

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2015-002511

RECEIVED

MAY 23 2016

SC SUPREME COURT

LEMONDE HOLLAND, 322379,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPENDIX
TO
PETITION FOR WRIT OF CERTIORARI

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Attachment A: Affidavit of Service filed November 23, 2015, Supervisor of Common Plea, Office of Horry County Clerk of Court, affiant states Order of Dismissal filed September 2, 2015 had not previously been served.



The South Carolina Court of Appeals

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February 10, 2012

REMITTITUR

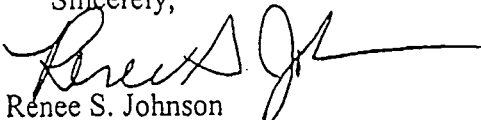
The Honorable Melanie Huggins
Government & Justice Center
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Conway, SC 29528-0677

Re: The State v. Holland, Lemond Corneilus
2006-GS-26-02012 2006-GS-26-02013 2006-GS-26-02014

Dear Ms. Huggins-Ward:

The above referenced matter is hereby remitted to the lower court. A copy of the judgment of this Court is attached.

Sincerely,


Renee S. Johnson
Case Specialist II

TAG/rj

cc: Deputy Chief Appellate Def. for Capital Appeals Robert M. Dudek
Assistant Attorney General Alphonso Simon, Jr.
John Gregory Hembree, Esquire

RECEIVED

FEB 13 2012

Referred to Simon ds
Answered _____

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Georgetown County

John L. Breeden, Jr., Circuit Court Judge

Opinion No. 4609 (S.C. Ct. App. filed 8/18/2009)

06-GS-26-2012-2014.

THE STATE,

RESPONDENT,

V.

LEMOND CORNEILUS HOLLAND,

PETITIONER

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on September 17, 2009.

QUESTION PRESENTED

1.

Whether the Court of Appeals erred by holding it was not error for the trial court to refuse to charge voluntarily manslaughter where there was evidence of an altercation inside the bar, evidence the decedent took his shirt off after leaving the bar, that the decedent and petitioner were then "wrestling" or "tussling" in the parking lot as the dispute continued, and the gunshots were fired during that fight since the shooting that occurred under these circumstances entitled petitioner to a voluntary manslaughter instruction?

2.

Whether the Court of Appeals erred by holding it was not error for the trial court to allow Carlos Adams to testify that "a month or a few weeks" before the incident in this case petitioner showed him a gun that was in his automobile since this was not relevant to what happened on the night of the incident, and any probative value the evidence had was outweighed by its danger of undue prejudice under Rule 403, SCRE?

STATEMENT OF FACTS

Procedural history

Petitioner was indicted at the April 27, 2006 term of the Horry County grand jury for the offenses of murder, assault and battery with intent to kill (ABIK) and possession of a weapon during the commission of a violent crime. All three counts arose out of an early morning argument and altercation at the McCatz Bar in North Myrtle Beach. R. 298 - 303.

Petitioner's case came on for trial on June 11, 2007 before the Honorable John L. Breeden, Jr., and a jury. Robert Richardson, Jr. and Jeffrey E. Johnson represented petitioner. Francis A. Humphries, Jr. and Donna Elder were the solicitors. R. 1.

On June 13, 2007 the jury found petitioner guilty on each count. R. 294, ll. 7-20. Judge Breeden sentenced petitioner to fifty years imprisonment for murder, twenty years imprisonment for ABIK and five years consecutive for possession of a weapon during the commission of a violent crime. R. 297, ll. 9 - 17.

The Court of Appeals affirmed petitioner's convictions in State v. Lemond Corneilus Holland, Op. No. 4609 (filed August 18, 2009). App. 1-8. See State v. Holland, 385 S.C. 159, 682 S.E.2d 898 (2009). Petitioner sought rehearing which was denied. This petition for a writ of certiorari follows.

Relevant facts

Yessica Caruthers had been dating the decedent for a month when they went to the McCatz Bar on December 30, 2005 at some time after midnight. McCatz was a late night bar where many in the service industry went after they got off work. R. 3, l. 11 - 4, l. 25.

Yessica remembered that the decedent became involved in an altercation "coming from the bathroom." There was evidence this argument was with petitioner. R. 5, ll. 8 - 14. Yessica said

that other patrons at the bar intervened to stop the would be fight. Bar manager Jeffrey Bennick remembered several customers “kind of stepped in,” and these patrons them not “to argue and fight and fuss.” R. 178, ll. 16 – 23. Yessica then left the bar with the decedent around four a.m after settling their tab. There was evidence the decedent had a blood-alcohol reading of .192 at the time. R. 6, ll. 12 – 20; R. 16, ll. 22-25.

Yessica admitted she had to ask the decedent two or three times for her car keys and she also had “tell him to let’s go” before he finally complied. Yessica claimed she did not recall if the decedent took his shirt off in the parking lot. However, as will be seen infra, there was other clear evidence that the decedent angrily pulled off his shirt in the parking lot following the verbal altercation inside the bar.¹ R. 18, l. 13 – 19, l. 11.

Yessica described the “loud yelling in the parking lot.” She remember that “at least four” people approached her car as she was attempting to drive away from the bar. R. 19, l. 20 – 23, l. 15. During this emotional encounter that started inside the bar, with Yessica driving, a man, who bar manager Jeffrey Binnick later identified as petitioner, came to the passenger window “and starting yelling [and] pointing a gun at the window” “trying to get him [the decedent] to get out of the car.” R. 8, l. 19 – 9, l. 16.

Yessica said the man “told him [the decedent] to get out of the car, come on and just some different things trying to get him out of the car . . . I believe he opened the door because he was pulling on the door and everything and then he just opened the rest of the way.” The decedent got out of the car and “*they just started tussling.*” R. 10, l. 10 – 13, l. 6. (emphasis added).

¹ There was other evidence that the shooting occurred at about four o’clock in the morning. R. 78, ll. 16 – 18.

Yessica admitted she got out of the car at this time and there would later be evidence she hit petitioner prior to his fight with the decedent because petitioner had hit her car. She had pushed petitioner to get him to stop hitting her car. R. 10, l. 10 – 13, l. 6. During the fight between the decedent and petitioner, Yessica heard gunshots and the decedent “fell down.” R. 14, ll. 2 – 21. Yessica said the shooter got in his car and drove away. R. 15, ll. 14 – 18.

The state then called Carlos Adams as a witness. Adams testified he was petitioner’s friend. R. 31, l. 23 – 33, l. 2. Adams was also at the McCatz Bar during the early morning hours of December 30, 2005. He saw petitioner inside the bar. R. 34, l. 6 – 35, l. 12. Adams and petitioner conversed for a while inside the bar. R. 35, l. 7 – 36, l. 2.

Prior weapon possession objections

When the solicitor asked Adams if he had “ever seen Mr. Holland in possession of any type of firearm or weapon?” Defense counsel objected on the grounds of relevance. The judge told the solicitor to “just withdraw the question.” Instead, the solicitor replied: “I’ll re-ask.” R. 36, ll. 6 – 13. The judge then sent the jury out of the courtroom. R. 36, ll. 12 – 25.

Defense counsel then said he did not know what relevance petitioner having a gun weeks before or even longer before December 30, 2005 had in this case, and he therefore objected to this line of inquiry. The solicitor argued it was relevant that Adams knew petitioner had a handgun and that he kept it in his car. R. 37, ll. 12 – 22. The judge ruled he would allow this testimony. Defense counsel then put his further objection on the record that the evidence should also be excluded under Rule 403, SCRE because it was unduly prejudicial. R. 37, l. 12 – 38, l. 15.

In the presence of the jury Adams then testified that he witnessed a verbal altercation inside the bar and he followed petitioner outside following the altercation “trying to figure out what was going on.” R. 39, l. 20 – 41, l. 10. Adams said petitioner was angry and cursing as he walked to

his car. Adams said he did not know if petitioner got anything out of his car at the time. The solicitor then inquired about petitioner possessing a gun. Adams responded, "maybe a month or a few weeks" before the incident, at some unknown location, petitioner showed him a gun that was in his car at that time. R. 42, l. 13 – 43, l. 21.

The parking lot altercation

Adams described how petitioner approached the passenger side of Yessica's car and he recalled "the guy that was sitting on the passenger side [the decedent] he tried to get out and then it was like an altercation and then I see like three shots get fired." R. 44, l. 3 – 45, l. 14. Adams described the scene as involving "a lot of people" and he recalled "it was craziness there."² R. 46, ll. 4 – 8.

Dr. Edward Proctor testified the decedent was six feet tall and he weighed two hundred twenty-five pounds. As stated, the decedent had a blood-alcohol reading of .192. When asked whether the level of intoxication was affected by how much the decedent had eaten and over what time period he drank the alcohol, Dr. Proctor responded: "All I can tell you is he was drunk." R. 55, l. 18 – 62, l. 12.

Jeffrey Bennick was a manager and a bartender at McCatz on the morning of December 30, 2005. R. 176, ll. 13 – 19. When Bennick arrived for work shortly after midnight there were about fifteen or twenty people in the bar. Bennick remembered a little later that morning there was a verbal altercation inside the bar. R. 176, l. 24 – 178, l. 14.

Bennick recalled that he was told there was an argument going on "near the men's bathroom." As stated, Bennick remembered several customers "kind of stepped in," and these

² There was evidence that Raphael Walke was accidentally shot in the leg during the altercation between the decedent and petitioner. That was the ABIK count. R. 50, l. 7 – 54, l. 7.

patrons told the people not "to argue and fight and fuss." R. 178, ll. 16 – 23. Bennick testified that Raphael, the man who was accidentally shot in the parking lot shortly thereafter, and Chris Hemingway, were two of the people who tried to intervene during the verbal altercation. R. 179, ll. 2 – 6.

Bennick remembered that the decedent was a white male and that his girlfriend was a black female. Bennick testified petitioner was a black male and his testimony described the altercation with these racial and gender descriptions. R. 179, l. 7 – 183, l. 18. When the decedent and his girlfriend, Yessica, left the bar Bennick recalled observing petitioner watch them leave. Bennick went outside because he was afraid there was going to be another altercation in the parking lot. R. 180, l. 10 – 182, l. 12. Bennick recalled:

When I walked out the white male they [the decedent and Yessica] were walking getting, getting ready to get in their vehicle and he actually turned around and I don't know if he thought that we were walking outside to say something to him, *he turned around and pulled his shirt off. At that moment, I kind of looked at him and said, you know, get in your car.* It's okay, nobody is going, you know, go ahead. Raphael had stepped down the handicap ramp. He is down kind of at the angle of the building. At that time he, I saw him looking at somebody and saying don't come around here . . .

R. 182, ll. 15 – 24. (emphasis added).

Bennick remembered: "[T]he black female was driving the car and the white male was in the passenger side." Bennick said petitioner ran to the passenger side of the car and started banging on the car window. "The female stopped the vehicle, got out of the car, walked around, tried to push him away from the car, told him not to hit her car, to leave the car alone." R. 183, ll. 3 – 18.

Bennick testified:

The white male [the decedent] spun around out of the passenger side and they kind of locked up with each other, grabbed a hold of each [others] shirts or jacket, not shirt, *but the white male had a hold of*

the black male's jacket and shirt and the black male had a hold of the white male's neck and they would kind of grasp each other. . .

R. 184, ll. 2 – 7. (emphasis added).

They sort of wrestled with one another about 15 or 20 feet from the back of the car and within about seven seconds of that happening a gunshot went off and about three seconds after that the third gunshot went off and the white male fell to his back.

R. 184, ll. 9 -14.

Bennick described how Yessica had backed the automobile up and it started forward -- about ten to fifteen feet -- before she stopped and got out of the car. This was when she confronted petitioner about hitting her car. R. 205, l. 11 – 207, l. 24. Bennick later identified petitioner as the man in the fight and the shooter from a photographic array. R. 197, l. 17 – 199, l. 20.

The purported jail house snitch

The state's final witness was Darren Malloy. Malloy was an inmate in the detention center and he was being prosecuted by the solicitor's office on other charges at the time of petitioner's trial. R. 217, l. 20 – 218, l. 17. Malloy said that he talked to petitioner when they were cellmates in the county jail during Malloy's incarceration on an earlier charge. Malloy claimed petitioner offered him ten thousand dollars to make three different witnesses "disappear." R. 219, l. 2 – 226, l. 5.

Malloy did not deny that the solicitor in petitioner's case also appeared in court when two of his earlier charges were dismissed and he then pled guilty on the third and was released. He denied that he was currying favor with the solicitor on his pending charges through his testimony in petitioner's case. R. 230, l. 12 – 232, l. 13.

Request to Charge

Defense counsel requested an instruction on voluntary manslaughter and the judge took the matter under advisement overnight. R. 237, l. 11 – 246, l. 10.

The following morning the judge stated he was not going to charge voluntary manslaughter. Defense counsel objected to this ruling, and he requested “that it be charged.” R. 246, ll. 9 – 17.

After the judge only gave the jury the options of guilty of murder or not guilty defense counsel took exception to the judge’s refusal to charge voluntary manslaughter. The judge again refused to change his ruling. R. 288, l. 16 – 291, l. 13.

Court of Appeals

The Court of Appeals held that petitioner was not entitled to an instruction on voluntary manslaughter despite the evidence of the fight above. The Court wrote: “The requirement that we view the evidence in the light most favorable to the defendant does not allow us to throw out all reason from our analysis or to ignore overwhelming, clear evidence of Holland’s *mission of violence* against Koehler – a state of mind that began before Koehler even stepped out of Caruther’s vehicle.” State v. Lemond Corneilus Holland, Op. No. 4609 (filed August 18, 2009). App. 6. (emphasis added).

The Court of Appeals stated: “The fight inside the bar was not accomplished by any physical contact between Koehler and Holland or any threatening gestures by Koehler.” App. 5. However, as seen above, the bar manager testified that several customers “kind of stepped in,” and these patrons told them not “to argue and fight and fuss.” R. 178, ll. 16 – 23. At a minimum the Court of Appeals was not viewing the evidence in the light most favorable to petitioner when it found this altercation involved “mere words,” irrespective of the physical fight that undoubtedly occurred between the intoxicated decedent and petitioner in the parking lot where there was

evidence the decedent wanted out of the car despite his girlfriend's desire to get him away from a fight.

The Court of Appeals also drew a distinction between "wrestling" and "tussling" and "throwing a punch" for purposes of the "heat of passion" and "legal provocation" for voluntary manslaughter. "[T]ussling and 'wrestling' does not permit an inference that Koehler threw any punches or otherwise posed a genuine threat to Holland through any specific identifiable hostile act." State v. Lemond Corneilus Holland, Op. No. 4609 (Filed August 18, 2009). App. 4.

Rehearing

In his rehearing petition he noted:

The Court . . . seems to misapprehend that the concept of being "without fault in bringing on the difficulty" which is an element of self-defense, and not a requirement for voluntary manslaughter, which is a recognition of human frailty that is often best on display late at night in bars when alcohol driven confrontations occur such as in this case.

Further, the Court also wrote that "there is no evidence, nor any reasonable inferences from the evidence, that *at the exact moment* Holland killed Koehler, Holland's rage was justified by legal provocation." (italics emphasis by petitioner). State v. Lemond Corneilus Holland, Op. No. 4609 (Filed August 18, 2009) at p. 6. This is a finding by the Court of a sufficient cooling time -- as a matter of law existed -- that the evidence in this case does not support as will be shown again infra.

The Court found that petitioner "relentlessly pursued a retreating Koehler," he "was on a mission to inflict harm, the "tussling and wrestling" does not permit an inference the decedent "posed a genuine threat," and the argument inside the bar was not accompanied by "any physical contact," or "any threatening gestures by Koehler." State v. Lemond Corneilus Holland, Op. No. 4609 (Filed August 18, 2009) at p. 7. This language respectfully shows that the Court not only drew its inferences in the light most favorable to the state, it shows that the Court substituted its view of what occurred during that early morning bar fight for that of the jury.

App. 10.

Petitioner also stated in that petition:

Here, there was evidence the decedent removed his shirt, a sign he wanted to fight, and the manager of the bar told him to "get in your car" when he showed his clear desire to fight petitioner. R. 182, ll. 15-24. Therefore, the Court's finding that the decedent was only protecting himself was not supported by the record. Further, there was clearly a physical fight in this case.

The fight in this case occurred at a bar at four o'clock in the morning where the physically large and drunk decedent was obviously hard to control as a fair reading of his girlfriend's testimony reveals. On much worse facts than this case the Supreme Court has held that a defendant was entitled to an instruction on voluntary manslaughter. While the Court cites Carter v. State, 301 S.C. 396, 392 S.E.2d 184 (1990) and State v. Gilliam, 296 S.C. 395, 373 S.E.2d 596 (1988) in its opinion it respectfully does not appear to comprehend the context of those cases in comparison with the facts of this case.

In Carter, the Court found ineffective assistance of counsel since Carter was entitled to a jury instruction on voluntary manslaughter where that instruction was not requested. In Carter the evidence showed that Carter had gone to *the victim's home*, and while there Carter got in a fight with the victim. The victim ejected Carter, *and Carter went to his car, retrieved a knife, and returned to fatally stab the victim*. This evidence entitled Carter to an instruction on voluntary manslaughter.

In State v. Gilliam, 296 S.C. 395, 373 S.E.2d 596 (1988) there was evidence that Gilliam assaulted his former lived-in girlfriend of seven years because he was angry that she persisted in making harassing phone calls to Gilliam's new wife. Gilliam's former girlfriend told him that her lover, John Austin, wanted to see him which prompted Gilliam to go to the Brown Derby Bar to find Austin. When Gilliam *sought out and found* Austin at the Brown Derby he motioned for him to come outside. The two men argued and Austin made threatening statements to Gilliam. Austin shot at Gilliam and Gilliam shot back at Austin killing him.

Our Supreme Court held the trial judge erred by refusing to charge voluntary manslaughter given these facts, and by only charging self-defense. The Court noted that the evidence justified a voluntary manslaughter instruction. This was true even though

Gilliam sought out the decedent where he obviously had to know a confrontation was very likely to occur.

App. 14-15.

Showing the gun on a prior occasion

The Court of Appeals also held that the trial judge did not abuse his discretion by allowing Adams to testify that petitioner had shown him his gun on a prior occasion. App. 7. Petitioner took exception to this holding on rehearing:

The Court found this [possession of the gun] was consistent with the ballistic evidence gathered by investigators after the shooting. Further, it solidified Caruthers's identification of Holland as the person who possessed the weapon used to kill Koehler and injure Walke [who was shot accidentally].' State v. Lemond Cornelius Holland, Op. No. 4609 (filed August 18, 2009) at pp. 10-11. However, neither reason, respectfully, justified the admission of this unduly prejudicial evidence where it was clear that was not the state's intent in placing it before the jury.

Petitioner submits that a segment of society views possession of handguns negatively, and handguns taken in public even more disapprovingly. Handguns are obviously not for any legitimate purpose other than protection. Showing off a handgun is in all likelihood going to be viewed by the jury as inconsistent with any legitimate purpose, and it leads to the impermissible inference that the person showing the gun is "itching" for a situation in which to use the gun.

The state here obviously sought to have the jury infer a negative inference from the fact that petitioner had a gun in his car weeks or a month prior to the altercation in this case. The clear implication the state wanted the jury to draw was that petitioner was illegally in possession of a weapon on a prior occasion, or that he was itching to use the gun.

App. 18.

ARGUMENT

1.

The Court of Appeals erred by ruling petitioner was not entitled to a voluntary manslaughter instruction. The Court appears to have confused concepts of self-defense and voluntary manslaughter. There was evidence of a heated argument inside the bar that the Court of Appeals improperly discounted. There was evidence the decedent angrily took his shirt off in the parking lot of the bar, that he did not want to leave, and that he wanted to fight. Further, the Court of Appeals distinction between "wrestling" and "tussling" and fighting is not supported by this Court precedents on voluntary manslaughter. This case involved an angry fight in a bar parking lot after an angry altercation inside the bar. Voluntary manslaughter should have been charged.

As petitioner argued in the Court of Appeals, in Carter v. State, 301 S.C. 396, 392 S.E.2d 184 (1990), this Court found ineffective assistance of counsel since Carter was entitled to a jury instruction on voluntary manslaughter. In Carter the evidence showed that Carter had gone to the victim's home, and while there Carter got in a fight with the victim. The victim ejected Carter, and Carter went to his car, retrieved a knife, and returned to fatally stab the victim. This evidence entitled Carter to an instruction on voluntary manslaughter.

Further, in State v. Gilliam, 296 S.C. 395, 373 S.E.2d 596 (1988) this Court noted that there was evidence Gilliam assaulted his former lived-in girlfriend of seven years because he was angry that she persisted in making harassing phone calls to petitioner's new wife. Gilliam's former girlfriend told petitioner that her lover, John Austin, wanted to see him which prompted Gilliam to go to the Brown Derby Bar to find Austin surely knowing there was going to be an angry altercation. When Gilliam found Austin at the Brown Derby he motioned for him to come outside.

The two men argued and Austin made threatening statements to Gilliam. Austin shot at petitioner and petitioner shot back and killed Austin.

- This Court held the trial judge erred by refusing to charge voluntary manslaughter given these facts, and by only charging self-defense. This Court noted that the evidence justified a voluntary manslaughter instruction. This was true even though Gilliam sought out the decedent where he obviously had to know a confrontation was very likely to occur.

In State v. Knoten, 347 S.C. 296, 555 S.E.2d 391 (2001) this Court found Knoten was entitled to an instruction on voluntary manslaughter where there was evidence that after an altercation inside his girlfriend's apartment where she assaulted him that she then chased Knoten out of her apartment and he went to his car. Knoten retrieved a metal pipe from the trunk of his car. Knoten re-entered the apartment and killed the decedent when she assaulted him again.

The majority of the court in Knoten rejected the state's argument that a sufficient cooling time had past between the incident inside the apartment, and petitioner retrieving the pipe from his car, and re-entering the apartment. In short, the majority rejected the argument that Knoten was not entitled to a voluntary manslaughter instruction because he could have gotten into his automobile and left rather than re-entered the apartment.

Here, it is clear that petitioner and the decedent were fighting in the parking lot when the decedent was shot. The Court of Appeals distinction between wrestling, tussling and throwing a punch is – respectfully – odd since this was obviously an angry *physical altercation*. It also is not supported by the precedents of this Court. As will be seen infra, this Court has found a voluntary manslaughter instruction applicable where there was never any physical contact during the angry encounter.

The Court of Appeals also improperly discounted the altercation inside of the bar where it clearly spilled out into the parking lot. The intoxicated decedent refused to give his girlfriend the car keys after the angry bar altercation until she asked him for the third time. The decedent then took off his shirt which is a clear sign he was ready to fight. While the decedent's girlfriend clearly wanted to stop the decedent from fighting -- the decedent just as clearly wanted to fight -- he did not want to leave.

While the panel of the Court of Appeals apparently found the facts of this case distasteful its finding that petitioner was on a clear mission of violence respectfully arrogated onto itself the fact finding duty reserved for the jury. The Court of Appeals simply did not -- as petitioner argued on rehearing -- view the evidence in the light most favorable to petitioner when determining if he was entitled to an instruction on voluntary manslaughter.

It is elementary that the law to be charge must be determine from the evidence presented at trial. State v. Cole, 338 S.C. 97, 525 S.E.2d 511 (2000). A judge must charge voluntary manslaughter if there is "any evidence whatsoever" of voluntary manslaughter. State v. Gardner, 219 S.C. 97, 104, 64 S.E.2d 130, 134 (1951); State v. Grubbs, 353 S.C. 374, 577 S.E.2d 493 (Ct. App. 2003). The Court of Appeals did not follow this Court's precedents when it determined petitioner was not entitled to an instruction on voluntary manslaughter.

As argued above, the distinction the Court made between "wrestling and tussling," and throwing a punch is not supported by this Court's precedent. Precedent reveals there does not even have to be a physical fight to mandate a voluntary manslaughter instruction. See State v. Penland, 275 S.C. 537, 272 S.E.2d 765 (1981)(pointing a gun sufficient to mandate voluntary manslaughter instruction); State v. Gallman, 79 S.C. 229, 240, 60 S.E. 682, 687 (1908) and State v. Petit, 144 S.C. 452, 472, 142 S.E. 725, 733 (1928) (humiliating assaults such as spitting in the face or

grabbing the ear and leading one around in the presence of others); State v. Martin, 216 S.C. 129, 57 S.E.2d 149 (1949)(assault of a family member); State v. Smith, 304 S.C. 129, 403 S.E.2d 162 (Ct.App. 1991)(blows to a third person). Even an offense against one's property has been held to justify a voluntary manslaughter instruction. State v. Gallman, 79 S.C. 229, 60 S.E. 682 (1908). Further, sudden mutual combat in which one participant is killed by another without a previously informed intent to do so has been held sufficient to justify a voluntary manslaughter instruction. See State v. McCants, 28 S.C.L. (1 Speers) 384 (1842); See, also, McAninch, Fairey, and Coggiola The Criminal Law of South Carolina at 180-190 (5th ed. 2007)

In State v. Lowry, 315 S.C. 396, 434 S.E.2d 272 (1993), this Court also held that where there was evidence the decedent "bumped chests" with Lowry, and evidence he then approached Lowry in a threatening manner, and Lowry then shot the decedent -- a voluntary manslaughter instruction was mandated. This was true even though Lowry cursed at the decedent after he fell and Lowry then shot him in the head.

As stated, it was a jury question whether this was murder or voluntary manslaughter since to warrant a court in eliminating the offense of manslaughter, it should very clearly appear that there is *no evidence whatsoever tending to reduce the crime for murder to manslaughter*. State v. Norris, 253 S.C. 31, 168 S.E.2d 564 (1969).

Voluntary manslaughter is the unlawful killing of a human being in a sudden heat of passion upon a sufficient legal provocation. Fighting has been held to constitute a sufficient legal provocation. State v. Grubbs, 353 S.C. 374, 577 S.E.2d 493 (Ct. App. 2003); State v. Davis, 278 S.C. 544, 546, 298 S.E.2d 778, 779 (1983).

In Grubbs this Court found the evidence that the decedent pushed Grubbs and punched her in the eye entitled Grubbs to an instruction on voluntary manslaughter when she shot and killed him.

Finally, in the death penalty case of State v. Cottrell, 376 S.C. 260, 657 S.E.2d 451 (2008), this Court held the defendant was entitled to an instruction on voluntary manslaughter based upon his confrontation with a police officer. See also State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981). This Court in Cottrell found it was permissible to infer, as did the trial judge, that the police officer acted as he did when he observed a gun in petitioner's possession. However, this Court also reasoned it was also a fair inference that the police officer reacted in an impermissibly aggressive manner when Cottrell attempted to walk away from him. This Court reasoned it was reversible error when the trial judge refused to give Cottrell a voluntary manslaughter instruction in that cop killer case based on the evidence of the confrontation or altercation between Cottrell and the police officer.

Based on this Court's precedent this petitioner was entitled to a voluntary manslaughter instruction. The Court of Appeals erred by holding otherwise, and petitioner respectfully submits that certiorari should be granted and petitioner be given a new trial.

2.

The Court of Appeals erred by holding that the trial judge did not abuse his discretion by admitting evidence petitioner had a gun in his car a few weeks or a month before the altercation in this case. Even if this evidence was somehow relevant, it still should have been excluded as unduly prejudicial under Rule 403, SCRE. Handguns are viewed negatively by many when they are on display or used in public. The state wanted this evidence before the jury so it would make the impermissible assumption that petitioner was itching for a fight.

Carlos Adams, as seen, described the “craziness” of the parking lot altercation. Defense counsel correctly argued that evidence petitioner had a gun in his car a month or a few weeks before the fatal altercation in the parking lot was not relevant, and that even if it was relevant, the evidence should still be excluded under Rule 403, SCRE.

The state obviously sought to have the jury infer a negative inference from the fact petitioner had a gun in his car weeks or a month prior to the altercation in this case. The clear implication the state wanted the jury to draw was that petitioner was illegally in possession of a weapon on a prior occasion or that he was proud of the gun and “itching to use it.”

The Court of Appeals held that “Adams’ testimony concerning Holland’s storage of a semi-automatic gun in his car within weeks prior to the incident was consistent with the ballistic evidence gathered by investigators after the shooting. Further, it solidified Caruthers identification of Holland as the person who possessed the weapon used to kill Koehler and injure Walke.”

Petitioner respectfully submits that the probative value of the fact petitioner showed Adams a gun weeks or a month before this incident in the parking lot of a bar was substantially outweighed by its unduly prejudicial effect under Rule 403, SCRE. Petitioner respectfully fails to see how the

fact he showed a gun to Adams weeks before solidified the identification of him as the shooter. Further, the fact that a semi-automatic handgun was used in this case proves little given the enormous number of semi-automatic handguns in circulation, and the prejudicial effect of the evidence was substantial. The gun is prone to be thought of as the petitioner's new toy that he is drawn to use as soon as convenient.

In State v. Douglas, 302 S.C. 508, 397 S.E.2d 98 (1990), this Court held it was reversible error for the trial judge to allow evidence that Douglas pulled a gun the night before he murdered the decedent while "horse playing" with another man because there was no connection or relation between the two incidents, and the evidence did not establish petitioner's state of mind at the time of the fatal altercation. The jury in Douglas was also impermissibly being asked to conclude that petitioner was a person of bad character who carried a gun around with him.

In State v. Bryant, 369 S.C. 511, 633 S.E.2d 152 (2006), petitioner was on trial for murder by shooting the decedent with a gun following an earlier altercation with a questionable nexus. The Court held that Bryant's prior firearm convictions should not have been allowed to be used to impeach Bryant. This Court noted this was particularly true given that Bryant was on trial for a gun related offense. While the procedural posture of Bryant is different, the reasoning of Bryant is instructive on the prejudice caused by prior evidence involving possession of a firearm.

