court relieved Mauldin and the Public Defender's Office and left open the question of whether Respondent would represent himself, be appointed counsel, or retain the attorney contacted by his mother. (Order Relieving Mauldin dated April 14, 2008).

At this point in the case, Respondent had already been warned of the dangers of self-representation, was made aware of the necessity to follow the rules of evidence and procedural rules, and was instructed he would be held to the same standard as an attorney. Further, the trial court knew Respondent had previously been tried on the same charges, so he was aware of possible defenses, the facts and evidence to be presented at trial, and the possible sentence upon conviction. In addition, his prior experience in going through both a trial and post-conviction relief demonstrates at least a basic level of familiarity with criminal trials, procedures, and his rights. Additionally, Mauldin expressed Respondent's desire to represent himself and his desire to control the strategy of his own case. (3/27T.6-7; R. 16-17). Accordingly, after this pre-trial hearing, it was clear Respondent knew the dangers of self-representation and, after considering the Cash factors, his waiver of the right to counsel was knowing and voluntary.

Respondent filed several *pro se* motions with the trial court and a hearing was held on April 18, 2008. Respondent appeared *pro se* at this hearing. After discussing several of Respondent's motions, the trial court cautioned Respondent needed a lawyer and needed to listen to a lawyer. (4/18T.12; R. 44). The trial court later explained: "You needed to have a good lawyer. But you're a smart man and you can represent yourself. But I'm not sure that's in your best interest." (4/18T.21; R. 53). Respondent made an

unequivocal request to represent himself by responding: "All I want to do is ask for a fair chance to represent myself." (4/18T.22; R.54).

At his next hearing in May 2008, Respondent requested counsel after realizing the voluminous amount of evidence involved in the case as well as a new tape recording. (5/30T.7; 12 R. 63; 68). The trial court explained to Respondent that he could not play games with the court. The trial court noted the fact he "emphasized to [Respondent] the last hearing we had that you should have a lawyer represent you. And you told me that you just might need a lawyer to do preliminary investigation for you and you were talking to Mr. Warder and - - or something to that effect." (5/30T.12; R. 68). After further discussion of the evidence and Respondent's alibi defense, Respondent expressed his desire to exercise his constitutional right to counsel. (5/30T.22; R. 78). The trial court then appointed Stephen Henry to represent him and made it clear that everything would need to be filed and handled through Henry from that point forward. (5/30T.24-25; R. 80-81).

On September 11, 2008, Respondent moved again to relieve his counsel. He expressed his long-running dissatisfaction and contemptuous relationship with the Greenville County Public Defender's Office and the fact Henry is on the board of the Defender's Corporation charged with overseeing the Public Defender's office. (9/11T.3-9; R. 90-96). The trial court found no conflict of interest existed justifying Respondent's motion to relieve counsel. (9/11T.10; R. 97). Respondent did not ask to proceed *pro se* at this hearing.

Finally, Respondent began trial with Henry as his attorney. After making the motion to proceed *pro se*, Respondent was fully advised of his rights and the dangers of

self-representation. By this time in the proceedings, the Cash factors have been clearly established and even if the Faretta colloquy the trial court engaged in with Respondent was insufficient, there was no abuse of discretion in allowing Respondent to proceed *pro se*. (9/22T.6-21; R. 99-114). Respondent conducted cross-examination, made proper motions and objections, and engaged in appropriate conversations with the court and opposing counsel. (9/22T. 146-148; 179-180; 190-191; 245-246; 308-317; 327; 339-342; 393-394; 429-432; 464-498; 524-527; R. 198-200; 216-217; 227-228; 261-262; 287-296; 306; 318-321; 331-332; 335-338; 339-373; 376-379). This demonstrates his familiarity with trial process and procedure. Further, it shows he had the requisite background to understand the dangers of self-representation and the willingness to accept those dangers and proceed *pro se*.

At all times and during all proceedings in which he proceeded *pro se*, Respondent knew the dangers of self-representation and the record demonstrates his decision to represent himself was made knowingly, voluntarily and with full disclosure by the trial court. Because this Court should find the Court of Appeals erred in reversing the trial court's denial of Respondent's motion for recusal, this Court should affirm the trial court's decision allowing Respondent to proceed *pro se*.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Court of Appeals opinion should be reversed

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General
S.C. Bar No. 15608

BY: 

William M. Blitch, Jr.

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

ATTORNEYS FOR PETITIONER

January 7, 2013

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Greenville County
Hon. Larry R. Patterson, Circuit Court Judge
Appellate Case Tracking No. 2011-195272

The State,

Petitioner,

v.

Robert Watkins,

Respondent.

PROOF OF SERVICE

I, ELLEN R. DuBOIS, certify that I have served the within Brief of Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

David Alexander, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 7th day of January, 2013.

Ellen R. DuBois
ELLEN R. DuBOIS
Legal Assistant
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenville County

Larry R. Patterson, Circuit Court Judge

THE STATE,

PETITIONER,

V.

ROBERT WATKINS,

RESPONDENT,

Appellate Case No. 2011-195272

BRIEF OF RESPONDENT

DAVID ALEXANDER
Appellate Defender

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

ATTORNEY FOR RESPONDENT.

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STATEMENT OF ISSUES ON APPEAL

I.

The Court of Appeals correctly ruled that the trial judge should have recused himself because he previously served as respondent's PCR judge and was reversed. As an additional ground for affirmance, the record demonstrates that the trial judge should have recused himself based on the unusual procedural and factual circumstances regarding this case.

II.

Should the Court elect to address petitioner's second issue, respondent's conviction should be reversed because the trial judge abused his discretion by allowing respondent to represent himself at trial, after having vacillated on the issue in the months leading up to the trial, after having selected a jury and introducing respondent's then-attorney to the jurors, and in placing the issue of respondent's representation before the jury.

STATEMENT OF THE CASE

Respondent agrees with appellant's procedural history with the exception that Respondent takes no position with respect to the reasons for the recall of the remittitur.

ARGUMENT

I.

The Court of Appeals correctly ruled that the trial judge should have recused himself because he previously served as respondent's PCR judge and was reversed. As an additional ground for affirmance, the record demonstrates that the trial judge should have recused himself based on the unusual procedural and factual circumstances regarding this case.

Factual Background

The Robbery

Marcus Scarabino ("Scarabino") was employed at the Chuck E. Cheese in 2001. R. 202, ll. 3 – 11. Scarabino was the general manager. R. To to ll. 12 – 13. Scarabino testified that on the night of December 19, 2001, the workers at the restaurant stayed late to do extra cleaning. R. 202, l. 22 – 203, l. 18. 5 people were in the restaurant. R. 203, ll. 19 – 24. Scarabino claimed that a man wearing a ski mask and carrying a handgun came in from the back of the restaurant. R. 209, l. 14 – 211, l. 21. The man asked them where the restaurant kept its money. R. 210, l. 23 – 211, l. 1. Scarabino gave the man money from the restaurant's safe. R. To 14, l. 4 – 215, l. 4. Scarabino claimed that the robber was not wearing gloves and his skin was black. R. To 15, ll. 5 – 10. Scarabino could not identify respondent Robert Watkins ("Watkins") as the robber. R. 227, l. 24 – 228, l. 3.

Krystyna Reilly ("Reilly") also worked at the restaurant. R. 231, ll. 16 – 217, l. 8. She saw the robber. R. 235, ll. 2 – 8. When law enforcement arrived, Reilly hid in the dressing room of the restaurant. R. 237, ll. 13 – 16. She never gave a statement to law enforcement. R. 240, l. 18 – 241, l. 1. She did not identify Watkins as the robber.

Jeannie Pireda ("Pireda"), another employee, was taken to the parking lot of an apartment complex where police shined a light on Watkins and asked her to identify him as the robber. R. 254, l. 25 – 255, l. 12. She did not identify Watkins. R. 255, ll. 5 – 21. Pireda also refused to identify Watkins as the robber at trial. R. 270, ll. 22 – 24.

Watkins testified in his own defense and vehemently denied committing the robbery. R. 357, ll. 3 – 6. Watkins explained that the money police found in his apartment came from his job as an automobile detailer and from cutting hair. R. 358, ll. 7 – 22. Watkins testified that his girlfriend should have provided an alibi. R. 358, l. 23 – 484, l. 6. This testimony was corroborated during the cross-examination of police officer Daniel Fuller, who admitted that in her initial statement to police, Watkins' girlfriend told them Watkins was in his room at their apartment at 1:00 am, which was the approximate time of the robbery. R. 303, l. 18 – 304, l. 12.

Watkins' PCR

The Honorable Larry R. Patterson presided over Watkins' PCR hearing. Supp. App. 1 – 6. Watkins claimed that his trial counsel was ineffective for failing to provide the State with a proper alibi notice pursuant to Rule 5 of the South Carolina Rules of Criminal Procedure. Supp. App. 4; see also SCRCrimP 5(e). Watkins' trial judge deemed the notice insufficient and refused to give an alibi charge to the jury. Supp. App. 4. Despite this seemingly clear instance of ineffective assistance, Judge Patterson denied Watkins' PCR application. Supp. App. 6. In doing so, Judge Patterson made a specific finding that Watkins' testimony was not credible. Supp. App. 4. Judge Patterson also ruled that Watkins could not show prejudice. Supp. App. 5.

The Court of Appeals reversed Judge Patterson. Supp. App. 9 – 11. The Court of Appeals discredited Judge Patterson's basis for finding trial counsel effective. Supp. App. 10. Judge Patterson found that trial counsel was not ineffective because "his belief that he complied with the rule was 'well-founded.'" Supp. App. 10. The Court of Appeals rejected this notion, stating that since Watkins was entitled to an alibi charge, "trial counsel was deficient for failing to raise this argument to the trial court and obtaining an alibi instruction." Supp. App. 10. The Court of Appeals also held that there was a reasonable probability that the result of Watkins' trial would have been different because "the State based its case against [Watkins] entirely on circumstantial evidence." Supp. App. 10. Watkins' case was remanded for a new trial.

Events at the Pre-Trial Proceedings

On March 14, 2008, after remand from the Court of Appeals, Watkins appeared before Judge Patterson for a bond hearing. R. 1 – 9. Watkins' original bond on the armed robbery charge was \$15,000 with an additional \$5,000 for the gun charge. R. 6, ll. 7 – 12. At the bond hearing, Judge Patterson said, "We've all – everyone in this room reads the advance sheets every week, and we know he got a new trial from the Supreme Court." R. 7, ll. 6 – 9. Judge Patterson more than doubled Watkins' bond and set it at \$70,000. R. 8, ll. 16 – 9, l. 1. As part of his basis for setting the bond, Judge Patterson said, "And the facts are pretty much in place. We've got the witnesses, everybody knows what – who the witnesses are and the evidence is." R. 8, ll. 16 – 22.

Watkins appeared before Judge Patterson again on March 27, 2008. At this hearing, Judge Patterson indicated he had read the Supreme Court opinion reversing him. R. 29, ll. 3 – 9. Judge Patterson said, "I – it's going to be very difficult to change the facts the way

they came out.” R. 30, ll. 13 – 14. Judge Patterson then said, “I haven’t read the – totally the case that was tried before Judge Pyle.” R. 30, ll. 15 – 16. This contradicted what Judge Patterson said in his PCR order when he stated he had the opportunity to review the record in its entirety. Supp. App. 3. Judge Patterson also stated that he did not know who the judge would be for Watkins trial. R. 28, ll. 13 – 15. Judge Patterson relieved the Greenville County Public Defender’s office. R. 31, ll. 20 – 22.

Watkins’ Motion to Recuse Judge Patterson

Judge Patterson held another hearing on April 18, 2008. R. 33. Watkins previously told the State that he wanted a bench trial. R. 37, ll. 8 – 9. With this knowledge in mind, the State indicated that it wanted to set the case in front of Judge Patterson. R. 36, ll. 13 – 18. They wanted judge Patterson to try this case because of his familiarity with Watkins at the previous bond hearing and the history of his motion to relieve his attorneys. R. 36, ll. 13 – 18.

Watkins asked Judge Patterson to reduce his bond. In response, Judge Patterson indicated an opinion about the strength of the evidence against Watkins. R. 38, ll. 15 – 22. Judge Patterson said, “[Y]ou’ve been convicted and you have served six and a half years. And I’m not going to say you’re going to be convicted again. But you know, a person knowing what the evidence is you – there’s a real good chance you’d be a flight risk, and for that reason the bond is set at \$70,000 and it just can’t be reduced.” R. 38, ll. 15 – 22.

Watkins, who was representing himself at this hearing, then immediately asked Judge Patterson “to step down from hearing my case.” R. 38, l. 25 – 39, l. 2. Without any discussion, Judge Patterson denied Watkins’ motion, stating:

I’m not going to recuse yourself (sic). I’d see that you got the fairest trial of anybody on the bench. You’re going to get your witnesses. You’re going to

get it all done. And I deny the motion to recuse myself. I've got nothing against you whatsoever.

R. 39, ll. 3 – 7. Watkins tried to respond, stating, “[Y]ou’ve been on my case since—I mean the original case—” when Judge Patterson interrupted him. R. 39, ll. 8 – 9. The judge then said, “I haven’t done anything except review what Judge Pyle did on the PCR. And [your trial counsel] told me the reason he didn’t call your alibi witness is because she – I think she pled guilty to the same crime and she wouldn’t have been an alibi witness.”¹ R. 39, ll. 10 – 14. Despite having adjudicated Watkins’ PCR, Judge Patterson then said, “I have not read all the transcript.” R. 41, l. 21.

Judge Patterson became frustrated with Watkins as he attempted to continue to argue for a bond reduction. Judge Patterson told him two times that he did not want to argue about the bond. R. 42, ll. 12 – 25. Judge Patterson again told them that he would be a flight risk that tried to correct his assessment of the evidence by saying that, “I don’t know what your chances are of you’re getting convicted or not.” R. 42, ll. 14 – 16. He then told Watkins, “We’re going to be here and I’m going to see that you get a fair trial, the fairest trial that any man on the face of the earth can get.” R. 42, l. 24 – 43, l. 2. Judge Patterson’s frustration increased as he told Watkins he was taking up the court’s time. R. 51, ll. 9 – 11.

During a hearing held May 30, 2008, Judge Patterson initially claimed ignorance of the previous trial. R. 63, l. 23 – 64, l. 2. Then Judge Patterson stated “but I would think that it’s going to be the same case that was previously tried.” R. 63, l. 23 – 64, l. 2. As Watkins made arguments concerning discovery and the conflicts of interest of the attorneys

¹ The State contends that the issue of Judge Patterson’s recusal is not preserved for appeal. This contention is without merit. Watkins was stating the grounds with specificity—that Judge Patterson “had been on his case since—” when the judge interrupted him. The judge mentioned the PCR in his ruling. This issue is preserved.

representing him, Judge Patterson said, "Listen, you cannot play around the courts and I made that perfectly clear." R. 68, ll. 3 – 4. Despite Watkins telling Judge Patterson that he had obtained discovery that he had not seen before, Judge Patterson responded, "And apparently it's going to be the same case that you sat in when it was tried before, whatever that was before Judge Pyle." R. 69, ll. 2 – 5. When discussing a continuance and Watkins' request for a lawyer, Judge Patterson said, "But Mr. Mauldin, Mr. Bannister for that matter, except you got a new trial based on something that he didn't do, and – but we got – and I explained you before, **we got to put this thing behind us.**" R. 78, ll. 5 – 8 (emphasis added).

Judge Patterson then appointed Stephen Henry ("Henry") as Watkins' attorney. R. 79, ll. 16 – 19. In his explanation of why he was appointing Henry as his lawyer, Judge Patterson told Watkins:

He's going to be your lawyer. And you ain't going to get rid of him. And we're going to call your trial real quickly. And he's not going to – he's got something in this writing, and I want the Appellate Courts to know. All these documents you've filed, and all these writings you give us, some of them is relevant in some of them is not. Nobody wants to protect your rights anymore than the Court, Mr. Mauldin, Mr. Henry, or Mr. Bannister, any other lawyer you've had. I know all these lawyers.

R. 79, l. 19 – 80, l. 2. At this hearing, Judge Patterson further told Watkins:

- "You're just pulling strings with this Court." R. 80, l. 11.
- "We tried to be fair with you." R. 80, ll. 22 – 23.
- "I don't know anything about your case. But my job is to not let people play games with the Court." R. 81, ll. 5 – 7.
- "And I'm going to try your case; so just get ready." R. 81, ll. 12 – 13.

- “[A]nd this is just not going to be a circus. It’s just going to be a trial. And you got the full transcript from the last case. I haven’t read it.” R. 85, l. 23 – 86, l. 1.

Watkins later filed a motion to relieve Henry as his attorney based on a conflict of interest with the Defender Corporation in Greenville County which was denied by Judge Patterson. R. 97, ll. 1 – 6.

Pre-Trial Hearings

On the morning of trial, Watkins filed a motion to relieve his attorney. R. 93, ll. 13-18. After a lengthy discussion and colloquy pursuant to Faretta v. California, 422 U.S. 806 (1975), Watkins decided not to represent himself. R. 117, ll. 14-22. However, after the conclusion of pre-trial motions, Watkins then made another motion to proceed *pro se*. R. 192, ll. 6-13. Judge Patterson stated:

I’m not spending any more time on this issue. He’s going to represent himself *pro se*. And I don’t want to be faced with this issue again. And I mean I—this is really trying—**kind of trying the patience of the Court**. But you have a Constitutional right to do that. Mr. Henry can be standby counsel and sit behind you, and you can represent yourself. Okay.

R. 193, l. 25—194, l. 6 (emphasis added). Watkins represented himself for the remainder of the trial with Henry as stand-by counsel.

Discussion

The Court of Appeals’ opinion reversing Judge Patterson is simple and direct because the principle is straightforward. In 1991, this Court determined that a criminal defendant should have a new set of hands weigh the scales of justice in a PCR. Floyd v. State, 303 S.C. 298, 400 S.E.2d 145 (1991). This same principle applies with even greater force when a PCR judge who has been reversed is asked to sit impartially over a new trial. This Court should adopt a *per se* rule requiring PCR judges who have been reversed to

recuse themselves from the retrial upon the motion of an applicant who is successful on appeal. Even if the Court declines to adopt such a rule, the unique circumstances of this case require reversal.