Finally, the Court of Appeals relied on this Court's holding in State v. Braxton, 343 S.C. 629, 634, 541 S.E.2d 833, 836 (2001) to support its holding in this case. However, in Braxton, the murder weapon was a .9 millimeter handgun and the witness testified that he knew Braxton owned a .9 millimeter handgun. Here the solicitor asked Adams if petitioner showed him a "weapon" "a few weeks before" this incident. In context Adams said petitioner had "maybe a month or few weeks" before this incident. The solicitor then asked "What kind of a weapon was it? Adams said, "It was

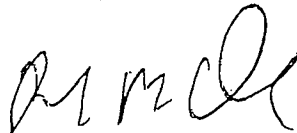
a, it was a gun. I don't know a lot about guns so I couldn't tell you." Adams then stated that he understood the difference between a revolver and a semi-automatic and that the gun was a semi-automatic and he confirmed "it had a clip in it." R. 42, ll. 16- 43, l. 21.

Unlike Braxton where a .9 millimeter was the murder weapon and the witness testified Braxton owned one here the class of guns was all semi-automatic handguns. Given the extraordinary number of semi-automatic handguns, and the substantial prejudicial effect this evidence could have -- as argued supra -- it should have been excluded under Rule 403, SCRE.

CONCLUSION

A petition for writ of certiorari should be granted to allow full briefing on these issues.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R M Dudek', written over a horizontal line.

Robert M. Dudek
Acting Chief Appellate Defender

ATTORNEY FOR PETITIONER.

This 18th day of December, 2009

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Georgetown County

John L. Breeden, Jr., Circuit Court Judge

Opinion No. 4609 (S.C. Ct. App. filed 8/18/2009)
06-GS-26-2012-2014.

THE STATE,

RESPONDENT,

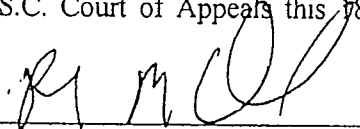
V.

LEMOND CORNEILUS HOLLAND,

PETITIONER

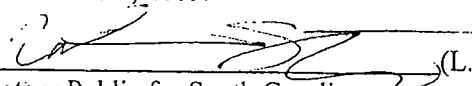
CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on Alphonso Simon, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, Lemond Holland at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, and the S.C. Court of Appeals this 18th day of December, 2009.


Robert M. Dudek
Acting Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 18th day
of December, 2009.


Notary Public for South Carolina

My Commission Expires: July 1, 2019.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM HORRY COUNTY
John L. Breeden, Jr., Circuit Court Judge

On Petition for Writ of Certiorari to the Court of Appeals
Opinion No. 4609 (S.C. Ct. App. Filed 8/18/2009)

THE STATE

RESPONDENT,

V.

LEMOND CORNEILUS HOLLAND,

APPELLANT

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PETITIONER'S QUESTIONS PRESENTED

1. Whether the Court of Appeals erred by holding it was not error for the trial court to refuse to charge voluntarily[sic] manslaughter where there was evidence of an altercation inside the bar, evidence the decedent took his shirt off after leaving the bar, that the decedent and petitioner were then "wrestling" or "tussling" in the parking lot as the dispute continued, and the gunshots were fired during that fight since the shooting that occurred under these circumstances entitled petitioner to a voluntary manslaughter instruction?
2. Whether the Court of Appeals erred by holding it was not error for the trial court to allow Carlos Adams to testify that "a month or a few weeks" before the incident in this case petitioner showed him a gun that was in his automobile since this was not relevant to what happened on the night of the incident, and any probative value the evidence had was outweighed by its danger of undue prejudice under Rule 403, SCRE?

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL

1. Whether the Court of Appeals correctly held the trial court did not err by refusing to charge voluntary manslaughter when there was no evidence presented that the defendant was provoked by an adequate legal provocation arising from actions by the victim; there was no evidence that the victim said anything to the defendant; and there was no evidence that the victim made any threatening action towards the defendant in the altercation that ended with the defendant shooting the victim?
2. Whether the Court of Appeals correctly held the trial court did not abuse its discretion in allowing a friend of the defendant to testify that the defendant showed him a semiautomatic handgun that the defendant kept in his car a few weeks prior to the shooting when the identity of the shooter was relevant, the handgun shown to the witness was

consistent with the one used in the shooting, and the defendant was not unfairly prejudiced by the testimony?

STATEMENT OF THE CASE

On June 11-13, 2007, Lemond Corneilus Holland ("Holland") was tried by a jury on the following charges: murder, possession of a weapon during the commission of a violent crime, and assault and battery with intent to kill. He was tried in the Fifteenth Circuit Court of General Sessions in Horry County before Judge John L. Breeden, Jr.

At trial, the State asked witness Carlos Adams, an acquaintance of Holland's, if he had ever seen Holland in possession of any type of firearm or weapon. (R. p. 36, ll 3-4). Holland's counsel objected to the question. Counsel's objection was initially a relevance objection. "I don't know what relevance a gun from two weeks before would have on the matter in question this night . . . I didn't want the jury to hear it and would object to her talking about a gun that he might have seen before this night." (R. p. 37, ll 5-6, 8-11). In response, the State outlined the witness's testimony for the court.

He's going to testify that within that period of time that preceding the event that the defendant showed him a handgun which he had in his vehicle. It is absolutely relevant that he know the defendant had a handgun and that he kept it in his vehicle which was consistent with his observations.

The court ruled that it would allow the testimony. There was immediately a short break. After the break, Holland's counsel asked if he could note his objection on the record. (R. p. 38, ll 3-4). "[I]n fullness of that motion I made I would make it under Rule 403 exclusion of relevant evidence on grounds of prejudice. I just feel like that that would be too prejudicial to talk about a gun that was two weeks before." (R. p. 38, ll 11-14). The court noted the objection. Adams resumed testifying. He later testified that Holland showed him a gun in his car. (R. p. 42, ll 19-24). When the State asked Adams if he knew

the difference between a semiautomatic weapon and a revolver, Holland's counsel objected. (R. p. 42, l 25 – R. p. 43, l 5). The court overruled the objection. (R. p. 43, l 4).

Holland submitted proposed jury charges including a request that the judge instruct the jury on voluntary manslaughter in regards to the murder indictment. (See R. pp. 237-38). The State argued that there was no evidence to support a voluntary manslaughter charge:

What we have in the bar is a verbal altercation. No evidence of any physical altercation whatsoever. Words alone obviously do not provide sufficient provocation. The only other evidence regarding the physical altercation which occurred out in the parking lot was as a result of the victim who was retreating in the vehicle, the defendant approaching the vehicle with a handgun with an attempt to get the victim out of the vehicle when then they engaged in some contact and the defendant being fully excused by way of self defense.

(R. p. 238, ll 4-14). The court briefly addressed the State's objection. The court also stated its understanding of the facts:

I must tell you that I, you pointed that out adroitly, my recollection of the testimony was that she backed out, she was headed out 10 to 15 feet and stopped and got out of the car, but right after that, and Mr. Richardson [sic] got out of the car and started yelling and screaming that she said or he said got out of the car and came around to the other side yelling and screaming for him to quit beating on the window. So the beating on the window was occurring before or at the time she stopped . . . Here's the significant thing, is that the defendant, excuse me, the victim didn't do anything except sit in the drivers seat at that time . . . passenger seat in the car. I'm going to have to think about that. I'm not included at this time. Let me think about it over the evening hour but right now my feeling is that it's murder or nothing.

(R. pp. 240, ll 15-23; 241, ll 5-7, 9; 241, ll 13-16). The next day, the court declined to give a voluntary manslaughter jury instruction. (R. p. 246, ll 11-14). Holland's counsel objected, and requested that it be charged. (R. p. 246, ll 15-17). After the jury was charged, Holland's counsel took exception and objected to the court's decision not to give a charge on voluntary manslaughter. (R. p. 291, ll 3-8). The court denied the motion by

Holland's counsel again, stating "the reason I'm not charging manslaughter is in my judgment there was no sufficient justification or provocation, that's why I didn't charge them that." (R. p. 291, ll 9-13).

On June 13, 2007, Holland was convicted on all three charges. (R. p. 294, ll 7-25). Holland's counsel renewed all of the prior motions made during the trial. (Supp. R. p. 370, ll 13-15). Counsel also moved in arrest of judgment because of errors on the face of the record in indictments, especially in regard to the assault and battery with intent to kill indictment. (Supp. R. p. 370, ll 15-21). Further, counsel moved for a new trial on the grounds that 1) there was no evidence in the record that Holland committed the crimes set forth in the indictments, 2) there was a variance between the testimony and allegations in the indictments, and 3) some evidence was properly admitted and some improper testimony was given. (Supp. R. p. 370, l 22 – R. p. 295, l 5). The court denied all of the motions. (R. p. 295, ll 6-10). Holland received a fifty (50) year sentence for the murder charge. (R. p. 297, ll 9-11). He also received a twenty (20) year sentence on the assault and battery with intent to kill charge to run concurrent with the murder charge. (R. p. 297, ll 12-14). For the possession of a weapon in the commission of a violent crime, Holland received a five (5) year sentence to run consecutive. (R. p. 297, ll 15-17).

Holland timely filed a notice of appeal on June 20, 2007. After full briefing and argument, the South Carolina Court of Appeals issued an opinion affirming petitioner's conviction. (App. pp. 1-8).¹ Petitioner filed a Petition for Rehearing on August 28, 2009. (App. pp. 9-21). The Court of Appeals denied the petition on September 17, 2009. (App. p. 22).

¹ Published at 385 S.C. 159, 682 S.E.2d 898 (Ct.App.2009).

Petitioner now seeks review of the South Carolina Court of Appeals' opinion in this Court.

RESPONDENT'S STATEMENT OF FACTS

On the early morning of December 30, 2005, Holland fired a handgun three times in the parking lot of McCatz Tavern and Bar in North Myrtle Beach, SC. One shot pierced through the head of Brandt Michael Koehler, killing him. (R. p. 59, ll 4-15). Another shot hit Raphael Walke, a bystander, in the leg. (See R. p. 51, l 22 – R. p. 52, l 15). The third shot struck the vehicle of Yessica Caruthers, the victim's girlfriend. (See R. p. 130, l 25 – R.. 131, l 7).

Koehler, the murder victim, and his girlfriend, Yessica Caruthers went to McCatz Tavern sometime after midnight on December 30. (R. p. 4, ll 15-19). McCatz Tavern was a late night establishment where service industry workers would go after work. (R. p. 34, ll 12-20). Ms. Caruthers had just got off from work. (R. p. 4, ll 20-21).

There is an argument inside the bar.

Sometime after Caruthers and Koehler arrive, Koehler got into an argument with Holland inside the bar. (R. p. 5, ll 8-11). No one who testified could say why they were arguing. Nor did anyone testify as to what was said during the argument. Caruthers stated that she saw the argument as she was returning from the restroom. (R. p. 5, ll 12-14). Carlos Adams, a friend of Holland's,² testified that he saw an argument, but he could not tell who was involved. (R. p. 40, ll 3-8). However, he believed that Holland was involved in some way. (R. p. 40, ll 9-11). Jeffrey Bennick, a manager and bartender at McCatz that

² (R. p. 32, l 22 – R. p. 33, l 2).

evening,³ also testified that he was informed of an argument that occurred near the men's restroom. (R. p. 177 l 22 – R. p. 178, l 7). None of the witnesses saw any physical contact between Holland and the victim. (R. pp. 6, ll 21-23, 40, ll 12-16, 178, ll 8-15). There was only a heated exchange of words. (R. p. 6, ll 24-25). According to both Caruthers and Bennick, other patrons intervened and restrained Holland. (R. p. 6, ll 12-15; 7, ll 1-2; R. p. 178, l 18 – R. p. 179, l 12).⁴ Holland was still angry and upset after the argument ended. (R. pp. 41, ll 16-17; 179, ll 10-12). Shortly thereafter, Koehler paid his tab. (R. p. 179, ll 12-14; see R. p. 6, ll 19-20). He and Caruthers left the bar. (R. pp. 6, ll 16-18; 179, ll 12-16).⁵

The victim and Caruthers go to her car.

Koehler and Caruthers headed out to the parking lot to Caruthers' 2003 Saturn Vue. (R. p. 7, ll 5-14). Bennick stood and watched as they left to make sure that no new argument arose between any of the patrons. (R. p. 179, ll 14-16). According to Bennick,

They [the victim and Caruthers] went to the south side door and they stood for a second and talked maybe for maybe 20, 25 seconds, and the black male that was arguing with them went to the north side door and stood and watched them, waiting for them to leave I guess, and kind of sort of agitated, walked out the door one time and then came right back in.

³ (R. p. 176, ll 15-19).

⁴ One of the patrons who intervened was Raphael Walke, the second individual who was shot by Holland. Walke was the victim on the assault and battery with intent to kill charge.

⁵ Adams did not recall seeing the victim and Caruthers leave the bar. (R. p. 41, ll 4-6). He was following Holland. (R. p. 41, ll 9-11).

(R. p. 180, ll 3-9). Bennick and Walke, the other shooting victim, walked out the south side door to make sure there was not going to be another argument. (R. p. 181, ll 7-10).⁶ When Bennick and Walke walked outside, Koehler and Caruthers were getting ready to get in her vehicle. (R. p. 182, ll 15-17). Koehler turned around and pulled his shirt off. (R. p. 182, ll 18-19).⁷ According to Bennick, Koehler was looking directly at him and Walke when he removed his shirt. (R. p. 185, ll 6-9). Bennick stated that Koehler was not hollering at anyone. (R. p. 204, ll 1-4). "When we walked out the door he was ready to see if somebody was going to come start trouble with him." (R. p. 204, ll 14-15). Adams, who was following Holland at the time, did not recall seeing Koehler remove his shirt or seeing him with his shirt off. (R. p. 47, ll 15-23). At trial, Bennick stated that "[a]t that moment I kind of looked at him and said, you know, get in your car. It's okay, nobody is going, you know, go ahead." (R. p. 182, ll 19-21).⁸ Both Koehler and Caruthers then got into her vehicle. (R. p. 8, ll 5-8; see R. p. 183, ll 8-10).

Holland goes to his car.

As Koehler and Caruthers were leaving the bar out of the south side entrance, Holland left out of the north side entrance. (R. p. 40, l 22 – R. p. 41, l 8; R. p. 181, ll 5-7). Bennick lost sight of Holland at that point. (R. p. 181, ll 1-3). Adams followed his friend Holland out the north side exit. (R. p. 41, ll 9-10). Adams "figured there was going to be an altercation but I was just like behind him, but he was just like cursing and he was like in

⁶ Bennick saw Holland run out the north side door of the bar around the time the couple left. (R. p. 181, ll 5-7). He was concerned the two would run into one another in the parking lot. Id.

⁷ Caruthers did not remember Koehler pulling his shirt off. (R. p. 18, l 23 – R. p. 19, l 6).

⁸ Caruthers did recall that Koehler was yelling with the individuals who had followed them out of the south side of the bar. (R. p. 18, ll 13-22).

front of me the whole time like he was walking towards his car.” (R. p. 41, ll 12-15).

Holland went to his car. (R. p. 41, ll 18-19). Nobody else was there. (R. p. 41, ll 20-25).

Adams watched Holland go “to his driver’s side and he reached in and then he slammed the door and then locked it.” (R. p. 42, ll 3-6). Adams does not know if Holland got anything out of the car. (R. p. 42, ll 7-12). However, Adams did know that Holland had a semiautomatic pistol in his car a few weeks prior to the shooting. (R. pp. 42, ll 16-20; 43, ll 8-9, ll 15-21). According to Adams, “one day he showed it to me in the car.” (R. p. 42, ll 19-20).

At that point, Adams had concerns about what was happening. (R. p. 43, ll 22-25). Adams tried to talk to Holland, but he could not because Holland was still very angry. (R. p. 44, ll 1-4). After Holland locked his car door, he took off towards Caruthers’ vehicle. (R. p. 44, ll 5-9).

Holland runs to Caruthers’ vehicle.

As Caruthers is backing out of her parking spot, Holland runs from the other side of the parking lot to the passenger side of the SUV. (R. p. 8, l 13 – R. p. 9, l 8). Koehler was sitting on the passenger side. (R. p. 9, ll 6-8). According to Caruthers, Holland “started yelling and pointing the gun at the window and trying to get him to get out of the car.” (R. p. 9, ll 15-16). Adams observed Holland run to the passenger side of the car. (R. p. 44, ll 13-20). Bennick also observed Holland run from around the side of the McCatz building and run to the passenger side of Caruthers’ vehicle. (R. pp. 183, ll 4-7; 185, ll 14-23). He also saw Walke attempt to stop Holland from heading towards the vehicle. (R. p. 186, ll 5-7). Holland pushed Walke away and continued towards the vehicle. (R. p. 186, ll 9-10).

Caruthers saw Holland had a handgun. (R. p. 9, ll 15-19). She indicates that while she is not familiar with guns, it appeared this gun had a clip. (R. p. 9, l 20 – R. p. 10, l 9). According to Caruthers, Holland was yelling and trying to get Koehler out of the vehicle. (R. p. 10, ll 10-16). She could not recall exactly what he said. Id. Bennick also testified that he observed Holland as he banged on the passenger side window really hard. (R. p. 183, ll 12-13). He thought the banging on the window sounded like metal hitting glass. (R. p. 186, ll 16-20).

There was some conflict in the testimony of the three witnesses of exactly what happened next. According to Caruthers, she stopped her vehicle as she was backing out. (R. p. 20, ll 3-16). Bennick testified that she had already backed out and had driven about ten (10) to fifteen (15) feet before she stopped. (R. p. 205, ll 14-21). After Caruthers stopped the vehicle, she jumped out and started yelling at Holland. (R. p. 183, ll 13-16).⁹ According to Bennick, “[t]he female stopped the car, got out of the car, walked around, tried to push him away from the car, told him not to hit her car, to leave the car alone.” (R. p. 183, ll 13-16; see R. p. 186, l 25 – R. p. 187 l 1). While Koehler was still in the vehicle, Caruthers and Walke actually physically pushed Holland in an attempt to get him away from the vehicle. (R. p. 190, ll 11-13).

Bennick and Caruthers both testify that Holland was pulling on the door latch and was attempting to get the door open. (R. pp. 11, ll 2-6, 12-13; 183, ll 22-25; 187, ll 1-6). Bennick stated, “[h]e was jerking on the car door. I don’t know if the door was locked and he was, or he was missing the handle or what, but he was grabbing it trying to jerk the door

⁹ Caruthers’ testimony conflicts with Bennick’s testimony. She stated that she exited the vehicle after the passenger side door was opened. (R. p. 21, l 18 – R. p. 22, l 5). Bennick’s testimony clearly indicates that she had exited the vehicle and was confronting Holland before the passenger side door was opened.

open.” (R. p. 183, ll 22-25). It is unclear who actually opened the passenger side door. (See R. p. 186, l 23 – R. p. 187, l 1). Caruthers indicates Holland was the one who opened the door. (R. p. 11, ll 2-6). Adams stated that he thought Koehler was trying to get out of the vehicle. (R. p. 44, ll 18-19). Bennick said “[t]he door opened up and, I won’t say, he didn’t lunge into the car, but he stepped into the, to the doorway of the car.” (R. p. 183, l 25 – R. p. 184, l 2).

The final encounter.

After the door is opened, Koehler gets out of the vehicle and he and Holland started “tussling.” (R. p. 11, ll 16-23).

The white male [Koehler] spun around out of the passenger side and they kind of locked up with each other, grabbed a hold of each shirts or jacket, not shirt, but the white male had a hold of the black male’s [Holland] jacket and shirt and the black male had a hold of the white male’s neck and they would kind of grasp each other.

(R. p. 184, ll 2-7). Caruthers testified that Holland still had the gun in his hand at this point. (R. p. 13, l 24 – R. p. 14, l 8). No one ever saw Koehler with a weapon in his hand. (R. p. 196, 19-25, see R. p. 14, ll 2-8). Bennick testified that Koehler had his head down, and “the momentum of the two of them they were like jostling back and forth but they wound up going like I said about 10 yards from the car but the white male’s head was actually down the entire time.” (R. p. 193, ll 7-10). No punches were thrown in the confrontation. (R. p. 193, ll 12-13). Holland “had his hands over the top of the white male’s arms and he was, it appeared to me that he was trying to do anything he could to, looked like he was almost like kind of hitting him in the top of the head kind of.” (R. p. 193, ll 17-21). According to Bennick,

They sort of wrestled with one another about 15 or 20 feet from the back of the car and within about seven seconds of that happening a gunshot went off and about

three seconds after that a second gunshot went off and about three seconds after that the third gunshot went off and the white male fell to his back

(R. p. 184, ll 9-14). Caruthers also saw three or four shots fired. (R. p. 14, ll 9-20). She also says that after the last shot, Koehler fell. (R. p. 14, ll 18-21). Adams stated that “[t]he guy that was sitting on the passenger side he tried to get out and then it was like an altercation and then I see like three shots get fired.” (R. p. 44, ll 18-20). Adams both heard the shots and saw the muzzle flash from the shots. (R. p. 44, l 21 – R. p. 45, l 7).

Koehler was shot in the head. (R. p. 15, ll 6-10). Walke was shot in the leg. After it was over, Holland took off, running to the back side of the building. (R. pp. 14, ll 22-25; 195, ll 13-15). Holland then hopped into his vehicle and sped off. R. pp. 15, ll 14-18; 184, ll 15-16; 195, ll 17-19).

ARGUMENT

I. The Court of Appeals correctly held that the trial court did not abuse its discretion in denying Petitioner’s request for a voluntary manslaughter charge.

Petitioner was not entitled to a voluntary manslaughter charge. As correctly noted by the Court of Appeals, “there is no evidence, nor any reasonable inferences from the evidence, that at the exact moment Holland killed Koehler, Holland’s rage was justified by legal provocation.” Holland, 685 S.E.2d at 902. As found by the Court of Appeals, there was no evidence in the record that there was any sufficient legal provocation for the shooting.

Standard of Review

“An appellate court will not reverse the trial court’s decision regarding jury instructions unless the trial court abused its discretion.” State v. Williams, 367 S.C. 192, 195, 624 S.E.2d 443, 445 (S.C. Ct.App.2005) (quoting Clark v. Cantrell, 339 S.C. 369,

389, 529 S.E.2d 528, 539. (2000)). Furthermore, “[t]o warrant reversal, a trial court’s refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant.” State v. Patterson, 367 S.C. 219, 232, 625 S.E.2d 239, 245 (S.C. Ct. App. 2006). “The law to be charged must be determined from the evidence presented at trial.” Id. If there is any evidence to support the requested charge, the trial court should grant the request. Williams, 367 S.C. at 195, 624 S.E.2d at 445. The evidence must be reviewed in the light most favorable to appellant. State v. Cottrell, 376 S.C. 260, 262, 657 S.E.2d 451, 452 (2008).

“Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation.” State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 513 (2000).

“Sudden heat of passion upon sufficient legal provocation” that mitigates a felonious killing to manslaughter must be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called “an uncontrollable impulse to do violence.”

State v. Lowry, 315 S.C. 396, 399, 434 S.E.2d 272, 274 (1993)(quoting State v. Gardner, 219 S.C. 97, 64 S.E.2d 130 (1951)). In determining whether voluntary manslaughter should be charged as a lesser offense of murder, the trial court must view the evidence in the light most favorable to the defendant. State v. Cottrell, 376 S.C. 260, 262, 657 S.E.2d 451, 452 (2008). The charge need not be given “where it clearly appears that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter.” State v. Pittman, 373 S.C. 527, 570, 647 S.E.2d 144, 166 (2007).

The Court of Appeals correctly pointed out that the argument inside the bar could not constitute sufficient legal provocation.

First, the argument inside the bar was not accompanied by any physical contact between Koehler and Holland or any threatening gestures by Koehler. Therefore, the argument itself could not serve as sufficient legal provocation because "mere words, no matter how opprobrious, are insufficient to constitute adequate legal provocation when death is caused by the use of a deadly weapon." Rogers, 320 S.C. at 525, 466 S.E.2d at 362. When "death is caused by use of a deadly weapon, the offending words must be accompanied by an overt, threatening act." Id. at 525, 466 S.E.2d at 362-63 (quoting State v. Lowry, 315 S.C. 396, 399, 434 S.E.2d 272, 274 (1993) (internal quotations omitted)).

Holland, 682 S.E.2d at 902. Further, the Court of Appeals correctly found

there is no evidence, nor any reasonable inferences from the evidence, that Holland saw Koehler remove his shirt in the parking lot. Even if Holland had seen Koehler remove his shirt, and even if this was a signal that Koehler was ready for a fight, merely displaying a willingness to fight, unaccompanied by any overt threatening act toward a defendant, does not constitute sufficient legal provocation. See Johnson, 324 S.C. at 40-41, 476 S.E.2d at 682 (holding that the trial judge properly refused to charge voluntary manslaughter, despite testimony that an individual approached the defendant and demonstrated a willingness to fight, because there was no evidence of any overt threatening act toward the defendant).

Id., 602 S.E.2d at 902-03.

Contrary to Petitioner's assertions, State v. Knoten, 347 S.C. 296, 555 S.E.2d 391 (2001) does not support his claim he was entitled to a voluntary manslaughter charge. As correctly pointed out by the Court of Appeals,

[i]n Knoten, one of the defendant's statements given to police indicated that the victim cut the defendant with a knife and chased him out of her apartment into the frigid weather while he was naked and that he reached into his trunk to obtain a metal pipe, presumably to defend himself as he went back into the apartment to retrieve his clothes. 347 S.C. at 303-04, 555 S.E.2d at 395. As he entered the apartment, the victim cut him with a knife a second time, and the defendant then hit the victim on the head with the metal pipe. 347 S.C. at 304-05, 555 S.E.2d at 395-96. Unlike the evidence of the victim's second assault of the defendant in Knoten, there is simply no evidence in the instant case that any action of Koehler after he retreated from the bar precipitated a new provocation rising to the level of "legal provocation," sufficiently distinct from any provocation Holland had already experienced inside the bar.

Holland, 682 S.E.2d at 903.

Similarly, Carter v. State, 301 S.C. 396, 392 S.E.2d 184 (1990), and State v. Gilliam, 296 S.C. 395, 373 S.E.2d 596 (1988), did not support Petitioner's request for a jury instruction on voluntary manslaughter.

In Carter, the defendant's heat of passion was provoked by the victim's striking the defendant and forcefully ejecting him from the victim's house. 301 S.C. at 397, 392 S.E.2d at 185. And in Gilliam, the defendant's heat of passion was provoked by the victim's firing a gun at the defendant. 296 S.C. at 397, 373 S.E.2d at 597. Here, Holland's rage was provoked by a mere verbal argument inside a bar, which does not rise to the level of legal provocation. Again, there is no **reasonable** inference of a specific, identifiable hostile act of Koehler that posed a genuine threat to Holland. The requirement that we view the evidence in the light most favorable to the defendant does not allow us to throw out all reason from our analysis or to ignore the overwhelming, clear evidence of Holland's mission of violence against Koehler—a state of mind that began before Koehler even stepped out of Caruthers' vehicle. Cf. Collins v. Bisson Moving & Storage, Inc., 332 S.C. 290, 296, 504 S.E.2d 347, 350 (Ct.App.1998) (“In reviewing the grant of a directed verdict, the appellate court should not ignore facts unfavorable to the opposing party.”).

Holland, 682 S.E.2d at 904.

The Court of Appeals also correctly pointed out that Petitioner's case was not similar to the facts in State v. Lowry, 315 S.C. 396, 434 S.E.2d 272 (1993).

The facts in the instant case are also different from those in Lowry, in which there was testimony that the victim moved toward the defendant in a menacing fashion with his arms and hands outstretched toward the defendant as if to grab him. 315 S.C. at 398, 434 S.E.2d at 273. The Lowry Court stated that this testimony tended to show that the victim was about to initiate a physical encounter when the shooting occurred. 315 S.C. at 399, 434 S.E.2d at 274. There was no testimony in the instant case that could be similarly characterized.

Holland, 682 S.E.2d at 903-04.

State v. Grubbs, 353 S.C. 374, 577 S.E.2d 493 (S.C. Ct. App. 2003), also does not support a finding of sufficient legal provocation to warrant a voluntary manslaughter jury instruction in this case. In Grubbs, this Court held that the defendant was entitled to a voluntary manslaughter charge despite the fact that her testimony at trial disavowed a previous statement that contained facts that supported a voluntary manslaughter charge.

Id. at 382-83; 577 S.E.2d at 497-98. The defendant in Grubbs had given several statements to police prior to trial. Id. at 376-77; 577 S.E.2d at 494-95. In one statement, she claimed the victim (her common law husband) argued with her, pushed her around, and punched her in the eye prior to the shooting. Id. At trial, the defendant claimed self-defense. The trial court refused to grant a voluntary manslaughter instruction, finding that a defendant does not have the right to submit several inconsistent theories of a defense and see which one works. Id. at 381, 577 S.E.2d at 497. This Court reversed the trial court's decision. Its decision was based on the holding in Knoten, which held that a voluntary manslaughter jury charge was warranted even though the evidence supporting the charge was one of several inconsistent statements introduced at trial. Id. Grubbs is not applicable here because in Grubbs, there was clear evidence that suggested the victim was the aggressor. In Grubbs, there was a statement in evidence that indicated the victim argued with the defendant, pushed the defendant, and struck the defendant in the eye. In Holland's trial, there was no evidence presented that indicates the victim was an aggressor. There is only limited evidence to support a finding that they argued inside McCatz Tavern. However, there is no evidence that the victim argued with the defendant during the final altercation, nor was there any evidence that the victim pushed or struck the defendant. The only physical contact between the two occurred when they grabbed one another in the parking lot, but even then the victim's head was down the entire time.