A Per Se Rule Extending Floyd v. State

The Court of Appeals correctly extended Floyd to this case and this Court should do the same. Floyd holds that in a PCR action, "a judge shall, upon motion, recuse himself if he was the judge who presided at the guilty plea, criminal trial, or probation revocation proceeding for which relief is being sought." Floyd at 299, 400 S.E.2d at 146. The Floyd court held that this rule would "eliminate even the suggestion of partiality." Id. The commentary to Canon 1 of the Judicial Code of Conduct states that "Public confidence in the impartiality of the judiciary is maintained by the adherence of each judge to [the] responsibility [of upholding the integrity and independence of the judiciary]. SCACR 501, Canon 1. Canon 2 states, "A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities." SCACR 501, Canon 2. Canon 3(C)(1) requires a judge to diligently discharge his administrative responsibilities without bias or prejudice. SCACR 501, Canon 3.

The rationale of Floyd and these canons applies with more force in this situation. A PCR judge who denied an applicant's claim would be more subject to the appearance of partiality than a trial judge. In a trial, the jury, not the judge, renders the verdict. In a PCR, the judge is the sole decider of the facts. The lack of a jury therefore makes a PCR judge more vulnerable to a charge of partiality.

Unlike a trial judge, a PCR judge is required to form an opinion as to the strength of the State's case against a defendant. In every PCR, the court must conduct a prejudice

inquiry. Strickland v. Washington, 466 U.S. 668, 687 (1984). The PCR judge must determine whether but for the alleged error there is a reasonable probability the outcome of the trial would be different. Terry v. State, 394 S.C. 62, 66, 714 S.E.2d 326, 329 (2011). In many PCR cases, the judge conducts this prejudice inquiry by deciding whether the evidence of guilt was overwhelming. Rosemond v. Catoe, 383 S.C. 320, 330, 680 S.E.2d 5, 11 (2009). These PCR standards for determining prejudice require a judge to form an opinion concerning the guilt or innocence of an accused far more than a trial judge who is merely concerned with the admissibility of evidence and its existence at the directed verdict and jury charge stages. See State v. Bostick, 392 S.C. 134, 138-39, 708 S.E.2d 774, 776-77 (2011) ("The jury weighs the evidence but when there is an absence of evidence, it becomes the duty of the trial judge to direct a verdict."). These considerations weigh heavily in favor of the adoption of the Floyd rule in cases such as the one at bar.

The State's analysis does not weigh these considerations. The State likens a PCR judge who is reversed to a trial judge who is reversed and who is called upon to re-try the case. This analysis fails to take into account the different role of a trial judge from a PCR judge. Trial judges are not called upon to form opinions about the weight of the evidence in a case. Judges recognize that their rulings on the admissibility of evidence are subject to attack. When a case is remanded for a new trial, a judge is given instructions from the appellate court concerning an evidentiary issue to follow. A PCR judge who is reversed is told that his opinion regarding the weight of the evidence is incorrect. This reversal, which is different in kind from a trial reversal, is more subject to attacks on a judge's partiality.

The State also argues that Floyd should be overturned. That issue is not before the Court. The only issue that is before the Court is whether Floyd should be extended to this

factual scenario. Regardless, Floyd has been the law in this state for almost twenty-five years. It has proved itself to be a good and workable rule and protects both criminal defendants, judges, and the reputation of our justice system. The rule of *stare decisis* provides sound guidance for rejecting this contention. The State's urging to adopt the federal convention used in motions pursuant to 28 U.S.C. § 2255 should also be disregarded. The federal procedure was in place when Floyd was adopted. Rule 4(a) governing § 2255 motions was adopted in 1976. 28 U.S.C. § 2255, R.4, Advisory Committee Notes. The Floyd court certainly knew of the federal procedure and chose differently. Nothing has changed in the interim to require the abandoning of the rule in Floyd.

The State argues that adoption of a *per se* rule of recusal will tax scarce judicial resources. This argument is wholly without merit. Very few cases will be subject to this rule for the simple reason that very few PCR judgments are reversed. The standard of review in a PCR action is whether "any evidence" supports the PCR judge's ruling. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). The burden of proof is on the applicant. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (internal quotations omitted). These procedural rules ensure that reversal of convictions in PCR actions will remain rare. Furthermore, as this Court recently addressed in its April 12, 2013, Order, any judge in a circuit or an adjoining circuit may sign a PCR order. Order of the S.C. Supreme Court dated April 12, 2013.

States are free to give their citizens greater freedom and more rights than the minimum required by federal law. State v. Forrester, 343 S.C. 637, 644-45, 541 S.E.2d 837, 840-41 (2001) (recognizing that South Carolinians have greater protections from unreasonable searches and seizures under state law than federal law). This Court should hold with that principle of safeguarding the rights of South Carolina's citizens and expand the rule of Floyd to the small number of successful PCR reversals.

The Unusual Circumstances of this Case Require Reversal

Several factors specific to this case required Judge Patterson to recuse himself. In his PCR order, Judge Patterson made an adverse credibility finding against Watkins, that he suffered no prejudice as the result of any alleged error, and made a clear error of law that resulted in Watkins' not receiving a new trial for over two years longer than if he had granted the application. Judge Patterson also stated that he "had the opportunity to review the record in its entirety." Supp. App. 3. The adverse findings, as discussed above, required Judge Patterson to form opinions about Watkins and the strength of the State's case not required of any trial judge. Second, Judge Patterson contradicted himself frequently during Watkins' retrial by stating multiple times that he had not read Watkins' transcript. To decide Watkins' PCR, he necessarily had to have read Watkins' transcript.

More disturbing are the unusual comments made by Judge Patterson during the proceedings leading up to the trial. As shown by the above-quoted comments, Judge Patterson was obviously frustrated with Watkins. Furthermore, the State's enthusiasm about trying the case before Judge Patterson—especially when it thought Watkins was waiving a jury trial—creates the appearance that Judge Patterson was inclined to be favorable to the State. "Under Canon 3(C), a judge should disqualify himself if his

impartiality might reasonably be questioned.” Ellis v. Procter & Gamble Dist. Co., 315 S.C. 283, 285, 433 S.E.2d 856, 857 (1993) (involving *ex parte* communications). The findings on the record made against Watkins in the PCR matter combined with the numerous statements recited above are evidence that the judge’s impartiality could reasonably be questioned. Judge Patterson should have recognized these issues and recused himself.

II.

Should the Court elect to address petitioner’s second issue, respondent’s conviction should be reversed because the trial judge abused his discretion by allowing respondent to represent himself at trial, after having vacillated on the issue in the months leading up to the trial, after having selected a jury and introducing respondent’s then-attorney to the jurors, and in placing the issue of respondent’s representation before the jury.

The Court need not address this issue if it affirms the Court of Appeals. However, in the event the Court does reach this issue, Watkins’ convictions should be reversed because the trial judge abused his discretion in how he handled whether Watkins would represent himself.

At the March 27, 2008, hearing, Watkins first suggested that he would want to represent himself. R. 26, l. 23 - 27, l. 11. The State’s position was that they believed Watkins should be represented. R. 28, l. 8 - 9. The judge concluded that he “would probably let [Watkins] do it if that’s what [Watkins wants]. R. 28, ll. 17 - 18. He reiterated that he would probably let him represent himself. R. 30, ll. 6 - 13.

At the April 18, 2008, hearing, the court again discussed the issue of Watkins' representation. It appears that Watkins did not have any representation at this hearing, and that he was, in fact, representing himself *pro se*:

MR. WATKINS: . . . All I want to do is ask for a fair chance to represent myself.

THE COURT: You got a fair change (sic) to represent yourself. We're going to do the trial— . . .

MR. WATKINS: Can I get a continuance?

THE COURT: No, sir. Everything is in place. You got a transcript. And there is no reason to keep putting this case off. It's something that happened in 2002. We're not going to do it. They're going to bring the witnesses in from out of state. And we're going to conduct this trial. And you're going to represent yourself.

I'm going to appoint a real good lawyer to sit behind you and help you a little bit, but he cannot be responsible for your trial. You cannot file an ineffective assistance of counsel or anything against him. You're going to be representing yourself.

R. 54, ll. 3 - 22.

At the May 30, 2008, Watkins asked for an attorney to represent him because of new discovery material he received. R. 63, ll. 17-20. Specifically, Watkins obtained a copy of the 911 tape. Watkins could not listen to the tape at the detention center R. 64, l. 3 - 68, l. 25. The importance of this tape became apparent at trial because it uncovered the existence of Reilly, the restaurant employee who hid from the police. Watkins reiterated that he needed a lawyer because of the new evidence the State produced. R. 68, ll. 1 - 2. The court responded:

Listen, you cannot play around with the Courts and I made that perfectly clear. The people in South Carolina want you to have a fair trial, Mr. Watkins. And I want you to understand that. You told me before you didn't want Mr. Mauldin. He is one of the best defense lawyers in Greenville County. He's a State employee now, or he was up until the

Governor vetoed the budget yesterday, but—I mean, these people nothing would please them more—I mean, nobody believes in the Constitution any more than Mr. Henry back there and Mr. Mauldin, and a lot of the lawyers you've had.

And I tried to emphasize to you the last hearing we had that you should have a lawyer to represent you. And you told me that you just might need a lawyer to do preliminary investigation for you and you were talking to Mr. Warder and—or something to that effect. I don't remember everything that was said. But we can't be—the Supreme Court sent this thing back for a trial. And this thing has been pending since 2001. And the Court just will not tolerate letting us sit here and not do anything about your case and you just sit down in the Greenville County jail. Your case has got to go to trial.

R. 68, ll. 14 - 25.

Watkins again asked for counsel. R. 78, ll. 15 - 16. The judge granted his request and gave him a lawyer, but told him he would not be allowed to relieve him:

THE COURT: We're going to see that everything is taken care of. Now, he's your lawyer. And he's going to speak for you from now on. Do you understand that? He will not be relieved. And I'm going to try your case, so just get ready.

MR. WATKINS: Let me ask you this.

THE COURT: That's it for the day. You talk to him and everything goes through him.

MR. WATKINS: I have a motion.

THE COURT: You're not representing yourself any more.

MR. WATKINS: I know, but I got—

THE COURT: You wanted a lawyer. You've got one. You're not representing yourself. So you cannot address the Court. We can't have two people representing you. You can't do it alone with Mr. Henry. You've got to follow his advice.

MR. WATKINS: But State versus—I mean Foretta (sic)—

THE COURT: He can explain all that and he's going to speak.

MR. WATKINS: -- versus—Foretta (sic) versus California—

THE COURT: Take him away.

R. 81, l. 9 - 82, l. 6. The judge did not have him taken immediately away, but did inform him that he had had his "chance" to represent himself. R. 82, ll. 21 - 23.

At the September 11, 2008, hearing, Watkins again requested to be allowed to proceed *pro se*. Watkins told the judge that he believed a conflict of interest existed because Henry was on the Board of Directors for the Defender Corporation which oversees the Greenville County Public Defender's office. He believed this conflict accounted for the fact that Henry was not filing the motions that he wanted filed in his case. R. 90, l. 1 - 97, l. 10. Watkins earlier stated that he intended to sue the Defender Corporation. R. 23, ll. 19 - 21. The motion was denied.

On the morning of trial, Watkins filed a motion to relieve his attorney. R. 93, ll. 13-18. Before he conducted a *Faretta* colloquy, the judge stated, "But you can represent yourself. I'm going to have to conduct a hearing and ask you a lot of questions, but I've got to know—the reasons you've given me right now as far as you getting more in and can do more than Mr. Henry can, it's just not an accurate statement." R. 97, ll. 6 - 10.

The judge asked Watkins general questions about his background. R. 108, ll. 4 - 25. He asked him whether he had taken any medications, drugs or alcohol in the past 24 hours. He asked him if there were any competency issues; any physical, emotional, or nervous problems, or anything else that would affect his ability to understand what he was doing. R. 109, ll. 4 - 25. He asked if he had any formal training in law. He did not. R. 110, ll. 1 - 3. He asked if he had any other experiences with criminal trials. He did not. R. 110, ll. 4 - 9.

Watkins testified he understood the charges contained in the indictment. R. 110, ll. 10 - 18.

He understood the range of possible punishments. R. 110, ll. 19 - 25.

Then, when the judge asked if he knew the elements of the crime, Watkins responded that he did not. R. 111, ll. 1 - 6. The judge did not inquire further. He asked if Watkins was familiar with the rules of criminal procedure. Again, Watkins replied he was not. Watkins was not familiar with what he may or may not be able to say in opening statements. R. 112, l. 13 - 113, l. 2. The judge did not inquire further.

The judge asked if he understood that he would need to make proper objections to preserve issues for appeal; and he reviewed his right to testify. R. 113, ll. 11 - 114, l. 23. They discussed prior convictions. R. 115, ll. 7 - 10. The judge told Watkins he believed it was unwise for him to represent himself. R. 116, ll. 8 - 22.

At the end of this colloquy, Watkins decided not to represent himself. R. 117, ll. 14 - 22. The court then heard pre-trial motions argued by Henry, including making a motion for a continuance based on the newly discovered witness referenced on the 911 tape.² R. 118, l. 1 - 129, l. 17; R. 130, l. 23 - 136, l. 15. The jury was selected. The parties discussed prior convictions which may be used for impeachment purposes. Henry then made a motion to suppress the fruits of the search warrant executed in this case, which was denied. R. 137, l. 4 - 191, l. 25.

At the conclusion of the pretrial motions, Watkins then made another motion to proceed *pro se*. R. 192, ll. 6 - 13. After again telling Watkins that he was likely to make mistakes, and informing him again that he would not be allowed to file an ineffective

² Henry presented essentially the same ground which, when presented earlier by Watkins, frustrated the trial judge.

assistance of counsel claim against himself, the judge ruled that Watkins would represent himself and Henry would act as standby counsel. R. 193, l. 25 - 194, l. 6.

After the jury was sworn, the judge addressed the jury:

Now, I informed you yesterday, and I introduced Mr. Henry as Mr. Watkins' lawyer. Mr. Watkins has chosen to exercise his Constitutional right and represent himself, and not be represented by Mr. Henry, who's in the courtroom here.

R. 197, ll. 8 - 12. After opening arguments, and before the jury, the judge said this:

I need to put in the record that I did have a hearing, and I found affirmatively that it was implied that Mr. Watkins knowingly, intelligently and voluntarily waived his right to council (sic) and decided to proceed with himself. And I find that he did it knowingly, voluntarily and intelligently. I want to put that in the record. Okay.

R. 200, ll. 7-13.

The judge abused his discretion by allowing Watkins to proceed *pro se* because he did not exercise his discretion in making the decision. State v. Smith, 276 S.C. 494, 280 S.E.2d 200 (1981). Rather, the judge granted Watkins' request simply because he was frustrated with Watkins. The judge allowed Watkins to proceed *pro se* prior to conducting a Faretta colloquy. As referenced above, at the March 27th hearing, the judge had already decided that he would "probably" let Watkins represent himself. By the time of the April 18th hearing, Watkins was appearing in court on his own motions. The court was quite clear that Watkins was representing himself at that point, but no Faretta colloquy had been conducted at that time.

The court had no difficulty allowing him to represent himself at trial at that point, although it did later, and after an attorney was appointed to represent Watkins. The judge then denied Watkins' request to proceed *pro se* at the September 11th hearing further shows the lack of discretion exercised by the judge. Once Watkins was assigned an attorney, the

judge would not allow him to relieve that attorney until after the jury had been sworn. If the judge believed that Watkins had the unfettered constitutional right to represent himself he should have allowed Watkins the right to relieve his attorney on September 11th. Instead, he summarily denied the motion

Finally, the judge did not provide his reasons for changing his mind on the record. There were no additional facts brought to the judge's attention between the September 11th hearing and the trial that would have justified the judge's granting the request at that late point, but not at an earlier time. This point strongly suggests that the judge did not predicate his decision on anything other than his frustration. It is also notable that the judge granted the request after the jury had been selected and Watkins' attorney was introduced to them. It would have been well within the judge's discretion to have denied Watkins' request at that point based on the timing of the request. See State v. Fuller, 337 S.C. 236, 523 S.E. 2d 168 (1999); State v. Reed, 332 S.C. 35, 503 S.E.2d 747 (1998). Instead, he granted it at that late point.

Further compounding the problem, Judge Patterson brought the matter to the jury's attention. The judge told the jury that he conducted a hearing on the matter to which they were not privy. The judge's actions brought the issue of representation to the forefront of the jurors' minds. Certainly they would have wanted to know why Watkins started off with an attorney and then no longer had one. This was improper.

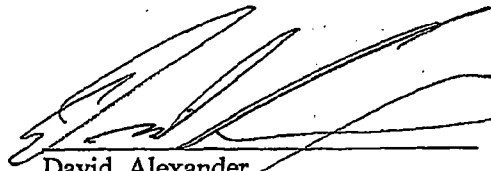
It is also worth noting that the Faretta colloquy that was conducted was unrelated to the judge's decision-making in this case. He never engaged in the colloquy prior to initially allowing Watkins to represent himself, nor did he engage in it prior to his decision to not allow Watkins to represent himself. For some reason, he only seemed to believe that he

needed to give the warnings on the day of trial. This strongly suggests that the judge was merely attempting to sanitize his actions by going through the motions, but without an appreciation of the values to be protected by the colloquy. Further evidence of the *pro forma* quality of the colloquy is the fact that Watkins gave negative responses to the judge's inquiries, but the judge never followed up. Therefore, should the Court reach this issue, it should affirm the Court of Appeals' reversal of Watkins' convictions on these grounds.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals reversing Watkins' convictions should be affirmed and this case remanded for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'David Alexander', written over a horizontal line.

David Alexander
Appellate Defender

ATTORNEY FOR RESPONDENT.

This 8th day of May, 2013.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenville County

Larry R. Patterson, Judge

THE STATE,

PETITIONER,

V.