A finding of sufficient legal provocation in this case is not supported by State v. Cottrell, 376 S.C. 260, 657 S.E.2d 451 (2008). In Cottrell, the South Carolina Supreme Court reversed a trial court's refusal to grant a voluntary manslaughter instruction in the shooting of a police officer. Id. at 265, 657 S.E.2d at 454. The victim, a police officer,

was shot and killed by the defendant after the victim attempted to conduct a Terry stop on the defendant in a parking lot. Id. at 263-64, 657 S.E.2d at 452-53. There was some evidence in Cottrell that indicated the victim both physically assaulted and possibly shot the defendant prior to the killing. Id. The trial court denied the jury instruction because of State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981), in which the South Carolina Supreme Court held a lawful arrest or detention in a lawful manner cannot serve as adequate legal provocation. Cottrell, 376 S.C. at 264, 657 S.E.2d at 453. The trial court in Cottrell found that as a matter of law, the attempted Terry stop was a lawful detention conducted in a lawful manner. Cottrell, 376 S.C. at 265, 657 S.E.2d at 453. Thus, no voluntary manslaughter instruction was warranted. Id. The South Carolina Supreme Court disagreed. "The evidence in this case presented a jury question whether the arrest was lawful but effectuated through the victim's unnecessary use of violence." Id., 657 S.E.2d at 454. Therefore, a voluntary manslaughter instruction was warranted. Id.

A voluntary manslaughter charge was not warranted in Holland's case because there was no evidence presented at trial that indicated that the victim physically assaulted Holland. Unlike the victim in Cottrell, Koehler was unarmed. Holland was the only one who brought a weapon to the scene. Koehler did not initiate the confrontation with Holland. Holland instigated the confrontation by running across the parking lot and hitting Caruthers' vehicle. Holland was the one attempting to open the vehicle's passenger side door to get to the victim. There was no evidence presented at trial that Koehler, the victim, physically assaulted Holland. He only came into physical contact with Holland after the vehicle's door was opened and he attempted to get out with armed Holland standing right outside. Thus, there was insufficient evidence to support a finding of sufficient legal

provocation. Since there was not enough evidence to support such a finding, the trial court did not abuse its discretion in denying Holland's request for a voluntary manslaughter jury instruction at trial.

Petitioner now asserts two new arguments to support his claim that a voluntary manslaughter instruction was warranted. First, he argues that precedent indicates there does not have to be a physical fight between the defendant and the victim for a voluntary manslaughter instruction to be given. Second, he claims that this murder may have been the result of sudden mutual combat. These arguments are not preserved for appellate review. Trial counsel did not make any similar arguments at trial.¹⁰ State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (S.C. Ct. App. 2003); see State v. Perez, 334 S.C. 563, 565-66, 514 S.E.2d 754, 755 (1999) (issue not raised and ruled upon by trial court is procedurally barred and not preserved for appeal); see also State v. Tucker, 319 S.C. 425, 428, 462 S.E.2d 263, 265 (1995) (party cannot argue one ground below and then another on appeal).

Furthermore, the facts of Petitioner's case are inapposite to those cases in which a voluntary manslaughter charge was given. For instance, there was no evidence in this case that the victim pointed a gun at Petitioner.¹¹ See State v. Penland, 275 S.C. 537, 273 S.E.2d 765 (1981). There was no probative evidence from which it could be inferred that Petitioner was the recipient of some humiliating assault from the victim. See State v. Gallman, 79 S.C. 229, 60 S.E. 682 (1908). There was no evidence presented at trial that indicated that the victim assaulted anyone, let alone anyone related to Petitioner. See State

¹⁰ Respondent submits that Petitioner did not raise the first argument in the Brief of Appellant. It was not raised until his Petition for Rehearing.

¹¹ Also note that in Penland, this Court specifically indicated there was a struggle after the decedent pointed the gun at the defendant. 275 S.C. at 540, 273 S.E.2d at 767.

v. Martin, 216 S.C. 129, 57 S.E.2d 149 (1949). Petitioner points to no evidence or testimony that indicated the victim violated Petitioner's property in any way. See Gallman, supra. Finally, mutual combat can only serve as the basis for a voluntary manslaughter charge when the killing "" be done in sudden heat and passion upon sufficient provocation without premeditation or malice."" See State v. Andrews, 73 S.C. 257, 53 S.E. 423 (1906). There was no probative evidence presented at trial that the killing was done in a sudden heat of passion upon sufficient provocation without premeditation or malice. Thus, Petitioner has failed to show that Petitioner was entitled to a jury instruction upon voluntary manslaughter. The Court of Appeals was correct in finding the trial court did not abuse its discretion in denying Petitioner's request for a voluntary manslaughter jury instruction.

II. The Court of Appeals correctly held the trial court did not abuse its discretion by admitting Carlos Adams' testimony that petitioner had a gun in his car a few weeks before the altercation in this case.

Adams' testimony was relevant to show Petitioner possessed the murder weapon and it corroborated the testimony of other witnesses who indicated Petitioner had a gun when he ran up to the victim's vehicle. Further, the probative value of his testimony was not substantially outweighed by any prejudicial effect of admitting the testimony.

Standard of Review

In criminal cases, the appellate court sits to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). An appellate court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 452, 527 S.E.2d 105, 111 (2000). The admission of evidence is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion. State v.

McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000). To constitute an abuse of discretion, the conclusions of the trial court must lack evidentiary support or be controlled by an error of law. Pittman, 373 S.C. at 570, 647 S.E.2d at 166-67.

Petitioner argued before the Court of Appeals and argues in this Petition that Adams' testimony essentially constituted improper character evidence because it indicated "petitioner was illegally in possession of a weapon on a prior occasion or that he was proud of the gun and 'itching to use it.'" (Petition at p. 19). The Court of Appeals correctly found that Petitioner's argument that it was improper character evidence and evidence of a prior bad act was not preserved for appellate review because it was not presented to the trial court. Holland, 682 S.E.2d at 905. Even if these arguments had been raised at trial, there was no probative evidence to support them. There was no probative evidence presented at trial that indicated Petitioner unlawfully possessed the firearm that was used in the murder. See id. Furthermore, there was no probative evidence, testimony, or argument presented at trial that indicated Petitioner was "proud of the gun and 'itching to use it.'" (See Petition at p. 19).

Holland's case is clearly distinguishable from State v. Douglas, 302 S.C. 508, 397 S.E.2d 98 (1990). In Douglas, the State introduced testimony that on the night before the murder, the defendant "produced a pistol from a purple bag, cocked it and threatened to kill" a friend with whom he had been "horseplaying." Id. at 510, 397 S.E.2d at 99. The prior bad act challenged by the defendant on appeal was not just the fact that the defendant had a gun. The testimony at trial in Douglas revealed the defendant cocked the gun and threatened to kill his friend with it. Id. In the State's closing in Douglas, the State argued that the prior incident was evidence of the defendant's state of mind when he later

committed the murder. Id. at 510-11, 397 S.E.2d at 99. On appeal, the court held that the testimony was improperly admitted. Id. at 511, 397 S.E.2d at 99. The State failed to establish a logical connection between the prior night's events and the murder, and it was unable to show that the prior night's events had any effect on the defendant's state of mind. Id. The court also found the testimony about the prior night's incident was more prejudicial than probative because it served as a substantial part of the State's case and revealed the defendant's bad character. Id.

The testimony in dispute in Holland's case in now way compares to the testimony in Douglas. In this case, the testimony was very limited. There was no discussion of Holland engaging in any bad acts with the handgun prior to the shooting. The testimony only established that Holland possessed a handgun, and he kept the handgun in his car. Unlike the testimony in Douglas, there was a clear, logical connection established between Adams' prior viewing of the gun and the night of the incident. Before running over to Caruthers' vehicle, Holland went to his car, opened the door, reached in for something, and then closed the door. Three witnesses testified that shots were fired from a handgun at the scene. It is clearly logical that the item Holland reached for in his car was the gun that was used to kill the victim. Thus, Douglas is inapplicable here.

State v. Bryant, 369 S.C. 511, 633 S.E.2d 152 (2006), is not applicable to the facts of this case. In Bryant, the issue on appeal was whether the defendant's prior firearms' convictions could be introduced to impeach his testimony in a trial on charges of murder and unlawful possession of a weapon by a felon. Id. at 515, 633 S.E.2d at 154-155. The defendant testified that the shooting was in self-defense, and his credibility was an issue. Id. at 518-19, 633 S.E.2d at 156. The South Carolina Supreme Court held that the

admission of the firearms convictions were improper because firearms charges are not typically probative for truthfulness, and the similarity of the prior convictions to the charges the defendant faced at trial created undue prejudice. Id. The facts in this case are completely incongruent to holding in Bryant. None of Holland's convictions¹² were introduced at trial. Adams' testimony was not introduced to impeach any statement made by Holland. The fact that he owned a semiautomatic handgun and kept it in his car was clearly probative and relevant to his case. Further, Holland was not unduly prejudiced by the inclusion of the statement because the statement neither expressed nor implied that Holland engaged in any illegal activity by keeping a handgun in his car.

Finally, Petitioner's argument that State v. Braxton, 343 S.C. 629, 541 S.E.2d 833 (2001), does not support a finding Adams' testimony was admissible is not preserved for appellate review. The argument now presented by Petitioner was not raised at trial, and it was not raised to Court of Appeals. Adams, supra; see Perez, supra; see also Tucker, supra. Braxton properly supports the Court of Appeals' decision. In Braxton, this Court found that a witness' testimony that he knew the defendant possessed a nine millimeter handgun was relevant because it tended to identify the defendant as the owner of the murder weapon, which was determined to be a nine millimeter pistol. The facts of this case are analogous. Adams' testimony indicated that Petitioner owned a semiautomatic handgun, and he kept that handgun in his car. (R. p. 42-3). Adams also testified that on the night of the shooting, Petitioner ran to his car, opened the driver side door, reached in, and then locked his car. (R. p. 42-3). Two shell casings were found on the scene. (R. p.

¹² During sentencing, it was noted that Holland was convicted of possession of marijuana in 1993; felony larceny in 1995; felony robbery in 1994; larceny in 1996; selling a controlled substance in 2002; possession of drugs in 2005; and for probation violations in 1996 and 1999. (R. p. 295, l 18 – R. p. 296, l 12).

91, ll 17-21). Both were determined to be 9 mm Luger caliber cartridge casings. (R. p. 147, ll 21-24). Agent David Black, the State Law Enforcement Division ("SLED") firearms and toolmarks examiner who examined the evidence in this case, determined that the same gun fired the two casings. (R. p. 144, ll 16-21). The fatal bullet was retrieved from the victim's head. (R. p. 134, l 18 – R. p. 135, l 21). Also, a bullet was retrieved from the inside of Caruthers' vehicle. (R. p. 130, l 10 – R. p. 131, l 7). Agent Black testified that the each bullet was consistent with 9mm Luger caliber bullets. (R. p. 147, ll 17-20). He also stated that based on the condition of the bullets, he could not conclude whether they were fired from the same gun. (R. p. 148, l 19 – R. p. 149, l 22). There was no question that a handgun was used in this crime. Based on the evidence presented, it was clear that the handgun used was a semiautomatic. Thus, Adams' testimony that Holland showed him his semiautomatic handgun observations from three weeks prior was clearly relevant because it tended to show that Holland possessed the murder weapon.

In all, Petitioner has failed to show that the Court of Appeals incorrectly applied state law when it found the trial court did not abuse its discretion in admitting Adams' testimony. The testimony was relevant to identifying Petitioner as the possessor of the murder weapon. Further, the probative value of the testimony was not substantially outweighed by any unduly prejudicial effect. As a result, this Petition for Writ of Certiorari should be denied.

CONCLUSION

Petitioner has failed to show that there is a special and important reason for this Court to grant his Petition. It raises no novel question of law. Further, there was no dissent in the decision of the Court of Appeals. There is no conflict between the Court of

Appeals' opinion and any prior decision of this Court. Petitioner has not raised any constitutional issues in the Petition. Also, no federal question was included in the Petition. The Court of Appeals was correct in its findings. As a result, Petitioner's Petition for a Writ of Certiorari should be dismissed.

Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

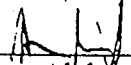
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February 25, 2010.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Horry County
John L. Breeden, Jr., Circuit Court Judge

On Petition for Writ of Certiorari to the Court of Appeals
Opinion No. 4609 (S.C. Ct. App. Filed 8/18/09)

THE STATE,

Respondent,

v.

LEMOND CORNEILUS HOLLAND,

Appellant.

PROOF OF SERVICE

I, Alphonso Simon, Jr., counsel for the Respondent, certify that I have served the within Return to Petition for Writ of Certiorari to the Court of Appeals on Appellant by depositing two (2) copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, Robert M. Dudek, Esq., Acting Chief Appellate Defender, SCCID, Division of Appellate Defense, 1330 Lady St., Ste #401, Columbia, SC 29201.

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

This 25th day of February, 2010.



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The Supreme Court of South Carolina

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February 9, 2012

Chief Appellate Defender Robert M. Dudek
South Carolina Commission on Indigent Defense
P O Box 11589
Columbia, SC 29211

Re: The State v. Holland, Lemond Cornelius
Trial Court Case No's. 2006-GS-26-02012, 02013 & 02014

Dear Counsel:

The Court has issued the following Order on your Petition for Writ of Certiorari in the above entitled matter:

"Petition for Writ of Certiorari Denied.

s/ Jean H. Toal C.J.
For the Court

February 9, 2012."

By copy of this letter we are advising all interested parties of the action of the Court in this matter.

Very truly yours,

Daniel E. Shearouse
65

CLERK

The State v. Holland, Lemond Cornelius
Page Two
February 9, 2012

DES/lda

cc: Assistant Attorney General Alphonso Simons, Jr.
John Gregory Hembree, Esquire
The Honorable Melanie Huggins
The Honorable Tanya Gee

COUNTY OF HORRY

Lemondé Corneilus Holland, SCDC#0022379

Plaintiff(s)

vs.

State of South Carolina

Defendant(s)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2013-CP - 26-

428

Submitted By: Ralph J. Wilson
 Address: P.O. Box 1827, Conway, SC 29528

SC Bar #: 6176
 Telephone #: 843-381-0765
 Fax #: 843-381-0767
 Other:

NOTE: This coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other paper required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

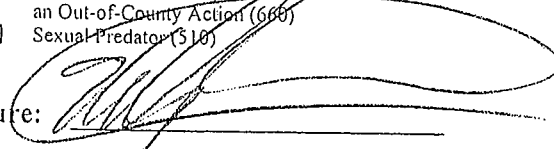
DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☐ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☒ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

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|--|--|---|---|
| ☐ Contracts
☐ Constructions (100)
☐ Debt Collection (110)
☐ Employment (120)
☐ General (130)
☐ Breach of Contract (140)
☐ Other (199) | ☐ Torts - Professional Malpractice
☐ Dental Malpractice (200)
☐ Legal Malpractice (210)
☐ Medical Malpractice (220)
☐ Previous Notice of Intent Case #
20____-CP-_____
☐ Notice/ File Med Mal (230)
☐ Other (299) | ☐ Torts - Personal Injury
☐ Assault/Slander/Libel (300)
☐ Conversion (310)
☐ Motor Vehicle Accident (320)
☐ Premises Liability (330)
☐ Products Liability (340)
☐ Personal Injury (350)
☐ Wrongful Death (360)
☐ Other (399) | ☐ Real Property
☐ Claim & Delivery (400)
☐ Condemnation (410)
☐ Foreclosure (420)
☐ Mechanic's Lien (430)
☐ Partition (440)
☐ Possession (450)
☐ Building Code Violation (460)
☐ Other (499) |
| ☒ Inmate Petitions
☒ PCR (500)
☐ Mandamus (520)
☐ Habeas Corpus (530)
☐ Other (599) | ☐ Administrative Law/Relief
☐ Reinstate Drv. License (800)
☐ Judicial Review (810)
☐ Relief (820)
☐ Permanent Injunction (830)
☐ Forfeiture-Petition (840)
☐ Forfeiture - Consent Order (850)
☐ Other (899) | ☐ Judgments/Settlements
☐ Death Settlement (700)
☐ Foreign Judgment (710)
☐ Magistrate's Judgment (720)
☐ Minor Settlement (730)
☐ Transcript Judgment (740)
☐ Lis Pendens (750)
☐ Transfer of Structured Settlement Payment Rights Application (760)
☐ Confession of Judgment (770)
☐ Petition for Workers Compensation Settlement Approval (780)
☐ Other (799) | ☐ Appeals
☐ Arbitration (900)
☐ Magistrate-Civil (910)
☐ Magistrate-Criminal (920)
☐ Municipal (930)
☐ Probate Court (940)
☐ Superior Court (950)
☐ Workers Comp. (960)
☐ Zoning Board (970)
☐ Public Service Comm. (990)
☐ Employment Security Comm (991)
☐ Other (999) |
| ☐ Special/Complex /Other
☐ Environmental (600)
☐ Automobile Arb. (610)
☐ Medical (620)
☐ Other (699) | ☐ Pharmaceuticals (630)
☐ Unfair Trade Practices (640)
☐ Out-of State Depositions (650)
☐ Motion to Quash Subpoena in an Out-of-County Action (660)
☐ Sexual Predator (610) | | |

Submitting Party Signature: 

Date: January 17, 2013

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

FOR MANDATED ADR COUNTIES ONLY

Allendale, Anderson, Beaufort, Clarendon, Colleton, Florence, Greenville, Hampton, Horry, Jasper, Lee, Lexington, Pickens (Family Court Only), Richland, Sumter, Union, Williamsburg, and York

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: You must comply with the Supreme Court Rules regarding ADR.
Failure to do so may affect your case or may result in sanctions.

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF HORRY)

Lemondé Corneilus Holland,)

PROOF OF ADR OR EXEMPTION

SCDC#0022379)

Plaintiff,)

vs..)

FILE NO.: 2013-CP-26

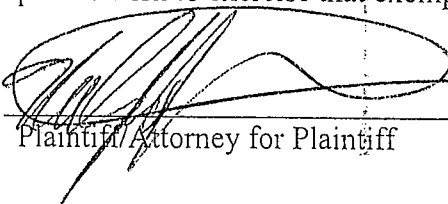
State of South Carolina)

Defendant.)

(An original and copy of this form is to be completed and filed with the Office of the Clerk of Court and a copy forwarded to the attorneys for the parties within 10 days of the conclusion of ADR, or within 300 days of the filing date of the action, whichever is earlier.)

PURSUANT to the South Carolina Alternative Dispute Resolution Rules (SCADR):

- A. X I certify that this case is exempt from ADR for the following reason and the parties wish to exercise that exemption: PCR



Plaintiff/Attorney for Plaintiff

Defendant/Attorney for Defendant

Ralph J. Wilson, Sr.

Print Name

Print Name

843-381-0765

Phone/Fax

Phone/Fax

Date: 1/17/2013

FILED
HORRY COUNTY
2013 JAN 18 PM 1:03
MELANIE HUGGINS-WARD
CLERK OF COURT

- B. 1. Alternative Dispute Resolution (ADR) was conducted in the form of:

(Note: If binding arbitration has been chosen by the parties but not yet completed, an appropriate order of dismissal must be attached hereto.)

2. The neutral(s) was/were: (Name of arbitrator/mediator):

3. The ADR was conducted on _____, 20 _____

SCADR 104A (11/2012)

4. As a result of ADR, this case should be considered (please check one);
- () Fully Settled.
- () by Consent Judgment, to be filed by _____
- or () Voluntary Dismissal to be filed by _____
- () Partially Settled.
- () At an Impasse.
- () In need of further ADR I ☐ am ☐ am not willing to continue as a neutral. I recommend that ADR resume as of _____
5. Plaintiff ☐ was present ☐ was not present
 Defendant ☐ was present ☐ was not present
6. Other participants were:
- _____ Lawyer for Defendant _____
- _____ Lawyer for Plaintiff _____
- _____ Representative for Insurance Carrier _____
- _____ Guardian *ad Litem* _____
- _____ Experts _____
- _____ Others _____
7. Choice of the neutral was by:
- _____ Stipulation
- _____ Court Order
8. The total number of hours spent in ADR was: _____ hours.
9. Further comments of the neutral:
- _____
- _____
- _____ Neutral's Signature
- Date: _____

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
C/A NO. 2013-CP-26-

Lemonde Corneilus Holland,)
SCDC#0022379,)

Plaintiff,)

v.)

State of South Carolina)
Defendant,)

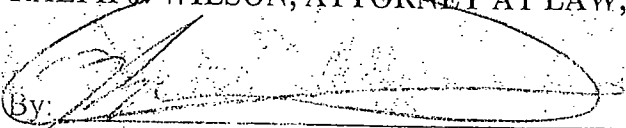
SUMMONS

FILED
HORRY COUNTY
2013 JAN 18 PM 1:03
MELANIE HUGGINS-WARD
CLERK OF COURT

TO: DEFENDANT, STATE OF SOUTH CAROLINA:

YOU ARE HEREBY SUMMONED and required to Answer the Application for Post-Conviction Relief in this action, a copy of which is herewith served upon you and to serve a copy of your Answer to the said Application on the Plaintiff's attorney at Post Office Box 1827, Conway, South Carolina 29528, within ninety (90) days after the service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for the relief demanded in the Complaint.

RALPH J. WILSON, ATTORNEY AT LAW, P.A.

By: 
Ralph J. Wilson
1411 First Avenue
PO Box 1827
Conway, SC 29528
Tel. 843-381-0765
Fax. 843-381-0767
Attorney for Plaintiff

January 17, 2013
Conway, South Carolina

FORM 5

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

Lemonde Corneilus Holland, SCDC# 00322379)
Full name and prison number (if any) of Applicant.)

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention Broad River Correctional Institute
2. Name and location of Court which imposed sentence General Sessions Court of the 15th Judicial Circuit in Horry County
3. Name(s) of co-defendant(s) (if any) None
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2006-GS-26-2014 - Murder
 - (b) 2006-GS-26-2013 - ABWIK
 - (c) 2006-GS-26-2012 - Possession weapon during violent crime
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) 2006-GS-26-2014 - June 13, 2007, 50 years to run concurrent with 2006-GS-26-

FILED
 Horry County
 2013 JAN 18 PM 1:03
 MELANIE HUBBARD
 CLERK OF COURT

2013

- (b) 2006-GS-26-2013 - June 13, 2007, 20 years to run concurrent with 2006-GS-26-

2014

- (c) 2006-GS-26-2012 - June 13, 2007, 5 years to run consecutive with 2006-GS-26-

2014

6. Check whether a finding of guilty was made:

- (a) after a plea of guilty _____
 (b) after a plea of not guilty X
 (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. South Carolina Supreme Court
 iii. _____

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

- i. Denied by Court of Appeals
 ii. Denied by writ by South Carolina Supreme Court
 iii. _____

(c) the date of each such result:

- i. Court of Appeals - August 18, 2009
 ii. South Carolina Supreme Court - February 9, 2012
 iii. _____

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

- i. Court of Appeals - Opinion Number 4609
 ii. _____
 iii. _____

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

- (a) _____
 (b) _____

(c) _____

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

(a) That I am not guilty and my trial lawyers failed to investigate and present my defense to the Court.

(b) _____

(c) _____

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

(a) My attorneys failed to investigate my defense.

(b) My attorneys failed to competently present my defense to the Court

(c) The combination of their failure to fully investigate my defense and to competently present my defense caused me to be found guilty.

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

(a) any petition in a State Court under South Carolina Law? No

(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. _____

ii. _____

iii. _____

iv. _____

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

i. _____

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

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

(d) the date of each such disposition:

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

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

- i. _____
- 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. _____
- iii. _____

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

- i. _____
- 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) This is my first PCR Application.

(b) _____

(c) _____

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

(a) your arraignment and plea? yes

(b) your trial, if any? yes

(c) your sentencing? yes

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

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

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. Robert Richardson, 1305 Third Avenue, Conway, SC 29526

ii. Jeffrey Johnson, 1409 Second Avenue, Conway, SC 29526

iii. Robert N. Dudek, SCCID, Division of Appellate Defense, Post Office Box 11589,

Columbia, SC 29211-1589

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

i. Robert Richardson - trial

ii. Jeffrey Johnson - trial

iii. Robert N. Dudek - appellate

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 Horry

VERIFICATION

I, Lemond^eCorneilus Holland, 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.

Lemond Corneilus Holland

SWORN to and subscribed before me this 10th
day of January, 2013.

Michelle L. McDonald (L.S.)
Notary Public

My Commission Expires: 11/26/22

FILED
Horry County
2013 JAN 18 PM 1:03
MELANIE HUGGINS-WARD
CLERK OF COURT

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

I, Lemond Corneilus Holland, 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
_____ day of _____, 2_____.

Notary Public

My Commission Expires: _____

TATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	
	)	
	)	2013-CP-26-428
	)	
Lemond Corneilus Holland, 322379	)	
	)	
Applicant,	)	
	)	RETURN
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

Respondent, making its Return to the Application for post conviction relief (PCR) filed January 18, 2013, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Applicant was indicted by the Horry County Grand Jury for murder (2006-GS-26-2014), ABWIK (2006-GS-26-2013) and possession of a weapon during violent crime (2006-GS-26-2014). Robert Richardson, Esquire, and Jeffrey Johnson, Esquire, represented Applicant.

On June 13, 2007, Applicant was tried and found guilty as indicted, and was sentenced to an aggregate term of fifty years imprisonment.

Attached herewith and incorporated herein are the records of the Horry County Clerk of Court regarding the subject conviction, and Applicant's SCDC records, and if available, the

transcript. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "“That I am not guilty and my trial lawyers failed to investigate and present my defense to the Court.”

III.

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

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 80 L.Ed.2d 674. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second,

counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

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

IV.

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

V.

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

VI.

WHEREFORE, having made its Return, the State requests that the Application be denied and the matter dismissed with prejudice.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

TYSON ANDREW JOHNSON, SR.
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

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

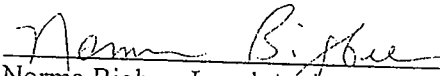
4/16, 2013.

STATE OF SOUTH CAROLINA	)	
COUNTY OF HORRY	)	IN THE COURT OF COMMON PLEAS
	)	
	)	2013-CP-26-428
LEMONDE C. HOLLAND, #322379	)	
Applicant,	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
STATE OF SOUTH CAROLINA,	)	
Respondent.	)	

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:

Ralph J. Wilson, Sr., Esquire
 1411 First Ave.
 Conway, SC 29528

DATED this 16th day of April, 2013.


 Norma Bigbee, Legal Assistant
 For Respondent

ARREST WARRANT

H-799549.

STATE OF SOUTH CAROLINA

County/ ☐ Municipality of
NO MYRTLE BCH MUNICIPAL COURT

THE STATE

against

Lemonde Cornelius Holland

Address: 2 Anthoon Drive

Conway, SC 29526

Phone:

Race: B Height: 5'02" Weight: 175

SSN: SC DL #: 100679778

DOB: 1/1974 Agency ORI#: SC0260700

Prosecuting Agency: NO MYRTLE BCH DEPT PUBLIC SFTY

Prosecuting Officer: Det. Dennis Pitsinger

Offense: Unlawful Possession of Pistol (a)

Code/Ordinance Sec. 16-23-30 (B)

Offense Code:

This warrant is CERTIFIED FOR SERVICE in the

County/ ☐ Municipality of

is to be arrested and brought before me to be

dealt with according to law.

Signature of Judge

(L.S.)

RETURN

A copy of this arrest warrant was delivered to

defendant Lemonde Cornelius Holland

on 01-05-2006

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

FRANK E. PRONCE, MUNICIPAL JUDGE #183

1015 SECOND AVENUE SOUTH

NORTH MYRTLE BEACH, SC 29582

843-280-5523

STATE OF SOUTH CAROLINA
County/ ☐ Municipality of
NO MYRTLE BCH MUNICIPAL COURT

Personally appeared before me the affiant Det. Dennis Pitsinger

being duly sworn deposes and says that defendant Lemonde Cornelius Holland

did within this county and state on December 30, 2005

State of South Carolina (or ordinance of ☐ County/ ☐ Municipality of ☐ NO MYRTLE BCH MUNICIPAL COURT

in the following particulars:

DESCRIPTION OF OFFENSE: Unlawful Possession of Pistol (a)

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:

On Dec. 30, 2005, about 4:15 a.m., Defendant and another person began arguing in Kacatz Bar in the City of North Myrtle Beach. Witnesses separated the two. The argument resumed outside the Bar where the victim, a witness, attempted to stop the defendant from fighting with the other person. The Defendant pushed the victim aside. At the time, the Defendant was armed with a pistol. The Defendant discharged the pistol, striking the victim in the leg with one round. On January 24, 2002, the Defendant was convicted of robbery, a violent crime, in Alexandria, VA.

Signature of Affiant

STATE OF SOUTH CAROLINA

County/ ☐ Municipality of

NO MYRTLE BCH MUNICIPAL COURT

Affiant's Address 1015 SECOND AVE SOUTH

NORTH MYRTLE BEACH, SC 29582

Affiant's Telephone 843-280-5511

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that

on December 30, 2005 defendant Lemonde Cornelius Holland

did violate the criminal laws of the State of South Carolina (or ordinance of

County/ ☐ Municipality of ☐ NO MYRTLE BCH MUNICIPAL COURT) as set forth below:

DESCRIPTION OF OFFENSE: Unlawful Possession of Pistol (a)

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable.

Sworn to and subscribed before me

on 12/30/2005

Signature of Issuing Judge

Judge Code: 6763

Signature of Issuing Judge

Judge Code: 6763

Issuing Court: ☐ Magistrate ☐ Municipal ☐ Circuit

Judge's Address 1015 SECOND AVENUE SOUTH

NORTH MYRTLE BEACH, SC 29582

Judge's Telephone 843-280-5523

H-799549 Ref #: 2005-50928

JAN 20 2006

TRANSMITTED TO SOUTHERN

ORIGINAL

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

INDICTMENT FOR:
POSSESSION OF A WEAPON DURING THE
COMMISSION OF A VIOLENT CRIME

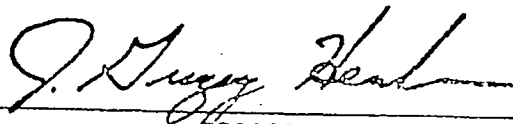
At a Court of General Sessions, convened on April 27, 2006, the Grand Jurors of Horry County present upon their oath:

POSSESSION OF A WEAPON DURING THE COMMISSION
OF A VIOLENT CRIME

CDR: 0549 16-23-0490

That Lemond Corneilus Holland did in Horry County, on or about December 30, 2005, possess a firearm, or visibly display what appeared to be a firearm, or visibly displayed a knife, during the commission or attempted commission of a violent crime, in violation of Section 16-23-0490, S. C. 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.