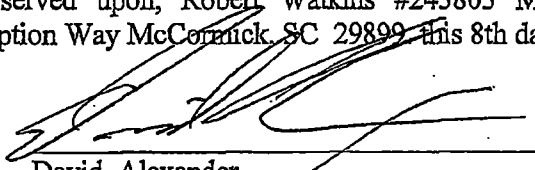
ROBERT WATKINS,

RESPONDENT,

Appellate Case No. 2011-195272

CERTIFICATE OF SERVICE

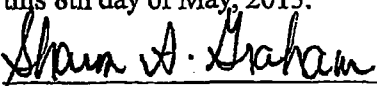
The undersigned attorney hereby certifies that a true copy of the Brief of Respondent and Designation of Matter in the above referenced case has been served upon William M. Blitch, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and also served upon, Robert Watkins #243803 McCormick Correctional Institution 386 Redemption Way McCormick, SC 29899 this 8th day of May, 2013.



David Alexander
Appellate Defender

ATTORNEY FOR RESPONDENT.

SUBSCRIBED AND SWORN TO before me
this 8th day of May, 2013.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: April 27, 2022.

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

The State, Petitioner,

v.

Robert Watkins, Respondent.

Appellate Case No. 2011-195272

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Greenville County
Larry R. Patterson, Circuit Court Judge

Opinion No. 27334
Heard October 16, 2013 – Filed December 4, 2013

REVERSED

Attorney General Alan McCrory Wilson and Assistant
Attorney General William M. Blich, Jr., both of
Columbia, and William Walter Wilkins, III, of
Greenville, for Petitioner.

Appellate Defender David Alexander of Columbia, for
Respondent.

JUSTICE PLEICONES: We granted certiorari to review a Court of Appeals decision that reversed respondent's convictions for armed robbery and possession of a weapon during a violent crime. *State v. Watkins*, Op. No. 2011-UP-091 (S.C.).

Ct. App. filed March 8, 2011). The Court of Appeals purported to adopt a rule¹ requiring that a trial "judge must grant a recusal motion made during a new trial arising from a [post-conviction relief] hearing in which the judge also sat." *Id.* We reverse the holding that creates this rule, find no error in the trial judge's denial of respondent's recusal request, determine there is no merit to respondent's *Faretta*² issue under Rule 220(C)(1), SCACR, and reverse the decision of the Court of Appeals.

ISSUE

Did the Court of Appeals err in creating a rule mandating that a trial judge recuse himself upon motion if he heard the post-conviction relief (PCR) matter that led to the new proceeding?

ANALYSIS

Respondent was first convicted of armed robbery and weapons possession in a trial held in 2002. Following the Court of Appeals' dismissal of respondent's *Anders*³ direct appeal in 2004,⁴ respondent file an application for PCR. Judge Patterson denied the application, finding (1) that respondent was not credible and (2) that trial counsel's belief that he had complied with the alibi notice requirement of Rule 5(e)(1), SCRCrimP, while erroneous, was "well founded." This Court granted certiorari and reversed, holding that trial counsel was ineffective in failing to preserve respondent's right to an alibi charge. *Watkins v. State*, Memo. Op. 2008-MO-001 (S.C. Sup. Ct. filed January 14, 2008).

After remand, the matter came before Judge Patterson in March 2008 on cross-motions by the Public Defender's Office to be relieved from representing respondent and respondent's motion that it be relieved. Ultimately, the judge relieved counsel and informed respondent, who was hoping to hire a private attorney, that he would appoint counsel for respondent if he made a timely request before the case was scheduled to be tried in July 2008. At a subsequent hearing

¹ Since this rule was announced in an unpublished memorandum opinion, it had no precedential value. Rule 220(a), SCACR.

² *Faretta v. California*, 422 U.S. 806 (1975).

³ *Anders v. California*, 386 U.S. 73 (1963).

⁴ *State v. Watkins*, Op. No. 2004-UP-406 (S.C. Ct. App. filed June 22, 2004).

before Judge Patterson in April 2008, the State announced that respondent wanted a bench trial, and that the State wished to set it for June 2 before Judge Patterson, given his familiarity with respondent's request to proceed pro se and the fear that once the case was called for trial that respondent would then seek to delay by asking for representation. Respondent's request that Judge Patterson recuse himself for the retrial because he had presided at respondent's PCR hearing was denied.

At a hearing in May 2008, respondent, appearing pro se, made numerous motions. As the situation deteriorated, Judge Patterson ordered the attorney he had appointed as stand-by counsel to take over representation. When the case was called for trial in September 2008, respondent again asked that appointed counsel be relieved. After the *Faretta* hearing, however, respondent changed his mind and asked that the attorney continue to represent him. Respondent, however, renewed his motion to proceed pro se following an in camera suppression hearing. The motion was granted and respondent represented himself at the trial. Respondent was convicted, sentenced, and appealed.

On appeal, the Court of Appeals held it was reversible error for Judge Patterson to deny respondent's request that he recuse himself, analogizing this case to *Floyd v. State*, 303 S.C. 298, 400 S.E.2d 145 (1991). *Floyd* adopted a *per se* rule that a judge scheduled to hear a PCR matter must, upon request, recuse himself if he presided over the guilty plea, criminal trial, or probation revocation for which PCR is sought.⁵ The State contends the Court of Appeals' extension of *Floyd's* rationale to this situation was error. We agree.

First, it is questionable whether respondent's request that Judge Patterson recuse himself, made only at the April 2008 hearing preserved the recusal issue for appeal when it was not renewed either at the May 2008 hearing or at the September 2008 trial. Second, a retrial judge is in a different posture than the PCR judge. A PCR judge is frequently asked to review his own conduct in the trial, plea, or probation revocation proceeding, albeit most often through a claim of ineffective assistance of counsel. On the other hand, a PCR judge tasked with retrying the case is not being asked to judge his own prior rulings. Moreover, the trial judge is often required in effect to pass upon the guilt of the defendant, while guilt or innocence

⁵ We granted the State's petition to argue against the *Floyd* precedent. Since *Floyd*, which establishes a rule for PCR, is not before the Court in this direct appeal, we decline to reconsider *Floyd* at this juncture.

is not at issue in a PCR hearing. *Compare State v. Atterberry*, 134 S.C. 392, 133 S.E. 101 (1926) (where trial judge expressed opinion that defendant was guilty when sentencing defendant, must recuse at retrial upon objection) *with State v. Hayes*, 272 S.C. 256, 250 S.E.2d 342 (1979) (no recusal necessary where trial judge had already adjudicated defendant's younger brother delinquent based upon the same offense).

While we disagree with the rule announced by the Court of Appeals, we emphasize that a criminal defendant may ask the judge who heard his PCR to recuse herself from the retrial of the matter for any of the reasons for which recusal may be sought. Here, we find no evidence of judicial bias warranting Judge Patterson's recusal. Canon 3(E)(1)(a), SCACR.

CONCLUSION

The decision of the Court of Appeals is

REVERSED.

TOAL, C.J., BEATTY, HEARN, JJ., and Acting Justice James E. Moore, concur.

FORM 5

STATE OF SOUTH CAROLINA)

COUNTY OF Greenville)Robert Watkins 343803
Full name and prison number (if any) of Applicant.)

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

2014-CP-23- 00589

APPLICATION FOR

POST-CONVICTION RELIEF

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WIGGINS
2014 JAN 1 10 4 59INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention M^e Cormick Correctional Institution
2. Name and location of Court which imposed sentence 13th Judicial Circuit Greenville County
Court of General Session - Greenville County
3. Name(s) of co-defendant(s) (if any) Elena Doruna Pelzer
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2002-65-23-1063
 - (b) _____
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) September 24th, 2011
 - (b) _____

- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty ✓ _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence? yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. South Carolina Court of Appeals
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. reversal
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. March 8, 2011
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. Unpublished Opinion 2011-LIA 091
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) N/A
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) ~~the State of South Carolina~~ See attachment
 (b) ~~the State of South Carolina~~ See attachment
 (c) ~~the State of South Carolina~~ See attachment

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

- (a) See Attachments
 (b) _____
 (c) _____

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

- (a) any petition in a State Court under South Carolina Law? Yes
 (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO
 (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO
 (d) any other petitions, motions or applications in this or any other Court? NO

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

- (a) the specific nature thereof:
 i. The S.C. Attorney General's Office filed a Petition for writ of Certiorari
 ii. _____
 iii. _____
 iv. _____
 (b) the name and location of the Court in which each was filed:
 i. S.C. Supreme Court, P.O. Box 11330, Columbia SC 29211
 ii. _____
 iii. _____
 iv. _____
 (c) the disposition thereof:
 i. reversal
 ii. _____
 iii. _____

- iv. _____
- (d) the date of each such disposition:
- i. Dec 4, 2011
- ii. _____
- iii. _____
- iv. _____
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
- i. Opinion No 27334
- ii. _____
- iii. _____
- iv. _____
14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?
- NO
15. If you answered "yes" to (14) identify:
- (a) which grounds have been presented:
- i. _____
- ii. N/A
- iii. _____
- (b) the proceedings in which each ground was raised:
- i. N/A
- ii. _____
- iii. _____
16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
- (a) _____
- (b) N/A
- (c) _____
17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? NO
- (b) your trial, if any? did not represent me at trial, But did pre-trial Motion to Suppress
- (c) your sentencing? NO
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? NO
18. If you answered "yes" to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
- i. Stephen John Henry 406 Pettigru St Greenville SC
- ii. Elizabeth Franklin Best ; David Alexander SCC ID Division 7 Appellate Dyers
- iii. _____
- (b) the proceedings at which each such attorney represented you:
- i. Pre-trial Motion to Suppress
- ii. Appeal
- iii. _____
19. State clearly the relief you seek in filing this application:
New trial
20. Are you now under sentence from any other court that you have not challenged?
NO

STATE OF SOUTH CAROLINA)
)
 County of)

VERIFICATION

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

Robert M. Watkins

SWORN to and subscribed before me this 20th
 day of Jan, 2014.

Frank (L.S.)
 Notary Public

My Commission Expires: 12-16-2019

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

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

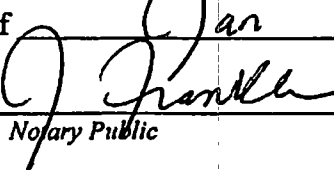
- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.



Applicant

SWORN or affirmed to and subscribed before me this

20th day of Jan, 2014.


Notary Public

My Commission Expires:

12-16-2019

Attachment goes with my Form 5
Application for post Conviction Relief

10 state concisely the grounds on which you base your allegation that you are being held in custody unlawfully.

(a) Applicant claims that he is being held in custody unlawfully in violation of his 5th, 6th, 14th USCA Right to Due Process right to effective assistance of Counsel.

(b) Applicant claims that he is being held in custody unlawfully in violation of his right to effective assistance of Appellate Counsel. 5th, 6th, 14th USCA Rights

(c) Lack of subject matters Jurisdiction.

(d) Brady violation. USCA 5th, 14

(e) Violation of 5th Amendment USC: Double Jeopardy Clause

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

(a) Applicant claims that pursuant to the first prong test of Strickland v Washington, 466 U.S. 688, 687-88, (1984) that the Court Appointed Counsel Stephen John Henry of 406 Pettigrew Street, Greenville SC, 29601, during pre trial Motion to Suppress hearing, performance fell below an objective standard of reasonableness in failing to

1) Articulate a 4th Amendment claim pursuant to Franks v Delaware, 438 US 154, and State v Smith, 392 S.E.2d 182

2) Call the victims and officers and defendants during the evidentiary suppression hearing to make a substantial showing that a false statement was knowingly and intentionally made with reckless disregard for the truth pursuant to Franks v Delaware

Id at Trial transcript of Case 2002-6523-1063
Before The Honorable Judge Larry R. Patterson at the
13th Judicial Circuit Greenville County on 9.24.2008

3) To challenge the search warrant, pursuant to violation of SC 1976 Code of law § 17-13-141

a) 1-6 Id at trial transcript page

4) To file a Motion For Judge Patterson to recuse himself, pursuant to SCACR Sol Canon 3E(1)(1)

5) Inform the trial Court that Applicant was making a special Appearance, and Motion the trial Dismiss or Squash the indictment on grounds it was obtained in violation of Applicant's procedural due Process of Rights and equal Protection of rights, to SCACR Rule 3 (c), and that the court lacks personal jurisdiction over Applicant due to an illegal Process, and a practice that is unconstitutional and a violation of SC Const article III § 34, and that violate the SC Const article 1 § 8 Separation of Powers act under SC 1976 Code of law § 1-7-330.

- 6) to inform Applicant that he had access an Identification expert.
- 7) to inform Applicant what state witness Krystyna Rielly told him when interviewed her, about what her testimony would be, so that Applicant would know what her testimony would be, and how to cross-examine her, and impeach her credibility.
- 8) In waiting up until the trial date to coerce Applicant to agree to allow him to renew the motion for Applicant to proceed pro se. after Applicant decided to allow counsel to represent him, because Applicant, did not understand or know the rules of Criminal Procedure or Rules of Evidence.
- 9) to disqualify himself under conflict of interest once Judge Patterson decided to appoint him a counsel, because of the existing conflict of interest.

11)

(B)

Applicant claims that pursuant to the first prong test of Strickland v Washington 466 U.S. 668-687; 88 (1984) that his appellate Defense Counsel Elizabeth Franklin and Best performance fell below an objective standard of reasonableness in

(1) failing to protect Applicant's rights to a New trial granted to him by S.C. Court of Appeals on March 8 2011

(2) failing to file a return to Assistant Attorney General William M. Blich Jr June 15 2011

Expedited Motion to recall the remittitur

(3) failing to file a Motion to vacate the S.C. Court of Appeal June 30, 2011 order recalling the remittitur pursuant to SCRPC 606(3) fraud upon the court

Applicant claims that pursuant to the second prong test of Strickland v Washington, 466 U.S. 668 687-88 (1984)

that had it not been for Appellate Counsel deficient performance, that there is a strong probability that the outcome of the proceeding would have been different.

B2

Applicant claims that pursuant to the first prong test of Strickland v Washington supra Appellate Counsel David Alexander performance

fell below an objective standard of reasonableness in failing to offer Applicant brought to his attention and presented him with proof.

to (1) Bring to the SC Supreme Court attention the acts of fraud upon the SC Court of Appeals By assistant Attorney General William M. Blitch Jr. By including false statement in an expedited Motion to recall the remittitur on June 15, 2011 and that based on the false statement the SC Court of Appeals recalled the remittitur

2) ineffective assistance in telling me there is nothing he can do since the remittitur has been recalled on a petition for writ of certiorari has been filed and granted by SC Supreme Court

3) in failing to file a return Motion pursuant SCACR 240(c) to assistant Attorney General William M. Blitch Jr. Motion out of time to argue against Precedent

4) failing to present evidence to show judicial Bias disqualifying Judge Patterson pursuant to SCACR 501 Canon 3 E(6)(c) during oral argument before SC Supreme Court on Oct 16, 2013

- 5) failing to take any exception to the recalling of the remittitur

Applicant claims pursuant to the Second Prong test of Strickland v. Washington Supra had it not been for Both Appellate Counsel's Elizabeth Franklin Best and David Alexander deficient performance there is a strong probability the outcome of the proceeding would have been different.

1. The SC Court of Appeals would have not granted assistant attorney General William M. Blitch Jr. expedited motions to Recall the remittitur. Therefore the SC Court of Appeals Judgment in Applicant's appeal will not be. would have been denied granting me a new trial.

11

C. Applicant states that the 13th Judicial Circuit Court of Greene County Criminal Jurisdiction under S.C. Code article 11 over the subject Matters b. Indictment 2002 GS-23-1003 was not satisfied on Oct 23-25th 2002 or September 22-24th 2002. The procedures practiced by the solicitor's office in place of Section 8 Rule 3(c).

11

(d). Applicant claims he is being held in custody in violation of his Due Process of Rights to a fair trial, on grounds that the government violated his 5th 14th U.S.C. Rights pursuant to Brady v Maryland, 373 U.S. 83, In failing to disclose favorable evidence to him that is material, and that there exists a reasonable probability that disclosure of the evidence would have changed the outcome of the proceeding United States v. Bagley 473 U.S. 667, 682 (1985)

Double Jeopardy

11

- (e) Applicant claims that he is being held in custody in violation of the USCA 5th double Jeopardy clause. That on 9-24-2008 The Honorable Judge Patterson sentenced him for violation of §16-23-490 Poss of a Wpn during a violent crime case 2002-65-23-106 to 5 years consecutive, after Applicant had already served the same sentence imposed by Judge Victor C. Rife Jr. on Oct 25th 2002 under case 2002-65-23-106 under an concurrent sentence to run concurrent both violations § 16-11-350 Armed Robbery case 2002-65-23-106 time credited from 12-19-01.

Facts

On October 25th 2002 in Reference to Indictment 2002-65-23-106 for Armed Robbery §16-11-350 and Poss of a Wpn during a violent crime §16-23-490. The Honorable Judge Patterson sentenced Applicant to 30 years for armed Robbery and 5 years to run concurrent for Poss of a Wpn during a violent crime §16-23-490, time credited from 12-19-01. SC Supreme Court reversed the Oct 25th 2002 conviction on January 14th 2006 in its Memorandum Opinion 2006-001 Remand for a New trial. Applicant had served the concurrent 5 years sentence for count two of Indictment 2002-65-23-106 for Poss of a Wpn during

Applicant asks that this court vacated that sentence
imposed by Judge Harry R. Patterson for violation
of 5-1970 Code of Laws 16-23-490 Poss of a Wpn
during a period of 5 years consecutive
sentences to run consecutive to the 25 year
sentence imposed for violation of 16-11-330
Armed Robbery under indictment 2002-05-23-10063

a violent crime 10-13-90 from 12-19-01 his release
 For New trial on Feb 6th 2008 from SCOL. For
 Applicant time for the concurrent sentence can coincide
 with the armed Robbery sentence of 30 years that begin
 on 12-19-01 would have ended day for day on
 12-19-06 85% of 3 years is 42.12 months.

For U.S. v Arrellano - Riss 797 F.2d 820, 524, 25
 (9th Cir 1986) (double jeopardy barred increasing
 sentence for aiding and abetting drug crimes on
 remand after reversal of related weapons
 conviction because defendant already served original
 sentence.)

Applicant after being found guilty during a jury
 trial of the same case, same Indictment for
 Armed Robbery and Poss of a wpn during a violent
 Crime Case 2002 SS-28-1063 on Sept 24 2008

Judge Leroy E. Patterson in violation of the
 double jeopardy clause of the 5th Amendment
 of the U.S.C. sentence Applicant to a consecutive
 sentence of 3 years for violation of 16-23-490
 Poss of a wpn during a violent crime to run
 consecutive to a 25 year sentence imposed for
 violation of 16-11-330 Armed Robbery.

The State of SC
County of Greenville
Robert Watkins
- vs -

The State of South Carolina

In the 13th Judicial Circuit
Court of Common Pleas
Greenville County

January 27th 2014

Dear Mrs Leanda King

How are you doing? Ma'am
May the peace and blessings, Grace and Mercy
of God Almighty be upon you and your loved ones

As for myself, I'm waiting on the rest of the
documents I've requested. I had to go
ahead and file my Application for Post Conviction

Relief, because everyday could toward
my habeas corpus, until I file a PCR Application
tolling the statute of limitation time period.

Ma'am, can you please file my PCR application,
forward a copy to the S.C. Attorney General's Office,
and send me a filed copy of the Application
and attachments.

God Bless You all Thank you

Sincerely Yours

Robert Watkins 293803 FY

197 A

M.C.I

386 Redemption Way

Mt Carmel SC 29809

Robert W. W. 243803
Applicant
vs

The State of South Carolina
Greenville County
Respondent

To The 13th Judicial Circuit Court 779
of Common Pleas
Greenville County

PCR Civil Case # 2014-CP 23-00589

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL J. WICKENSIMER
2014 APR 2 PM 3 08

4-2-14

JW

Amendment to PCR application

ENTERED COMPUTER

Dear clerk of Court of Common Pleas.

Assist clerk Leanda King

Please assign file this amendment to my
PCR application case 2014-CP 23-00589 and
send a copy to the Solicitor's office, the attorney General's
office and the administrative judge of The Court of Common
pleas; and return a copy eligible to me for my records
along with ^{a copy of} the court of Common Pleas schedule for
Court of Common Pleas for PCR Evidentiary hearing for
2014.

Memorandum to P.R. Applicant,

Case # 2014 CP-13-00589

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

(F) I am being held unlawfully in violation of my Due Process of Rights and Equal Protection of Right to effective assistance of counsel in my First Appeal Evitts v Lucey 105 S.Ct. 530. Violation of S.C. Const. article 1 section 3.; S.C. Const. article 1 section 14.; U.S.C.A. 5th, 6th, 14th.

11. state concisely and in the same order the facts which support the grounds set out in 10.

(10)(F). My Appellate Defense Counsel Elizabeth Franklin Best pursuant to the first prong test in Strickland v Washington 466 U.S. 688-88 (1984) performance fell below an objective standard of reasonableness in failing to (i) file a return pursuant to SCACR 240(e), to Assistant Attorney General William M. Birch Jr Expedited Motion & recall the committee.

(ii) file a Motion pursuant to SCACR Rule 60(b)(3)(4) to dismiss Assistant Attorney General William M. Birch Jr. Petition

For a Writ of ~~Ceteri~~ Certiorari, on grounds of fraud upon the Court, misrepresentation, or other Misconduct of adverse party and ~~Judgment is void~~ Judgment of SC Court of Appeals Order recalling the remittitur is void.

10. (F) My Appellate Defense Counsel David Alexander pursuant to the first prong test in Strickland v Washington, 466 U.S. 688-689, 88(1984) performance fell below an objective standard of reasonableness in failing to: (i) File pursuant to ~~SCCCP~~ Rule 60(b)(3)(4) ~~pedagogical~~ motion to dismiss the States "Assistant Attorney General William M. Blitch Jr. Petition for a Writ of Certiorari, on grounds of fraud upon the Court, misrepresentation or Misconduct of the adverse party."

(ii) take a position with respect to the reason for the recall of the remittitur, and bring to the attention of the Court, the misconduct of the adverse party, Assistant Attorney General William M. Blitch Jr. fraud upon the Court, to get the remittitur recalled so he could file a petition for Writ of Certiorari.

(iii) File a petition for rehearing in reference to SC Supreme Court Reversal of SC Court of Appeals reversal of my conviction in SC Court of Appeals opinion.

2008-UP-091 ~~etc.~~ SC Supreme Court Opinion No 27334
 Heard October 16, 2013. - filed December 29, 2013. Reversed.
 Appellate Counsel should have filed a ~~not~~ petition for
 rehearing in order to protect my rights to Federal Habeas
 Corpus by exhausting all state remedies or procedures.
 Such a Petition for a rehearing. Failure to file a ^{Rehearing} ~~rehearing~~
 prejudiced me under the second prong test of Strickland
v. Washington 466 U.S. 668, 687-88 (1984) by meeting Exhaustion
 requirement, and to Federal Habeas Corpus; access to Federal
 Court with this issue,

10 (6). I am being held in custody unlawfully in violation
 of S.C. Const. article V § 1. and S.C. Const. article V § 4.
 and in violation of my due Process of Rights and Equal
 Protection of Rights under USCA 5th, 14th to S.C.
 Const article V § 1 and S.C. Const article V § 4. Due
 to the unconstitutional ~~practice~~ local practices of
 the Solicitors Office of Greenville County. As a
 result of these constitutional violations, Indictment
 2002-6523-0063 is void, and Therefore the trial Court
 subject Matters Jurisdiction was not satisfied;

Applicant would also Amend his conclusion to the issues raised in the filing of his PCR Application Case 2014-CP-23-00589, with Office of the Clerk of Court Common Pleas on Jan. 31 2014. along with issue raised in 4-29-14 Amended issues.

In conclusion of all issues raised as subject to further amendment under SCRCP 71.1(d). Applicant Relief Sought is dismissal of Indictment 2002-6523-1063 and the granting of a new trial here on all issues raised in (10) and (11) of PCR Application and Amendment.

As of the filing of this Amendment to my PCR Application and Conclusion of Relief Sought: The SC Attorney General's Office has 30 days to make its return. S.C. Code Ann § 17-27-70 (Kee3) if the State fails to respond within the ~~period~~ specified period, the applicant must conclusively show he was prejudiced by the State's delay in order to receive the relief requested in the application.

Kneze v State, 236 S.E.2d 746, 747 (S.C. 1977) per curiam) Citing Herring v State, 206 S.E.2d 885 (S.C. 1974) (per curiam) See also Skazak v South Carolina, No 2003-CP-10-766, 2003 WL

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	C.A. No. 2014-CP-23-0589
COUNTY OF GREENVILLE	)	
	)	
Robert Max Watkins,	)	
S.C.D.C. No. 243803,	)	
	)	
Applicant,	)	
	)	RETURN
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

In response to the post-conviction relief application filed January 31, 2014, the Respondent would show this Court:

I.

The Greenville County Grand Jury indicted the Applicant at the February 2002 term of General Sessions for armed robbery (2002-GS-23-1063, count 1) and possession of a weapon during commission of a violent crime (2002-GS-23-1063, count 2). Stephen J. Henry, Esquire represented the Applicant.

The State brought the case to trial.¹ After trial began, the Applicant successfully argued to have counsel relieved and proceeded pro se. The jury found the Applicant guilty of the charges as indicted. On September 24, 2008, the Honorable Larry R. Patterson sentenced the Applicant to consecutive terms of twenty-five years for armed robbery and five years for possession of a weapon during commission of a violent crime.

¹ The Applicant was originally convicted of these charges on October 20, 2002 and was unsuccessful in his subsequent direct appeal and PCR actions. Upon appeal from the denial of PCR, however, the South Carolina Supreme Court reversed and remanded the case for a new trial. Watkins v. State, 2008-MO-001 (S.C. Sup. Ct. filed Jan. 14, 2008).

A notice of appeal was filed at the South Carolina Court of Appeals. Elizabeth A. Franklin-Best, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal. The Court of Appeals reversed the Applicant's convictions and sentences. State v. Watkins, Op. No. 2011-UP-091 (S.C. Ct. App. filed March 8, 2011). The Respondent filed a petition for writ of certiorari at the South Carolina Supreme Court. The Applicant was represented by David C. Alexander, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense. The Supreme Court granted the petition and the parties submitted briefs. The Supreme Court reversed the decision of the Court of Appeals on December 4, 2013. State v. Watkins, 406 S.C. 360, 752 S.E.2d 261 (2013). The Remittitur was sent on December 20, 2013.

Attached herewith and incorporated herein by reference are the records of the Greenville County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the trial transcript, and the appellate records.

II.

In his application for post-conviction relief, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel (Stephen J. Henry) during a pre-trial suppression hearing:
 - a. Failed to articulate a Fourth Amendment claim pursuant to Franks v. Delaware.
 - b. Failed to call the victims, officers, and defendants during the hearing to show false statements were made with reckless disregard for the truth.
 - c. Failed to challenge the search warrant pursuant to S.C. Code Ann. § 17-13-141.
 - d. Failed to file a motion for the trial judge to recuse himself pursuant to Canon 3(E)(a)(1).
 - e. Failed to "inform the trial court that Applicant was making a

- special appearance, and motion the trial dismiss or squash the indictment on grounds it was obtained in violation of Applicant's procedural due process of rights and equal protection of rights, to SCRCrimPRule 3(c), and that the court lacks personal jurisdiction over Applicant due to an illegal process, and a practice that is unconstitutional."
- f. Failed to inform the Applicant he had access to an identification expert.
 - g. Failed to inform the Applicant what State witness Reilly told him when he interviewed her and what he testimony would be.
 - h. Waited "up until the trial date to coerce Applicant to agree to allow him to review the motion for Applicant to proceed pro se after Applicant decided to allow counsel to represent him, because Applicant, did not understand or know the rules of Criminal Procedures or Rules of Evidence."
 - i. Failed to "disqualify himself under conflict of interest once [the trial judge] decided to appoint him a counsel, because of the assisting conflict of interest."
2. Ineffective assistance of appellate counsel (Elizabeth A. Franklin-Best):
- a. Failed to "protect Applicant's rights to a new trial granted to him by S.C. Court of Appeals."
 - b. Failed to file a return to the State's expedited motion to recall remittitur.
 - c. Failed to "file a motion to vacate the . . . order recalling the remittitur pursuant to SCRCP 60b(3)."
3. Ineffective assistance of appellate counsel (David C. Alexander):
- a. Failed to "bring to the SC Supreme Court attention the acts of fraud upon the S.C. Court of Appeals by [the State] by including false statements in an expedited motion to recall the remittitur."
 - b. Stated "there is nothing he can do since the remittitur has been recalled."
 - c. Failed to "file a return motion pursuant to SCACR 240(e) to [the State's] motion out of time to argue against precedent."
 - d. Failed to "present evidence to show judicial bias disqualifying [the trial judge] pursuant to SCACR 501 Canon 3E(a)(1) during oral argument."
 - e. Failed "to take any exception to the recalling of the remittitur."
4. Lack of subject matter jurisdiction:
- a. Violation of Rule 3(c), SCRCrimP.
5. Brady violation.
6. Double jeopardy.

In an "Amendment to PCR Application" filed May 2, 2014, the Applicant made the

following additional allegations:

1. Ineffective assistance of appellate counsel (Elizabeth A. Franklin-Best):
 - a. Failed to "[f]ile a return pursuant to SCACR 240(e), to . . . expedited motion to recall the remittitur."
 - b. Failed to "[f]ile a motion pursuant to SCRCP Rule 60(b), (3)(4) to dismiss . . . Petition for a Writ of Certiorari, on grounds of fraud upon the Court, misrepresentation, or other Misconduct of adverse party and Judgement [sic] of S.C. Court of Appeals order recalling the remittitur is void."
2. Ineffective assistance of appellate counsel (David C. Alexander):
 - a. Failed to "[f]ile pursuant to SCRCP Rule 60(B)(3)(4) motion to dismiss the State's . . . Petition for a Writ of Certiorari, on grounds of fraud upon the court, misrepresentation or misconduct of the adverse party."
 - b. Failed to "take a position with respect to the reason for the recall of the remittitur, and bring to the attention of the court, the misconduct of the adverse party . . . fraud upon the court, to get the remittitur recalled so he could file a Petition for a Writ of Certiorari."
 - c. Failed to "[f]ile a petition for rehearing in reference to SC Supreme Court reversal of SC Court of Appeal reversal of my conviction. . . . Counsel should have filed a petition for rehearing in order to protect my rights to Federal Habeas Corpus by exhausting all states redemies [sic] and procedures such a petition for rehearing."
3. Indictment 2002-GS-23-1063 is void and the trial court lacked subject matter jurisdiction due to "the unconstitutional local practices of the Solicitors Office of Greenville County and violations of: of Due Process, Equal Protection, and the Fifth and Fourteenth Amendments of the state and federal constitution."

III.

The Respondent asserts the Applicant's allegation that Stephen J. Henry, Esquire was ineffective is not a proper allegation in post-conviction relief. Henry was not the Applicant's trial attorney. At his own request, the Applicant represented himself at trial. The Applicant has failed to articulate a cognizable ground upon which he can attack Henry's pre-trial representation. See S.C. Code Ann. § 17-27-20(a) (2003). As such, all allegations related to Henry's representation should be dismissed.

IV.

The Applicant's allegation that his appellate attorneys (Elizabeth A. Franklin-Best, Esquire and David C. Alexander, Esquire) were ineffective is without merit. 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 on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. The Applicant must overcome this presumption in order to receive relief. See Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

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

A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S. Ct. 830 (1985). In analyzing a claim of ineffective assistance of appellate counsel, the Court applies the Strickland test just as it would when analyzing a claim of

ineffective assistance of trial counsel. See Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009); Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999) (noting courts apply the Strickland test to determine if appellate counsel was deficient for failing to raise an issue and whether the defendant was prejudiced from the failure to raise the issue). Appellate counsel, however, is not required to raise every non-frivolous claim, but instead may select among them in order to maximize the likelihood of a favorable outcome. Smith v. Robbins, 528 U.S. 259, 288, 120 S. Ct. 746, 765 (2000).

The Respondent submits the Applicant cannot satisfy either requirement of the Strickland v. Washington test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983) (citing Norman v. State, 276 S.C. 278, 277 S.E.2d 707 (1981)).

V.

The Respondent submits the Applicant's assertion that the trial court lacked subject matter jurisdiction is without merit. The true test of the sufficiency of an indictment is not whether it could be made more definite and certain, but whether it contains the necessary elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet. State v. Gentry, 363 S.C. 93, 103, 610 S.E.2d 494, 500 (2005). The Respondent further notes that indictments are not evidentiary or jurisdictional documents – they are merely notice documents. Id. at 102, 610 S.E.2d at 500. The indictment in this case was true-billed and clearly sufficient to put the Applicant on notice of the charges he was facing. See State v. Tumbleston, 376 S.C. 90, 95-96, 654 S.E.2d 849, 852 (Ct. App. 2007).

VI.

The Applicant's allegation that a Rule 3(c), SCRCrimP violation occurred is without merit. "[T]he failure of the solicitor to act upon a warrant within ninety (90) days . . . does not within itself invalidate a warrant or prevent subsequent prosecution." State v. Culbreath, 282 S.C. 38, 40, 316 S.E.2d 681, 681 (1984). The Applicant has failed to articulate any evidence of prejudice that may have resulted from a delay. See, e.g., State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007) (noting one must prove prejudice in order to prevail on an allegation that one's speedy trial rights were violated).

VII.

The Respondent denies each allegation not expressly admitted, qualified or explained.

VIII.

WHEREFORE, having made its Return, the Respondent requests that a hearing be held and counsel appointed to represent the Applicant.

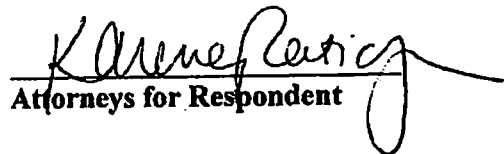
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General
P.O. Box 11549
Columbia, S.C. 29211

By:


Attorneys for Respondent

July 11, 2014

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

ROBERT MAX WATKINS, 243803

Applicant,

vs

STATE OF SOUTH CAROLINA,

Respondent.

IN THE COURT OF COMMON PLEAS

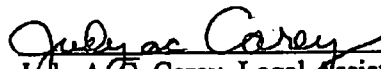
2014-CP-23-0589

AFFIDAVIT OF SERVICE BY MAIL

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

Robert Max Watkins, 243803
Perry Correctional Institution
430 Oaklawn Road
Pelzer SC 29669

DATED this 11th day of July, 2014.


Judy A.C. Carey, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	2014-CP-23-0589
COUNTY OF GREENVILLE	)	
	)	
	)	
	)	
	)	
ROBERT M. WATKINS,	)	
PLAINTIFF,	)	
	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
STATE OF SOUTH CAROLINA,	)	
DEFENDANT.	)	
	)	

April 22, 2015
Greenville, South Carolina

B E F O R E:

THE HONORABLE EDWARD W. MILLER, JUDGE

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

R. MILLS ARIAIL, JR., ESQ.
Attorney for the Plaintiff

KAREN C. RATIGAN, ESQ.
Attorney for the Defendant

CHERYL A. SMITH
Circuit Court Reporter

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(PW) - Denotes Plaintiff's Witness
(SW) - Denotes State's Witness

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P R O C E E D I N G S

MS. RATIGAN: May it please the Court. Your Honor, this is the case of Robert Watkins vs. The State of South Carolina. The docket number is 2014-CP-23-0589.

Mr. Watkins was indicted in 2002 for armed robbery and possession of a weapon during the commission of a violent crime. The case actually went to trial back in October of 2002 where Mr. Watkins was represented by Jim Bannister, and he was convicted at that time. He had an unsuccessful direct appeal and an unsuccessful PCR action. However, he appealed the denial of that PCR, and the Supreme Court reversed and remanded the case for a new trial back in January of 2008. The case was brought to trial by the Solicitor's Office in September of 2008.

At the beginning of the trial, Mr. Steve Henry was appointed as counsel for Mr. Watkins. However, after trial began, Mr. Watkins successfully argued to go pro se, and Mr. Henry remained as standby counsel only.

On September 24, 2008, Mr. Watkins was found guilty of the charges. Judge Patterson sentenced him to consecutive terms of 25 years for armed robbery and 5 years for the weapons charge. Mr. Watkins filed an appeal at the Court of Appeals. The Court of Appeals reversed. In March of 2011, the State filed a petition for writ of certiorari at the Supreme Court, which was granted. The parties

1 submitted briefs, and the Supreme Court ultimately reversed
2 the Court of Appeals in an opinion filed in December of
3 2013. This application was filed the following month, and
4 the State is ready to proceed.