SOLICITOR

WITNESSES

REPEC/NMBPD

DOCKET NO. 2006-CS-26-2012

THE STATE OF SOUTH CAROLINA

COUNTY OF HORRY

79985 DE

COURT OF GENERAL SESSIONS

APRIL TERM 2006

THE STATE

vs.

LEMOND CORNEILUS HOLLAND B/M
 1116 PANTHEON DRIVE
 CONWAY, SC 29526

DOB: 01-23-74

SSN: 132-56-6710

DOA: 12/30/05

ACTION OF GRAND JURY

APR 27 2006

Foreman of Grand Jury

ATTORNEY: STUART AXELROD

VERDICT

INDICTMENT
 POSSESSION OF A WEAPON DURING THE
 COMMISSION OF A VIOLENT CRIME

ORIGINAL

J. GREGORY HEMBREE, SOLICITOR

Foreman of Petit Jury Date:

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Horry
STATE VS.

INDICTMENT/CASE#:

AKA:

Race:

Sex:

Age:

DOB:

SS#:

Address:

City, State, Zip

DL#

SID#

A/W#:

Date of Offense:

S.C. Code §:

CDR Code #:

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS

TO:

in violation of § 16-3-620 of the S.C. Code of Laws, bearing CDR Code # 010114☐ NON-VIOLENT☒ VIOLENT☐ SERIOUS☒ MOST SERIOUS☐ Mandatory GPS (CSC☐ §17-25-45w/minor 1st or Lewd Act)The charge is: ☐ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (Defendant initial)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Solicitor

Defendant

Attorney for Defendant

WHEREFORE the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,for a determinate term of 20 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years

and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment of \$ _____; plus costs

and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South Carolina

Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 6/06/2014☐ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms:

☐ set by SCDPPPS

Recipient:

*Fine:

§14-1-206 (Assessments 107.5%)

§14-1-211(A)(1) (Conv. Surcharge)

§14-1-211(A)(2) (DUI Surcharge)

§56-5-2995 (DUI Assessment)

§35.13 (Public Def/Prob)

§73.3, 1B TP (Law Enforce. Funding)

§33.7, 1B TP (Drug Court Surcharge)

§50-21-114 (BUI Breath Test Fee)

§56-5-2942(J) (Vehicle Assessment)

3% to County (if paid in installments)

TOTAL

\$100

\$100

\$12

\$500

\$25

\$100

\$50

\$40/ea

\$3.75

\$128.75

PTUP

_____ days/hours Public Service Employment

Obtain GED

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning

Substance Abuse Counseling

Random Drug/Alcohol Testing

Fine may be pd. in equal, consecutive weekly/monthlypmts. of \$ 25.00 beginning

\$ _____ paid to Public Defender Fund

Other:

☐ Appointed PD or appointed other counsel, \$35.13 TP

Requires \$500 be paid to Clerk during probation.

PRESIDING JUDGE

Judge Code:

Sentence Date:

Court Reporter:

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

INDICTMENT FOR:
ASSAULT AND BATTERY WITH
INTENT TO KILL

At a Court of General Sessions, convened on April 27, 2006, the Grand Jurors of Horry County present upon their oath:

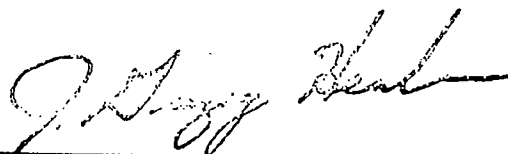
ASSAULT AND BATTERY WITH INTENT TO KILL

CDR: 0014 16-03-0620

→ Raphael Walke

That Lemond Corneilus Holland did in Horry County on or about December 30, 2005, commit an unlawful act of violent injury to the victim, ~~Brandt Michael Koehler~~, with malice, by striking the victim in the leg with one pistol round, thus committing the crime of Assault and Battery with Intent to Kill, in violation of Section 16-03-0620, S. C. 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.



SOLICITOR

DOCKET NO. 2006-GS-26-2013
 THE STATE OF SOUTH CAROLINA
 COUNTY OF Horry DE
 79985

COURT OF GENERAL SESSIONS

APRIL TERM 2006

THE STATE

vs.

LEMOND CORNEILUS HOLLAND B/M
 1116 PANTHEON DRIVE
 CONWAY, SC 29526

DOB: 74

SSN:

ATTORNEY: STUART AXELROD

INDICTMENT
 ASSAULT AND BATTERY WITH
 INTENT TO KILL

ORIGINAL

J. GREGORY HEMBREE, SOLICITOR

WITNESSES

REPEC/NMBPD

ARREST WARRANT NO.

H799548

CDR: 0014 16-03-0620

DOA: 12/30/05

ACTION OF GRAND JURY

APR 27 2006

Foreman of Grand Jury

VERDICT

Foreman of Petit Jury Date:

ARREST WARRANT

H-799548

STATE OF SOUTH CAROLINA

☒ County of NO KYTELE BCH MUNICIPAL COURT
THE STATE
against

Leronde Cornelius Holland

Address: Pantheon Drive
Conway, SC 29526Phone: 803-211-175 Height: 5'10" Weight: 175DOB: 01/01/1970 Race: B SSN: ██████████LJB: 360260700Prosecuting Agency: NO KYTELE BCH MUNICIPAL COURTProsecuting Officer: Det. Dennis PitsingerOffense: Assault and Battery with Intent to KillCode/Ordinance Sec. 16-3-620 Offense Code: ██████████This warrant is CERTIFIED FOR SERVICE in the
☒ County/ ☐ Municipality of NO KYTELE BCH MUNICIPAL COURT

The accused is to be arrested and brought before me to be dealt with according to law.

Signature of Judge (L.S.)

RETURN

A copy of this arrest warrant was delivered to defendant Leronde Cornelius Holland on 01-05-2006Signature of Constable/Law Enforcement Officer Sgt. F. Brown

RETURN WARRANT TO MUNICIPAL JUDGE 6783

1015 SECOND AVENUE SOUTH

NORTH KYTLE BEACH, SC 29582

843-280-5523

STATE OF SOUTH CAROLINA
☒ County of NO KYTELE BCH MUNICIPAL COURTPersonally appeared before me the affiant Det. Dennis Pitsinger being duly sworn deposes and says that defendant Leronde Cornelius Holland did within this county and state on December 30, 2005 whoState of South Carolina (or ordinance of ☐ County/ ☒ Municipality of NO KYTELE BCH MUNICIPAL COURT) in the following particulars:
Assault and Battery with Intent to Kill

DESCRIPTION OF OFFENSE:

I further state that there is probable cause to believe that the defendant named above did commit the offense set forth and that probable cause is based on the following facts:
On Dec. 30, 2005, about 4:15 a.m., defendant and another person began arguing in Macatz Bar in the City of North Myrtle Beach. Witnesses separated the two. The argument resumed outside the Bar where the victim, a witness, attempted to stop the defendant from fighting with the other person. The Defendant pushed the victim aside. At the time, the Defendant was armed with a pistol. The Defendant discharged the pistol, striking the victim in the leg with one round. The Victim required medical attention for the gun shot wound. The shooting was committed with malice aforethought.

Signature of Affiant

STATE OF SOUTH CAROLINA
☒ County of NO KYTELE BCH MUNICIPAL COURTAffiant's Address: 1015 SECOND AVE SOUTH
NORTH MYRTLE BEACH, SC 29582Affiant's Telephone: 843-280-5511

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

If appearing from the above affidavit that there are reasonable grounds to believe that defendant Leronde Cornelius Holland did violate the criminal laws of the State of South Carolina (or ordinance of ☐ County/ ☒ Municipality of NO KYTELE BCH MUNICIPAL COURT) as set forth below:DESCRIPTION OF OFFENSE:
Assault and Battery with Intent to KillHaving found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to Sworn to and 399307/2005 before meon January 3, 2006Signature of Issuing Judge (L.S.)Judge Code: 6783Judge's Address: 1015 SECOND AVENUE SOUTHNORTH MYRTLE BEACH, SC 29582Judge's Telephone: 843-280-5523Issuing Court: ☐ Magistrate ☐ Municipal ☐ Circuit

H-799548 Ref # 2005-50928

ORIGINAL

TRANSMITTED TO SOLICITOR
JAN 20 2006FILED
JAN 19 AM 10:07
NORTH MYRTLE BEACH, SC

AFFIDAVIT

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF
STATE

VS.

INDICTMENT/CASE#:

AKA:

A/W#:

Date of Offense:

S.C. Code §:

CDR Code #:

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADSTO: Murderin violation of § 16-3-10, 20 of the S.C. Code of Laws, bearing CDR Code # 0, 1, 1, 6
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS (CSC w/minor 1st or Lewd Act) ☐ §17-25-45
The charge is: ☐ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. _____ (Defendant initial)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Solicitor

Defendant

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 50 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of \$_____; provided that upon the service of _____ days/months/years and/or payment of \$_____; plus costs and assessments as applicable; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: W/ 06/2013☐ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

Total: \$_____ plus 20% fee: \$_____

Payment Terms:

☐ set by SCDPPPS

Recipient:

*Fine:	\$	
§14-1-206 (Assessments 107.5%)	\$	
§14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ 100.00
§14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§56-5-2995 (DUI Assessment)	\$12	\$
§35.13 (Public Def/Prob)	\$500	\$
§73.3, 1B TP (Law Enforce. Funding)	\$25	\$ 25.00
§33.7, 1B TP (Drug Court Surcharge)	\$100	\$
§50-21-114(BUI Breath Test Fee)	\$50	\$
§56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
3% to County (if paid in installments)	\$	\$ 3.75
TOTAL	\$	\$ 128.75

PTUP

_____ days/hours Public Service Employment

Obtain GED

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning

Substance Abuse Counseling

Random Drug/Alcohol Testing

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ 25.00 beginning

\$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel, §35.13 TP

Requires \$500 be paid to Clerk during probation.

Melanie Higgins
Clerk of Court/Deputy Clerk

Court Reporter:

Brenda Bahb

PRESIDING JUDGE

Judge Code:

Sentence Date:

John R. [Signature]
6/13/07

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

INDICTMENT FOR:
MURDER

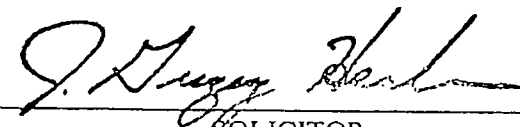
At a Court of General Sessions, convened on April 27, 2006, the Grand Jurors of Horry County present upon their oath:

MURDER

CDR: 0116 16-03-0010,0020

That Lemond Corneilus Holland did in Horry County, on or about December 30, 2005, willfully, feloniously, and intentionally kill the victim, Brandt Michael Koehler, with malice aforethought, either express or implied, by means of shooting him with a pistol, and the victim did die as a proximate result thereof on or about December 30, 2005, in Horry County, in violation of Section 16-03-0010, S. C. 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.


SOLICITOR

DOCKET NO. 2006-GS-26-2014
THE STATE OF SOUTH CAROLINA
COUNTY OF Horry DE
79985

COURT OF GENERAL SESSIONS

APRIL TERM 2006

THE STATE

vs.

LEMOND CORNEILUS HOLLAND B/M
1116 PANTHEON DRIVE
CONWAY, SC 29526

DOB: 74
SSN: [REDACTED]

WITNESSES

REPEC/NMBPD

ARREST WARRANT NO.

H799545
CDR: 0116 16-03-0010,0020

DOA: 12/30/05

ACTION OF GRAND JURY

TRUE BILL

APR 27 2006
Foreman of Grand Jury

VERDICT

INDICTMENT
MURDER

ORIGINAL

Foreman of Petit Jury Date:

J. GREGORY HEMBREE, SOLICITOR

ARREST WARRANT

H-799545

STATE OF SOUTH CAROLINA

County/ ☐ Municipality of
NO MYRTLE BCH MUNICIPAL COURT

THE STATE

against

Leonard Cornelius Holland

Address: Pantheon Drive

Conway, SC 29526

Phone: Race: B SSN: 100679778

DOB: SC DL#: 1974 Height: 6'02" Weight: 175

Agency ORI#: SC0260700

Prosecuting Agency: NO MYRTLE BCH DEPT PUBLIC SFTY

Prosecuting Officer: Det. Dennis Pittsinger

Offense: Murder

Code/Ordinance Sec. 16-3-10 Offense Code:

This warrant is CERTIFIED FOR SERVICE in the

County/ ☐ Municipality of

is to be arrested and brought before me to be dealt with according to law.

Signature of Judge

(L.S.)

RETURN

A copy of this arrest warrant was delivered to defendant LEONARD CORNELIUS HOLLAND on 12.30.05

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO: CLAYTON L. PROBERT, MUNICIPAL JUDGE 6783

1015 SECOND AVENUE SOUTH

NORTH MYRTLE BEACH, SC 29582

843-280-5523

STATE OF SOUTH CAROLINA

County/ ☐ Municipality of

NO MYRTLE BCH MUNICIPAL COURT

Personally appeared before me the affiant

being duly sworn deposes and says that defendant

did within this county and state on

State of South Carolina (or ordinance of ☐ County/ ☐ Municipality of

in the following particulars:

DESCRIPTION OF OFFENSE: Murder

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:

On Dec. 30, 2005, about 4:15 a.m., Defendant and the victim, Brandt Michael Koehler, were arguing in Macatz Bar in North Myrtle Beach. Witnesses separated the two, and the victim and his female companion left through the south door. The defendant reacted about being disrespected, left through the north door and went to an unidentified car at the bar's rear. Meanwhile, the victim removed his shirt and assumed a defensive posture as witnesses approached to calm things down, after which he got into his car with the female. The defendant exited the unknown car and went to the victim's car, pushing aside a witness who tried to stop him. Defendant beat on the victim's car window, challenging him. Victim exited his car, shirtless and unarmed, and the two began wrestling. Defendant was armed with a pistol. Defendant fired three times. One bullet struck a witness in the leg, another struck the car, and the third struck the victim in the top of the head, killing him. The killing was done with malice aforethought.

Signature of Affiant

STATE OF SOUTH CAROLINA

County/ ☐ Municipality of

NO MYRTLE BCH MUNICIPAL COURT

Affiant's Address

1015 SECOND AVE SOUTH

Affiant's Telephone

NORTH MYRTLE BEACH, SC 29582

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that on December 30, 2005 defendant Leonard Cornelius Holland did violate the criminal laws of the State of South Carolina (or ordinance of

County/ ☐ Municipality of NO MYRTLE BCH MUNICIPAL COURT) as set forth below:

DESCRIPTION OF OFFENSE: Murder

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable.

Sworn to and subscribed before me

on 12/30/2005

Signature of Issuing Judge

Judge Code: 6783

Issuing Court: ☐ Magistrate ☐ Municipal ☐ Circuit

Judge's Address

1015 SECOND AVENUE SOUTH

Judge's Telephone

NORTH MYRTLE BEACH, SC 29582

843-280-5523

ORIGINAL

H-799545

Xref #: 2005-50928

TRANSMITTED TO SC 101

JAN 20 2006

AFFIDAVIT

H. Don Repes

Det. Dennis Pittsinger

Leonard Cornelius Holland

December 30, 2005

violate the criminal laws of the

NO MYRTLE BCH MUNICIPAL COURT

CMTI330D SCDC OFFENDER MANAGEMENT SYSTEM 03/08/13
OMCOMITA RELEASE DATE SCREEN C023981
SCDC# > 322379 LOC: BROAD RIVER
HOLLAND, LEMOND C. SCDC CLASSIFICATION... VIOLENT
OFFENDER TYPE...: ADULT-STRAIGHT SENTENCE SEXUAL REGISTRY...: N
SEXUAL PREDATOR...: NOT APP
DNA STATUS...: COMPLETED
GPS REQUIREMENT...: N
PREA DECISION...:
CURRENT SENTENCE: 055-00-000 CONSECUTIVE SENTENCE ...: Y
055-00-000 CURRENT SENT START DATE: 12/31/2005
PROJECTED COMPLETION DATES
MAXOUT DATE: 12/17/2060
YOA SIX YEAR DATE: / /
INITIAL PAROLE DATE: 00/00/0000
CURRENT EWC ..: 3 F 5
CURRENT EEC ..: NOT CURRENTLY EARNING EEC
NEXT PAROLE HEARING DATE: 00/00/0000
TOTAL GT DAYS EARNED: 000000 LABOR CREW/WORK PROG DATE: 99/99/9999
TOTAL EARNED WORK CREDITS ...: 000616 LABOR CREW DISQ REASON:
TOTAL EDUCATION CREDITS: 000000 CATEGORY 4 OR 5 OFFENSE
TOTAL EXTRA EARNED CREDITS ..: 000 SUPERVISED REENTRY DATE...: 00/00/00
TOTAL SERVICE TIME EARNED ...: 002588 ISS.....:

PFKEYS: 5: HISTORY OF DATE CHANGES

4-©

1 Sess-1

167.7.50.33

SCDC1370

3/11

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS

RECORD SUMMARY REPORT DATED 03/08/13

C0239

HOLLAND, LEMOND C. FBI # 179418VA2 SID# SC01624584 SCDC # 322379

OFFENDER TYPE.: ADULT-STRAIGHT SENTENCE

INSTITUTION ...: BROAD RIVER CORR. INST.

SECURITY/CUST.: 3 MINIMUM IN

CURR INCARC SENT...: 55 YRS 0 MOS 0 DYS

CENTRAL MONITORING.: YES

SOCIAL SECURITY #....: - - - -

DORM.....: MLT1061B

RACE....: B SEX...: M

PROJ MAXOUT DATE: 12/17/2060

PROJ PAROLE DATE: 00/00/0000

EWC JOB...: WARDKEEPER ASSISTANT

EDUC PGM.: NO CURR EDUC PROGRAM

EWC LEVEL: 3F5 EEC LEVEL:

ASSIGNMENT...: WARD KEEPER

CURRENT PROGRAM...: NO CURRENT PROGRAM

AGE...: 39 DATE OF BIRTH...: /74

PREVIOUS NUMBERS:

** NO PREVIOUS NUMBERS **

CURRENT OFFENSES	SENTENCE			COUNTY	SENTENCE			V/NV	CATEGORY
	YRS	MOS	DYS		START				
FIREARMS PROVISION	5	0	0	HORRY	6/13/20	7	N		3
ASSLT & BATT W/INTNT KIL	20	0	0	HORRY	12/31/20	5	V		4
MURDER	50	0	0	HORRY	12/31/20	5	V		5

PRIOR COMMITMENTS OVER 90 DAYS:

10/ 4/99 *COMMON LAW ROBBERY

3 YRS 0 MOS 0 DYS

DETAINERS (HOLD, WANTED, NOTIFY):

NO DETAINERS

NO DETAINERS

ESCAPES:

NO ESCAPE HISTORY

CRIMINAL CHARGES:

NO CRIMINAL CHARGES WHILE IN CUSTODY

NO CRIMINAL CHARGES HISTORY

ASSAULTIVE DISCIPLINARIES:

NO ASSAULTIVE DISCIPLINARY HISTORY

NON-ASSAULTIVE DISCIPLINARIES:

10/22/ 9 USE, POSS NARC, MARIJ, UNAU CONVICTED

MAJOR

5/29/ 9 REFUSING OR FAILING OBEY

OTHER

6/11/ 8 INTERFERING WITH COUNT

OTHER

11/14/ 7 REFUSING OR FAILING OBEY CONVICTED

ADMIN

HISTORY OF MOVEMENTS:

2/14/13	BROAD RIVER	INCARCERATED		ADMINISTRATIVE
2/14/13	RICHLAND CO	AUTH ABSENCE (AWL)		MEDICAL
2/ 7/13	BROAD RIVER	INCARCERATED		ADMINISTRATIVE
2/ 7/13	RICHLAND CO	AUTH ABSENCE (AWL)		MEDICAL
1/16/13	BROAD RIVER	INCARCERATED		ADMINISTRATIVE
1/16/13	RICHLAND CO	AUTH ABSENCE (AWL)		MEDICAL
10/ 5/12	BROAD RIVER	INCARCERATED		ADMINISTRATIVE
10/ 3/12	KIRKLAND INFRM	INCARCERATED		MEDICAL
9/20/12	BROAD RIVER	INCARCERATED		ADMINISTRATIVE
9/20/12	PALMETTO RCHLAN	AUTH ABSENCE (AWL)		MEDICAL
9/ 4/12	BROAD RIVER	INCARCERATED		ADMINISTRATIVE
9/ 4/12	KIRKLAND	INCARCERATED		MEDICAL
8/15/12	BROAD RIVER	INCARCERATED		ADMINISTRATIVE
7/26/12	KIRKLAND	INCARCERATED		ADMINISTRATIVE
3/20/12	LIEBER	INCARCERATED		ADMINISTRATIVE
3/20/12	KIRKLAND	INCARCERATED		MEDICAL
7/29/11	LIEBER	INCARCERATED		MEDICAL
7/29/11	RICHLAND CO	AUTH ABSENCE (AWL)		MEDICAL
5/17/11	LIEBER	INCARCERATED		ADMINISTRATIVE
5/17/11	KIRKLAND	INCARCERATED		MEDICAL
3/ 1/11	LIEBER	INCARCERATED		ADMINISTRATIVE

565

3/ 1/11

KIRKLAND

INCARCERATED

MEDICAL

HOLLAND, LEMOND C. FBI # 179418VA2 SID# SC01624584 SCDC # 322379 (CONTINUED)

11/22/10	LIEBER	INCARCERATED	ADMINISTRATIVE
11/22/10	CHARLESTON CO	AUTH ABSENCE (AWL)	MEDICAL
10/12/10	LIEBER	INCARCERATED	ADMINISTRATIVE
10/12/10	KIRKLAND	INCARCERATED	MEDICAL
8/31/10	LIEBER	INCARCERATED	ADMINISTRATIVE
8/30/10	KIRKLAND	INCARCERATED	MEDICAL
7/26/10	LIEBER	INCARCERATED	MEDICAL
7/26/10	RICHLAND CO	AUTH ABSENCE (AWL)	MEDICAL
7/13/10	LIEBER	INCARCERATED	ADMINISTRATIVE
7/13/10	KIRKLAND INFRM	INCARCERATED	MEDICAL
5/24/10	LIEBER	INCARCERATED	ADMINISTRATIVE
5/24/10	KIRKLAND	INCARCERATED	MEDICAL
12/ 3/ 9	LIEBER	INCARCERATED	ADMINISTRATIVE
11/23/ 9	BROAD RIVER	INCARCERATED	ADMINISTRATIVE
11/23/ 9	RICHLAND CO	AUTH ABSENCE (AWL)	MEDICAL
10/27/ 9	BROAD RIVER	INCARCERATED	ADMINISTRATIVE
10/27/ 9	KIRKLAND	INCARCERATED	MEDICAL
7/ 6/ 9	BROAD RIVER	INCARCERATED	ADMINISTRATIVE
6/23/ 9	LEE	INCARCERATED	ADMINISTRATIVE
6/22/ 9	KIRKLAND	INCARCERATED	MEDICAL
6/10/ 9	LEE	INCARCERATED	ADMINISTRATIVE
5/26/ 9	PERRY	INCARCERATED	ADMINISTRATIVE
5/26/ 9	KIRKLAND	INCARCERATED	MEDICAL
5/19/ 9	PERRY	INCARCERATED	ADMINISTRATIVE
5/13/ 9	KIRKLAND INFRM	INCARCERATED	MEDICAL
5/ 6/ 8	PERRY	INCARCERATED	ADMINISTRATIVE
5/ 6/ 8	KIRKLAND	INCARCERATED	MEDICAL
4/15/ 8	PERRY	INCARCERATED	ADMINISTRATIVE
4/15/ 8	RICHLAND CO	AUTH ABSENCE (AWL)	MEDICAL
3/17/ 8	PERRY	INCARCERATED	ADMINISTRATIVE
3/17/ 8	KIRKLAND	INCARCERATED	MEDICAL
3/12/ 8	PERRY	INCARCERATED	MEDICAL
3/12/ 8	ANDERSON CO	AUTH ABSENCE (AWL)	MEDICAL
2/27/ 8	PERRY	INCARCERATED	ADMINISTRATIVE
2/27/ 8	RICHLAND CO	AUTH ABSENCE (AWL)	MEDICAL
1/22/ 8	PERRY	INCARCERATED	ADMINISTRATIVE
1/22/ 8	KIRKLAND	INCARCERATED	MEDICAL
1/ 3/ 8	PERRY	INCARCERATED	ADMINISTRATIVE
1/ 2/ 8	KIRKLAND	INCARCERATED	MEDICAL
8/29/ 7	PERRY	INCARCERATED	ADMINISTRATIVE
8/27/ 7	LIEBER	INCARCERATED	ADMINISTRATIVE
7/11/ 7	PERRY	INCARCERATED	ADMINISTRATIVE
6/14/ 7	KIRKLAND	INCARCERATED	NEW ADMISSION

HISTORY OF EARNED WORK CREDIT ASSIGNMENTS:

JOB	START	END	TERMINATION	JOB
DESCRIPTION	DATE	DATE	REASON	LVL
WARDKEEPER ASSISTANT	08/16/12	0/ 0/ 0		3F5
WARDKEEPER	07/31/12	8/15/12	INSTIT TRANSFER	3F5
WARDKEEPER ASSISTANT	12/08/09	7/26/12	INSTIT TRANSFER	3F5
WARDKEEPER ASSISTANT	07/09/09	12/ 3/ 9	INSTIT TRANSFER	3F5
LAMINATOR	09/24/07	10/16/ 7	UNSAT JOB PERFORM	3F5

HISTORY OF EARNED EDUCATION CREDITS:

EEC	START	END	TERMINATION
DESCRIPTION	DATE	DATE	REASON
NO SCHOOL ASSIGNMENTS			

***** END OF REPORT *****

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Horry
STATE

INDICTMENT/CASE#:

VS. Leonard C. HollandA/W#: 1799549 -GS- 26 2012

AKA:

Race: BSex: MAge: 30DOB: 7-4SS#: [REDACTED]Date of Offense: 12-30-2005S.C. Code §: 16-23-490CDR Code #: 0, 5, 4, 9

Address:

City, State, Zip

DL#

SID#

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADSTO: loss weapon during violent crimein violation of § 16-23-490 of the S.C. Code of Laws, bearing CDR Code # 0, 5, 4, 9☒ NON-VIOLENT☐ VIOLENT☐ SERIOUS☐ MOST SERIOUS☐ Mandatory GPS (CSC☐ §17-25-45w/minor 1st or Lewd Act)The charge is: ☐ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. _____ (Defendant initial)
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Solicitor

Defendant

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,for a determinate term of 5 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years

and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment of \$ _____; plus costs

and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☒ CONSECUTIVE to sentence on: W/ 06-2014☐ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms:

☐ set by SCDPPPS

PTUP

_____ days/hours Public Service Employment

Obtain GED

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning _____

Substance Abuse Counseling _____

Random Drug/Alcohol Testing _____

Fine may be pd. in equal, consecutive weekly/monthlypmts. of \$ 2500 beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel, \$35.13 TP

Requires \$500 be paid to Clerk during probation.

Recipient:

*Fine:

\$14-1-206 (Assessments 107.5%)

\$14-1-211(A)(1) (Conv. Surcharge)

\$14-1-211(A)(2) (DUI Surcharge)

\$56-5-2995 (DUI Assessment)

\$35.13 (Public Def/Prob)

\$73.3, 1B TP (Law Enforce. Funding)

\$33.7, 1B TP (Drug Court Surcharge)

\$50-21-114(BUI Breath Test Fee)

\$56-5-2942(J) (Vehicle Assessment)

3% to County (if paid in installments)

TOTAL

\$	\$
\$100	\$100.00
\$100	\$
\$12	\$
\$500	\$
\$25	\$25.00
\$100	\$
\$50	\$
\$40/ea	\$
\$	\$3.75
\$	\$128.75

Nellie Higgins

Clerk of Court Deputy Clerk

Court Reporter:

Cresda Babb

PRESIDING JUDGE

Judge Code:

Sentence Date:

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Horry
STATE VS.

AKA:

Race: BSex: MAge: 26DOB: 10-3-1974SS#: [REDACTED]

Address:

City, State, Zip

DL#

SID#

INDICTMENT/CASE#:

A/W#:

Date of Offense:

S.C. Code §:

CDR Code #:

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADSTO: ABWIT
in violation of § 16-3-600 of the S.C. Code of Laws, bearing CDR Code # 010114
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS (CSC ☐ §17-25-45
w/minor 1st or Lewd Act)The charge is: ☐ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (Defendant initial)
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Solicitor

Defendant

Attorney for Defendant

WHEREFORE the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 20 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment of \$ _____; plus costs
and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South Carolina
Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 6/06/2014☐ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State
Department of Corrections.☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Walved, ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms:

☐ set by SCDPPPS

Recipient:

*Fine:

\$14-1-206 (Assessments 107.5%)	\$	
\$14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ <u>100.00</u>
\$14-1-211(A)(2) (DUI Surcharge)	\$100	\$
\$56-5-2995 (DUI Assessment)	\$12	\$
\$35.13 (Public Def/Prob)	\$500	\$
\$73.3, 1B TP (Law Enforce. Funding)	\$25	\$ <u>25.00</u>
\$33.7, 1B TP (Drug Court Surcharge)	\$100	\$
\$50-21-114(BUI Breath Test Fee)	\$50	\$
\$56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
3% to County (if paid in installments)	\$	\$ <u>3.75</u>
TOTAL		\$ <u>128.75</u>

PTUP

days/hours Public Service Employment

Obtain GED

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning

Substance Abuse Counseling

Random Drug/Alcohol Testing

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ 25.00 beginning

\$ _____ paid to Public Defender Fund

Other:

☐ Appointed PD or appointed other counsel, \$35.13 TP

Requires \$500 be paid to Clerk during probation.