5 THE COURT: What did the Court of Appeals do? I'm
6 sorry.

7 MS. RATIGAN: The Court of Appeals reversed the
8 convictions based on -- Judge Patterson was the initial PCR
9 judge and then did the retrial, so they reversed on that
10 ground, and then the Supreme Court reversed that.

11 THE COURT: All right. Tell me this. Mr. Henry was
12 made standby counsel, correct?

13 MS. RATIGAN: Yes.

14 MR. ARIAIL: Correct, Your Honor.

15 THE COURT: What participation did he have, if any, in
16 the actual trial?

17 MS. RATIGAN: From the transcript, he's actually
18 formally appointed as standby on page 140. Judge Patterson
19 states that he is not to sit at counsel table with
20 Mr. Watkins. He's actually to sit behind. And it can be
21 for purposes of, quote, serious questions and questions of
22 procedural -- procedural questions, and that's it, I
23 believe Judge Patterson said. So he didn't even sit at
24 counsel table. He actually sat behind.

25 THE COURT: Okay. And was he ever consulted?

1 MS. RATIGAN: It does appear from the transcript that
2 at times he does consult with Mr. Henry. However, you
3 can't argue ineffective assistance of standby counsel. I
4 have several 4th Circuit Cases that I can argue to the
5 Court. But I don't believe they're going forward on
6 ineffectiveness of standby counsel. The argument, I
7 believe, is issues pertaining to before the plea -- I mean
8 before the trial.

9 THE COURT: Okay. Well, I just want to make sure we
10 limit what's presented here that is not relevant
11 information. Okay.

12 MR. ARIAIL: Correct, Your Honor.

13 THE COURT: All right.

14 MR. ARIAIL: I call Mr. Watkins to the stand right
15 now.

16 THE COURT: All right.

17 WHEREUPON,

18 ROBERT M. WATKINS,

19 After first having been duly sworn, testified as follows:

20 THE CLERK: Please state your full name for the
21 record.

22 DEFENDANT WATKINS: Robert Watkins.

23 THE CLERK: Thank you. You may be seated.

24 DEFENDANT WATKINS: Can I get one hand loose so I can
25 get my documents, Your Honor?

1 THE COURT: I'm sorry?

2 DEFENDANT WATKINS: Can I get one hand loose so I can
3 get my documents? Because it's hard for me.

4 THE COURT: Yeah. We'll let him have one hand.

5 DEFENDANT WATKINS: Thank you, sir. Thank you, Your
6 Honor.

7 DIRECT EXAMINATION

8 BY MR. ARIAIL:

9 Q All right. Mr. Watkins, we're here today on behalf --
10 in regards to your PCR application that you filed. And I
11 just want to go through, as you've heard Judge Miller say,
12 we can't claim there's ineffective assistance of standby
13 counsel, so anything that happened during the trial with
14 Mr. Henry, can't claim that.

15 What we're talking about, and I think what you've
16 summarized the issues for me, there's really three things
17 we want to kind of look at. Basically, there's an
18 ineffective assistance of Mr. Henry during a pretrial
19 suppression hearing, and I think you've kind of broken that
20 down to I think there was an issue in regards to a Franks
21 vs. Delaware Fourth Amendment claim that you had; is that
22 correct?

23 A Yes, sir. Franks vs. Delaware.

24 Q Correct. So tell me exactly what you're alleging he
25 did that was ineffective in regards to that claim.

1 A Okay. During the Frank vs. Delaware hearing,
2 Mr. Henry was my trial attorney at that time. Okay. The
3 court-appointed counsel, Mr. Henry, scheduled a hearing
4 during the pretrial motion to suppress the evidence
5 pursuant to a written June 10, 2008, motion he filed with
6 the appellate court, Paul B. Wickensimer, and served on the
7 solicitor -- assistant solicitor Lucas Marchant. That was
8 held on September 22, 2008, before Judge Larry R. Patterson
9 at the Court of General Sessions in Greenville County in
10 reference to arrest warrant GH65977 and arrest warrant
11 GH65988, case 01-95052, indictment 2002-GS-23-1063.

12 Performance fell below an objective standard of
13 reasonableness pursuant to the first prong test of
14 Strickland vs. Washington, 466 US 668 687-88, 1984, and
15 failing to challenge the truthfulness of certain facts or
16 statements made in the police -- the police affidavit
17 supported their warrant to search my apartment, to call the
18 victims and the officers to prove the misstatements, to
19 show by a preponderance of the evidence that the false
20 statements were included in the affidavit knowing and
21 intentionally or with a reckless disregard for the truth,
22 and the false statements were necessary before the finding
23 of probable cause which would make the search warrant
24 invalid and the fruits of the search excluded from the
25 trial to the same extent as the probable cause was

1 lacking ---

2 THE COURT: Are you reading from a case? What are you
3 reading from?

4 DEFENDANT WATKINS: My claim that I put together, and
5 I'm -- introduce my exhibits.

6 THE COURT: Well, you just paraphrase it, okay?

7 DEFENDANT WATKINS: Okay.

8 BY MR. ARIAIL:

9 Q Maybe I can help you paraphrase it. Let me ask the
10 questions. I mean, I've got your application. What I'm
11 trying to go down is basically to find out I know you're
12 saying he hadn't done these things, failure to call
13 officers, victims, defendants. So tell me who he failed to
14 call and why that is prejudicial to you.

15 A He failed to call Marcus Scar -- Scarbino -- Scarbino,
16 Jimmy Skeleton and Geannie Pierella [phonetic].

17 Q Okay. And those individuals would have done what to
18 help you in regards to a suppression hearing?

19 A They would have proved that they did not provide the
20 information included in the affidavit by the evidence, that
21 they never provided that information to him that he said he
22 claimed he got from them to prove -- to issue a search
23 warrant.

24 Q And you're talking about Investigator Dan Fuller?
25 What I'm trying to understand is these people provided

1 information, you were saying, that has led to a search. Is
2 that what you're saying?

3 A Led to issuing a search warrant.

4 Q Okay. And you're saying what they provided is false?

5 A No. What I'm saying is what was provided -- what was
6 included in the search warrant was never provided by the
7 victims or the officers from which the applicant of the
8 search warrant claimed that he got that information from.

9 Q I'm having trouble following that. Because what I'm
10 -- so you're -- they provided information to the officer or
11 the Court to get the search -- that's what the officers
12 did?

13 A Yeah. They said that in obtaining the search warrant
14 -- we had a Franks vs. Delaware hearing. It challenged the
15 veracity of the information in the search warrant.

16 Q Correct.

17 A And the officer said when he was cross-examined by my
18 counsel, they said that they got the information from their
19 interviews with the witnesses and with the officer on the
20 scene.

21 Q Okay.

22 A As this hearing went over to establish if reckless
23 disregard for the truth under false information was
24 included in the affidavit, Mr. Henry, according to Franks,
25 should have called the witnesses to verify that these are

1 false statements.

2 Q Okay. So I think I'm understanding what you're saying
3 now is that the stuff that was testified to, he should have
4 called someone to impeach that or to say they didn't offer
5 that information?

6 A Yes.

7 Q Okay. So the individuals you say he should have
8 called were Mr. Scarbino; is that right?

9 A Scarbino.

10 Q Skeleton?

11 A Skeleton and Geannie -- Geannie, I think is the name.

12 Q Those individuals that were in the Chuck E. Cheese?

13 A Yes, sir.

14 Q Okay. So those are the three you wanted him to call.
15 Did y'all discuss that? Did you ask him to call them? Did
16 you just say, "Hey, I" -- you know?

17 A Yes. It was in the report. It was in a memorandum
18 that he had. Before he had got on the case, the prior
19 lawyer, Bannister, had did the same hearing in my first
20 trial.

21 Q Okay.

22 A So he had all the evidence from the first trial in
23 this trial transcript right here showing that they didn't
24 get none of the information in the affidavit from them.

25 Q Okay.

1 A So -- but at the Franks hearing, I found out in order
2 to be successful on such a hearing, you have to show a
3 reckless disregard for the truth. In order to do that in
4 Franks, we have to call the witnesses. Mr. Bannister
5 didn't call the witnesses. Even though they said that he
6 was getting the information from these people that was at
7 trial, he never called them. So when ---

8 THE COURT: We're not talking about Mr. Bannister's
9 trial. We're talking about Mr. Henry's.

10 DEFENDANT WATKINS: Mr. Henry. Yeah. Mr. Henry, he
11 didn't call those witnesses. He did not call those
12 witnesses during the suppression hearing. So the judge
13 said you didn't prove a reckless disregard for the truth
14 because he never called the witnesses to verify that they
15 never provided this information to them.

16 BY MR. ARIAIL:

17 Q Maybe I can just simplify it. What are they going to
18 say that's different -- I mean that's inconsistent with
19 what was said to get the search warrant?

20 A They don't -- they -- throughout the trial --
21 throughout the trial, what I did was I impeached their --
22 after I lost the Franks hearing, I impeached their -- I
23 asked them did they provide this information. And if you
24 read the trial transcript and the testimony, it will show
25 that when the officer was saying that he got this

1 information from them based upon the evidence in the trial
2 transcript, he never got that information from them.

3 Q Okay. So you're saying ---

4 THE COURT: Where in the trial transcript are you
5 referring to?

6 DEFENDANT WATKINS: All the witnesses' testimony.
7 See, that's why I ---

8 By MR. ARAIAL:

9 Q Which witness? Skeleton? Mr. Scarbino?

10 THE COURT: Skeleton, Scarbino.

11 DEFENDANT WATKINS: Okay. I'm reading down. I had it
12 so I could go in order.

13 THE COURT: I don't see a Geannie.

14 DEFENDANT WATKINS: Geannie, G-E-A-N-N-I-E.

15 I'm going to go through transcript pages where they --
16 none of them. I got it. What I did was I used information
17 -- every time I did -- I want to introduce this into
18 evidence right here. This -- this trial transcript that he
19 read that he got everything -- he read this trial
20 transcript from my first trial, and based upon him on this
21 first trial transcript, he had information showing that
22 false information was included because the first ---

23 THE COURT: Well, I'll tell you what, Mr. Watkins.
24 You show me in the transcript where you're saying there's
25 false information. If you don't have it, you don't have

1 it. That's fine.

2 DEFENDANT WATKINS: No. I got -- I got -- I got it.
3 I got some of it right here.

4 In Detective Bruce's statement, in his testimony, he
5 testified that -- when I cross-examined him -- okay. Here
6 it is. It starts at page -- okay. Right here it says --
7 it says right here, page 411.

8 THE COURT: 411?

9 DEFENDANT WATKINS: Yes. That's the ---

10 THE COURT: That's somebody named Bruce.

11 DEFENDANT WATKINS: Yeah. W. C. Bruce. That's the
12 one who -- some of the -- some of the information that he
13 gave showed that also in the transcript. I don't have --
14 see, when I did my -- did my claim, my claim was based upon
15 the first trial transcript.

16 THE COURT: Well, I'm not going to consider that.

17 So you're telling me that your claims of ineffective
18 assistance of counsel are based on a trial transcript from
19 2002?

20 DEFENDANT WATKINS: No, no. It's just ---

21 THE COURT: That's what you just said.

22 DEFENDANT WATKINS: Okay. Hang on. Hang on. Geannie
23 Pierella. He said one of the information he used at 248
24 starting at line 17, (as read) "Did you ever tell the
25 police officer that you seen the person that committed the

1 robbery get into a white Ford Taurus?"

2 "No, they did not."

3 And then she never said -- on page 250, 4 to 7, it
4 says (as read), "So you've never seen a person -- where the
5 person went, so you never told the police that the person
6 fled towards or never . . ."

7 And she said, "No, I did not see anything."

8 And I asked him, does she -- she didn't see where the
9 person went. She never told me about a white Ford Taurus.

10 THE COURT: So your position is that Mr. Henry should
11 have called this Pierella at your suppression hearing; is
12 that right?

13 DEFENDANT WATKINS: Yes. To show a false statement of
14 facts.

15 THE COURT: Okay.

16 DEFENDANT WATKINS: Her -- in that trial transcript, I
17 did impeachment of him. I went over the information with
18 W.C. Bruce, and he starts saying ---

19 THE COURT: Okay. Yeah. I'm not going to go through
20 what you did except as it relates to what you say Mr. Henry
21 should have done.

22 DEFENDANT WATKINS: That's -- that's what I'm trying
23 to show you. I'm trying to show you that.

24 THE COURT: Well, you've made reference to it here on
25 page 250.

1 Okay. What else have you got?

2 DEFENDANT WATKINS: I had it all organized for you,
3 make it real simple.

4 THE COURT: Well, if you look, your cross-examination
5 of Mr. Scarbino begins on page 183.

6 DEFENDANT WATKINS: I didn't -- I didn't bring his
7 statement. I brought -- my lawyer told me I could present
8 these exhibits and show you how -- how it all took place.

9 THE COURT: Yeah. Well, you said Scarbino. So your
10 cross of him starts on page 183. Where in that
11 cross-examination does he make what you consider to be
12 exculpatory information for you?

13 DEFENDANT WATKINS: I didn't bring the transcript with
14 me, sir. But I have -- I can't use -- okay. Where's the
15 statement -- okay. See, I used in reference to the
16 statement that the coat matching the description that the
17 robbers wore -- wore by the robbers shows that based upon
18 the interlocutory statements -- see, can I explain to you
19 what this evidence is right here to prove that and how I
20 was going to prove it?

21 THE COURT: Right now we're trying to figure out what
22 it is that you're claiming Mr. Henry did wrong with respect
23 to the three witnesses you talked about: Scarbino,
24 Skeleton and I guess it was Pierella.

25 DEFENDANT WATKINS: Pierella. Okay.

1 THE COURT: So direct us and confine it to those
2 issues.

3 DEFENDANT WATKINS: Okay. My exhibit right here shows
4 that Stephen Henry had a copy of my trial transcript which
5 had the evidence in it that they did not provide the
6 information in the search warrant affidavit to the
7 defendants. I'm showing that he had this evidence before
8 we even went to trial.

9 And the technique that he should use in bringing these
10 witnesses into hearing, into court, and this transcript --
11 this transcript was brought up. And this transcript -- and
12 it wouldn't have been brought up in this transcript because
13 he never cross-examined him on issues like that. See, it
14 was done in this transcript right here, and he just
15 cross-examined Detective Bruce, and Detective Bruce just
16 kept saying that their evidence come from the witnesses --
17 the witnesses, and he never called the witnesses.

18 So to prove that a reckless disregard for the truth --
19 and the evidence is in my first trial. They got testimony
20 under oath. All of -- Geannie Pierella and all of them
21 gave testimony under oath in my first trial, and I was
22 going to enter -- and to do that, Exhibit No. 4, and then I
23 was going to show the transcript, the pages that, based
24 upon their testimony in towards -- towards the search
25 warrant, he would have seen that, yeah, he should have

1 called him and then to show the Court that he should have
2 called him.

3 So when he made his -- when he made his motion -- his
4 motion on the 10th, he stated that false -- the statements
5 was false in there. He didn't state the type of hearing it
6 was until I told him tell the judge it's Franks vs.
7 Delaware. And that was at the end -- at the end of the
8 hearing. And then the judge went and seen that he didn't
9 call no other witness than that.

10 The case Frank vs. Delaware in particular talks about
11 the lawyer calling the witnesses to verify that all
12 statements included in the affidavit was a reckless
13 disregard for the truth. And I took my time out to put
14 this together to bring my evidence in order and to present
15 my exhibits, so when I just read from the paper, and I
16 could just put it in the record and show it, and it will
17 show such and such. And it will show through the
18 transcript what I had, that the hearing we had that he had
19 to look at, and he had a copy of this memorandum right here
20 -- this memorandum that was done -- that was given to --
21 this lawyer, Mr. Bannister, was of his office. So when he
22 took over the case, he was the -- he knew everything that
23 existed.

24 THE COURT: So you wanted Mr. Henry to use materials
25 prepared by a lawyer who you claim to be ineffective in the

1 first trial in which the Court agreed with you, and you
2 wanted him to use those materials prepared by ineffective
3 counsel?

4 DEFENDANT WATKINS: No, sir. The counsel -- the
5 counsel was ineffective dealing with the alibi defense.
6 But we had a suppression hearing with the search warrant.
7 When I went back and read the search warrant, it was
8 understood how Franks vs. Delaware was -- how the case
9 went, then I seen that Mr. Henry -- or Mr. Bannister, he
10 had no intentions on putting no law to the case. He was
11 just going to argue the facts. It was like he just wanted
12 to see if these officers was lying, including this false
13 information in the warrant and where it came from. He
14 came, and he did a good job of impeaching that evidence in
15 the record in the transcript. But as far as the kind of
16 law and what kind of motion it was, he never did that, so
17 it wasn't preserved for a direct appeal. He never objected
18 to it.

19 Also, after Mr. Henry gave the Franks hearing, he
20 never objected. He failed to object to reserve for direct
21 appeal for it to be reviewed. He didn't object. After the
22 hearing was held, he never objected so it could be reviewed
23 so the issue could be brang [sic] up on direct appeal.

24 THE COURT: Are you talking about Bannister or Henry?

25 DEFENDANT WATKINS: Mr. Henry. He gave the

1 evidentiary hearing. He never objected.

2 THE COURT: Okay.

3 DEFENDANT WATKINS: And if you read -- if you go and
4 read this transcript, sir -- Your Honor, you will see that
5 the witnesses, they never provided their information. I
6 wish I would -- you know, I had a copy of that transcript.
7 My lawyer informed me that I was going to be able to
8 introduce this right here. That's why I just brought -- I
9 brought this. I would have brought the transcript if I
10 thought I needed it.

11 BY MR. ARIAIL:

12 Q What are you trying to introduce?

13 A He wants to -- wanted me to show him from the trial
14 transcript that Mr. Henry was on where I can show the
15 evidence that he should have brought these witnesses and
16 proved false statements in the affidavit.

17 Q I know. But what is that evidence you're trying to
18 put in? That's what I'm trying to figure out. Is it the
19 trial transcript from the first trial?