PRESIDING JUDGE

Judge Code:

Sentence Date:

Court Reporter:

1 STATE OF SOUTH CAROLINA) TRANSCRIPT OF RECORD
2 COUNTY OF HORRY) CASE NO.: 2013-CP-26-428
3 PCR HEARING
4 -----

5 February 3, 2015

6 BEFORE: The Honorable G. Thomas Cooper, Jr.
7 -----

8 LEMONDE CORNELIUS HOLLAND,
9

10 Petitioner,
11

12 vs.
13

14 THE STATE OF SOUTH CAROLINA,
15

16 Respondent.
17 -----

18 APPEARANCES:
19

20 Joshua Thomas, Esq.
21 Attorneys for the Respondent.

22 Ralph Wilson, Esq.
23 Attorneys for the Petitioner.

24 Official Court Reporter
25 Natalie Dahl, RPR

I N D E X

WITNESS

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E X H I B I T S

(NO EXHIBITS)

CALL OF THE CASE
P R O C E E D I N G S

1
2 MR. THOMAS: This is Lemonde Holland. This is an
3 April 2007 indictment for murder, assault and battery
4 with intent to kill and possession of a weapon during
5 the commission of a violent crime -- sorry, he's not in
6 the courtroom yet.

7 (Whereupon, Mr. Holland enters courtroom.)

8 MR. THOMAS: I apologize, Your Honor. Indictments
9 for murder, ABWIK, and possession of a weapon during
10 the commission of a violent crime. He was represented
11 by Robert Richardson and Jeffrey Johnson. He went to
12 trial on June 11th through the 13th, 2007 and was
13 convicted by the jury as indicted. Judge Breeden
14 sentenced him to 50 years on murder, concurrent 20 on
15 the ABWIK and a consecutive 5 on the possession of a
16 weapons charge. Robert Paycheck at the Office of
17 Appellant Defense did perfect an appeal for him. The
18 Court of Appeals affirmed his conviction in a published
19 opinion at 385 S.C. 159, 682, S.E 2nd 898. The
20 remitter was returned on February 10, 2012. He filed
21 this PCR January 18, 2013 alleging various grounds of
22 ineffective assistance of counsel. He is present and
23 represented by Ralph Wilson. State is ready to
24 proceed.

25 THE COURT: Mr. Wilson.

EDWARD PROCTOR, JR. -- DIRECT EXAMINATION

1 MR. WILSON: Thank you, Your Honor. If it pleases
2 the Court, I would like to call a witness out of order.
3 I have a pathologist here who testified in the trial
4 and I would like to call him. Normally, I would call
5 the Defendant, but he has a tight schedule and two
6 other subpoenas that he has to honor in other counties,
7 so I ask the Court to allow me to call him out of
8 order.

9 THE COURT: Motion granted.

10 MR. WILSON: Thank you, Your Honor. Dr. Proctor.

11 (EDWARD PROCTOR, having been duly sworn,
12 testified as follows:)

13 THE CLERK: State your name and spell your last
14 for the record.

15 THE WITNESS: I am Edward Leroy Proctor,
16 P-R-O-C-T-O-R, Junior.

17 DIRECT-EXAMINATION

18 BY MR. WILSON:

19 Q Did you testify in the trial of Mr. Lemonde
20 Holland back in June of 2009?

21 A Yes, sir.

22 Q And let me ask you in regards to that testimony,
23 do you remember your testimony from that?

24 A I have reviewed my testimony, yes, sir.

25 Q Very well. And were you given a subpoena to come

EDWARD PROCTOR, JR. -- DIRECT EXAMINATION

1 and testify today?

2 A I was.

3 Q Now, let me ask you in regards to that, that
4 testimony you gave -- first, you were qualified at that
5 time as a forensic pathologist; is that correct?

6 A That's correct.

7 Q And had you testified previous to that and been
8 qualified as a forensic pathologist?

9 A Yes, sir.

10 Q Do you recall having a conversation with
11 Mr. Richardson or Mr. Johnson, who were the defense
12 lawyers, prior to your testimony as trial? If you
13 don't recall --

14 A I don't remember.

15 Q And at the court -- during the course of the trial
16 you were asked a number of questions about powder and
17 residue being on the wound and not on the wound?

18 A Yes, sir.

19 Q And your testimony was, essentially, that you
20 didn't find any powder?

21 A That's correct.

22 Q And you didn't find any stippling on the wound?

23 A That's correct.

24 Q Were you ever given a scenario or a hypothetical
25 as to where the relative positions of each person was

EDWARD PROCTOR, JR. -- DIRECT EXAMINATION

1 at the time that these shots were allegedly fired?

2 A No, sir, I was not.

3 Q And if you had -- let me ask you this, based on
4 your autopsy report, did you make a determination as to
5 the path of the bullet?

6 A I did, yes, sir.

7 Q And let me -- if you would, I would like --

8 THE COURT: Mr. Wilson, will you give me a little
9 more background? All I have is a sentencing sheet.

10 MR. WILSON: I apologize.

11 Q (MR. WILSON) Let me go back. During the course of
12 the trial, there was --

13 MR. WILSON: Your Honor, I don't know how much he
14 remembers.

15 THE COURT: Is it one victim, two?

16 MR. WILSON: There is one victim. There was an
17 altercation, which occurred outside of a bar, in the
18 early hours of the morning. Allegedly, the Defendant
19 and the victim were fighting, and the Defendant shot
20 the victim during the course of the altercation, during
21 the course of the fight, that is what the testimony was
22 at trial.

23 THE COURT: Okay.

24 Q (MR. WILSON) Now, let me ask you, in relationship
25 to the wound, if you would, I would like for you to

EDWARD PROCTOR, JR. -- DIRECT EXAMINATION

1 mark the entrance wound and the exit point of the
2 wound on this (indicates)?

3 A Yes, sir. The entrance for the wound was in the
4 midline forehead just at the hair line area
5 (indicates). The wound passed anterior, posterior,
6 slightly inferior, right to left, and came through the
7 bony portion of the skull, which is the mastoid, and
8 was recovered from the soft tissues just behind the
9 angle of the jaw in the left neck.

10 So anterior to posterior, and right to left, and
11 down at about 15, 20 degrees (indicates).

12 Q So the bullet would have entered the front of the
13 head up here, and traveled down through here
14 (indicates)?

15 A That's correct.

16 Q And there was no powder or stippling found on the
17 wound at anyplace?

18 A I did not find any.

19 Q And the significance of finding powder or
20 stippling would be what?

21 A Powder and stippling is usually seen in contact --
22 loose contact or very close range wounds. A contact
23 wound, you may or may not see powder or residue inside
24 the wound itself. A loose contact you'll see powder
25 around the entrance, and stippling, which is the

EDWARD PROCTOR, JR. -- DIRECT EXAMINATION

1 burning powder coming out, will actually burn the skin
2 and leave stippling marks.

3 In wounds from like handguns and those kinds of
4 things, the stippling and the powder -- or at least
5 some evidence of it -- can occur up to 18, 24 inches
6 distance.

7 Q So the fact that there was no powder and no
8 stippling found would indicate to you, what?

9 A It would indicate one of two things. Number one,
10 that the distance was greater than 18 to 24 inches away
11 from the entrance site, or this was a very tight
12 contact wound that went straight in with all of the
13 residue and powder going in and, you know, at the time
14 of the examination, if there was significant bleeding
15 and whatnot, you may not see that because it was washed
16 away.

17 Q Let me ask you, Doctor, were you ever given a
18 demonstration or shown a hypothetical as to where each
19 of the individuals were positioned at the time that the
20 shooting allegedly occurred?

21 A No, sir.

22 Q And if the testimony were that the individuals
23 were in close contact with each other, in fact, if the
24 testimony was that each of the individuals were
25 arm-in-arm, and if you could --

EDWARD PROCTOR, JR. -- DIRECT EXAMINATION

1 MR. WILSON: Your Honor, can I have him step down?

2 MR. THOMAS: Your Honor, at this time he's getting
3 into expert testimony, and I would ask for
4 qualifications.

5 THE COURT: All right.

6 Q (MR. WILSON) If the individuals were -- hold your
7 arms out for me. If the individual was arm-in-arm
8 with the Defendant's arms over the arms of the victim,
9 and the Defendant was also holding a gun in his hand.

10 A Yes, sir.

11 Q And the head of the victim is in the chest of the
12 Defendant. If you would, put your head down towards my
13 chest. Is there any way that that shot could have been
14 fired from that position?

15 A If the head of the victim was truly in the chest
16 of the defendant, I honestly don't see how the gun
17 could do this (indicates), put the hole in the front of
18 the head.

19 Q If you had been asked that question -- excuse me
20 one second.

21 (A brief pause in the proceedings.)

22 Q (MR. WILSON) The angle of the bullet was from right
23 to left?

24 A That's correct.

25 Q And would that angle be consistent with a

EDWARD PROCTOR, JR. -- DIRECT EXAMINATION

1 right-handed person having fired that shot?

2 A You know --

3 Q From that --

4 A From -- with the head down -- I don't know which
5 hand the Defendant had the gun in, but with the head
6 down, with that knowledge, with the head in the chest,
7 it would be, you know, difficult to even have the
8 entrance there.

9 Q Okay. All right. And if -- now, what about the
10 angle from the -- you are saying that the bullet goes
11 in here and down into --

12 A To the left, to the victim's left. When I say
13 "right to left," I'm referring right to left in the
14 victim. So from the midline to the left side of the
15 victim's head.

16 Q All right. All right. And let me ask you, if you
17 had been asked that question at trial, would your
18 testimony have been the same as it is here today, that
19 is that it would have been pretty much impossible for
20 that shot to have occurred based on those facts?

21 A Based on that scenario, it would be difficult,
22 yes, sir. I would have to say it would be very
23 difficult.

24 Q All right. And would that have been your
25 testimony had you been asked that at trial?

EDWARD PROCTOR, JR. -- DIRECT EXAMINATION

1 A Given that scenario, I would have had to have
2 said -- particularly with the victim's head in the
3 chest of the Defendant -- it would be very, very
4 difficult to have a midline forward entrance wound,
5 yes, sir.

6 Q Now, if this shot had been fired in close contact,
7 as we described earlier, with the Defendant and the
8 victim being arm-in-arm, would you have expected to
9 find powder burns anywhere on the victim?

10 A It depends on the -- are they closely locked
11 head-to-head or --

12 Q If they are locked up arm-in-arm.

13 A Arm-in-arm, head-to-head, more likely would have
14 seen some stippling of some sort, or at least residue.

15 Q All right. Let me ask you one other question, and
16 I think I'll be through. I'm just about -- this right
17 to left, if you would come down for me again, please,
18 Doctor, so I can help the Attorney General and the
19 Court in what we're saying.

20 If the two individuals are arm-in-arm as we are
21 describing here, and the head is in the chest and the
22 right-handed person fires the bullet, if the person is
23 right-handed and fires the bullet, even if they fired
24 it, which direction --

25 A If I'm the Defendant and your head is down, if the

EDWARD PROCTOR, JR. -- CROSS-EXAMINATION

1 gun is down here it can -- and the head was down, it is
2 possible that it could go in and down, but this close,
3 I would expect to see some sort of residue. What I'm
4 saying head down like this, arm-in-arm with the gun
5 being pushed down with the head, that angle could occur
6 (indicates).

7 MR. WILSON: I don't think I have any other
8 questions.

9 THE COURT: Cross-examination.

10 MR. THOMAS: If it pleases the Court.

11 CROSS-EXAMINATION

12 BY MR. THOMAS:

13 Q Dr. Proctor, walk through with me real quick the
14 instances of stippling and gunpowder. When you do --
15 what happens on a contact wound?

16 A Contact wound, depending if it is loose or tight,
17 a very tight contact, pressed against the skin, scalp,
18 anywhere, all of the powder, burning powder, smoke and
19 whatnot goes straight through and very seldom leaves
20 markings. If there is a lot of hemorrhage around the
21 wound site, you may or may not see it inside the wound.

22 Loose contact, you usually get a rim of dark
23 powder and stippling. Close range, it starts spreading
24 out until you get to about 16, 18 inches. You'll get
25 rim of powder, which is the powder that burns the skin,

EDWARD PROCTOR, JR. -- CROSS-EXAMINATION

1 and greater than 18 to 24 inches, you just don't see
2 it.

3 Q In your examination of the body in this case,
4 there was no powder?

5 A I saw none.

6 Q As far as the -- we've been using this for the
7 record, it is a Styrofoam head as a demonstrative
8 exhibit?

9 A Yes, sir.

10 Q And I'm using this head right now. Your testimony
11 is that the bullet went in sort of midline?

12 A Just below the hairline.

13 Q And from there, it traveled slightly downward?

14 A Slightly downward and to the victim's left. When
15 I'm referring to the direction of the bullet, it is
16 using the victim as a frame of reference. So midline
17 forehead to posterior aspect of the victim's left ear,
18 so it would be victim's right to left and inferior.

19 Q And from your examination of the body, did the
20 bullet go straight in that direction -- let me ask you
21 this. When a bullet enters inside your brain, can it
22 change direction?

23 A Through the bone, it can change directions. It
24 was pretty much a circular entrance, which does
25 indicate it is probably straight in. Once it hits the

EDWARD PROCTOR, JR. -- CROSS-EXAMINATION

1 bone, it can be deflected upwards or downwards and
2 maybe a slight angle on the gun, which still allows you
3 to have a circular entrance.

4 Q So in this case, though, did the bullet go
5 straight from its entrance point to where you found it
6 behind the skull?

7 A It came through the skull, entered the anterior
8 aspect of the left side of the brain, and there was a
9 bullet track through the left cerebral hemisphere, down
10 to the base of the skull, through the skull and to the
11 left side. There was a track with extensive damage to
12 the brain all the way along.

13 Q So my question is, was it straight or did it veer
14 to one side or the other?

15 A It definitely veered victim's right to left, and
16 down.

17 Q So --

18 A And we're talking about maybe 10 degrees.

19 Q Say, hypothetically, if I'm pointing the gun --
20 and I'm using this model -- pointing it straight at the
21 head in a perfect angle, if the bullet was to go
22 straight and not redirect by anything, it would come
23 out the back?

24 A If it went in straight -- you actually had it
25 angled down, but if it goes straight and not deflected

EDWARD PROCTOR, JR. -- CROSS-EXAMINATION

1 by bone in any way, it should follow a path straight
2 through.

3 Q It was a circular wound, not --

4 A Circular. It did not have what we call an
5 abrasion collar, lateral, medial. It was a circular
6 abrasion, which indicates most of the time that it is a
7 straight-shot, most of the time.

8 Q So if it was a straight shot on and ended up
9 taking a right-hand turn --

10 A It was deflected once it entered, passed the
11 skull.

12 Q And can I ask you to step around. We've been
13 talking about the victim. We'll do it this way so Mr.
14 Wilson can see. You were never given this scenario?

15 A The only scenario I was given was an altercation
16 in a bar with a man shot.

17 Q But if the testimony showed that the victim
18 were --, we'll do what Mr. Wilson did -- they were
19 locked up like this, and if your head is into my chest,
20 you are saying there is no way to fire that gunshot
21 into the center of the skull with his hand over here
22 beside your left ear?

23 A Unless they were locked up like this and the gun
24 was way down here, which, you know, it certainly is
25 possible. It depends on how they were locked up and

EDWARD PROCTOR, JR. -- CROSS-EXAMINATION

1 where the gun was. With the definite scenario of the
2 head tight into a man's chest and gun up, it is hard --

3 Q So there is no way to do that with the gun by his
4 right ear, you would have to bring it back to the
5 chest --

6 A You'd have to bring it back down and under.

7 Q And is it possible if you are locked up like that,
8 and your head is in my chest, is it possible so that I
9 can pull my hand back and place the gun directly on
10 your forehead?

11 A Sure. Anything is possible.

12 Q But, again, you don't know without seeing it?

13 A I don't know.

14 Q Thank you. So it is possible that this was a
15 close contact wound, in terms of the gun was pressed
16 directly into the skull?

17 A It is possible that -- it would not be a close
18 contact, it would have to be a hard contact. Close
19 contact you would expect to see some residue around it;
20 hard contact, you may not.

21 Q So it's entirely possible that in that scenario
22 where we're locked up, the gun hand comes around and
23 presses into the forehead and pulls the trigger; is
24 that consistent with the evidence you saw?

25 A With the evidence that I've been given and

EDWARD PROCTOR, JR. -- CROSS-EXAMINATION

1 whatnot, any scenario in which the gun could be greater
2 than 18 or 24 inches away, whether locked up or not,
3 the gun somehow could have come around and caught the
4 man's head straight on, hard contact. You know, those
5 are possible.

6 Q And under that scenario where there is a head in
7 the middle of one gentleman's chest, and that head has
8 a bullet wound into the center of it, is there any way
9 for that victim to sustain that bullet wound unless it
10 comes from directly in front of him?

11 A To my knowledge, no.

12 Q So if it was fired, say, from behind the
13 individual who was locked up, would you expect to see
14 an injury on the individual that was locked up with the
15 victim?

16 A If it was fired from behind the Defendant, or
17 whoever was locked up with the victim, unless the
18 victim's head was sideways and up and somebody fired
19 over the shoulder or something, it could, but it would
20 have to be -- again, that is a scenario. You can
21 picture any scenario. If the head was turned somewhat
22 and there was an openings there, it is possible.

23 Q But, again, the only evidence you were provided
24 when you examined the body was the body?

25 A I have the case history. I was told by the deputy

LEMONDE HOLLAND - DIRECT EXAMINATION

1 coroner that there was a dispute at a local bar and
2 that the victim was shot once in the head, that is all
3 I knew at the time of the autopsy.

4 MR. THOMAS: Thank you. That is all I have.

5 MR. WILSON: Nothing else for Dr. Proctor.

6 THE COURT: You may come down. Can this witness
7 be excused?

8 MR. THOMAS: Yes, absolutely.

9 THE COURT: Thank you.

10 MR. WILSON: We call the applicant.

11 (LEMONDE HOLLAND, having been duly sworn,
12 testified as follows:)

13 DIRECT-EXAMINATION

14 BY MR. WILSON:

15 Q You are the applicant in this case; is that
16 correct?

17 A Yes, sir.

18 Q You have filed an application indicating that you
19 believe your lawyers were ineffective during the course
20 of your trial?

21 A That's correct.

22 Q And I want you to start out by telling us why you
23 believe your lawyers were ineffective, what it is that
24 they did that you believe made them ineffective?

25 A First, in the beginning, as I was consulting with

LEMONDE HOLLAND - DIRECT EXAMINATION

1 them and they were first retained --

2 Q "They," you're speaking of Mr. Richardson and Mr.
3 Johnson?

4 A Yes, Mr. Richardson and Mr. Johnson. I asked them
5 to -- there was two main witnesses, one in particular
6 who was the other victim allegedly, who was injured or
7 shot, so to speak. I wanted my lawyers to talk with
8 him and get his story, and if he could -- if he didn't
9 say --

10 Q "He," you are speaking of Rafael --

11 A Yes, one of the victims. If he said I was not the
12 one that shot him, I asked them -- they never spoke to
13 him, but if they had spoke to him and he said that, if
14 they subpoenaed him and he testified to that, his
15 testimony would have been very critical to the jury if
16 they would have heard that.

17 Q So you wanted your lawyers to contact the other
18 victim in the case, obviously not the deceased victim,
19 but Mr. Rafael Walke (phonetic), who was also shot in
20 the leg at the scene; is that correct?

21 A Yes, sir.

22 Q And you wanted your lawyers to call him as a
23 witness?

24 A Yes, sir.

25 Q Did you discuss that with them and ask them to do

LEMONDE HOLLAND - DIRECT EXAMINATION

1 it?

2 A Yes, sir.

3 Q Did they do that, to your knowledge?

4 A No, sir.

5 Q They did not?

6 A No, sir.

7 Q Did they give you a reason why they did not do
8 that?

9 A Not particularly, that I can remember, sir.

10 Q What else?

11 A I discussed with them on many occasions that I
12 wanted to take the stand and testify. I wanted to tell
13 my side of the story of what happened, and they kept
14 advising me not to. I think that it would have been
15 important for the jury to hear my version, being the
16 Defendant, of exactly what occurred on that evening of
17 the incident, especially the confrontation between me
18 and the victim. I have it written down. And not only
19 would have described in words how we were fighting, I
20 could have given a complete physical demonstration on
21 how our bodies were locked up tightly the whole time in
22 a wrestling momentum way, until the last gunshot was
23 fired and the victim fell to his back.

24 Q So you wanted to testify in the trial of your case
25 to tell the jury how the fight occurred?

LEMONDE HOLLAND - DIRECT EXAMINATION

1 A Yes, sir.

2 Q And what transpired during the fight?

3 A Yes, sir.

4 Q Is there any other way -- was there any other way
5 for your lawyers to get that information to the jury
6 other than for you to testify, that you know of?

7 A No, not at all. No, sir.

8 Q And did you ultimately testify in the trial of
9 your case?

10 A No, sir, I did not.

11 Q Did the judge at trial ask you if you wanted to
12 testify?

13 A Yes, sir, he did.

14 Q And what did you tell him?

15 A I told him -- I said no.

16 Q Why did you tell the judge no if you wanted to
17 testify?

18 A Because, at the time, my lawyer said constantly --
19 constantly telling me that they didn't want me to
20 testify or they didn't think I should testify, so I
21 trusted them as being my lawyers that had experience,
22 and they knew what was best, even though I ultimately
23 and deep down inside in my heart I really did want to
24 testify.

25 Q Now, tell me, if you had testified, what was it

LEMONDE HOLLAND - DIRECT EXAMINATION

1 that you would have said at trial in terms of what
2 happened in the fight?

3 THE WITNESS: Your Honor, may I stand up?

4 THE COURT: Certainly.

5 THE WITNESS: As Dr. Proctor gave the
6 demonstration, basically I would have said the exact
7 similar way how that occurred from the time that I was
8 -- the victim and his girlfriend were in their car, and
9 at that particular time, as the victim was on the
10 passenger's side, as he opened the car and he came out,
11 we began -- at that particular time we locked up, right
12 then and there.

13 Q When you say "locked up," tell me what that means.
14 What happened? What physically were you doing and what
15 was he doing?

16 A My hands was wrapped around his body, his were
17 wrapped around me. We were hugged up tightly together.
18 We wrestled in a momentum way, side-to-side, back and
19 forth wrestling with each other until his head -- at
20 that time he put his head like that (indicates) inside
21 my chest, and we were still tussling back and forth,
22 but my hands were wrapped around his body this whole
23 entire time. It was never apart at no time. The --
24 I'm not sure about the amount of time, but I know there
25 were three gunshots that were fired. The first gunshot

LEMONDE HOLLAND - DIRECT EXAMINATION

1 we were tussling, and the second we were still hugging
2 and the third we were hugged tightly here. The last
3 gunshot, I started to feel a little release of pressure
4 from the victim, and then that is when I see him fall
5 straight to his back like this right here.

6 Q And what did you do at that point?

7 A At that point, I started hearing people yelling
8 and people were screaming and saying, Run, run,
9 somebody shooting. I started looking around and I saw
10 everybody scattered around going to their cars and
11 leaving, going inside the club. What I did is I went
12 to my car and fled the scene.

13 Q You can take a seat. At any point in time did you
14 have a gun?

15 A No, sir.

16 Q Did you have a weapon, a gun in your hands at any
17 point of time the night that the shooting occurred?

18 A No, sir.

19 Q Let me ask you, are you right-handed or left?

20 A Right-handed.

21 Q Have you always been right-handed?

22 A Yes, sir.

23 Q And whenever you are eating or trying to write, do
24 you write right-handed, use your right hand?

25 A Everything I do is with my right hand, sir.

LEMONDE HOLLAND - DIRECT EXAMINATION

1 Q Would you have testified to that at trial, that
2 you were, in fact, right-handed?

3 A Yes, sir.

4 Q And was there any period of time during the time
5 that you and the victim were fighting that you all were
6 not locked up arm-in-arm? Was there any period of time
7 where that was not true?

8 A No. We were together the whole time. We were
9 never separated.

10 Q Until he fell?

11 A Until the last gunshot when he fell to his back
12 side.

13 Q All right. What else is it that your lawyers did
14 or didn't do that you feel make them ineffective?

15 A Other than the witnesses and not allowing me to
16 testify, I feel those were the very, very two important
17 key points, sir.

18 Q Tell me -- tell the Court how you think your
19 testimony at trial could have been helpful to your
20 defense?

21 A Because I wasn't -- didn't have the opportunity to
22 testify. The only evidence that the jury had was from
23 the witnesses, which in my opinion is not enough, then
24 hearing the testimony that was actually involved. I
25 know what happened and could have told the story better

LEMONDE HOLLAND - DIRECT EXAMINATION

1 than anyone else because I was involved, I was there.

2 Q During the course of the altercation, you say you
3 don't really recall how long it was, how many seconds
4 or how long it occurred; is that correct?

5 A Yes, sir.

6 Q Was there ever a point where the victim had a
7 weapon, that you know of?

8 A I don't recall, sir.

9 Q Do you remember him having a weapon?

10 A No, sir.

11 Q Was there ever a time when -- after the first
12 shot, did you know where the first shot came from when
13 you heard the first shot, do you know from which area
14 it came from?

15 A No, sir.

16 Q What about the second one?

17 A No, sir.

18 Q The third one?

19 A No, sir, but at the third shot, like as soon as I
20 heard the shot, bang, I did kind of feel like something
21 went passed me, you know. I mean, I've never been in
22 close contact with a gunshot before, but I felt like a
23 static or something that flew past me. By me never
24 having been shot before, I didn't know if I was hit.
25 The only way I knew someone was shot was because the

LEMONDE HOLLAND - DIRECT EXAMINATION

1 victim started to release pressure, and then he just
2 fell to his back.

3 Q When you are out there this night, are there other
4 people out there other than you and the victim?

5 A Several people, sir.

6 Q Approximately, how many? I know you don't know
7 the exact number.

8 A It was very, very dark. You are talking about a
9 small location, very.

10 Q Outside in the parking lot of a club?

11 A Yes. Very litly dim.

12 Q Dimly lit?

13 A I'm sorry, dimly lit, yeah, all the way around.

14 Approximately, maybe -- if I could -- this is a guess,

15 I mean, this is approximately. People I knew actually

16 that were out there that I can point, at least 10 to

17 15.

18 Q And these people were all around where you and the
19 victim were fighting?

20 A Yeah, they were very close.

21 Q Okay. Tell me about the attitude of the people
22 out there. Were they loud and rowdy? Quiet? What was
23 going on during the fight?

24 A Well, there was a lot of drinking going on,
25 partying and things of that nature.

LEMONDE HOLLAND - DIRECT EXAMINATION

1 Q Outside or --

2 A In the bar and outside.

3 Q So other than testifying or not allowing you to
4 testify, what else did your lawyers not do that you
5 wanted them to do?

6 A At the time -- that was kind of close to -- as I
7 mentioned, one of the very key vital points was me not
8 taking that stand, because that is something that now I
9 would have never known what would have happened, the
10 outcome of that if I would have told my version of the
11 story of what happened.

12 Q All right. And you saw the -- did you hear the
13 testimony of Mr. Bennett when he testified at trial?

14 A Yes, sir.

15 Q And is what he says pretty much what happened?

16 A No, sir.

17 Q What is different?

18 A As he said about going to the car -- going to the
19 car --

20 Q I'm talking about the fight. I'm asking you --
21 Mr. Bennett testified at trial about what happened --

22 A I'm sorry.

23 Q Is there anything in his testimony at the trial
24 about the fight that you disagree with?

25 A Oh, no. All of that is true, sir.

LEMONDE HOLLAND - DIRECT EXAMINATION

1 Q Okay.

2 A Excuse me, there is one other thing as far as my
3 lawyers.

4 Q All right.

5 A As far as what Dr. Proctor just spoke on, when he
6 mentioned -- I believe it would have been very
7 important if he would have explained to the victim --
8 they would have explained to them what was going on
9 with the fight.

10 Q Sorry. That who would have explained?

11 A Mr. Richardson and Mr. Johnson.

12 Q That he would have explained to who?

13 A To Dr. Proctor. If they would have gave him some
14 explanation in how the fight occurred or gave him some
15 type of knowledge before he did the autopsy, or before
16 he even came to trial and, you know, gave his testimony
17 so he could have been aware of what was going on with
18 the situation, and because they did not inform him of
19 what was going on, the jury, they could not hear his
20 response from that.

21 Q So the jury was deprived of his testimony as to
22 how the fight occurred?

23 A Yes, sir.

24 Q Anything else?

25 A I would like to -- this is something I wrote down;

LEMONDE HOLLAND - DIRECT EXAMINATION

1 it is brief. May I stand again?

2 THE COURT: Sure.

3 THE WITNESS: Your Honor, as I just stated to my
4 attorney what my lawyers could have done differently,
5 I'm not saying they were bad attorneys, I just think
6 they could have been more specific when describing to
7 the jury about when their client was fighting with the
8 victim, explaining and demonstrating how we were
9 together, locked up together the entire time until the
10 very last shot was fired, that we were never separated.

11 You just heard from the medical examiner elaborate
12 on his description and his expertise on how two people
13 were together, what would have occurred by him
14 performing the autopsy and what he found. The jury did
15 not hear him say anything of this, which left them only
16 to believe what they heard from the witnesses the
17 entire time. This whole entire nine-and-a-half years
18 I've been confined for this crime, it is very hard for
19 me to sleep at night not knowing if the outcome would
20 have been different if I would have been encouraged to
21 testify on my behalf telling the exact truth on what
22 happened; because I was told not to, I will never know.

23 My wish and my prayers, Your Honor, is to one day
24 have that one opportunity to get on the stand, let the
25 entire truth be heard with a brand new trial and brand

LEMONDE' HOLLAND - CROSS-EXAMINATION

1 new jury. With 41 more years left to serve, that is my
2 prayer. Thank you.

3 Q Let me ask you this. When you were arrested, did
4 you give a statement to the police or did they ever ask
5 you?

6 A No, sir, I didn't give a statement and no one
7 asked.

8 Q Other than now, is this the first time to law
9 enforcement or court that you ever gave a statement
10 about what happened?

11 A This is the first opportunity I have had, yes,
12 sir. Yes, sir.

13 MR. WILSON: Thank you.

14 THE COURT: 'Cross-examination.

15 MR. THOMAS: If it please the Court.

16 CROSS-EXAMINATION

17 BY MR. THOMAS:

18 Q How many meetings did you have with your
19 attorneys?

20 A I don't know. I'm not sure, sir, the exact
21 amount.

22 Q A lot? A little? Ballpark.

23 A In between -- between a lot and medium.

24 Q Did they have an opportunity to explain to you
25 sort of what your charges were, the elements of the

LEMONDE HOLLAND - CROSS-EXAMINATION

1 crimes?

2 A I'm not sure I understand your question.

3 Q Did they explain that you were charged with
4 murder?

5 A Yes, sir.

6 Q And they explained the elements of murder, what
7 the State would have to prove?

8 A Yes, sir.

9 Q And did they do that with your other two charges
10 as well?

11 A Yes, sir, they did.

12 Q Did you ever have a chance -- you understand what
13 I mean when I talk discovery, the State's evidence?

14 A As far as what they have from like over all like
15 witnesses or anything?

16 Q Right. Right. Did you have an opportunity to
17 review that with them?

18 A Yes, sir, I did.

19 Q And did you tell them your version of events of
20 what happened that night?

21 A As far as from discovery, or from my own actual
22 words?

23 Q In your own words did you tell them?

24 A Yes, sir.

25 Q And that is pretty much what you told us here

LEMONDE HOLLAND - CROSS-EXAMINATION

1 today?

2 A Yes, sir, it was.

3 Q What did they tell you sort of the trial strategy
4 was going to be in terms of defending those
5 allegations?

6 A Could you explain more?

7 Q Did they discuss self-defense with you?

8 A At one time they did.

9 Q Did you discuss voluntary manslaughter?

10 A Yes, sir, we did.

11 Q And did you discuss basically the fact that, I
12 guess, the defense -- what I'm asking is what did they
13 tell you when they go to trial that they were going to
14 argue for the trial, what did they tell you that was?

15 A Just the bottom line, I mean, from the very
16 beginning, voluntary manslaughter.

17 Q So there was never a discussion of the defense was
18 you didn't do it, you didn't pull the trigger?

19 A No, there was never going to be a chance for that.
20 No, sir.

21 Q I kind of want to walk through with you, you said
22 that the judge asked you about whether you want to
23 testify or not?

24 A Yes, sir.

25 Q Do you remember the judge telling you that that

LEMONDE HOLLAND - CROSS-EXAMINATION

1 was your decision to make?

2 A Yes, sir.

3 Q And as far as your version we talked about today,
4 I want to try to understand what was going on. You
5 were fighting with the victim and you heard gunshots;
6 is that a fair assessment of what happened?

7 A Yes, sir.

8 Q So you are locked up with the victim, basically in
9 a bear hug, I think you described it?

10 A Hugged up and tight.

11 Q Where were his head during all of this?

12 A In the very first beginning, we were hugged up and
13 tight, and as we were constantly moving around, I don't
14 know. Like I said, as far as how many seconds -- this
15 guy here was heavy, way larger than me. We were about
16 the same height. I managed to move his head down in my
17 chest.

18 MR. THOMAS: Can I get Mr. Wilson here to
19 demonstrate?

20 THE COURT: Because he's a bigger man?

21 MR. THOMAS: It is rare I find someone bigger than
22 me (laughing).

23 Q So you are hugged up with the victim. Is it a
24 bear hug, or your arms are on the shoulders?

25 A It is more or less -- more or less like a bear

LEMONDE HOLLAND - CROSS-EXAMINATION

1 hug.

2 Q (MR. THOMAS) Close in here (indicates)?

3 A Yes, sir.

4 Q And where is the victim's head? I'll be the
5 victim, and Mr. Wilson is you, and that is kind of
6 opposite of the scenario, but tell me when to stop.

7 A Right there..

8 Q So it is right in your chest?

9 A Yes, sir.

10 Q Where is the victim's head when you hear the first
11 gunshot?

12 A The first gunshot, his head is -- let me see....

13 Q Back here, or still down in your chest?

14 A The very first beginning -- we were wrestling like
15 this right here. His head is into my chest until the
16 very first beginning.

17 Q Of the gunshots?

18 A Yes, sir.

19 Q So when the gunshots are going off, his head is
20 down here in the chest?

21 A Yes, sir.

22 Q Through all three gunshots?

23 A No. Just, I believe, the very first one.

24 Q And after the first one, where does the head go?

25 A His head is raised up like this (indicates). We

LEMONDE HOLLAND - CROSS-EXAMINATION

1 are in the momentum back and forth, and everything, you
2 know what I mean, is so fast. I just remember
3 wrestling, wrestling. I remember his head in my chest
4 for a brief few seconds, but it was in the beginning.

5 Q In the beginning.

6 MR. THOMAS: Thank you, Mr. Wilson.

7 Q (MR. THOMAS) So after the gunshots go off, his head
8 is not in your chest anymore?

9 A It is more like back like this right here
10 (indicates).

11 Q Is he looking straight ahead or up when the
12 gunshots --

13 A I don't know, sir.

14 Q Fair enough. You were right there at him? There
15 wasn't a separation between you when the gunshots were
16 going off?

17 A No, sir.

18 Q Last thing I want to ask you, you said that your
19 attorneys didn't necessarily do a bad job, you just
20 think that the jury might have come back if they heard
21 other evidence?

22 A Like I said, sir, I think this could have been --
23 more or less, I believe this trial was like rushed
24 into. There wasn't enough time to prepare, and like I
25 said, the witnesses and everything, you know, to be

LEMONDE HOLLAND - REDIRECT EXAMINATION

1 contacted, whether or not they would have helped or
2 not. I mean, at least they could have attempted to
3 contact them and -- you know, especially more or less
4 for the part of me to be able to testify.

5 Q So you are not sure if it changed anything, you
6 just hope that it would?

7 A Well, I mean, I can't be the judge of that,
8 obviously.

9 Q That's the right answer?

10 A I could not see it have hurt.

11 Q Thank you, Mr. Holland. I appreciate it.

12 A Sure. Absolutely.

13 MR. THOMAS: Thank you.

14 REDIRECT-EXAMINATION

15 BY MR. WILSON:

16 Q Just one question. Is it your belief that had
17 Mr. Richardson and Mr. Johnson presented your testimony
18 to the jury, that the outcome of your trial may have
19 been different?

20 A The testimony as far as what? My testimony?

21 Q No.

22 MR. THOMAS: I'm going to object, that calls for a
23 legal conclusion. I know we got there, but he answered
24 correctly, that it is not his job to answer that, so.

25 THE COURT: Overruled. Go ahead.

ROBERT RICHARDSON - DIRECT EXAMINATION

1 Q (MR. WILSON) Is it your belief that had
2 Mr. Richardson and Mr. Johnson presented this
3 testimony to Dr. Proctor, that the outcome of your
4 trial likely would have been different?

5 A Absolutely, sir.

6 MR. WILSON: Nothing else.

7 MR. THOMAS: No follow-up.

8 MR. WILSON: That is our showing.

9 MR. THOMAS: State would call Robert Richardson to
10 the stand.

11 (ROBERT RICHARDSON, having been duly sworn,
12 testified as follows:)

13 THE WITNESS: Robert Richardson.

14 DIRECT-EXAMINATION

15 BY MR. THOMAS:

16 Q Just want to get some background information. How
17 long have you been practicing law?

18 A Forty years.

19 Q And how much criminal work had you done when you
20 took Mr. Holland's case?

21 A I lot of it. I've been doing it mainly the whole
22 time practicing.

23 Q How did you become involved in his case?

24 A His family contacted me, and that is how I got in.

25 Q So you were retained?

ROBERT RICHARDSON - DIRECT EXAMINATION

1 A Yes, sir.

2 Q When you were retained, what kind of motions did
3 you file in terms of discovery? Did you file the
4 standard Rule 5 Brady?

5 A Standard Rule 5 and did follow-up letters
6 demanding other discovery and made trips to the Beach
7 and the scene, Solicitor's Office on numerous
8 occasions.

9 Q So was the State's discovery turned over to you?

10 A I got a trial notebook about that thick
11 (indicates). We received, I think, basically
12 everything they had. Some of it I had to go to North
13 Myrtle Beach and dig out that the Solicitor didn't give
14 to me, but when I found out what it was and asked for
15 it, I got it.

16 Q In terms of the substance, what was it? Witness
17 statements? Just walk us through what the evidence was
18 that they were going to use?

19 A I had numerous witness statements, forensic tests,
20 FBI or SLED, shell casings, diagrams, pictures,
21 numerous pictures, tests of the gun casings, shell
22 casings, photographs and different diagrams of the
23 vehicle, there was a bullet that went into a vehicle,
24 forensics reports, different officer statements.

25 Q As far as the victim in this case, the victim in

ROBERT RICHARDSON - DIRECT EXAMINATION

1 this case, and there was another victim?

2 A Yes, sir, Mr. Walke, I guess it is.

3 Q Did he provide a statement?

4 A I think he did.

5 Q What was the substance of that statement, to the
6 best of your recollection?

7 A The basic thing was he was shot somewhere in the
8 -- grazed between the knee and the ankle, somewhere in
9 his leg or calf.

10 Q Did you have an opportunity to ever talk to Mr.
11 Walke?

12 A I don't think I did.

13 Q Is there any reason why you wouldn't have spoken
14 to him?

15 A Lemonde said you wouldn't find him.

16 Q So you discussed Mr. Walke with Mr. Holland?

17 A Yes.

18 Q Did he tell you to look for him?

19 A We talked about looking for him, because we wanted
20 to get him on the stand, and he finally said to us that
21 you won't find him, he's gone. Of course I discussed
22 with him -- Mr. Johnson and I -- the fact I would hate
23 to call him to the stand because since he is a victim,
24 he could testify and make the case for the State as far
25 as his wound.

ROBERT RICHARDSON - DIRECT EXAMINATION

1 Q Is it normally -- do you normally get to interview
2 victims?

3 A Every chance I get, if it is needed.

4 Q And, I guess, I'm trying to figure out why you
5 didn't call him?

6 A There was no number to call. I was told by
7 Lemonde that he would not be found, that he just was
8 gone.

9 Q Did you see any need to track him down further?

10 A Didn't want to put him on the stand based on his
11 making the case against Lemonde on the assault charges.
12 That was my advice to him, particularly after he said
13 he was gone. I said, well, you know, I wouldn't want
14 to call him anyway.

15 Q How many meetings did you have with Mr. Holland?

16 A I don't know. I had a time sheet. We didn't bill
17 by the hour, but for some reason I kept a time sheet.
18 There is 230-some hours of my time, and most of the
19 time Jeff was with me. So we had at least 400 hours of
20 interviews and went to see him numerous times. His
21 brother, James, came to the office on numerous
22 occasions, and I talked to his mother.

23 Q During those meetings, did you have an opportunity
24 to share discovery with him?

25 A I gave him a whole copy of it. He looked over

ROBERT RICHARDSON - DIRECT EXAMINATION

1 everything. I had it organized and outlined and
2 indexed, and we went over all of it, every piece of it
3 with him.

4 Q Based on your review of the discovery -- let me
5 ask you this. Did he tell you his version of the
6 events?

7 A Yes, sir.

8 Q Was it consistent with what he heard today, or
9 what did he --

10 A It was pretty consistent with what he said today
11 as far as where everybody was standing and what was
12 going on. On cross-examination, he said they weren't
13 quite as locked up as it started out to be.

14 Q Did you have an opportunity review Dr. Proctor's
15 report?

16 A I did.

17 Q Did you feel a need to talk to Dr. Proctor about
18 that?

19 A I'm sure we talked to him on the phone, but
20 besides that, I was not as concerned about Dr.
21 Proctor's report, because it was inclusive. That is
22 what I thought was important, it did not prove or
23 disapprove whether Lemonde shot him.

24 Q So Dr. Proctor -- you saw the demonstration with
25 Dr. Proctor?

ROBERT RICHARDSON - DIRECT EXAMINATION

1 A Yes, sir.

2 Q Is there any reason why you didn't walk through
3 that demonstration with him when he was on the stand?

4 A The demonstration Ralph gave was different from
5 Lemonde on cross-examination saying that they weren't
6 always locked up, and the head wasn't in the chest at
7 the third shot.

8 Q Reviewing all of that -- speaking to your client
9 and reviewing all the forensics and everything, what
10 were you going to argue to the jury? What was your
11 strategy?

12 A Somebody shot him, don't know where it came from.
13 Lemonde was there, and there was no powder residue, I
14 think it was. We wanted to talk about there was --
15 seems like there was two shell casings with one head
16 stamp on it, and another one with a different head
17 stamp. I was arguing there was more than one shooter
18 there, and nobody actually, except the girl, and I
19 think she strays from her testimony. So my idea is --
20 and still is -- that I didn't get the truth from
21 anybody. I always felt there was something going on, a
22 drug deal or something that did not make sense.

23 The girl was leaving in the car when she claimed
24 Lemonde came up beating on the window. She didn't tell
25 it too clear to start with whether Lemonde had a gun.

ROBERT RICHARDSON - DIRECT EXAMINATION

1 She had the car in drive driving out the driveway, and
2 I never understood why she wouldn't just mash the gas
3 and be gone, and yet she says she didn't know Lemonde
4 and then she claims he had a gun, so she gets out and
5 confronts Lemonde. I don't think that makes too much
6 sense when you don't know anybody and he's got a gun,
7 you put your car in park and walk around the other side
8 to confront him; that never made sense. So there was a
9 lots of things. We tried to take all the witnesses'
10 statements and plug as many holes into them as we
11 could?

12 Q So you cross-examined her on all of that?

13 A Yes, sir.

14 Q What did you give him at what the likelihood of
15 success was at the trial?

16 A When we got discovery and went through everything,
17 there was like five direct witnesses against Lemonde,
18 and there was no dispute that they weren't fighting.
19 The biggest argument we had was whether or not he had a
20 gun, and that was a biggy, but I told him the
21 assessment was not good. Of course, like everything
22 else, you never know when you are going to win or lose.

23 Q So I guess what was your -- what was the advice to
24 him about his taking the stand to testify?

25 A Based upon the statements and all, I told him he

1 had every right to take the stand, that I would never
2 tell someone not to take the stand, but under the
3 circumstances, he might very well say something to help
4 them, but I was scared he would say something that
5 would harm him, but it was completely up to him.

6 Q So you told him it was his choice?

7 A Yes, sir. No question about it.

8 Q And you remember the judge telling him that?

9 A Yes, sir.

10 Q Do you feel like you were prepared to go to trial
11 on this?

12 A As good as we could have been.

13 Q What could you -- if you had more time, is there
14 anything else you could have done?

15 A Time wouldn't have made any difference, I didn't
16 think.

17 MR. THOMAS: Thank you.

18 CROSS-EXAMINATION

19 BY MR. WILSON:

20 Q Mr. Richardson, let me ask you -- actually, with
21 Dr. Proctor's testimony, it was Mr. Johnson that
22 cross-examined Dr. Proctor?

23 A I think that is correct.

24 Q You said you have been practicing 40 years, how
25 long had Mr. Johnson been practicing at that time?

ROBERT RICHARDSON - CROSS-EXAMINATION

1 A Probably six or seven.

2 Q That long in 2007?

3 A How long has it been since the trial? He's been
4 practicing about 11 or 12, so that is, what, three,
5 four years.

6 Q So he was practicing three, four years at that
7 time?

8 A Yes, sir.

9 Q And how many murder trials had he been involved in
10 in those three years?

11 A That was his first.

12 Q That was his first one. Would you agree that Dr.
13 Proctor was going to be a critical witness or could
14 have been a very potentially critical witness for the
15 defense in this case?

16 A I looked at Dr. Proctor's report, and I think his
17 testimony ended up -- it was pretty neutral. I felt
18 like the way he described everything, if it had been --
19 if Lemonde had been the shooter and a contact wound,
20 the blood would have bled it out, but if Lemonde had
21 not been the shooter and someone was standing way back,
22 that also could have been the case. I felt we were
23 coming way ahead on the forensic or autopsy report just
24 to be in a neutral position.

25 Q Did you ever entertain the idea during your

ROBERT RICHARDSON - CROSS-EXAMINATION

1 strategy that someone other than the Defendant could
2 have been the shooter?

3 A Oh, yeah, and I argued it to the jury.

4 Q So when Mr. Bennett testified at trial that the
5 entire time that this altercation was going on, that he
6 and the victim, the Defendant, were locked up, in fact,
7 that is his testimony throughout the trial, was it not,
8 that is Mr. Bennett?

9 A "Locked up" could mean a lot of things. Just like
10 Lemonde showed, to him, they were locked up, but they
11 pulled apart somewhat and moved around, that is always
12 the impression I had. They were tussling.

13 Q Okay.

14 A Always in contact with each other, locked up from
15 the standpoint that they were locked together in some
16 extent, but not head to chest, I think like was first
17 described to Dr. Proctor.

18 Q On cross-examination you're asking that very
19 question of Mr. Bennett, and he says there was never
20 any -- there was never any punches thrown?

21 MR. WILSON: Your Honor, I'm reading from 257,
22 Line 11.

23 Q (MR. WILSON) There was never any -- any punches
24 thrown. His -- he was holding on, and his head was
25 down actually in the black male's chest the entire

ROBERT RICHARDSON - CROSS-EXAMINATION

1 time. All right. And what was the -- what was the
2 Defendant doing during that -- during this? What was
3 his positions? He was -- he had his hands over the
4 top of the white male's arms and he was -- it appeared
5 to me that he was trying to do anything he could,
6 looked like he was almost, like, kind of hitting him
7 in the top of the head, kind of.

8 That was Bennett's testimony, right?

9 A That is punches thrown, if he's hitting him on top
10 of the head.

11 Q That is Bennett's testimony.

12 A Right.

13 Q Anywhere in there did he say that there was a
14 separation between he and the victim -- the
15 Defendant -- any time during the course of the trial?

16 A Separation being a complete separation, no. But a
17 separation as Lemonde put it, he moved back to some
18 extent, but as far as ever being completely one hand
19 not touching the other, no, it wasn't ever that
20 situation.

21 Q And he testified that his hand --

22 A He who?

23 Q Mr. Bennett. Mr. Bennett's testimony -- back on
24 Page 257 -- is that the black male, meaning the
25 Defendant, that his hands were over the top of the arms

ROBERT RICHARDSON - CROSS-EXAMINATION

1 of the victim. That was his testimony; was it not?

2 A I think at one point, but I don't know if he meant
3 the whole time they were together.

4 Q Well, did you ask him? I mean, isn't it important
5 to know when your client -- when the Defendant is
6 accused of having killed a guy, isn't it important to
7 know exactly where the Defendant was versus where the
8 victim was so you can determine where the shot was
9 fired from?

10 A That is exactly what I was trying to do. I was
11 trying to get as much space from each other from the
12 standpoint that it wouldn't be in his chest, because
13 there is no way that someone else could have shot him
14 if his head was locked in the chest. I was trying to
15 get as much space as I could, and that is why I say
16 they were tussling. They were going kind of around and
17 around in a wrestling match kind of.

18 Q But I'm specifically talking now about
19 Mr. Bennett, because Mr. Bennett in the transcript is
20 the only person who actually physically describes what
21 they were doing, other than I think someone said
22 wrestling. He is the only one that gives a real
23 description of the actual fight.

24 Now, as I understand it, Dr. Proctor testified
25 before Mr. Bennett, is that right, in the course of the

ROBERT RICHARDSON - CROSS-EXAMINATION

1 trial?

2 A As far as I know, yes, sir, I think so.

3 Q So when Dr. Proctor testified, he didn't have the
4 benefit of knowing what Mr. Bennett's story was; is
5 that correct?

6 A I'm assuming what you are saying is I should have
7 had a demonstration, like you gave with Dr. Proctor,
8 during the trial?

9 Q No. What I'm asking is simply whether or not at
10 the time of the trial whether you gave -- whether Dr.
11 Proctor had the benefit of knowing what the testimony
12 of the primary witness against the Defendant was, that
13 is what I'm asking?

14 A I don't know that he did, as far as I didn't
15 stress that they were locked up to Dr. Proctor. I
16 don't know what Solicitor did or told him. I did not
17 stress it to Dr. Proctor, the positions.

18 Q Well, do you agree that it is important in a
19 homicide or in a murder case that you know the angle of
20 the bullet, the entrance place, exit place so that you
21 can determine where the shooter or shooters may have
22 been standing; do you think that is a fair statement?

23 A It could have -- here is the way I look at it. It
24 could not have had his head in the chest because no one
25 else could have shot him if he was -- or Lemonde could

ROBERT RICHARDSON - CROSS-EXAMINATION

1 not have even shot him. So that was a no-no if his
2 head was touching at the time the shots were fired.
3 From that point back, you get a point that if it is
4 neutral from the pathologist that he couldn't tell
5 whether he was up close or far away, then my point of
6 it is if we could argue far away, the further away I
7 could get, the better. So I didn't want them locked
8 up. It is my understanding they were tussling, and he
9 said his head went back. Also, the angle of the bullet
10 is determined by where the gun is located, and the
11 angle of the head being turned one way or the other.
12 All of it changes with a slight movement of the head or
13 the gun.

14 Q Where is the evidence in the course of the trial
15 that there was separation between them, anywhere in the
16 course of the trial?

17 A Not complete separation, but there was -- Lemonde
18 himself just said that the head was back. You have to
19 get the separation and the head out of the chest, and
20 Lemonde testified to that awhile ago. The separation
21 from there is -- the head had to get back if someone
22 else shot him, then it would be somebody else from a
23 distance shooting him.

24 Q But Lemonde didn't testify during the course of
25 the trial, and what we're looking at is what we had at

ROBERT RICHARDSON - CROSS-EXAMINATION

1 the time of the trial. The first time Lemonde
2 testified was this morning, so none of us had the
3 benefit of that, and certainly the jury didn't have the
4 benefit of that?

5 A I had the benefit of that when I made the decision
6 how to approach the fact that where he was standing and
7 what was going on and how to evaluate it.

8 Q So you are saying now that Lemonde told you at
9 some point in time that there was separation between he
10 and the Defendant?

11 A No. No more than he said awhile ago that his head
12 wasn't in his chest, that it was back. They were
13 always touching hand-to-hand or hand-on-hand or
14 hand-on-body. They never physically separated, but
15 tussling going around and around.

16 Q Is there any reason that once you have a witness
17 who comes in, like Mr. Bennett, and he gives a story,
18 and that story is that these people were locked up the
19 entire time, that he was watching them the entire time,
20 is there any reason not to use that to recall Dr.
21 Proctor and give Dr. Proctor the benefit of saying to
22 the jury under those circumstances, no, this shot could
23 not have been fired?

24 A According to the way the proposition you gave Dr.
25 Proctor. If his head was in the chest completely, all

ROBERT RICHARDSON - CROSS-EXAMINATION

1 the time, he wouldn't have been shot in the head. No,
2 I didn't recall Mr. Proctor or thought it was
3 important, because if I could get him off the stand and
4 could not prove that it was a contact wound or 25 feet
5 away, that's what I was after at that time.

6 Q So that was your strategy after Bennett
7 testified --

8 A Yes, sir.

9 Q -- that they were locked arm-in-arm the entire
10 time when the shooting occurred, that your strategy
11 then was to disregard that and look at the fact that
12 Dr. Proctor said there was no powder or stippling, so
13 you didn't want to --

14 A Let's talk about it, Ralph. The best I remember,
15 and I don't have it before me, but we had every
16 statement of every witness. I don't know that the
17 testimony changed from the statements to the trial. I
18 think Dr. Proctor, best I remember, testified just like
19 his statement given to the police -- or his report. I
20 think that the other gentleman you are talking about,
21 his testimony was the same thing before trial.

22 Q Well --

23 A I don't recall any surprises from the testimony
24 versus the statements.

25 Q In your closing argument, on Page 336, you are

ROBERT RICHARDSON - CROSS-EXAMINATION

1 saying now that your strategy was to not recall Dr.
2 Proctor, but in your strategy on Page 336 of your
3 closing statement, you said -- and I'm looking at Line
4 2 -- he said he had his hands on the top of each other.
5 How did he have his hands? Just like that, beating on
6 each other's back, or his back was getting beat on.

7 So there you are going back to the --

8 A I was arguing anything I could argue. I was
9 giving the jury anything they could do. It was a tough
10 case. You had about five witnesses in there, and I put
11 it that he didn't even have a gun, that he was on his
12 shoulder and arguing. My argument was that they
13 haven't even proven he had a gun. They proved he had
14 one two weeks ago. And the little lady driving the
15 car -- Capers or Cuthers -- she embellished her
16 statement in court versus her written statement, and I
17 tried to get her on that. Because the first time it
18 wasn't as clear that there was a gun; there was a metal
19 sound.

20 So, basically, except for that and the appearance
21 of the gun that wasn't in the statement from three
22 weeks earlier, that is the two things I remember that
23 had changed at trial versus statements.

24 Q So I'm understanding, then, you are not calling
25 Dr. Proctor back to the stand to give him the benefit

ROBERT RICHARDSON - CROSS-EXAMINATION

1 of Mr. Bennett because, as you say, that was your
2 strategy; is that what you are saying?

3 A Dr. Proctor and the way I looked at the case
4 wasn't critical, because he was neutral. He didn't put
5 him being the shooter point-blank or disregard the fact
6 that it could have happened 10, 20 feet away.

7 You had it in such a way, as I thought it and
8 understood it, that the jury could consider that the
9 shot was fired 10, 15 feet away. That is what I was
10 after as much as anything, that Lemonde didn't shoot
11 him, the shot had to be a distance away.

12 Q With all of the going back and forth, and you are
13 saying that the shot was fired from a distance,
14 wouldn't it have made your case even stronger to have
15 Dr. Proctor say, Based on what was described to me,
16 that shot could not have occurred close up like that?

17 A I didn't see it at the time, and I don't know that
18 I still do. He was neutral. I had to argue -- because
19 everyone had Lemonde being there and only one fighting
20 him, so I was trying to do what I could to --

21 Q Let me ask you this. Prior to the trial, did you
22 go see Mr. Bennett?

23 A Yes. He was the manager, right?

24 Q Yes, sir.

25 A Yes, we went and spoke to him.

ROBERT RICHARDSON - CROSS-EXAMINATION

1 Q You said that you think you talked with Dr.
2 Proctor on the phone?

3 A Yes, sir.

4 Q Did you talk to Rafael Walke?

5 A Couldn't find him.

6 Q And what about Ms. Cuthers (phonetic), the other
7 person?

8 A I don't think I talked to her.

9 Q What efforts, if any, did you make to find
10 Mr. Walke?

11 A I talked to Lemonde and he said he's gone, don't
12 worry about that, you won't find him, don't look for
13 him.

14 Q Lemonde was in jail. Mr. Holland was in jail this
15 entire time, never got out from the time he was
16 arrested, which was the day after the incident until
17 trial, and so how would he know where --

18 A I don't know if a visitor, friend or phone call or
19 what, but he assured me you wouldn't find him.

20 Q And you say that -- do you recall whether or not
21 there was a written statement from Mr. Walke?

22 A I can't recall right now. I don't have any notes
23 as far as that. You have my file. Is there one in it?
24 I'll look at it, but I gave you my whole file.

25 Q He gave a statement; it was very benign.

ROBERT RICHARDSON - CROSS-EXAMINATION

1 A Basically saying he got shot in the leg, is what I
2 remember.

3 Q That is correct. That is correct. Mr. Walke was
4 shot in the leg?

5 A I think that is correct, somewhere in the calf or
6 something. He was standing between the car, back of
7 the car and the -- somewhere back there.

8 Q Okay.

9 MR. WILSON: Nothing further. Thank you.

10 MR. THOMAS: No redirect. We ask Mr. Richardson
11 be excused.

12 MR. WILSON: No objection.

13 MR. THOMAS: That is the State's case, Your Honor.

14 THE COURT: Anything further?

15 MR. WILSON: No additional witnesses.

16 THE COURT: Any closing statements?

17 MR. WILSON: I would, Your Honor.

18 THE COURT: Yes.

19 MR. WILSON: Your Honor, I think in this
20 particular case that the reason that I find compelling
21 is that with Dr. Proctor's testimony, that if the fight
22 occurred as was described by the State's primary
23 witness in this case, that that shot would have been
24 practically impossible to have occurred. The
25 Defendant's defense --

CLOSING ARGUMENT

1 THE COURT: Would have been impossible for your
2 client?

3 MR. WILSON: Yes, sir. Right. The defense knew
4 about Mr. Bennett's testimony, and Dr. Proctor already
5 testified. There is no reason not to recall Dr.
6 Proctor once Mr. Bennett testified. But greater than
7 that, Mr. Bennett gave a written statement beforehand,
8 which pretty much is the same. And so there would be
9 no reason not to give that to the jury, to have the
10 pathologist say that based on the testimony of the
11 State's primary witness, that that murder could not
12 have occurred the way that the State was offering it.
13 Maybe some other scenario may have been possible, but
14 that wasn't a scenario that the State was offering.
15 The State was offering the scenario based on
16 Mr. Bennett's testimony. Dr. Proctor's statement would
17 have done away with that.

18 Throughout the transcript Mr. Bennett is clear
19 that he watches the entire time, that he's like 10 feet
20 away, he sees everything, and there never is a period
21 of time where the two are not locked up, as he
22 describes it.

23 THE COURT: Never sees a gun?

24 MR. WILSON: I think that would have been
25 compelling to a jury, especially in a case like this

CLOSING ARGUMENT

1 when you have very factual circumstances, where it is
2 unclear as to what happened, and to have Dr. Proctor
3 come in and say that, that would have been critical. I
4 think the defense was remiss in not calling him back to
5 the witness stand once Mr. Bennett testified to present
6 that to him.