20 A Yeah. See, because they got -- what they have -- it's
21 like this. If you see this right here, you have sworn
22 testimony by the witnesses. Didn't get the information.
23 Then we're going to question them about the information in
24 the affidavit, did they give this information to this
25 officer. They said no. They never saw -- they never saw a

1 black male in a white Ford Taurus surveilling the
2 businesses. He never -- just showed all witnesses, said he
3 never seen me, never seen a black male who was in a white
4 Ford Taurus.

5 The witness also stated that during the first trial,
6 Mr. Bannister knew that the coat -- I mean Mr. Henry knew
7 that the coat had nothing to do with the robbery. So the
8 two statements in the search warrant affidavit about the
9 coat being dark blue or the coat being the coat worn by the
10 robber included in that search warrant evidence is false.
11 You know that. And the solicitor testified to that in this
12 trial and said the evidence has nothing to do with the
13 trial or with me. So these statements he could have
14 challenged this way and excluded. Instead, he kept asking
15 the officer about this coat that he knew was false.

16 Q And that information, you're saying, was in the first
17 transcript?

18 A Yes.

19 Q Did you go over that with Mr. Henry?

20 A Yeah. Again, we came -- I went over everything, the
21 whole Franks hearing and everything with him.

22 Q What I'm asking is, did you go back over specifically
23 and say, "These are the problems that happened the first
24 time in the Franks v. Delaware hearing that Jim Bannister
25 held for me"?

1 A Yes. Because he sent me a letter saying he
2 understands how it has to be challenged.

3 Q Okay. Did he understand -- did you say you need to
4 call these people to the stand to contradict what they
5 previously said?

6 A Did I tell him that? No. I said it in the memorandum
7 in case -- case -- he was going to have a Franks hearing,
8 I'm pretty sure he said Franks vs. Delaware, that he knew
9 that he's got to call the witnesses. I asked if he's going
10 to prove a reckless disregard for the truth. If you came
11 on false information in an affidavit in your pretrial
12 motion and right here -- can I introduce this right here,
13 Exhibit No. 1?

14 Q That's the hearing. I mean that's the motion you
15 filed -- or Mr. Henry filed for the ---

16 A Mr. Henry filed challenging the search warrant based
17 upon false information.

18 Q So you're saying he filed the motion. You're just
19 saying he argued a motion or didn't put in evidence he
20 should have?

21 A He didn't stipulate according to Franks vs. Delaware,
22 how Franks vs. Delaware, the evidence existed. In my first
23 trial transcript that he had read -- reread before he took
24 -- started representing me, and he didn't properly perfect.
25 So it's a Fourth Amendment claim.

1 Q I mean, I think we've adequately discussed that issue,
2 and you said there's numerous issues that he didn't raise,
3 and we can ask about that when he gets to his cross. But I
4 want to go on to the appellate -- you've got an appellate
5 issue, too, that you're saying your appellate counsel
6 didn't address; is that right?

7 A Yeah. Yes. That was one of my issues. But this
8 Fourth Amendment, this is the one I really wanted to get on
9 the record, because I've got to show -- I've got to show
10 the second-prong test.

11 Q We put it on the record. I'm trying to figure out
12 what more do you want to put on the record or what you want
13 to put as part of the record to be able to discuss that
14 issue.

15 A I'm willing to -- I want to be able to show evidence
16 that's in the record that Mr. Bannister -- I mean Mr. Henry
17 knew that the witnesses did not provide these officers
18 information. I need to get it in the record so -- or make
19 a record so it will go to a writ of certiorari, it will be
20 established what I'm talking about by evidence that's the
21 proof, that if I just talk about it and don't present no
22 evidence and can't present my exhibits that show what I'm
23 talking about, then I haven't proved anything on the
24 record.

25 Q Okay. And I guess what I'm going back and once again

1 trying to figure out, what exactly are you wanting to
2 present other than the first trial transcript?

3 A My exhibits showing -- showing that Mr. Henry was on
4 my case, what evidence that he had in possession of, the
5 proof that he had, and he knew about Franks vs. Delaware,
6 he knew this evidence and he had to call these witnesses,
7 and he didn't call these witnesses. And now the judge is
8 wanting me to show where I can present this information to
9 show these things, and I'm seeing this in the first trial
10 transcript. But it's apparent you don't want me to try to
11 get it in or something.

12 MR. ARAIAL: Well, in all my -- Your Honor, I think
13 what he's -- I'm trying to figure out how the best way to
14 do this is to enter the first trial transcript as an
15 exhibit. And he's got a copy. And I don't know if -- I
16 can make a copy of his and then submit it at a later date,
17 but it might be already part of the record. Well, no,
18 because it's a retrial of the same case. I'd ask we be
19 allowed to put that as part of the record.

20 THE COURT: Anything from the State?

21 MS. RATIGAN: I would object to relevance, Your Honor.
22 This is a retrial of the case. What happened in the first
23 trial isn't really germane to Mr. Henry's actions in
24 defending Mr. Watkins, at least for the first 135 pages of
25 the transcript.

1 THE COURT: Do you have specific page numbers and line
2 numbers in the transcript which you say Mr. Henry should
3 have read which would have alerted him to present this
4 evidence you claim that exists?

5 DEFENDANT WATKINS: Yes, sir.

6 THE COURT: What are they?

7 DEFENDANT WATKINS: It can come from this transcript
8 right?

9 THE COURT: Pardon me?

10 DEFENDANT WATKINS: Okay. During the first -- during
11 the testimony of Geannie Marcus Scarbino, the coat was
12 introduced into evidence, and a description was given of
13 the coat that was found in the trash, dumped, and that the
14 police say it was the coat worn by the robber.

15 THE COURT: Mr. Watkins, from the first trial
16 transcript from 2002, give us the page and line number that
17 you claim is relevant to Mr. Henry's representation of you
18 in the 2008 retrial.

19 DEFENDANT WATKINS: Okay. I understand that.

20 Okay. Page 75, lines -- this is by Marcus Scarbino,
21 page 75, line 15 through 17; and lines -- page 103 -- 103
22 -- this is Geannie Scarbino -- lines 10 through 16; line
23 104 ---

24 THE COURT: Page 104?

25 DEFENDANT WATKINS: I mean page 104, lines 11 through

1 12 -- 11 and 12; page 106, lines 9 through 13; lines
2 111 ---

3 BY MR. ARIAIL:

4 Q Page 111?

5 A Yeah. Page 111, line 19 through page 113, line 11;
6 page 113, line 19 through page 114, line 6; page 31,
7 line 14 through page 32, line 13; line -- I mean page 92,
8 line 22 to page 93, line 4. Page -- this is coming from
9 the -- okay. That's enough.

10 And I was -- okay. And my defense had -- had
11 Mr. Henry bothered to show that, there's a probability the
12 outcome of the case would have been different if he had did
13 that. I'm saying the second-prong test is strictly
14 prejudiced because he didn't do that and the judge allowed
15 him to -- the judge said that he didn't prove reckless
16 disregard for the truth was included in the affidavit
17 because he didn't call the witness and ask it be excluded
18 from the evidence.

19 THE COURT: Okay. I understand your argument.

20 BY MR. ARIAIL:

21 Q Right. We've got that.

22 Now, the other issue you discussed with me was an
23 issue in regards to your appellate, and I guess it was a
24 remittitur at one time that was dealt with. What are you
25 claiming your appellate counsel was ineffective in

1 objecting to?

2 A Okay. When I was -- the appellate -- when the Court
3 of Appeals reversed my conviction on March 8, 2011, they
4 sent a letter to -- that was going to Sally Elliott, the
5 assistant attorney general Sally Elliott. And she wasn't
6 the attorney general on my case. Mr. Beach [phonetic], I
7 think that's how you -- Beach was -- was the attorney
8 general handling the case. And when she received the order
9 where the judge reversed my conviction, she was notified
10 that the remittitur be sent in I think it's 15 days if they
11 don't file a petition for a rehearing. So she sent it to
12 Robert Drift [phonetic], and he filed a petition for writ
13 of -- rehearing on March 21, 2011.

14 The Court of Appeals -- Court of Appeals then denied
15 that rehearing on April 21, 2011, and they sent a copy of
16 that to Sally Elliott. I have wrote Sally Elliott a letter
17 asking her not to file an appeal and showed some things
18 that I discovered over the years in my case, you know, the
19 local practice in Greenville County and the statute of
20 limitations. And I told her I was willing to take a
21 ten-year time-served plea if she didn't file a petition of
22 my writ of certiorari.

23 So when she received that order denying the -- order
24 denying his rehearing, she held onto it and she didn't
25 forward it to Mr. Beach in time enough to file the petition

1 for writ of certiorari. So the remittitur was sent. So I
2 received the petition for a rehearing -- petition for a
3 writ of certiorari; so therefore, they sent the remittitur
4 on June 2, 2011.

5 THE COURT: So you're not actually claiming
6 ineffective assistance of your appellate counsel. You're
7 claiming malicious prosecution?

8 DEFENDANT WATKINS: No. What they did was that ---

9 THE COURT: I heard what you said. What did your
10 appellate counsel do wrong?

11 DEFENDANT WATKINS: Oh, she failed -- she failed to
12 file a motion to the Court that showed that -- filing
13 against the Court by the attorney general, and his answer
14 to the motion, he included false statements that he -- that
15 he didn't never receive the petition -- the order denying
16 petition for a rehearing. But he did receive it, and he
17 filed -- he filed ---

18 THE COURT: All that was obviated by the ruling of the
19 Supreme Court.

20 BY MR. ARIAIL:

21 Q Was there a hearing on that, too, with the Supreme
22 Court?

23 A No. See -- see, when I was released from -- when I
24 was released from custody on July 14th, that's when she
25 turned it over from SCDC to Greenville County. She turned

1 over the petition denying ---

2 THE COURT: July 14th of what year?

3 DEFENDANT WATKINS: 2011.

4 THE COURT: Am I mistaken, Ms. Ratigan, or did the
5 Supreme Court step in and reinstate the conviction
6 regardless of what rulings the Court of Appeals came up
7 with?

8 MS. RATIGAN: Yes. My office filed the motion,
9 recalled the remittitur. That was granted. The matter
10 proceeded to the Supreme Court and ultimately they were
11 sent to the Court of Appeals.

12 THE COURT: So there is nothing that the appellate
13 defense counsel could have done to stop that. Okay.

14 Next ground.

15 MR. ARAIAL: Okay.

16 DEFENDANT WATKINS: Sir, I've got the document that's
17 showing that he received -- he received the hearing. He --
18 what I'm trying to say is had he -- she filed a motion, she
19 could have stopped the remittitur from being recalled. The
20 Supreme Court would have never got a chance to hear the
21 writ of certiorari if she had stopped the remittitur from
22 being called. She had a chance to challenge the remittitur
23 being recalled, a motion -- ask for the motion recalling
24 the remittitur. He included false information in it. I
25 provided her to stop the remittitur from being called. She

1 did nothing. She stopped talk. She didn't respond to my
2 petition or anything. And I filed a complaint against her
3 where they relieved her, and they put another attorney on
4 my case. But had she protected my right to -- she's
5 supposed to protect my right to a trial. I had a new
6 trial. She didn't protect my right to a new trial because
7 she never filed a return motion to this motion to recall
8 the remittitur.

9 BY MR. ARIAIL:

10 Q She should have filed an objection to the remittitur,
11 a motion to recall the remittitur, is what you're saying.

12 A She's supposed to file a return motion. She's
13 supposed to -- a return motion. When she found out they
14 deemed she consented to call another remittitur, I was
15 already in Greenville County. I'm thinking I'm getting a
16 new trial. She never did that. And because she never did
17 that, they went ahead and granted the order to recall a
18 remittitur.

19 Then on July 14th -- July 14th, that's when the State
20 filed a petition for a rehearing out of time. It's really
21 out of time. I'm being released within the time frame of
22 that, but because that case law, South Carolina Department
23 of Corrections, they allowed if you found some type of
24 reason, you can get the remittitur recalled if you can find
25 reason not part of the attorney general but for the Court.

1 He made it seem like the Court made her that he never
2 received ---

3 THE COURT: Well, I'm going to make the finding that
4 even if the conduct of the appellate counsel fell below an
5 objective standard of reasonableness, the fact that the
6 Supreme Court took the case up in any way, regardless,
7 there's no prejudice from any deficiency, if there was any.

8 So next ground.

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

10 THE COURT: Okay.

11 DEFENDANT WATKINS: I've got some more issues. You've
12 got some more -- you've got some more issues. You've got
13 this issue right here dealing with 17-141 -- 17-13-141 ---.

14 BY MR. ARIAIL:

15 Q 17-141, what is that issue?

16 A It's -- it's in my application. It states that the
17 magistrate failed to keep record-keeping requirements of
18 the search warrant when she issued it.

19 Q Okay. Explain to me that one. I don't know if that's
20 a --

21 A Okay. It says when the magistrate issues a search
22 warrant, she's supposed to keep for a period of, I think,
23 two or three years all the information pertaining to that
24 search warrant, the time and date she issued it, the name
25 of the person she issued it in, the property we saw, the

1 time return was made. She didn't comply with that statute.

2 THE COURT: So how is Mr. Henry ineffective for that?

3 DEFENDANT WATKINS: Well, he should have -- when he --
4 he made it -- he made a challenge -- he made a statement in
5 his motion he filed right here. He stated in this motion
6 -- in this motion he states that based upon the search
7 warrant obtained after the search was initiated. That was
8 one of the claims that he made. And the thing that I
9 explained to him that we had document showing the search
10 warrant was obtained at 10:10 a.m., it was -- then he said
11 he entered my apartment at 10:10 a.m., and then another
12 officer said they went to my apartment at 9:30.

13 THE COURT: So is what you're saying -- just let's cut
14 to the chase -- is that Mr. Henry was ineffective because
15 he didn't challenge the record-keeping requirements of the
16 magistrate's office?

17 DEFENDANT WATKINS: He didn't show how I was
18 prejudiced by it. See, because if he showed ---

19 THE COURT: Okay. We got you. We cut right to the
20 chase, cut to the heart of that issue.

21 What's your next issue?

22 BY MR. ARIAIL:

23 Q Were you saying he's ineffective for not asking for a
24 recusal of the judge during this?

25 A He did not suppress the evidence based upon failure of

1 the -- of 17-13-141.

2 Q We got that point. The judge understands that you're
3 saying he's ineffective for not making a motion.

4 The next one you've got as part of this, I want to
5 say, is you're saying he's ineffective for not making a
6 motion to recuse the judge. Is that one of your grounds or
7 it's not?

8 A No. No, it's not.

9 Q Okay. I've gone through -- I'm looking at the ones
10 we've discussed. Those are the issues that I've put down.
11 Do you have any others that you want to raise?

12 A Yeah. I've got one. One dealing with the double
13 jeopardy. Before he sentenced me, I told the judge -- I
14 tried to tell the judge -- I raised it in a pretrial
15 motion, and I told the judge right before the sentencing
16 that it would be double jeopardy. And I objected to him
17 sentencing me upon the double jeopardy because I had
18 already served a five-year gun charge. When I was
19 sentenced the first year -- the first time back in two
20 thousand -- October 2025 [sic] -- 25th of October 2002, I
21 was sentenced to 30 years for the armed robbery and five
22 years concurrent.

23 THE COURT: So this is an issue involving your
24 sentencing at your second trial; is that right?

25 DEFENDANT WATKINS: Yes.

1 THE COURT: Well, Mr. Henry didn't represent you at
2 that time, so that's one of those issues.

3 MS. RATIGAN: Your Honor, I would also note that in
4 the May 30, 2008, motion hearing transcript, Mr. Watkins
5 did, in fact, make this double jeopardy motion, and it was
6 denied.

7 THE COURT: Okay. All right.

8 DEFENDANT WATKINS: Okay. It was my understanding
9 that at the PCR, it's the last stage for me to present any
10 of my federal claims in the state court to get them to
11 address my issue before I can exhaust my state remedies and
12 go to Federal Court.

13 THE COURT: Okay. You've stated your issue.

14 DEFENDANT WATKINS: All my claims do not have to be
15 ineffective counsel. They can be constitutional
16 violations.

17 MR. ARIAIL: Your Honor, I have no further questions.

18 THE COURT: Have you got any other issues?

19 DEFENDANT WATKINS: I've got an issue with lack of
20 subject matter jurisdiction. I thought in court I'm
21 supposed to be able to litigate my issues and get my issues
22 on the record. It seems like I can't get my issues -- all
23 I wanted to do was come here, present my exhibits, and
24 prove what I have on the record. It seems like -- it's
25 like every time I get to something, I'm getting cut off,

1 I'm not getting to be able to put my claims properly on the
2 record, and all I'm trying to do is make my claim, put my
3 stuff on the record the best way I know how. You told me
4 that I'd be able to do this. Now you're shaking your head,
5 and I don't understand it.

6 BY MR. ARAIAL:

7 Q I'm not shaking my head. I'm trying to find -- these
8 are the issues we've talked about, and I wanted you to put
9 your issues on the record. And if you've got any other
10 issues, you can put them on the record right now.

11 A And I have to -- and I have to show prejudice. I have
12 to prove -- when you do -- I have to prove a two-prong
13 test. Any other constitutional violation is like a due
14 process violation.

15 The next violation I want to show is lack of subject
16 matter jurisdiction about the indictment that's never been
17 filed against me. And there's a case law saying the
18 subject matter jurisdiction is satisfied when the
19 appropriate charge is filed in the court of competent
20 jurisdiction. They was practice -- the local practice in
21 the County of Greenville in which under 17-330 the
22 solicitor was in control of the General Sessions court
23 docket, and because he was in control of the General
24 Sessions docket, they would allow him to keep the
25 indictments after the trial.

1 The pretrial indictments, they didn't file them.
2 After they initiated and drafted the search -- drafted the
3 indictment, the procedure that was in place at that time
4 was to allow the solicitor to keep the indictment. He
5 wouldn't comply with Rule 3(c)(1), pretrial indictment, or
6 allow the Federal Court to assign a criminal -- a case
7 number so a person could be arraigned and be made aware of
8 these charges and provided counsel. So -- and the
9 indictment was never filed against me in two thousand --
10 2002. And when I got back for a retrial, they still wasn't
11 -- it wasn't filed against me.

12 And I had to tell the judge I was never arraigned in
13 2008, and he arraigned me on the same day of trial. And I
14 think that's a due process violation because I have to be
15 provided an opportunity to prepare my case, to get --
16 confront -- to put witnesses together, witnesses in my case
17 and stuff like that. He tried me on the same day, the same
18 day he arraigned me.

19 THE COURT: So you're trying to tell me that the
20 second trial, because you got arraigned the same day, you
21 didn't know what the charges were against you? Is that
22 what you're trying to say?

23 DEFENDANT WATKINS: No, I didn't. Because the
24 charges, yes, in the transcript and right here -- if you've
25 got the arraignment, page 47, you'll see where the judge

1 arraigned me. And I asked for a copy of the indictment.
2 He would not give me a copy of the indictment because he
3 altered the indictment. He amended the indictment and
4 charged the indictment and changed the words of the
5 indictment. So when I asked for a copy of the indictment,
6 he would not give it. He says it's the same indictment in
7 2002. When he instructed the jury on the charge of the
8 indictment, he amended it again and took out all the words
9 out of the indictment. And then when ---

10 THE COURT: I'll just tell you right now, you don't
11 charge an indictment to a jury, so that argument is
12 wholly ---

13 DEFENDANT WATKINS: No. I mean, he said -- he told
14 the jury, "I'm going to charge with this indictment," and
15 when he read the charge to the jury, he was telling them
16 what the elements and stuff they had to find me guilty of
17 in the indictment. He left off carrying away the property
18 of another when he charged.

19 THE COURT: Well, that's a legal issue that should
20 have been raised and objected to by the trial lawyer. And
21 who was that?

22 DEFENDANT WATKINS: That was me. That's someone --
23 this here was a due process violation.

24 THE COURT: Okay. All right. What's your next issue?

25 DEFENDANT WATKINS: The subject matter -- lack of

1 subject matter. I objected to personal jurisdiction. I
2 objected to personal jurisdiction, and appellate defense
3 counsel didn't -- didn't raise it on direct appeal. I
4 objected to personal jurisdiction because they never filed
5 an indictment. It was never filed. I was arraigned on
6 that same day, and I asked the judge for a copy of the
7 filed indictment showing it's been filed against me, and he
8 wouldn't produce it.

9 THE COURT: All right. Anything else?

10 MR. ARIAIL: Nothing from me, Your Honor..

11 THE COURT: Anything else?

12 THE WITNESS: Yes, sir.

13 THE COURT: What?

14 DEFENDANT WATKINS: I wanted to show under 7 -- 71 --
15 17-1 -- 17-13-144 where the magistrate failed to file that.

16 THE COURT: You've already talked about that. You've
17 already addressed that.

18 DEFENDANT WATKINS: Yes, sir. But in the case law, it
19 says you have to show where you're prejudiced at. You have
20 to show that these claims are coverable claims. When you
21 make -- any type of Fourth Amendment claim is challenged,
22 the lawyers that -- you have to show that your claim is
23 coverable, has -- has merits. If you don't show that the
24 case has merits, then you can't win because like you're
25 just raising the issues.

1 THE COURT: What's your next issue?

2 DEFENDANT WATKINS: My next issue --

3 BY MR. ARIAIL:

4 Q Are you talking about on your --

5 A Yeah.

6 Q Let's see. Failed to inform the applicant what state
7 witness Riley [phonetic] told him when he interviewed her.
8 What ---

9 A Yes. When they had a surprise witness, he got a --
10 Mr. Henry got a letter from -- a Rule 5 from the solicitor
11 and -- about a witness, Christine Riley, I think her name
12 was Christine Riley, and he had the hearing to see what her
13 testimony would be and stuff like that. And he went and
14 talked to her outside the courtroom with the judge. And
15 when he renewed my motion for me to represent myself, he
16 never told me what this witness would testify to.

17 Q Okay.

18 A So that's before they cross-examined the witness.

19 Q The last one I see outside the appellate issues is
20 failed to inform the applicant he had access to an
21 identification expert.

22 A Yeah. He had -- he had -- had identification for the
23 witnesses. She said she thinks that's me, but wasn't sure,
24 Geannie Pierella, and then she tried to identify me in the
25 court by my eyebrows. He had got an identification expert,

1 but I didn't know about this till I got my discovery and
2 seen that he had -- that I had that person available to me.

3 Q That's all the issues I got. Do you have any others?

4 A Can I introduce these evidence to support my ---

5 Q I don't know what you're talking about introducing.

6 A I want to introduce this right here, copy of a mail
7 log of the attorney general's office log -- mail log
8 showing that he received a copy of that ---

9 Q The remittitur was sent to them on June 3, 2011. And
10 you sent a letter -- this is the ---

11 A See, he wrote a letter. He said ---

12 Q Expedited motion recall, yeah.

13 A Okay. See where he said he did not receive it --
14 receive the ---

15 Q He said he was never served with a copy of the order
16 of the Court of Appeals.

17 A Okay. I wonder if that's it right here.

18 Q Okay. So I understand, so you want me to put as part
19 of this the mail log that you received under the Freedom of
20 Information Act for -- it looks like this is Mr. Glitches'
21 [phonetic] mail log.

22 A Yeah. And you see here, they issued the order based
23 upon what he said here. That showed that he was not being
24 truthful. That's fraud upon the Court. That's a
25 misconduct of an adverse party which could have gotten a

1 writ of certiorari thrown out and they would have never
2 heard -- it would never have been reviewed by the Supreme
3 Court.

4 THE COURT: So, Mr. Watkins, you think you know what's
5 going through the minds of the Supreme Court?

6 DEFENDANT WATKINS: No. I'm saying they wouldn't have
7 never got -- they would have never got the case. See, if
8 you stop the remittitur -- if you stop the remittitur from
9 calling the case ---

10 THE COURT: Okay.

11 MS. RATIGAN: I would object. This hasn't been
12 authenticated, Your Honor. I mean, there is a cover
13 letter. I can identify Ms. Myers' signature, so I would
14 have no objection to the actual cover letter, but the rest
15 of this, I'd argue, hasn't been authenticated. This looks
16 like it could be typed by anybody for any purpose.

17 THE COURT: All right. I'll sustain that objection.

18 MR. ARIAIL: Your Honor, if I could at least put in
19 the first part of this letter which says there was a -- if
20 I can just put the first part.

21 MS. RATIGAN: I have no objection to the cover letter.

22 THE COURT: The first page.

23 BY MR. ARIAIL:

24 Q Any other exhibits you want to put in?

25 A No.

1 MR. ARIAIL: Your Honor, I have no further questions.

2 MS. RATIGAN: I have no cross, Your Honor.

3 THE COURT: Okay. With respect to the reference pages
4 in the original -- or the first trial transcript, I haven't
5 ruled on that yet.

6 You can step down. Thank you.

7 MR. ARIAIL: The next witness would be Mr. Henry, Your
8 Honor.

9 THE COURT: Okay.

10 WHEREUPON,

11 STEPHEN JOHN HENRY,

12 After first having been duly sworn, testified as follows:

13 THE CLERK: Please state your full name for the
14 record.

15 THE WITNESS: Stephen John Henry.

16 DIRECT EXAMINATION

17 BY MR. ARIAIL:

18 Q Mr. Henry, how are you doing today?

19 A Fine, thanks.

20 Q You've heard the testimony from Mr. Watkins in regards
21 to -- I think we can start off with the Franks v. Delaware
22 issue.

23 A Right.

24 Q Do you recall any discussion with him in regards to
25 these inconsistencies between the first hearing -- I mean

1 first trial and this trial?

2 A I knew of them.

3 Q Okay. Was there any reason that you did not call
4 those individuals?

5 A Yes.

6 Q Or what was your mindset on the case?

7 A First of all, the individuals he's talking about are
8 the victims of the armed robbery. So that was my first
9 reason. The victims had a lot more to say about the Franks
10 issue than just those particular points. They would have
11 testified about a number of other factors that would have
12 supported the search warrant. That's the first reason.

13 The second reason was I went back, just briefly looked
14 at the transcript. I think that Franks hearing took about
15 50 pages of testimony. My approach in Franks vs. Delaware
16 cases -- and, of course, Mr. Watkins thinks he introduced
17 me to that case, but he didn't. In any event, in Franks
18 hearings, what I try to do in this case was to get the
19 officer -- the main officer was Will Bruce -- to admit that
20 the information in his search warrant did not match the
21 information he got from the victims. I didn't need the
22 victims to do that. In fact, Will Bruce, for the most
23 part, after some prodding, admitted that much of the
24 information in the search warrant -- I'm not saying he made
25 it up, but didn't match what the statements were from the

1 victims. The victims also made verbal statements that were
2 in the report. So we had access to the information we
3 needed, plus Will Bruce essentially admitted what I wanted
4 him to admit for the Franks hearing.

5 In addition to that, I think I called the magistrate,
6 which is somewhat unusual, Jennifer Prescott, it was a
7 magistrate out of Easley, and had her testify to kind of
8 circle the time frame and also information she got from
9 Will Bruce. So I think it was a pretty closed circle.
10 And, in fact, Judge Patterson took some time to consider
11 whether to grant that motion or not. Took a break.

12 Q So you just didn't think, based on those grounds, it
13 was necessary to call or bring up the previous transcript?

14 A Not only unnecessary, but it would have been foolish
15 to call the victims of the armed robbery in at that point.

16 Q Okay. I know he went through the code section
17 17-13-141 in regards to failure to challenge a search
18 warrant. Did you discuss any of this with him about that?
19 Or any reason why you didn't?

20 A Probably the amount of -- the number of things that I
21 discussed with Robert is hard to list. You may have gotten
22 some clue of that today. That probably was one of them.
23 If it wasn't included, I didn't think it would matter.

24 Q Okay. Did you discuss -- and, I mean, I guess you
25 went through and it's -- I guess I'm trying to limit what

1 we're dealing with since you didn't deal with the trial,
2 but did you discuss these specific issues with him? I
3 mean, I know he's had this since 2002. Did you go over the
4 case with him, prepare it with him?

5 A Yes.

6 THE WITNESS: I do have a question for the Court, if I
7 could, Judge.

8 THE COURT: Yeah.

9 THE WITNESS: I don't know what my -- my rights are
10 here as far talking about confidential matters as standby
11 counsel. I've never had that before. If the PCR waives
12 that right, I just want to be aware that I can talk about
13 communication with my client like I could if I was at a PCR
14 when I was counsel.

15 THE COURT: Well, let's ask Mr. Watkins. The right
16 belongs to him, if it exists at all.

17 Do you object to Mr. Henry speaking about -- I'll tell
18 you this. In a PCR hearing, the applicant waives their
19 right to claim an attorney-client privilege. Now, you sued
20 him as standby counsel. So before I make a ruling, I want
21 to know if you waive your right to claim attorney-client
22 privilege with standby counsel. Do you waive that?

23 DEFENDANT WATKINS: Do you mean what he said that he
24 can testify to as standby counsel, I waive ---

25 THE COURT: Yeah. What y'all talked about with him as

1 standby counsel.

2 DEFENDANT WATKINS: I waive.

3 THE COURT: Okay. All right. There you go.

4 THE WITNESS: Can you ask it again, if you don't mind?

5 BY MR. ARAIAL:

6 Q Pretty much I'm trying -- what did y'all discuss? Did
7 you work up the case like you normally do a case and
8 prepare it with him for trial?

9 A This was not a normal case, and I'll tell you why. I
10 was first appointed -- and I think he won his PCR in 2008
11 when he got it reversed, came back for a retrial. And
12 initially, I was appointed in, I think, May of 2008,
13 thereabouts, as standby counsel. It's one point that I
14 think has been missed. That's how I started out. And then
15 he wanted me back in the case. And then I became his
16 lawyer and worked the case up for trial.

17 And then -- and, again, this is, I think, part of his
18 strategy all along was to try to make it a Forever
19 [phonetic] vs. California argument down the road someplace
20 where I didn't have a good lawyer, the same argument he
21 made against Jim Bannister in the early case in 2002. And
22 so he kept bringing the case back, I want a lawyer, I want
23 to represent myself, I want a lawyer, I want to represent
24 myself. And he had the right judge for this because Judge
25 Patterson was extremely, extremely patient with this up to

1 the point where I believe it was the Friday or the Thursday
2 before the trial on Monday, he once again asked to
3 represent himself. The judge granted that. Even after
4 telling him, "I'm not going to entertain this again," he
5 did it anyway.

6 And, I believe, based on my communication with Robert,
7 is that he was just trying to set the framework for a later
8 challenge. And it backfired on him, because after the
9 motion to suppress, which he didn't like the outcome
10 because the judge denied the motion under Franks, he
11 decided, once again, he wanted to represent himself. And
12 the rest, of course, is history there.

13 But not only did I work up the case, to answer your
14 question, is I had prepared documents for each witness,
15 charts, questions to be asked, which he used during the
16 trial. Not very well, but he used them.

17 Q Okay. Were there any -- I guess he just brought --
18 the state witness Riley told him when he was -- interviewed
19 her and what the testimony would be, you failed to inform
20 him about that, failure to inform him anything about what
21 any witnesses were going to say. Do you remember ---

22 A Not true. The -- Riley, I believe, was the fifth
23 victim that was missing. And when I found out about Riley,
24 I made a request at the Solicitor's Office and made a
25 motion to the Court to have them produce her or her address

1 -- I think she's in Georgia at that time and out of the
2 jurisdiction -- which they did. They brought her to court.
3 And the compromise was to allow me to interview Riley
4 outside of the jury's presence so I could find out what she
5 had to say. Communicated that with Robert. It wasn't
6 helpful.

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

9 MS. RATIGAN: I have no questions for Mr. Henry and
10 ask that he be released, Your Honor.

11 THE COURT: Well, I'm just curious. You did say that
12 you felt, based on your investigation, that had you called
13 these other witnesses or the witnesses in the Franks
14 hearing, there were other factors that would have come to
15 light that would have supported the search warrant. Do you
16 remember what those were?

17 THE WITNESS: Not all of them. But the point is, they
18 testified during trial, and their testimony led to his
19 conviction beyond a reasonable doubt. So there were more
20 factors than just the ones in the search warrant.

21 THE COURT: Okay. Can you think of any benefit you
22 could have derived from calling those witnesses?

23 THE WITNESS: None. It would have been a total -- I
24 think that would have been ineffective assistance of
25 counsel to call those armed robbery victims.

1 THE COURT: And you were familiar with the transcript
2 from the first case?

3 THE WITNESS: I was.

4 THE COURT: And you were familiar -- did you speak
5 with Jim Bannister?

6 THE WITNESS: I didn't.

7 THE COURT: Okay. But you reviewed the existing file?

8 THE WITNESS: Yes.

9 THE COURT: Okay. I don't have anything further.

10 MR. ARIAIL: I've got one question, and I'm trying to
11 figure this out.

12 BY MR. ARIAIL:

13 Q My client is asking me to ask you why you didn't
14 object on the record to the decision by Judge Patterson in
15 the Franks vs. Delaware case.

16 A It wasn't necessary. I think I did.

17 MR. ARIAIL: Okay. I just wanted to ask.

18 Thank you, Your Honor. No further questions.

19 THE COURT: Thank you very much.

20 Anything else from the applicant?

21 MR. ARIAIL: Nothing, Your Honor.

22 THE COURT: Anything from the State?

23 MS. RATIGAN: We would rest on Mr. Henry's testimony
24 and obviously the trial record, Your Honor.

25 THE COURT: Okay. All right. I'm going to deny the

1 applicant's relief. I don't find that he's shown
2 ineffective assistance of counsel by Mr. Henry. The only
3 thing ineffective that occurred with that was that
4 Mr. Watkins didn't let him represent him. He would have
5 been much better served to allow Mr. Henry, one of the more
6 respected, experienced and savvy criminal defense lawyers
7 in Greenville, to have represented him. And I find that
8 Mr. Henry's conjecture that Mr. Watkins was doing this to
9 set up an appellate issue, I find that to be credible. I
10 don't find that there are any constitutional violations
11 which would entitle Mr. Watkins to relief as well, and I
12 therefore deny the petition. Okay.

13 MS. RATIGAN: Thank you, Your Honor.

14 (WHEREUPON, Plaintiff's Exhibit No. 1 was marked for
15 identification.)

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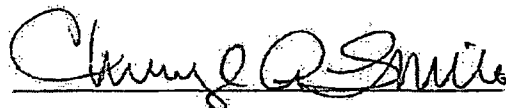
1 CERTIFICATE OF REPORTER

2
3 STATE OF SOUTH CAROLINA)
4 COUNTY OF GREENVILLE)
5
6

7 I, CHERYL A. SMITH, Official Court Reporter for the
8 Thirteenth Judicial Circuit of the State of South Carolina,
9 do hereby certify that the foregoing is a true, accurate
10 and complete Transcript of Record of the proceedings had
11 and evidence introduced in the trial of the captioned case,
12 relative to appeal, in the Court of Common Pleas for
13 Greenville County, South Carolina, on the 22nd day of
14 April, 2015.

15 I do further certify that I am neither of kin,
16 counsel, nor interest to any party hereto.
17

18 November 13, 2015
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22

23 Cheryl A. Smith, CVR-M

24 Court Reporter
25

1 CERTIFICATE OF REPORTER

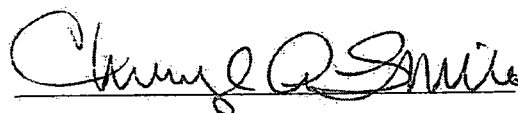
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23 Cheryl A. Smith, CVR-M

24 Court Reporter
25



ALAN WILSON
SECURITIES COMMISSIONER

January 6, 2012

Mr. Robert M. Watkins, #134960
Greenville County Detention Center
201 McGee Street
Greenville, SC 29601

RE: Freedom of Information Act ("FOIA") request

Dear Mr. Watkins:

Your request pursuant to the FOIA for copies of the mail log for Assistant Deputy Attorney General Salley Elliott, for the period March 8, 2011 to June 15, 2011, the mail log for Attorney William Blitch, for the period April 21, 2011 to June 15, 2011, a letter from you dated June 7, 2011, and a copy of the Remittitur relating to case 2002-GS-23-01063, has been referred to me for reply. Pursuant to your request, the records of this Office were checked and enclosed are documents responsive to your request.