7 I think part of the problem here is that the
8 defense really didn't understand the significance of
9 being locked up and the shot being fired. I don't know
10 that there was a question, and I'm not hearing it. So
11 that was never presented, I think more as an omission
12 more than a defense strategy. It wouldn't make much
13 sense to have it as a strategy when in closing argument
14 Counsel is arguing that very point, and nothing would
15 have made it stronger than for him to have had Dr.
16 Proctor back up that theory, and he lost the benefit of
17 that by not calling Dr. Proctor.

18 In addition to that, the Defendant is saying that
19 he wanted to testify during the course of the trial.
20 Now, the Court did ask him, Do you want to testify, and
21 he said, No, to the judge. His reasoning is, well, my
22 lawyers told me they didn't think it was a good idea,
23 that I should get up and testify. I know the Court has
24 probably heard it 10,000 times plus, but in this case,
25 his testimony -- which is very consistent with

CLOSING ARGUMENT

1 Mr. Bennett's testimony -- and then with Dr. Proctor's
2 testimony certainly could have created the kind of
3 reasonable doubt in this case that could make a jury
4 hesitate to want to convict him. I think all of those
5 things collectively would make -- cause the case to --
6 the outcome of the case to be different had those
7 things been done. So I ask the Court to grant us a new
8 trial.

9 THE COURT: Did he have a prior record at the
10 time?

11 MR. WILSON: Yes, he had a record for robbery.

12 THE COURT: Did the Court inquire and advise him
13 which of those offenses -- if they were convictions --
14 could have been used for impeachment?

15 MR. WILSON: I'm pretty sure the judge did, yes.

16 MR. THOMAS: Your Honor, that is on Page 10
17 starting at Line....

18 THE COURT: Page 10? Pretty early in the trial to
19 advise the defendant.

20 MR. THOMAS: They got a pretrial ruling on what
21 would be admissible.

22 THE COURT: Oh, they did.

23 MR. WILSON: You asked the question whether or not
24 Mr. Bennett ever said the Defendant had a gun, and the
25 answer is no. He said no, never saw the Defendant with

CLOSING ARGUMENT

1 a gun, and he said he never saw muzzle flashes either.

2 THE COURT: All right. Mr. Thomas.

3 MR. THOMAS: Yeah. Your Honor, in reply, to start
4 with, Mr. Richardson articulated his strategy for not
5 going into more detail with Dr. Proctor. I think even
6 the demonstration with Dr. Proctor shows there is a
7 number of scenarios where the victim and the Defendant
8 was locked up together where that bullet -- that bullet
9 wound could have occurred.

10 I think Mr. Bennett's testimony is absolutely --
11 it is that they grasped, held each other, hands on
12 shoulders, didn't see anything, he could not tell if he
13 had anything in his hands, not that he didn't see.

14 THE COURT: Was the gun recovered?

15 MR. THOMAS: It was not.

16 THE COURT: But the shell casings were?

17 MR. THOMAS: They recovered shell casings from the
18 scene, and Dr. -- I'm not sure which SLED expert, but
19 they couldn't match -- couldn't say particularly; it is
20 just consistent. The bullet recovered from the victim
21 was consistent with the caliber they found, but there
22 is no way it could be more exact on that. But there
23 was testimony from one individual, I think Ms. Adams,
24 maybe saw the Defendant with the gun in the car, and
25 there was somebody else that saw the Defendant with a

CLOSING ARGUMENT

1 gun.

2 Basically, at the end of the day nobody seems to
3 argue at any point that the two people were not
4 fighting. The Defendant and the victim were fighting
5 in the parking lot. The victim has a gunshot wound the
6 head. There is no scenario no matter hands around
7 shoulders, hands around waist, there is no scenario
8 that that bullet comes from anywhere else in that
9 parking lot and doesn't injure the Defendant. Dr.
10 Proctor testified to that.

11 There is no scenario also where -- you know,
12 Mr. Bennett's testimony is not clear. He's not very
13 precise on everything he says. All he can testify to
14 is they were there. He says he saw the Defendant
15 hitting the victim in the head, that is in the
16 transcript. We submit, based on all of that, it is
17 fairly clear that there is no way that anybody else
18 could be the person firing the shots.

19 Mr. Bennett testifies that the shots came from
20 where the altercation was occurring, where he was
21 watching this altercation occur.

22 The Fifth Amendment issue, I think that's covered
23 in the transcript; they went over that. We would
24 submit that he has not met his burden.

25 THE COURT: All right. Can you give me proposed

CLOSING ARGUMENT

1 orders in 30 days?

2 MR. WILSON: Yes, sir.

3 MR. THOMAS: Yes, Your Honor. Thank you.

4 (Whereupon, the proceedings concluded.)

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1 CERTIFICATE OF REPORTER
2

3 State of South Carolina)

4 County of Horry)
5

6 I, Natalie Dahl, Official Court Reporter for the
7 State of South Carolina, do hereby certify that the
8 foregoing is a true, accurate and complete Transcript
9 of Record of the proceedings had and evidence
10 introduced in the captioned case, relative to appeal,
11 for Horry County, South Carolina, on the 3rd day of
12 February, 2015.

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

16 February 24th, 2015
17
18

19 _____
20 Natalie Dahl, RPR

21 Court Reporter
22
23
24
25

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STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF HORRY)

FIFTEENTH JUDICIAL CIRCUIT

Lemond C. Holland, #322779,)

Case No. 2013-CP-26-428

Applicant)

v.)

State of South Carolina,)

Respondent.)

HORRY COUNTY
2015 MAY 19 PM 1:08
MELANIE HODGINS-WARD
CLERK OF COURT

This matter comes before the Court by way of an Application for Post-Conviction Relief filed January 18, 2013. Respondent made its Return on or about April 16, 2013. The Court convened an evidentiary hearing into the matter on February 3, 2015 at the Horry County Courthouse. Applicant was present at the hearing and represented by Ralph J. Wilson, Sr., Esquire. Joshua L. Thomas, Esquire, of the South Carolina Attorney General's Office represented Respondent. Testifying at the hearing on behalf of the Applicant were: Applicant and Dr. Edward L. Proctor. Testifying on behalf of Respondent was Robert N. Richardson, Jr., Applicant's lead trial counsel. The Court also had before it a copy of the Trial Transcript.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to Orders of commitment of the Horry County Clerk of Court. In April 2006 the Horry County Grand Jury indicted Applicant for Murder (2006-GS-26-2014), Assault and Battery With Intent to Kill (2006-GS-26-2013) and Possession of a Weapon During the

Commission of a Violent Crime (2006-GS-26-2012). Robert N. Richardson, Jr., Esquire ("lead counsel") and Jeffrey E. Johnson, Esquire ("co-counsel") represented Applicant in his trial proceedings. On June 11, 2007 the jury found Applicant guilty as indicted. Judge Breeden sentenced Applicant to concurrent terms of fifty (50) years for Murder and twenty (20) years for Assault and Battery With Intent to Kill. Judge Breeden issued a consecutive sentence of five (5) years for Possession of a Weapon During the Commission of a Violent Crime.

Applicant timely filed an appeal of his convictions. This appeal was denied by the Court of Appeals on August 18, 2009. State v. Holland, 385 S.C. 159, 682 S.E.2d 898 (Ct. App. 2009). Thereafter, Applicant filed a Petition for Rehearing which was also denied by the Court of Appeals on or about September 17, 2009. Subsequently Applicant filed a Petition for Writ of Certiorari with the South Carolina Supreme Court. Applicant's Petition was denied on or about February 9, 2012 with the remittitur returned to the Circuit Court on February 10, 2012.

II. ALLEGATIONS

In his application, Applicant alleged he is being held in custody unlawfully on the grounds of ineffective assistance of counsel. Specifically:

1. "That I am not guilty and my trial lawyers failed to investigate and present my defense to the Court."
 - a. "My attorneys failed to investigate my defense."
 - b. "My attorneys failed to competently present my defense to the Court."
 - c. "The combination of their failure to fully investigate my defense and to

competently present my defense caused me to be found guilty."

At the evidentiary hearing Applicant proceeded on the allegations of ineffective assistance of counsel for failure to investigate and present a competent defense in three particulars: 1) Failing to adequately prepare for the trial of this case by meeting with or in any way attempting to speak with forensic pathologist and expert witness Dr. Edward G. Proctor prior to trial; 2) Failing, during trial, to adequately and sufficiently cross examine Dr. Proctor by having the expert witness demonstrate how the shooting must have occurred and/or manner(s) in which it could not have occurred based upon the forensic evidence and eyewitness accounts; 3) Failing, during trial, to re-call Dr. Proctor to the witness stand following the testimony of State's witness Jeffrey E. Bennick whose eyewitness account made it physically impossible for Applicant to have been the shooter; 4) Improperly advising the Defendant not to testify and, further, inducing the Applicant not to testify in his own behalf when such testimony would have been the only account the jury would have received from the Applicant himself as to what happened and, further, would have been consistent with the testimony of Bennick (thus further corroborating the impossibility of Applicant as the shooter, and; 5) Failing to make any attempt to locate and/or otherwise speak with eyewitness Walke (who was also listed as a victim in the assault charge for which Applicant was ultimately convicted) following information provided by Applicant that Walke would testify Applicant was not the shooter on the night in question.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the evidentiary hearing. The Court has further had the opportunity to

observe each witness who testified at the hearing and to closely pass upon their credibility. The Court has weighed the testimony accordingly. 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. Factual background

This record reveals on the morning in question Holland and the victim got into a verbal altercation inside a bar which eventually travelled outside into the back parking lot and turned physical. By all accounts there were anywhere from six to ten individuals who followed the two outside then proceeded to surround them at various locations and distances as they wrestled. In the midst of the altercation, multiple gunshots went off in quick succession. The first two shots caused superficial wounds to one of the onlookers. The third shot struck the victim in the head fatally wounding him at which point he fell to the ground and Holland fled. The State's primary witness Jeffrey Bennick, an employee of the bar, was the closest to the altercation and testified he saw the entire event from start to finish without ever losing sight of either individual until it was over.

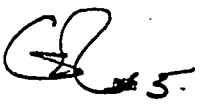
B. Summary of Testimony

Dr. Proctor testified he was the forensic pathologist who examined the victim's body in this case. During the trial Dr. Proctor was admitted as an expert witness in the field of forensic pathology. At the evidentiary hearing on PCR, counsel for both parties stipulated to Dr. Proctor's qualification as an expert in the field of forensic pathology. Dr. Proctor testified the victim died as a result of a gunshot wound to the head which entered at the midline of the victim's forehead just at the hairline area and travelled front to back, top to bottom, and right to left ultimately settling toward the left jaw. Proctor further testified that there was no stippling nor any gun powder found on the victim or within the wound.

Proctor testified gunshot residue and stippling are normally found in cases involving close contact gunshot wounds, specifically gunshot wounds closer than 18 inches. Proctor further testified, however, that residue and/or stippling may not be visible in a "hard contact" gunshot wound, one where the weapon is pressed firmly and directly upon the bullet's entry site at the time of firing. Proctor testified in this case, the absence of both residue and stippling indicates the fatal shot had to have come from a distance of greater than 18-24 inches unless at the time of firing the weapon was pressed directly against the victim's skull with no space in between to allow for stippling and/or powder/residue to be expelled upon the surrounding areas.

Dr. Proctor testified he does not recall ever meeting with or otherwise speaking to either of Applicants trial attorneys, Robert Richardson or Jeffrey Johnson, prior to the trial of this case. Proctor further testified he was never presented with a scenario (by either the State or the defense) of where and how the victim and his alleged assailant were positioned at the time the fatal shot was fired. Proctor testified that until this Evidentiary Hearing, he was not aware this incident involved a close contact physical altercation between the victim and his alleged assailant and testified that such information is and would have been pertinent.

During trial the State's primary witness Jeffrey Bennick testified that Holland and the victim were wrestling, describing them as "locked up" the "entire time". Bennick further testified that Holland and the victim were "arm in arm" with one another, facing each other with each's hands upon the other's shoulders wrestling back and forth and never broke apart until the third shot went off at which point the victim fell to the ground and Holland ran. At the evidentiary hearing, Proctor testified he was unaware of Bennick testimony and/or this scenario. Utilizing the trial transcript, Applicant's counsel demonstrated for Dr. Proctor



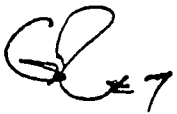
the exact manner and positioning which Bennick testified the Holland and the victim were situated. Proctor testified in that scenario and under those version of facts (Bennick), it would have been physically impossible for Holland to have been the shooter given the forensic evidence in this case. Proctor explained that if the two were facing each other, locked arm in arm, hands upon the other's shoulders, they would have been within the 18-24 inches in which stippling and/or residue is expected to be found. Furthermore, it would have been physically impossible for a hard contact wound such as he'd described earlier to have occurred under that scenario given the entry site of the bullet (midline forehead) and trajectory of its path (right to left), there is no way Holland (who is right handed) could have fired such a shot as he would not be at the correct position nor angle to do so. Proctor testified that had he been provided with that scenario and/or been re-called to the stand following Bennick testimony and questioned as to the feasibility of Holland being the shooter in light of Bennick testimony, he would have testified that Applicant could not have been the shooter under those circumstances. While counsel for Respondent did present Proctor during cross examination with multiple alternative "scenarios" as to how the two may have been positioned in order for Holland to have been the shooter, these alternative scenarios were not in the record at the time of this trial and are in direct opposition to the only scenario in the record, that provided by Bennick. As Bennick was the State's primary witness, the State offered no testimony to contradict the precise positioning and manner of positioning as described in detail by Bennick during the trial of this case.

Applicant testified he and his family retained Robert Richardson, Jr. and Jeffrey Johnson to jointly represent him in General Sessions Court on these charges. He testified that he is right handed. Applicant testified since his date of arrest and up until the time of trial

he remained in the custody of J. Reuben Long Detention Center. Applicant testified once he was able to retain Richardson and Johnson, he had numerous meetings with both attorneys at the jail and discussed the evidence against him as well as various trial strategies suggested by counsel. Applicant testified he maintained his innocence with his attorney's the entire time. Applicant further testified the manner in which he and the victim were positioned and wrestling was just as described by Bennick and he had relayed this information to both of his attorneys multiple times prior to the trial of this case. Applicant testified he advised his attorneys he heard the shots come past him and when the first two shots were fired he was still locked arm in arm with the victim but when the third shot went off and the victim fell to the ground he was finally able to break free and, therefore, ran because he did not know who was shooting or who they were shooting at.

Applicant testified he advised his attorneys that eyewitness and listed victim, Walke, (who'd been hit in the leg with a stray bullet) knew him personally and would be able to testify that Holland was not the person who shot him. Applicant further advised his attorneys Walke would likely be a friendly witness because he knew Holland was not guilty of this crime. Applicant testified that he urged his attorneys to locate and speak to Walke for this reason but his attorneys each expressed strong disagreement with trying to find Walke indicating it was best to just leave him alone since he was listed as a victim.

Applicant testified he expressed to his attorneys a desire to testify during the trial of explaining because neither the police nor any other member of law enforcement ever took a statement from him as to what happened and/or his side of the story, it would be the only chance the jury would have to hear from him directly as to what transpired. Applicant testified when he expressed this desire to testify and his belief it would be important to his



case, his attorneys strongly discouraged him from testifying due to his prior criminal history (none of which was for violent crimes such as what he was charged with at the time) and opined his testimony was more likely to result in conviction than the other way around. Applicant testified due to the trust he'd placed in his attorneys to know what was best and the fear they'd instilled in him about his testimony resulting in conviction, he followed counsels' advice and waived his right to testify.

Lead trial counsel Robert Richardson testified that Applicant's family retained both himself and Jeffery Johnson to represent Applicant on the charges for which he was ultimately convicted. Richardson testified Applicant did, in fact, provide him with a scenario nearly identical to the one described by Bennick during the trial of the case and agreed that Holland's testimony would have been consistent with Bennick's. Richardson testified he does not recall ever attempting to speak with Proctor prior to the trial because he did not consider Proctor, an expert witness in the field of forensic pathology, to be material to the case and opined that Proctor's testimony neither hurt nor helped the Applicant's case. Richardson testified co-counsel Jeffrey Johnson conducted the questioning of Proctor. When questioned as to why Proctor was never presented with a scenario (either before or during trial) consistent with that described by Bennick (in a prior statement to police) or by the Applicant (the two engaged, locked arm in arm, not separated) Richardson indicated his theory was to create space between the two so the bullet could have come from another shooter nearby therefore he did not deem such a demonstration fruitful. When questioned as to why he did not re-call Proctor to the witness stand following Bennick's testimony he reiterated that this was inconsistent with his desire to create space between Holland and the victim thus did not further his purpose. Richardson testified he and Johnson wanted to get Dr.

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Proctor off the stand once he testified he could not determine whether the fatal wound was from a contact shot or a distant shot.

As to the investigation of Walke, Richardson testified he did not pursue Walke because he did not believe Walke would be helpful. Richardson did, however, testify that Applicant did tell him that Walke would be helpful and that Applicant wanted him to find and speak with Walke. Richardson testified ultimately, however, because the Applicant had told him Walke was "no longer in the area" that he did not see fit to pursue him. Richardson testified, however, at the time Applicant told him he'd heard Walke had left town, the Applicant had been locked up for in excess of one year and would have had little way of knowing where Walke may be due to his incarceration.

C. Ineffective assistance of counsel

In a Post-Conviction relief action, the applicant bears the burden of proving the allegations in his application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985) (citing *Griffin v. Martin*, 278 S.C. 620, 300 S.E.2d 482, (1983)). Where the application alleges ineffective assistance of trial counsel as a ground for relief, Applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Id.*

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984). "Where allegations of ineffective assistance of counsel are made, the question becomes, 'whether 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.'" *Butler*, 286 S.C. at 442, 334 S.E.2d at 814 (quoting *Strickland*, 466

U.S. at 686). As such, courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 668). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 68788. "Under this prong, [t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

The Court finds in this case counsel's failure to sufficiently examine Dr. Proctor by providing the specific scenario as to the positioning of the victim and the alleged assailant (Holland) as well as counsel's failure to re-call Dr. Proctor to the witness stand following the testimony of Bennick falls below the prevailing norms. Dr. Proctor testified specifically that this shot must either have come from greater than 24 inches or been a direct contact wound. Proctor testified under the version of events provided during the trial by Bennick (testimony which Proctor was unaware of) it would not have been possible for Holland to be the shooter and had he been presented with that scenario and those questions during trial, he - as an expert witness in the field of forensic pathology - would have informed the jury of such. Furthermore, I find Trial Counsel's position that it was his "trial strategy" to create distance between Holland and the victim to be implausible and illogical. Counsel admitted he wanted the shooter to have been considered far away. By establishing Holland was within the

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close range distance locked arm in arm with the victim (thereby negating any possibility of a hard contact gunshot wound), it would have taken Holland out of the equation as a possible shooter as demonstrated by the testimony of Proctor offered during the Evidentiary Hearing. Recalling Proctor to the stand following Bennick's testimony would only have bolstered any trial strategy counsel may have had to make the shooter be far away by negating the possibility that Holland could have engaged a hard contact gunshot wound due to the positioning of their arms upon each others' bodies and was, otherwise, too close to be the shooter given the absence of stippling and residue. As demonstrated during the evidentiary hearing, Proctor would have testified that given Bennick's testimony as to how Holland and the victim were positioned, Holland could not have been the shooter given the forensic evidence in this case. As Proctor was an expert witness in this field, it is reasonable to conclude that such testimony is likely to have changed the outcome of this case.

As to trial counsel's failure to investigate, locate, or speak with Walke, I find such a failure also falls below prevailing norms and was prejudicial to the Applicant. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 691. "One component of that duty is to investigate . . . witnesses identified by a defendant, and the failure to make some effort to contact them to ascertain whether their testimony would aid the defense is unreasonable." Walker v. State 2012-211267, Opinion No. 27368 (Decided 3/19/14) citing Grooms v. Solem, 923 F.2d 88, 90 (8th Cir. 1991). While counsel claimed the Applicant was "dismissive" of prior requests to investigate Walke by claiming Walke was no longer in town, I find such claims without merit. Specifically, because Applicant was incarcerated and had been incarcerated for more than a year prior to that point, I find counsel had a duty to check into



Walke's whereabouts, as requested by Applicant, regardless of what limited information Applicant may have been able to possess from the confines of the Detention Center. It is unreasonable to conclude that Applicant possessed reliable information in regard to Walke's whereabouts when he'd been locked up for such an extended period of time prior to that point. Furthermore, because Walke was listed as victim and the Defendant was ultimately convicted of assaulting Walke, Applicant was most certainly prejudiced by counsel's failure to even attempt to locate or otherwise speak with Walke to determine whether the information provided by Applicant bore veracity. Applicant provided information to counsel that Walke, despite the fact that he was listed as victim, would be a helpful witness to him specifically indicating Walke would testify that Applicant was not the person who shot him or the others; Counsel had no articulable reason to believe otherwise.

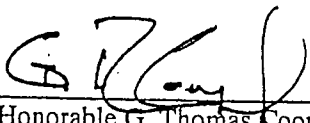
IV. CONCLUSION

Based on the foregoing, the Court finds and concludes that Applicant has met his burden of proof and has established ineffective assistance of counsel in this matter. I find that counsel's omissions as outlined herein were unreasonable under prevailing professional norms and was, therefore, deficient. Further, I find that there exists a reasonable probability that but for counsel's deficient performance the outcome of this case would have been different. Thus I find that Applicant was prejudiced by counsel's omissions/deficiencies and conclude that counsel provided Applicant with ineffective assistance.

In light of the foregoing the Applicant's conviction is hereby SET ASIDE and the Applicant's sentence is hereby VACATED. This matter is hereby REMANDED for a NEW TRIAL.

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IT IS SO ORDERED!



Honorable G. Thomas Cooper, Jr.
Presiding Judge

May 15, 2015

Charleston, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY) IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT

Lemonde C. Holland, #322779,)
) Case No. 2013-CP-26-428
) Applicant,)
))
) v.)
))
) State of South Carolina,)
))
) Respondent.)
_____)

MOTION TO RECONSIDER

Respondent, pursuant to Rules 59(a) and (e), SCRCP, would respectfully show unto this Court:

I.

This matter came before the Court by way of an Application for Post-Conviction Relief filed January 18, 2013. The Court convened an evidentiary hearing into the matter on February 3, 2015, at the Horry County Courthouse. Applicant was present at the hearing and represented by Ralph J. Wilson Sr., Esquire. By order filed May 19, 2015, the Court granted relief on two grounds. Respondent received a copy of this order on June 5, 2015.

II.

Respondent respectfully asks this Court to reconsider its judgment granting Applicant post-conviction relief. In the order granting relief, the Court found trial counsel ineffective for failing "to sufficiently examine Dr. Proctor by providing the specific scenario as to the positioning of the victim and the alleged assailant (Holland) as well as counsel's failure to re-call Dr. Proctor to the witness stand following the testimony of Bennick[.]" (Order p. 10). Respondent respectfully submits this Court should reconsider this ruling on two grounds.

First, Respondent submits this Court may have mis-apprehended the standard of review and failed to give deference to trial counsel's strategic decision to not further question Dr.

Proctor. On collateral review, this Court is required to “indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]” Strickland v. Washington, 466 U.S. 668, 689 (1984). This presumption is necessary because “it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.” Id. (citing Engle v. Isaac, 456 U.S. 107 (1982)). Respondent submits this Court may have overlooked the legal principle that the examination of witnesses is a matter left wholly to the discretion of trial counsel. See Abney v. State, 408 S.C. 41, 48, 757 S.E.2d 544, 547 (Ct. App. 2014) (Piepher, J., concurring) (discussing decisions primarily involving trial strategy and tactics that are left to counsel's discretion, including the examination of witnesses), cert. denied (Jan. 15, 2015); Sallie v. N.C., 587 F.2d 636, 640 (4th Cir. 1978) (“Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)"] was not intended to promote judicial second-guessing on questions of strategy as basic as the handling of a witness.”). The Court may have also overlooked the legal principle that the nature and extent of cross-examination is an area left wholly to the sound discretion of trial counsel. See, e.g. Willis v. United States, 87 F.3d 1004, 1006 (8th Cir. 1996) (“In hindsight, there are few, if any cross-examinations that could not be improved upon. If that were the standard of constitutional effectiveness, few would be the counsel whose performance would pass muster.”); Yarrington v. Davies, 779 F.Supp. 1304, 1308 (D. Kan. 1991) (“The extent of examination and cross-examination of witnesses is an area of trial tactics left to the discretion of counsel.”).

Here, trial counsel clearly articulated a theory of attempting to place as much distance between the shooter and the victim as possible. Trial counsel recalled reviewing Dr. Proctor's report prior to trial. He did not view Dr. Proctor's testimony at trial as either helpful or harmful to Applicant's case. He also testified Dr. Proctor's demonstration at the evidentiary hearing was not entirely consistent with the version of events from Applicant or the witnesses. However, trial

counsel did not think any further testimony from Dr. Proctor at trial would have furthered the defense. He recalled wanting to give the jury a scenario where there was space between Applicant and the victim so that the bullet could have come from another shooter nearby. Trial counsel did not want to further question Dr. Proctor once he testified he could not determine whether the fatal wound was from a contact shot or a distant shot. Thus, trial counsel believed Dr. Proctor's trial testimony that he could not determine the distance between the victim and the weapon (Trial Tr. p. 122, lines 14-25) was the most beneficial testimony he could get from Dr. Proctor. This Court's finding trial counsel's strategy "implausible and illogical" (Order p. 10) fails to indulge a presumption that such strategy was proper and is not supported by the record. See Harrington v. Richter, 562 U.S. 86, 109, 131 S. Ct. 770, 790, 178 L. Ed. 2d 624 (2011) ("There is a 'strong presumption' that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than 'sheer neglect.'" (citing Yarborough v. Gentry, 540 U.S. 1 (2003))); see also Strickland, 466 U.S. at 690 ("[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable[.]"); Meyer v. Branker, 506 F.3d 358, 374 (4th Cir. 2007) ("[L]egal judgments based on thorough investigation are virtually unassailable on collateral review.").

Second, Respondent submits the Court erred in finding "it is reasonable to conclude that [Dr. Proctor's] testimony is likely to have changed the outcome of this case." (Order p. 11). In so finding, this Court may have overlooked the legal principle that an inmate "is not entitled to a new trial for the sole purpose of presenting a 'fancier' case." Simpson v. Moore, 367 S.C. 587, 598 n.2, 627 S.E.2d 701, 707 n.2 (2006) (citing Jones v. State, 332 S.C. 329, 504 S.E.2d 822 (1998))). Specifically, Dr. Proctor's testimony at the evidentiary hearing did not conclusively demonstrate Applicant could not have been the shooter. See Skeen v. State, 325 S.C. 210, 216-

17, 481 S.E.2d 129, 133 (1997) (“[O]ne can only speculate whether a ‘better’ cross examination would have helped Skeen.”).

Dr. Proctor opined that there was no way the victim could have been shot in the forehead based on Applicant’s version of events. Specifically, Applicant elicited testimony from Dr. Proctor that Applicant could not have shot the victim in the forehead if the victim’s head was in Applicant’s chest and Applicant’s right hand held a gun on the victim’s shoulders. However, he also opined there was no way the victim was shot in the head without Applicant also being injured in that scenario. If the victim’s head was in Applicant’s chest at the time a shot came from somewhere behind Applicant, and the shot entered the victim’s forehead, the bullet would have had to pass through Applicant. Thus, Applicant’s new testimony from Dr. Proctor presents a completely impossible scenario: if Applicant is not the shooter, he would also have been shot. Respondent submits this Court erred in crediting Applicant’s version of events that creates this absurd situation.

Respondent notes the testimony at trial, (Trial Tr. p. 257, lines 2-21), was not as detailed as the testimony from Applicant at the evidentiary hearing. Dr. Proctor opined there also were several other scenarios similar to Applicant’s version of events, but with slight differences in the body position of either the victim or Applicant, that could result in the victim being shot in the head. These alternate scenarios were not incompatible with the general testimony at trial about the positioning of Applicant and the victim.¹ Ultimately, Dr. Proctor concluded he could not make a determination of whether Applicant could have shot the victim without witnessing the shooting. In light of the uncertainty of Dr. Proctor’s testimony regarding how the shooting *could* have happened, Applicant failed to demonstrate prejudice from trial counsel’s lack of further

¹ Respondent also notes the witness this Court claims Dr. Proctor’s testimony would have refuted also testified Applicant appeared to be hitting the victim in the head (Trial Tr. p. 257, line 20), which is not consistent with Applicant’s testimony that his hands were behind the victim’s head the whole time, but is consistent with the injury to the victim.

questioning of Dr. Proctor. Skeen, 325 S.C. at 216-17, 481 S.E.2d at 133.

This Court's reliance on Dr. Proctor's additional testimony also ignores the other significant evidence of Applicant's guilt in the record. Witnesses observed Applicant and victim in an altercation inside the bar. Applicant's friend witnessed Applicant go to his car, reach inside, and then run toward the passenger side of the victim's girlfriend's car where the victim was sitting. This same friend also knew Applicant kept a semi-automatic handgun in his car. The victim's girlfriend observed Applicant with a handgun before pulling the victim out of the car. Witnesses observed Applicant and the victim grabbing each other and locking arms, and saw Applicant hitting the victim over the head. Applicant was the only person near the victim at the time he was shot, and a witness testified to hearing the shots come from where Applicant and the victim were fighting. Thus, this Court's finding that further questioning of Dr. Proctor would have changed the outcome of trial is not supported by the record in this case. Accordingly, Respondent would respectfully ask this court to reconsider its ruling on this issue.

III.