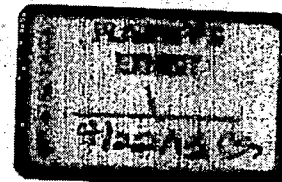
With respect to copies of orders or judgments, any materials this Office might possess relating to your case should previously have been made available to you through counsel and, if not, should be obtained from that source. If you can not or do not wish to obtain them from that source, this Office will provide them to you for a fee not to exceed our actual research and copy costs. Agencies are permitted to charge reasonable fees not to exceed their actual costs to provide records and this Office has elected to charge the fees as a way to offset the costs of responding to requests. This Office charges \$18.90 per hour of staff time required to locate and copy records responsive to requests and copy costs of \$.20 a copy. These costs are directly related to the cost to the Office for staff to search for and copy responsive records. If you wish this Office to provide copies of the documents referred to above, please send a deposit of \$20.00 to my attention at the address below. Upon receipt of the appropriate deposit, we will copy and provide the documents to you, along with either the excess of your deposit if our costs are less than \$20.00 or a bill for the remainder if our costs exceed \$20.00.

I hope you find this information helpful.

Sincerely yours,

Tracy A. Meyers

Tracy A. Meyers
Senior Assistant Attorney General



TAM/tpn

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)
Robert Max Watkins,)
S.C.D.C. No. 243803,)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
C.A. No. 2014-CP-23-0589

ORDER OF DISMISSAL

FILED
SOUTH CAROLINA
PAUL D. WHITENESS
2015 OCT 2 PM 1 41

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed January 31, 2014. The Respondent made its return on July 11, 2014. An evidentiary hearing was held on April 22, 2015 at the Greenville County Courthouse. The Applicant was present and represented by R. Mills Ariail, Jr., Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Also testifying was the Applicant's standby counsel, Stephen J. Henry, Esquire. The Court had before it the transcripts from the pre-trial hearings and the trial, the Greenville County Clerk of Court records, the South Carolina Department of Corrections records, the PCR application, the return, the appellate records, and Applicant's Exhibit 1.

PROCEDURAL HISTORY

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Applicant was indicted at the February 2002 term of the Greenville County Grand Jury for armed robbery (2002-GS-23-1063, count 1) and possession of a weapon during commission of a violent crime (2002-GS-23-

1063, count 2).

The State brought the case to trial.¹ After trial began, the Applicant successfully argued to have counsel relieved and proceeded pro se. Stephen J. Henry, Esquire was present as standby counsel. On September 24, 2008, the jury found the Applicant guilty and the Honorable Larry R. Patterson sentenced him to consecutive terms of 25 years for armed robbery and 5 years for possession of a weapon during commission of a violent crime.

A notice of appeal was filed at the South Carolina Court of Appeals. Elizabeth A. Franklin-Best, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal. The Court of Appeals reversed the Applicant's convictions and sentences. State v. Watkins, Op. No. 2011-UP-091 (S.C. Ct. App. filed March 8, 2011). The Respondent filed a petition for writ of certiorari at the South Carolina Supreme Court. The Applicant was represented by David C. Alexander, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense. The Supreme Court granted the petition and the parties submitted briefs. The Supreme Court reversed the decision of the Court of Appeals on December 4, 2013. State v. Watkins, 406 S.C. 360, 752 S.E.2d 261 (2013). The Remittitur was sent on December 20, 2013.

ALLEGATIONS

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

1. Ineffective assistance of counsel (Stephen J. Henry) during a pre-trial suppression hearing:
 - a. Failed to articulate a Fourth Amendment claim pursuant to Franks

¹ The Applicant was originally convicted of these charges on October 20, 2002 and was unsuccessful in his subsequent direct appeal and PCR actions. Upon appeal from the denial of PCR, however, the South Carolina Supreme Court reversed and remanded the case for a new trial. Watkins v. State, 2008-MO-001 (S.C. Sup. Ct. filed Jan. 14, 2008).

v. Delaware.

- b. Failed to call the victims, officers, and defendants during the hearing to show false statements were made with reckless disregard for the truth.
 - c. Failed to challenge the search warrant pursuant to S.C. Code Ann. § 17-13-141.
 - d. Failed to file a motion for the trial judge to recuse himself pursuant to Canon 3(E)(a)(1).
 - e. Failed to "inform the trial court that Applicant was making a special appearance, and motion the trial dismiss or squash the indictment on grounds it was obtained in violation of Applicant's procedural due process of rights and equal protection of rights, to SCRCrimPRule 3(c), and that the court lacks personal jurisdiction over Applicant due to an illegal process, and a practice that is unconstitutional."
 - f. Failed to inform the Applicant he had access to an identification expert.
 - g. Failed to inform the Applicant what State witness Reilly told him when he interviewed her and what he testimony would be.
 - h. Waited "up until the trial date to coerce Applicant to agree to allow him to review the motion for Applicant to proceed pro se after Applicant decided to allow counsel to represent him, because Applicant, did not understand or know the rules of Criminal Procedures or Rules of Evidence."
 - i. Failed to "disqualify himself under conflict of interest once [the trial judge] decided to appoint him a counsel, because of the assisting conflict of interest."
2. Ineffective assistance of appellate counsel (Elizabeth A. Franklin-Best):
- a. Failed to "protect Applicant's rights to a new trial granted to him by S.C. Court of Appeals."
 - b. Failed to file a return to the State's expedited motion to recall remittitur.
 - c. Failed to "file a motion to vacate the . . . order recalling the remittitur pursuant to SCRCP 60b(3)."
3. Ineffective assistance of appellate counsel (David C. Alexander):
- a. Failed to "bring to the SC Supreme Court attention the acts of fraud upon the S.C. Court of Appeals by [the State] by including false statements in an expedited motion to recall the remittitur."
 - b. Stated "there is nothing he can do since the remittitur has been recalled."
 - c. Failed to "file a return motion pursuant to SCACR 240(e) to [the State's] motion out of time to argue against precedent."
 - d. Failed to "present evidence to show judicial bias disqualifying [the trial judge] pursuant to SCACR 501 Canon 3E(a)(1) during oral argument."

- e. Failed "to take any exception to the recalling of the remittitur."
- 4. Lack of subject matter jurisdiction:
 - a. Violation of Rule 3(c), SCRCrimP.
- 5. Brady violation.
- 6. Double jeopardy.

In an "Amendment to PCR Application" filed May 2, 2014, the Applicant made the following additional allegations:

- 1. Ineffective assistance of appellate counsel (Elizabeth A. Franklin-Best):
 - a. Failed to "[f]ile a return pursuant to SCACR 240(e), to . . . expedited motion to recall the remittitur."
 - b. Failed to "[f]ile a motion pursuant to SCRCRP Rule 60(b), (3)(4) to dismiss . . . Petition for a Writ of Certiorari, on grounds of fraud upon the Court, misrepresentation, or other Misconduct of adverse party and Judgement [sic] of S.C. Court of Appeals order recalling the remittitur is void."
- 2. Ineffective assistance of appellate counsel (David C. Alexander):
 - a. Failed to "[f]ile pursuant to SCRCRP Rule 60(B)(3)(4) motion to dismiss the State's . . . Petition for a Writ of Certiorari, on grounds of fraud upon the court, misrepresentation or misconduct of the adverse party."
 - b. Failed to "take a position with respect to the reason for the recall of the remittitur, and bring to the attention of the court, the misconduct of the adverse party . . . fraud upon the court, to get the remittitur recalled so he could file a Petition for a Writ of Certiorari."
 - c. Failed to "[f]ile a petition for rehearing in reference to SC Supreme Court reversal of SC Court of Appeal reversal of my conviction. . . Counsel should have filed a petition for rehearing in order to protect my rights to Federal Habeas Corpus by exhausting all states redemies [sic] and procedures such a petition for rehearing."
- 3. Indictment 2002-GS-23-1063 is void and the trial court lacked subject matter jurisdiction due to "the unconstitutional local practices of the Solicitors Office of Greenville County and violations of: of Due Process, Equal Protection, and the Fifth and Fourteenth Amendments of the state and federal constitution."

This Court does not take into consideration any pro se amendments filed after the appointment of PCR counsel on November 4, 2014. See Rule 11(a), SCRCRP; Jones v. State, 348 S.C. 13, 14, 558 S.E.2d 517, 517 (2002) (holding there is no constitutional right to hybrid

representation either at trial or on appeal).

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 and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

A.

The Applicant argued Counsel improperly handled the Franks hearing in his case.² The Applicant argued Counsel failed to challenge the truthfulness of the statements in the search warrant affidavit. The Applicant argued Counsel should have called the victims as witnesses at the Franks³ hearing to show they did not provide the information used in the affidavit. The Applicant argued Counsel failed to object after the Franks hearing in order to preserve the issue for appeal.

Counsel testified he was aware of inconsistencies between the testimony at the first and second trials. Counsel testified he questioned the magistrate about the time frame involved and the information she received from the officer. Counsel testified the officer admitted some of the information in the affidavit did not match the victims' statements. Counsel, however, testified it would have been foolish to call the victims as witnesses at the Franks hearing.

Initially, this Court notes Counsel is an experienced and accomplished criminal defense attorney. This Court finds Counsel was familiar with the issues, arguments, and testimony from

² This hearing was held before Counsel was relieved by the trial judge and ordered to remain as standby counsel.

³ Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674 (1978).

the Applicant's first trial. This Court has reviewed the transcript and can find no deficiency in how Counsel conducted the Franks hearing. This Court finds Counsel's decision not to call the victims as witnesses at this hearing was entirely proper, as doing so would likely have harmed the Applicant's case. This Court further notes it was not necessary for Counsel to have objected to the trial judge's ruling at the Franks hearing in order to preserve the issue for appellate review. This Court concludes the Applicant has not met his burden of proving this issue by a preponderance of the evidence. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (holding that, in a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence").

B.

The Applicant argued Krystyna Reilly was a surprise witness and Counsel did not tell him what he had discussed with Reilly. Counsel testified the State found Reilly (who was the missing fifth victim) and he was allowed to interview her. Counsel testified Reilly was not helpful and that he relayed this to the Applicant. This Court finds Counsel's testimony is credible. This Court finds the Applicant has failed to articulate what impact Reilly's testimony could have had upon the trial and, as Reilly did not testify at the PCR hearing, this Court cannot engage in speculation. See Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (the South Carolina Supreme Court "has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial.") (emphasis in original). This Court concludes the Applicant has not met his burden of proving this issue by a preponderance of the evidence. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

C.

The Applicant argued Counsel did not tell him that he had obtained an identification expert. The Applicant, however, failed to present this alleged expert witness – or any identification expert witness – at the PCR hearing, so this Court cannot speculate as to the impact such testimony may have had upon the trial. See Lorenzen v. State, 376 S.C. 521, 530, 657 S.E.2d 771, 777 (2008) (finding that, as the applicant failed to present any expert testimony at the PCR hearing, “it is merely speculative that these allegedly favorable expert witnesses would have aided in his defense”). This Court concludes the Applicant has not met his burden of proving this issue by a preponderance of the evidence. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

D.

The Applicant argued appellate counsel was ineffective because (1) the issue of personal jurisdiction was not raised on appeal and (2) counsel failed to file a motion arguing “fraud against the court” related to the State’s motion to recall the remittitur.

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel’s ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984). In analyzing a claim of ineffective assistance of appellate counsel, the Court applies the Strickland test just as it would when analyzing a claim of ineffective assistance of trial counsel. See Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009).

This Court finds the Applicant has failed to demonstrate appellate counsel was deficient in failing to argue the State committed “fraud against the court” in filing his motion to recall the

remittitur. The Applicant did not present testimony from appellate counsel at the PCR hearing, so this Court cannot speculate as to whether appellate counsel considered filing such a motion or believed it would have any merit. See Bannister v. State, 333 S.C. at 303, 509 S.E.2d at 809. Regardless, the timeline of when the State received the Court of Appeals' denial of its petition for rehearing was presented to the Supreme Court and that Court chose to grant the State's motion. This Court finds the Applicant has failed to demonstrate either that appellate counsel was ineffective in his representation or that the lack of such a motion prejudiced his appeal.

This Court finds the allegation that appellate counsel was ineffective in failing to raise the personal jurisdiction issue on appeal is without merit. Appellate counsel, however, is not required to raise every non-frivolous claim, but instead may select among them in order to maximize the likelihood of a favorable outcome. Smith v. Robbins, 528 U.S. 259, 288, 120 S. Ct. 746, 765 (2000). The Applicant has failed to demonstrate either that this issue was meritorious or that raising this issue would have changed the outcome of his appeal.

This Court concludes the Applicant has not met his burden of proving this issue by a preponderance of the evidence. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

E.

The Applicant argued he was subjected to double jeopardy because he already served the 5-year sentence for the weapons charge. This Court finds the Applicant failed to demonstrate there was a violation of the Double Jeopardy Clause in his case. While he was convicted of these charges in 2002, these convictions were reversed and remanded for a new trial in 2008. Conviction after this re-trial does not constitute a violation of double jeopardy. See, e.g., State v. Nelson, 336 S.C. 186, 196, 519 S.E.2d 786, 791 (1999) (finding "the Double Jeopardy clause does not preclude retrial of a defendant whose conviction was set aside because of trial error").

Further, this Court notes the Applicant received credit for the time served since his original conviction on these charges. This Court concludes the Applicant has not met his burden of proving this issue by a preponderance of the evidence. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

F.

The Applicant argued S.C. Code § 17-13-141 was violated due to the magistrate's non-compliance. The Applicant, however, failed to present any evidence the magistrate did not comply with this statute. Regardless, this Court finds the Applicant failed to demonstrate prejudice. See State v. Wise, 272 S.C. 384, 252 S.E.2d 294, 295 (1979) (holding the State's failure to fulfill a ministerial requirement only voids the search warrant if the defendant demonstrates prejudice). This Court concludes the Applicant has not met his burden of proving this issue by a preponderance of the evidence. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

G.

The Applicant argued the trial judge lacked subject matter jurisdiction because of a violation of Rule 3(c), SCRCrimP. This Court finds the Applicant has not met his burden of proving the warrant in his case was invalid or that the trial court lacked subject matter jurisdiction. See State v. Culbreath, 282 S.C. 38, 40, 316 S.E.2d 681, 681 (1984) ("[T]he failure of the solicitor to act upon a warrant within ninety (90) days . . . does not within itself invalidate a warrant or prevent subsequent prosecution."); see also State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007) (noting one must prove prejudice in order to prevail on an allegation that one's speedy trial rights were violated). The Applicant also argued his arraignment on the day of trial was improper. An arraignment is a mere formality and the arraignment in this case gave the

Applicant adequate notice of the charges he was facing. See State v. Ariail, 311 S.C. 35, 426 S.E.2d 751 (1993). This Court concludes the Applicant has not met his burden of proving these issues by a preponderance of the evidence. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds the Applicant has abandoned any such allegations.

CONCLUSION

Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial, sentencing, and appellate proceedings. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 2 day of October, 2015.



Edward W. Miller
Presiding Judge
Thirteenth Judicial Circuit

Greenville, South Carolina.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2014-DP-23-589

Robert Max Watkins, ... Appellant,

v.

State of South Carolina Respondent.

CERTIFICATE OF SERVICE

I, Denise Tanner LaBeck, paralegal to R. Mills Ariail, Jr., do hereby certify that on this October 13, 2015, I served upon the below named Respondents copies of the **NOTICE OF APPEAL** by depositing copies of the same via U.S. Mail, postage prepaid, Registered Mail in an envelope addressed as set forth herein below:

Karen C. Ratigan, Esq.
Assistant Attorney General
PO Box 11549
Columbia, SC 29211
Attorney for the State of South Carolina

Greenville County Clerk's Office
Greenville County Courthouse
305 East North Street
Greenville, SC 29601

Robert Max Watkins SCDC# 243803
Perry Correctional Institute
430 Oaklawn Road
Pelzer, SC 29669

SC Commission of Indigent Defense
Division of Appellate Defense
PO Box 11433
Columbia, SC 29211-1433

Denise Tanner LaBeck
Denise Tanner LaBeck

October 13, 2015

857

WITNESSES

W.C. BRUCE

Owens

CPD

12/19/01

ARREST WARRANT NUMBER

G 865977

G 865988

ACTION OF GRAND JURY

TRUE BILL

Joan Holman

FOREMAN GRAND JURY

Representative of Grand Jury

VERDICT

COUNT ONE: *Guilty*

COUNT TWO: *Guilty*

John J. ...
Foreperson of Petit Jury

Date: *10/25/02*

✓
DOCKET NO. 2002-GS-23-

TJQ

The State of South Carolina

C1063

County of Greenville

COURT OF GENERAL SESSIONS

FEBRUARY TERM 2002

THE STATE

vs.

ROBERT MAX WATKINS

Guilty

9-24-08
GUILTY

Indictment for

0139 ARMED ROBBERY

VIOLATION § 16-11-330

0549 POSSESSION OF A WEAPON DURING
THE COMMISSION OF OR THE ATTEMPT TO

COMMIT A VIOLENT CRIME

VIOLATION § 16-23-490

ENTERED
ACCT.
10/25/02

273

ENTERED
ACCT.
m

SCANNED

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

INDICTMENT FOR
COUNT ONE - ARMED ROBBERY
COUNT TWO- POSSESSION OF A WEAPON DURING
THE COMMISSION OF OR THE ATTEMPT TO COMMIT
A VIOLENT CRIME

At a Court of General Sessions, convened on FEBRUARY 19, 2002 the
Grand Jurors of Greenville County present upon their oath:

COUNT ONE - ARMED ROBBERY

That ROBERT MAX WATKINS did in Greenville County, on or about the 19th day of December, 2001, while armed with a deadly weapon, or while alleging, either by action or words or both, he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon did, by use of force, threats or intimidation, take and carry away the property of another, to wit: U.S. currency from Chuckie Cheese. This is in violation of §16-11-330 of the South Carolina Code of Laws (1976) as amended.

COUNT TWO - POSSESSION OF A WEAPON DURING THE COMMISSION OF OR THE
ATTEMPT TO COMMIT A VIOLENT CRIME

That ROBERT MAX WATKINS did in Greenville County, on or about the 19th day of December, 2001, possess or visibly display a handgun during the commission or attempted commission of a violent crime, to wit: Armed Robbery. This is in violation of §16-23-490 of the South Carolina Code of Laws (1976) as amended.

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

Thomas J. Quinn
SOLICITOR