Respondent also respectfully asks this Court to reconsider its ruling that "trial counsel's failure to investigate, locate, or speak with Walke [...] falls below prevailing norms and was prejudicial to the Applicant." (Order p. 11). Initially, Respondent submits this court failed to give due deference to trial counsel's testimony that he made a strategic decision to not pursue Walke as a witness. Trial counsel did not further investigate Walke because Applicant informed him Walke could not be found. Both Applicant's and trial counsel's testimony at the evidentiary hearing clearly indicates Walke and Applicant were friends. Thus, the Court's conclusion that Applicant could not have "possessed reliable information in regard to Walke's whereabouts[.]" (Order p. 12), is not supported by the record. Strickland, 466 U.S. at 691 ("[W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or

even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable."); see also Rodriguez v. State, 74 S.W.3d 563, 568 (Tex. App. 2002) ("Moreover, we opt not to fault trial counsel for the intentional withholding of vital information by his client." (citations omitted)); U.S. v. Pellerito, 878 F.2d 1535, 1543 (1st Cir. 1989) ("If counsel was ineffective in any sense, it was only because the client rendered him so, first by keeping Noriega in the dark, and then, by refusing to heed his advice. That is not the sort of "ineffectiveness" for which relief can be granted."). Trial counsel also explained he would not have wanted to call Walke as a witness anyway because Applicant shot Walke, and Walke's testimony may have harmed the defense.² Trial counsel articulated a valid strategic reason for not further pursuing Walke as a witness. See Legare v. State, 333 S.C. 275, 281, 509 S.E.2d 472, 475 (1998) ("Where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective." (citing Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992))).

Regardless, Walke did not testify at the evidentiary hearing. The South Carolina Supreme Court has consistently held that an applicant cannot show prejudice from failing to investigate or call a favorable witness if that witness does not testify at the evidentiary hearing. Dempsey v. State, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005); Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 810 (1998); Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995); Underwood v. State, 309 S.C. 560, 562, 425 S.E.2d 20, 22 (1992); see also Clark v. State, 315 S.C. 385, 388, 434 S.E.2d 266, 267 (1993) ("pure conjecture" about what a witness would testify about does not "establish the result would probably change if a new trial is had"). Because Walke did not testify at the evidentiary hearing, this Court's finding trial counsel's

² Respondent is also troubled by the Court's conclusion that trial counsel should have investigated Walke because Applicant "was ultimately convicted of assaulting Walke[.]" (Order p. 12). Respondent submits prevailing professional norms do not require attorneys to investigate victims of crimes simply because they are victims. See S.C. Const. art. 1, § 24(A)(6) ("To preserve and protect victims' rights to justice and due process regardless of race, sex, age, religion, or economic status, victims of crime have the right to [...] be reasonably protected from the accused or persons acting on his behalf throughout the criminal justice process[.]"); see also Rules 4.2, 4.3, & 4.4, RPC, Rule 407, SCACR

failure to investigate Walke prejudiced Applicant is not supported by the record. Accordingly, Respondent respectfully requests this Court reconsider its ruling on this issue.

IV.

WHEREFORE, Respondent respectfully requests the Court reconsider its ruling for the foregoing reasons.

Respectfully submitted,

ALAN WILSON
Attorney General

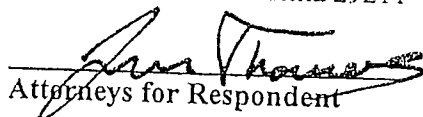
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By:


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June 8, 2015

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	
Lemonde C. Holland, #322779,	)	Case No. 2013-CP-26-428
	)	
Applicant	)	
	)	
v.	)	RESPONSE TO STATE'S MOTION TO RECONSIDER
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

FILED
HORRY COUNTY
2015 JUL 10 PM 4:54
JULIANE H. HARRIS, CLERK OF COURT

Applicant, by and through the undersigned counsel, hereby responds to the State's Motion for Reconsideration filed with this Court on June 10, 2015.

Respondent has requested this Court to reconsider its judgment granting Applicant post-conviction relief on the grounds stated in the Court's Order. In support of its Motion, the State alleges the Court erred in the following particulars:

- A. By failing to give deference to trial counsel's strategic decision not to further question Dr. Proctor (Motion to reconsider p. 2)
- B. By failing to "indulge a presumption that counsel's strategy [regarding the handling of Dr. Proctor as witness] was proper and "is not supported by the record." (Motion to Reconsider p. 3)
- C. By failing "to give due deference to trial counsel's testimony that he made a strategic decision to not pursue Walke as a witness." (Motion to reconsider p. 5)

In response, Applicant would respectfully show as follows:

Respondent, in its Motion, states that "examination of witnesses is a matter left wholly to the discretion of trial counsel" citing Abney v. State, 408 SC 41 (Ct. App. 2014) in

support thereof. Respondent further alleges that because trial counsel "clearly articulated a theory of attempting to place as much distance between the shooter and the victim as possible" (Motion to reconsider p. 2) the Court must "give deference to" this "strategic decision" and accept counsel's theory carte blanche regardless of whether or not such a decision is objectively reasonable. While Applicant would agree that both the examination of witnesses and trial strategy as a whole is generally within trial counsel's discretion, such discretion is not without limitation and certainly does not give counsel free license to act unreasonably and/or in a manner which deprives his client of effective assistance of counsel. In regards to complaints of ineffectiveness surrounding issues of trial strategy, the Courts have repeatedly held that the test is NOT whether counsel can articulate any strategy whatsoever, but whether or not that strategy, once clearly articulated is valid and reasonable in relation to the record. In *Abney*, the very case cited by the Respondent, the Court specifically found, "Counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness . . . when counsel articulates a strategy, it is measured under an objective standard of reasonableness." *Id* at 46, Emphasis added.

In the case at bar, it is undisputed that during the evidentiary hearing trial counsel did testify that it was his "trial strategy" to "place as much distance between the shooter and the victim as possible" (Motion to reconsider p. 2) and also "to give the jury a scenario where there was space between the Applicant and the victim" (Motion to Reconsider p 3) which is why he did not further examine/cross examine Dr. Proctor nor recall him to the stand following the uncontroverted testimony of the State's only eye witness which detailed the precise positioning of Applicant and the victim throughout the duration of the struggle and at the precise time the shots were fired. "Trial counsel did not want to further question

Dr. Proctor once he testified he could not determine whether the fatal wound was from a contact shot or a distant shot. Thus trial counsel believed Dr. Proctor's trial testimony that he could not determine the distance between the victim and the weapon was the most beneficial testimony he could get from Dr. Proctor." As the Court has already found as a matter of both fact and law, this "strategy" as articulated by trial counsel during the evidentiary hearing is not reasonable and thus not valid given the record in this case. The record reveals that Dr. Proctor clearly testified during the trial that the trajectory of the bullet was right to left, front to back, and downward. Dr. Proctor further testified during the trial that due to the absence of stippling around the wound, the shot could only have occurred one of two ways, either: 1) from a hard contact wound, meaning the weapon must've been placed directly on the victim's forehead, or 2) from a distance of greater than 18-24 inches away. Jeffrey Bienick clearly testified that Applicant and the victim were "locked up" the entire time. He specifically described the positioning of Applicant's arms as being on top of the victim's arms and shoulders the entire time. Dr. Proctor testified during the evidentiary hearing that had he been recalled to the stand following Bienick's testimony, he would have testified that it is his expert opinion that Applicant could not have fired the fatal shot if, in fact, the two were positioned as described by Bienick. His basis for this is that because it would've been physically impossible for Applicant to have fired a contact shot given the trajectory of the bullet and the positioning of the parties, and because the two were locked arm in arm they would've been within the 18-24 inches which would have produced stippling. Respondent, during the evidentiary hearing and in his brief, repeatedly asserts a number of alternative methods in which Dr. Proctor agreed this shot could have occurred but, once again, none of these scenarios were in the record during the trial of this case. The

ONLY scenario in the record during the trial of this case was the uncontested, uncontroverted sworn testimony of the State's witness Jeffrey Bienick who described the precise positioning of both the Applicant and the victim during the altercation and at the time of the shots, and according to Dr. Proctor's testimony at the evidentiary hearing, if he had been apprised of this testimony and provided these details, he would have testified during the trial of this case that Applicant could not have been the shooter under those circumstances. Respondent claims in the footnote of his Motion on p 7 that Applicant has alleged Dr. Proctor's testimony would have "refuted" Bienick's testimony, but exactly the opposite is the case. It is clear that Dr. Proctor's testimony would have clarified Bienick's testimony and provided the jury with the benefit of his expert medical opinion that given Bienick's testimony, which Applicant does not refute, Applicant could not have been the shooter.

It is important to note that at no time did Bienick testify that he ever saw Applicant fire these shots, nor did he ever see Applicant with a gun at all during any point of the altercation. He merely saw the two entangled the entire time and heard the gunshots. As such, the jury clearly surmised that Applicant must've fired the shots. However, as clearly demonstrated by Dr. Proctor at the evidentiary hearing, when considered in light of the forensic evidence in this case, Bienick's testimony proves conclusively that Applicant did not and could not have fired those shots. Without question this was vital information the jury was deprived of and without question it was unreasonable for counsel to decide not to elicit such testimony from this expert witness for the jury's consideration. Once again, this was the ONLY eye witness account of how both Applicant and victim were positioned, and the ONLY expert witness in the case has testified that he been recalled to the stand and

apprised of this sworn testimony during the trial of the case, he would have testified that Applicant could not, under those uncontested circumstances, have fired that shot. Whether or not the Attorney General can now come up with a host of alternative scenarios and/or other circumstances which Applicant could have fired the shot is irrelevant as such scenarios are not and never were a part of the record. As the State points out in its Motion, a party is not entitled to relief in order to "*present a 'fancier' case*" (Motion to Reconsider p 3). This would include even the State's attempt to utilize Applicant's version of events as presented during the evidentiary hearing which were never a part of the original trial proceedings. Applicant's testimony was never a part of the record in this case, the only testimony that was a part of the record in regards to precise positioning was Bienick's and under Bienick's version of events, it is Dr. Proctor's expert medical opinion based upon the forensic evidence in this case that Applicant could not have been the shooter. Therefore, it was and remains proper, supported by both the record and the law, that counsel's "strategic decision" not to recall Dr. Proctor to the stand and not to elicit and utilize such powerful testimony from State's own expert medical witness is not objectively reasonable and, thus, not valid.

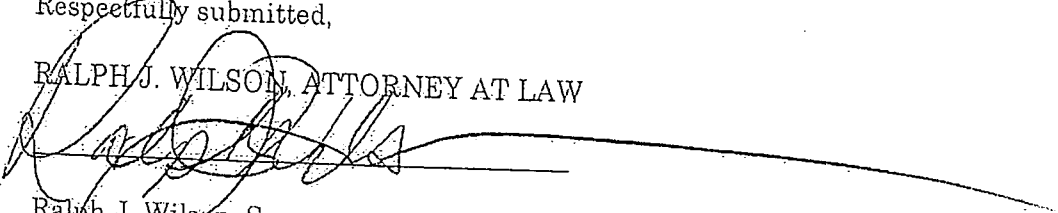
Further, in terms of Walke, Respondent alleges counsel, once again, employed a "strategic decision" to not pursue Walke as a witness and specifically states this so-called "strategy" was developed "because Applicant informed him Walke could not be found." (Motion to Reconsider p. 5). As pointed out by Respondent, trial strategy in general is within the discretion counsel because Courts have held that such tactical decisions "requires sophisticated training and skill which attorneys possess and defendant's do not." (Abeney v. State, Pieper, J. concurring) (discussing why trial strategy is generally within

counsel's discretion). In the present case, however, counsel by his own admission failed to act as the law requires by utilizing that sophisticated training and skill to make this tactical/strategic decision about whether or not to locate Walke, relying instead solely on the word of his client who'd been incarcerated and without resources for more than a year as to whether or Walke could be found. It is doubtful such a decision could at any point be considered "tactical" or "strategic" when built upon such a shaky foundation. Regardless, however, even if such decision was considered strategic, it could be considered neither reasonable nor valid under the circumstances.

For the reasons set forth above in addition to the evidence presented at the evidentiary hearing previously held in this matter, the Applicant requests the Court deny Respondent's Motion to Reconsider and uphold its ruling of May 19, 2015.

Respectfully submitted,

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STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT

Lemond C. Holland, #322779,)

Case No. 2013-CP-26-428

Applicant,)

v.)

State of South Carolina,)

Respondent.)

ORDER OF DISMISSAL

HORRY COUNTY
2015 SEP -2 PM 1:02

This matter comes before the Court by way of Respondent's Motion to Reconsider this Court's Order of May 19, 2015 setting aside Applicant's conviction, vacating his sentence, and remanding the case for a new trial. After careful reconsideration of the facts and review of the law as presented by Respondent, it is the opinion of this Court that Respondent's Motion to Reconsider should be GRANTED and the Applicant's Post-Conviction Relief Application must be DISMISSED.

In this case, an Application for Post-Conviction Relief filed on January 18, 2013. Respondent made a timely Return on or about April 16, 2013. The Court convened an evidentiary hearing into the matter on February 3, 2015, at the Horry County Courthouse. Applicant was present at the hearing and represented by Ralph J. Wilson Sr., Esquire. Joshua L. Thomas, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Testifying at the hearing were: Applicant; his trial counsel, Robert N. Richardson Jr., Esquire; and Dr. Edward L. Proctor. The Court had before it a copy of the trial transcript, the records of the Horry County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, and the pleadings in this matter.

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The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. In April 2006, the Horry County Grand Jury indicted Applicant for murder (2006-GS-26-2014), assault and battery with intent to kill (2006-GS-26-2013), and possession of a weapon during the commission of a violent crime (2006-GS-26-2012). Robert N. Richardson Jr., Esquire ("trial counsel") and Jeffrey E. Johnson, Esquire, represented Applicant. On June 11, 2007, Applicant proceeded to trial before the Honorable John L. Breeden Jr. and a jury. On June 13, 2007, the jury found Applicant guilty as indicted. Judge Breeden sentenced Applicant to concurrent terms of fifty (50) years for murder and twenty (20) years for assault and battery with intent to kill. Judge Breeden issued a consecutive sentence of five (5) years for possession of a weapon during the commission of a violent crime.

Applicant filed a timely notice of appeal, and Robert M. Dudek, Esquire, of the Office of Appellate Defense perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on August 18, 2009. State v. Holland, 385 S.C. 159, 682 S.E.2d 898 (Ct. App. 2009). The Court of Appeals denied Applicant's petition for rehearing on September 17, 2009, and the South Carolina Supreme Court denied Applicant's petition for a writ of certiorari on February 9, 2012. The remittitur was returned to the circuit court on February 10, 2012.

II. ALLEGATIONS

In his application, Applicant alleged he is being held in custody unlawfully for the following reasons:

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1. "That I am not guilty and my trial lawyers failed to investigate and present my defense to the Court."
 - a. "My attorneys failed to investigate my defense."
 - b. "My attorneys failed to competently present my defense to the Court."
 - c. "The combination of their failure to fully investigate my defense and to competently present my defense caused me to be found guilty."

At the evidentiary hearing, Applicant proceeded on the allegations of ineffective assistance of trial counsel for failure to investigate and present his defense in three particulars. First, Applicant alleged trial counsel failed to question the pathologist regarding the scenario of the incident as described by witnesses. Second, he alleged trial counsel's advice to not testify prevented him from describing events from his point of view. Third, he alleged trial counsel did not present testimony from the assault victim that would have corroborated Applicant's version of events.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the evidentiary hearing. The Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. The Court has weighed the testimony accordingly. 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. Summary of Testimony

Dr. Proctor testified he was the forensic pathologist¹ who examined the victim's body in this case. He did not recall speaking with trial counsel prior to the trial. Dr. Proctor testified the victim died as a result of a gunshot wound to the head. He recalled the bullet entered the victim's skull in the front forehead, and traveled downward toward the left jaw. However, he

testified the final location of the bullet does not necessarily indicate the direction it came from, as it can change direction upon entering the skull. Dr. Proctor testified gunshot residue or stippling is normally found in gunshot wounds closer than 18 inches. He further testified residue and stippling may not be visible in a "hard contact" gunshot wound where the weapon is pressed against the body. Dr. Proctor recalled he did not observe any residue or stippling on the victim.

Dr. Proctor testified he was not presented with a scenario of where the victim and assailant were positioned when the fatal shot was fired. Applicant's attorney demonstrated how Applicant and a witness described the location of Applicant and the victim at the time of the fatal shot: interlocked arms with hands on each other's shoulders, and the victim's head in Applicant's chest. Dr. Proctor opined that there was no way the victim could have been shot in the forehead if Applicant was holding the gun in his right hand and the victim's head was in Applicant's chest. Respondent's attorney also demonstrated several other scenarios similar to the description given by the witness and Applicant, but slight differences in the body position of either the victim or Applicant. Dr. Proctor opined that each of those alternate scenarios could result in the type of hard contact wound the victim received. He also opined that, assuming the victim's head was near Applicant's chest, there is no scenario where the victim could have been shot by a weapon that was not located between Applicant and the victim without Applicant suffering an injury.

Applicant testified he had several meetings with trial counsel. He recalled discussing the charges and evidence against him. Applicant testified he told trial counsel his version of events the night of the shooting. He described being locked arm-in-arm with the victim and feeling

¹ Counsel for both parties stipulated to Dr. Proctor's qualification as an expert in forensic pathology.

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shots pass by him. However, he could not recall what direction the shots came from. Applicant further testified there was no period of time where he was separated from the victim during the fight. He testified the victim's head was not in his chest when the fatal shot was fired, but was looking up toward the sky. Applicant testified he discussed the theories of self-defense and voluntary manslaughter with trial counsel, but denied he had a weapon the night of the shooting. Thus, Applicant recalled his defense was that he did not shoot the victim.

Applicant testified he asked trial counsel to investigate the assault victim, Mr. Walke. He testified Walke would have been helpful because it would have supported his version of events. Applicant also testified he wanted to testify to his version of events, but trial counsel advised him not to take the stand. Applicant testified he believed the jury did not get to hear his version of events because he did not testify.

Trial counsel testified Applicant's family retained him and Mr. Johnson to represent Applicant. He recalled having numerous meetings with Applicant during his representation. Trial counsel testified the State's response to his discovery motions consisted of witness statements, forensic tests, State Law Enforcement Division reports, diagrams, and incident reports. He recalled sharing this evidence with Applicant during their meetings. He also recalled discussing Applicant's version of events during these meetings. Trial counsel testified that, based on these discussions, he formulated a trial strategy to argue someone else at the scene shot the victim.

Trial counsel testified he discussed the possibility of investigating Walke with Applicant. He recalled Applicant informed him Walke had left the area and would not have been found. However, trial counsel testified Walke's statement was merely that he was shot the night of the

incident. Trial counsel further testified he did not want to call Walke as a witness because Walke was a victim and may provide testimony helpful to the State.

Trial counsel recalled reviewing Dr. Proctor's report prior to trial. He testified he did not view Dr. Proctor's testimony at trial as either helpful or harmful to Applicant's case. He also testified Dr. Proctor's demonstration at the evidentiary hearing was not entirely consistent with the version of events from Applicant or the witnesses. However, trial counsel testified he did not think any further testimony from Dr. Proctor at trial would have furthered the defense. He recalled wanting to give the jury a scenario where there was space between Applicant and the victim so that the bullet could have come from another shooter nearby. Trial counsel testified he and Mr. Johnson wanted to get Dr. Proctor off the stand once Dr. Proctor testified he could not determine whether the fatal wound was from a contact shot or a distant shot.

B. Ineffective Assistance of Trial Counsel

In a post-conviction relief action, the applicant bears the burden of proving the allegations in the application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of trial counsel as a ground for relief, Applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The proper measure of performance is whether trial counsel provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir.

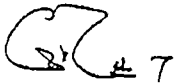
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1977)). The Court strongly presumes trial counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The Court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, Applicant must prove trial counsel's performance was deficient. Id. Under this prong, the Court measures trial counsel's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, trial counsel's deficient performance must have prejudiced 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.

The Court finds Applicant failed to meet his burden to show trial counsel provided ineffective assistance. In general, the Court finds trial counsel's testimony credible and gives it great weight. To the extent Applicant's testimony is inconsistent with trial counsel's, the Court finds such testimony not credible. The Court further finds trial counsel conducted a proper investigation, adequately conferred with Applicant, and was thoroughly competent in his representation.

The Court finds Applicant's allegation trial counsel failed to further cross-examine Dr. Proctor to be without merit. The nature and extent of cross-examination is an area left to the sound discretion of trial counsel. See, e.g. Willis v. United States, 87 F.3d 1004, 1006 (8th Cir. 1996) ("In hindsight, there are few, if any cross-examinations that could not be improved upon. If that were the standard of constitutional effectiveness, few would be the counsel whose

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performance would pass muster."); Yarrington v. Davies, 779 F.Supp. 1304, 1308 (D. Kan. 1991) ("The extent of examination and cross-examination of witnesses is an area of trial tactics left to the discretion of counsel."). The Court finds credible trial counsel's testimony that he did not believe further cross-examination of Dr. Proctor was necessary to the case. Trial counsel clearly articulated a theory of attempting to place as much distance between the shooter and the victim as possible. Trial counsel believed Dr. Proctor's trial testimony that he could not determine the distance between the victim and the weapon (Trial Tr. p. 122, lines 14-25) was the most beneficial testimony he could get from Dr. Proctor. The Court finds trial counsel has articulated a valid strategic reason for not further cross-examining Dr. Proctor. See Legare v. State, 333 S.C. 275, 281, 509 S.E.2d 472, 475 (1998) ("Where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective." (citing Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992))).

The Court further finds Applicant has not demonstrated further cross-examination of Dr. Proctor would have changed the outcome of his trial. Applicant presented testimony from Dr. Proctor to demonstrate the impossibility of the Applicant being the person who shot the victim. However, Dr. Proctor also testified that any number of small changes in the body position of either Applicant or the victim could have explained the State's theory that Applicant shot the victim. Ultimately, Dr. Proctor concluded he could not make a determination of whether Applicant could have shot the victim without witnessing the shooting. In light of the uncertainty of Dr. Proctor's testimony regarding how the shooting *could* have happened, the Court finds Applicant has not demonstrated prejudice from trial counsel's lack of further cross-examination. See, e.g., Skeen v. State, 325 S.C. 210, 216-17, 481 S.E.2d 129, 133 (1997) ("[O]ne can only

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speculate whether a 'better' cross examination would have helped Skeen."); Simpson v. Moore, 367 S.C. 587, 598 n.2, 627 S.E.2d 701, 707 n.2 (2006) ("Though hindsight may provide a different view of counsel's actions, Simpson is not entitled to a new trial for the sole purpose of presenting a 'fancier' case." (citing Jones v. State, 332 S.C. 329, 504 S.E.2d 822 (1998))).

Applicant's allegation trial counsel mis-advised him about his right to testify is also without merit. "The right to testify on one's own behalf at a criminal trial has sources in several provisions of the Constitution." Rock v. Arkansas, 483 U.S. 44, 51 (1987) (citing Faretta v. California, 422 U.S. 806 (1975)). For a defendant to waive his right to testify, the record must demonstrate the defendant made such waiver knowingly and voluntarily. State v. Orr, 304 S.C. 185, 188, 403 S.E.2d 623, 624-25 (1991), overruled on other grounds by Franklin v. Catoe, 346 S.C. 563, 552 S.E.2d 718 (2001). The Court finds credible trial counsel's testimony he thoroughly advised Applicant regarding the right to testify. This advice included a discussion of the risks and benefits of testifying, as well as an admonition that the ultimate decision was Applicant's. Furthermore, the record indicates Judge Breeden advised Applicant regarding his right to testify. (Trial Tr. p. 313, line 10-p. 314, lines 19). Applicant waived this right on the record. (Trial Tr. p. 315, line 18-p. 316, line 9). Applicant was fully aware the decision to testify was his to make, not trial counsel's. Because Applicant knowingly and voluntarily waived that right, the Court finds he has not demonstrated trial counsel was ineffective in this regard.

The Court also finds Applicant failed to demonstrate trial counsel ineffective for failing to further investigate Walke and call him as a witness. The Court finds credible trial counsel's testimony on this issue, and finds Applicant's not credible. Trial counsel did not further

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investigate Walke because Applicant informed him Walke could not be found. Had Walke been important to the defense, Applicant could have insisted trial counsel attempt to locate him instead of being dismissive. Thus, trial counsel had no reason to believe Walke would be a helpful witness. Strickland, 466 U.S. at 691 ("[W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable."); see also Rodriguez v. State, 74 S.W.3d 563, 568 (Tex. App. 2002) ("Moreover, we opt not to fault trial counsel for the intentional withholding of vital information by his client." (citations omitted)). Trial counsel also explained he would not have wanted to call Walke as a witness anyway because Applicant shot Walke, and Walke's testimony may have harmed the defense. The Court finds counsel has articulated a valid strategic reason for not further pursuing Walke as a witness. Legare, 333 S.C. at 281, 509 S.E.2d at 475. Regardless, Walke did not testify at the evidentiary hearing. Therefore, the Court will not speculate as to whether Walke's testimony at trial would have aided Applicant's defense. Dempsey v. State, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005) ("A PCR applicant cannot show that he was prejudiced by counsel's failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence." (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995))). Accordingly, the Court finds Applicant has not demonstrated trial counsel was ineffective in this regard.

Finally, the Court finds the record contains overwhelming evidence of Applicant's guilt. Witnesses observed Applicant and victim in an altercation inside the bar. Applicant's friend witnessed Applicant go to his car, reach inside, and then run toward the passenger side of the



victim's girlfriend's car where the victim was sitting. This same friend also knew Applicant kept a semi-automatic handgun in his car. The victim's girlfriend observed Applicant with a handgun before pulling the victim out of the car. Witnesses observed Applicant and the victim grabbing each other and locking arms, and saw Applicant hitting the victim over the head. Applicant was the only person near the victim at the time he was shot. Because the evidence overwhelmingly indicates Applicant shot the victim, the Court finds Applicant cannot show he was prejudiced by trial counsel's actions. See Harris v. State, 377 S.C. 66, 79, 659 S.E.2d 140, 147 (2008) (applicant cannot prove prejudice where there is overwhelming evidence of guilt).

C. All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this order, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

IV. CONCLUSION

Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from his attorney's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial

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of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, his attorney must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 28 day of August, 2015.



THE HONORABLE G. THOMAS COOPER, JR.
Presiding Judge

Chuson, South Carolina

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRYCOUNTY
Court of Common Pleas
G. Thomas Cooper, Jr., Presiding Judge

2013-CP-26-428

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S.C. SUPREME COURT

LEMONDE C. HOLLAND, #322779

v.

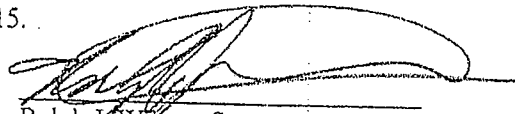
Petitioner,

THE STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

NOW COMES the Petitioner in the above-captioned Post-Conviction Relief action, acting by and through his undersigned counsel, giving notice of his appeal from the Order of Dismissal filed in this matter on September 2, 2015, a copy of which is attached. Counsel for Petitioner was served with this Order of Dismissal by the Horry County Clerk of Court's Office on November 23, 2015. See, Attached Affidavit. Counsel received the Order and Notice of filing from the Horry County Clerk of Court on November 30, 2015.



Ralph J. Wilson, Sr.
Attorney and Counselor at Law
S.C. Bar No. 06176
1323 Third Avenue
Conway, South Carolina 29526
(843) 381-0765 Phone
info@rjwlawpa.com
ATTORNEY FOR PETITIONER

This 1st day of December, 2015.

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

ATTACHMENT A

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)
LEMONDE C. HOLLAND, #322779)
Applicant,)
v.)
THE STATE OF SOUTH CAROLINA,)
Respondent.)

IN THE COURT OF COMMON PLEAS

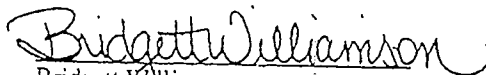
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AFFIDAVIT OF SERVICE

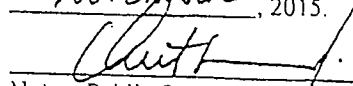
The undersigned, Bridgett Williamson, Supervisor of the Common Pleas Department for the Horry County Clerk of Court's Office, being duly sworn states the following. On today's date, November 23, 2015, a clocked copy of the Order of Dismissal filed in the above captioned Post-Conviction Relief action on September 2, 2015, has been served upon Counsel for the Applicant, Ralph J. Wilson, Sr., by U. S. mail sent to the address listed below. The records of the Horry County Clerk of Court have been reviewed and indicate that this Order *has not previously been served upon Attorney Wilson* by the Horry County Clerk of Court's Office.

Ralph J. Wilson, Sr.
Attorney at Law
1323 Third Avenue
Conway, South Carolina 29526

Further Affiant Sayth Naught.


Bridgett Williamson
Supervisor of Common Pleas
Office of the Horry County Clerk of Court

SWORN TO BEFORE ME this 23rd day of

November, 2015.
 (L.S.)

Notary Public for South Carolina

My Commission Expires: 10/21/2024

COPY, ORIGINAL AFFIDAVIT ON FILE WITH THE OFFICE OF
THE HORRY COUNTY CLERK OF COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRYCOUNTY
Court of Common Pleas
G. Thomas Cooper, Jr., Presiding Judge

2013-CP-26-428

LEMONDE C. HOLLAND, #322779

v.

THE STATE OF SOUTH CAROLINA,

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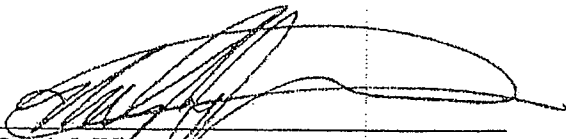
S.C. SUPREME COURT

Petitioner,

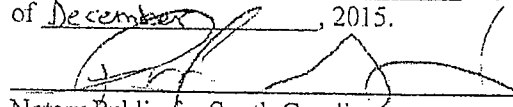
Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Petitioner's Notice of Appeal in the above-entitled cause has been served upon opposing counsel, Jessica Kinard, Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this 1st day of December, 2015.


Ralph J. Wilson, Sr.
Attorney for Petitioner

SWORN TO BEFORE me this 1st day
of December, 2015.


Notary Public for South Carolina
My Commission Expires: 07/19/2021

(L.S.)