

VOLUME TWO OF TWO

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
SEP 28 2016
S.C. SUPREME COURT

Appeal from Kershaw County

Honorable Diane Schafer Goodstein, Circuit Court Judge

TOMMY MCKNIGHT,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-000821

A P P E N D I X

JOHN H. STROM
Appellate Defender

ALAN WILSON
Attorney General

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

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Assistant Attorney General
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1000 Assembly Street, Room 519
Columbia, SC 29201

ATTORNEY FOR PETITIONER

ATTORNEYS FOR RESPONDENT

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Here, counsel correctly argued the state did not provide sufficient evidence to negate appellant's claim of self-defense. See, State v. Dickey, 380 S.C. 384, 394, 669 S.E.2d 917, 922 (2008). As in State v. Hendrix, 270 S.C. 653, 244 S.E.2d 503 (1978), appellant established self-defense as a matter of law. The state here was required to disprove self-defense since there was clear evidence of self-defense. See, State v. Burkhardt 350 S.C. 252, 261 565 S.E.2d 298, 303 (2002).

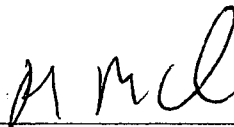
It was undisputed that the decedent hit appellant with a beer bottle and attacked him. The solicitor's claim that appellant started the difficulty by asking about the decedent's decedent's dog is bogus. At the most, appellant could legally have been guilty of voluntary manslaughter because he killed the decedent in a heat of passion after a clear legal provocation — being attacked and hit with a beer bottle.

There was no direct or substantial circumstantial evidence given the highly unusual facts of this case that appellant was guilty *of murder*. He was either guilty of voluntary manslaughter or not guilty by reason of self defense. See State v. Lowry, 315 S.C. 396, 434 S.E.2d 272 (1993); State v. Fuller, 297 S.C. 440, 442-443, 377 S.E.2d 328, 330 (1989). The trial judge should have directed a verdict of acquittal on the murder charge. See, State v. Martin, supra.

CONCLUSION

By reason of the forgoing argument, an order of acquittal should be issued by this Court.

Respectfully submitted,

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

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 27th day of January, 2011.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Kershaw County

J. Ernest Kinard, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TOMMY MCKNIGHT,

APPELLANT

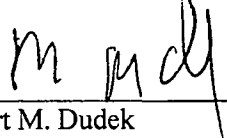
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Tommy McKnight states:

1. He is Chief Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge J. Ernest Kinard, Jr., which was held on March 16-18, 2009, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, he asks the Court to relieve him as counsel for Tommy McKnight.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

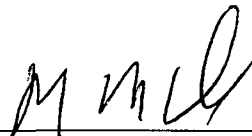
ATTORNEY FOR APPELLANT

This 27th day of January, 2011.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

January 27th, 2011



Robert M. Dudek
Chief Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Kershaw County

J. Ernest Kinard, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

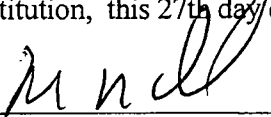
V.

TOMMY MCKNIGHT,

APPELLANT

CERTIFICATE OF SERVICE

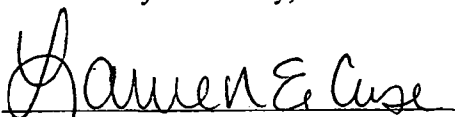
The undersigned attorney hereby certifies that a true copy of the Final Anders Brief of Appellant in the above referenced case has been served upon Donald J. Zelenka, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, South Carolina 29201; and a copy of the final Anders brief of appellant and Record on Appeal have been served on Tommy McKnight, #186784 at Lee Correctional Institution, this 27th day of January, 2011.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 27th day of January, 2011.



Notary Public for South Carolina
My Commission Expires: August 23, 2014.

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

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

The State,

Respondent,

v.

Tommy McKnight,

Appellant.

Appeal From Kershaw County
J. Ernest Kinard Jr., Circuit Court Judge

Unpublished Opinion No. 2012-UP-341
Submitted May 1, 2012 – Filed June 6, 2012

APPEAL DISMISSED

Chief Appellate Defender Robert M. Dudek, of
Columbia, and Tommy McKnight, pro se, for
Appellant.

Attorney General Alan Wilson, Chief Deputy
Attorney General John W. McIntosh, Assistant
Deputy Attorney General Donald J. Zelenka, and

Solicitor Daniel E. Johnson, all of Columbia, for Respondent.

PER CURIAM: Tommy McKnight appeals his conviction of murder, arguing the circuit court erred in denying his motion for a directed verdict. Additionally, McKnight asserts several pro se arguments. After a thorough review of the record and all briefs pursuant to Anders v. California, 386 U.S. 738 (1967), and State v. Williams, 305 S.C. 116, 406 S.E.2d 357 (1991), we dismiss¹ the appeal and grant counsel's motion to be relieved.

APPEAL DISMISSED.

WILLIAMS, THOMAS, and LOCKEMY, JJ., concur.

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

FORM 5

STATE OF SOUTH CAROLINA)

COUNTY OF Kershaw)

IN THE COURT OF COMMON PLEAS

Tommy M. Kershaw #186784)
Full name and prison number (if any) of Applicant.)2012-CP-28-1064

v.)

APPLICATION FOR

State of South Carolina)

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 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 Lee Correctional Institution
2. Name and location of Court which imposed sentence Kershaw County GS
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) 2008GS2802183
 - (b) N/A
 - (c) N/A
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) April 28, 2009
 - (b) N/A

30 Attorney's Correct & Certified
Copy of Original on File in this
Court

Debra S. Ward Revised 3/2003
Clerk of Court Kershaw County

- (c) N/A
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty N/A
- (b) after a plea of not guilty ✓
- (c) after a plea of nolo contendere N/A
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 Appeal
- ii. N/A
- iii. N/A
- (b) the result in each such Court to which you appealed:
- i. Dismissed
- ii. N/A
- iii. N/A
- (c) the date of each such result:
- i. June 6, 2012
- ii. N/A
- iii. N/A
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. N/A
- ii. N/A
- iii. N/A
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) N/A
- (b) N/A
- (c) N/A
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

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2012 NOV 19 PM 1:06
JAMES H. DONALD
CLERK OF COURT
SOUTH CAROLINA

5th, 14th & 14th Amendment U.S. Constitution

- (a) ineffective assistance of trial counsel
 (b) allegation misconduct & police brutality
 (c) ineffective assistance of appellate counsel

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

- (a) Denial of Fundamental due process
 (b) counsel fail to object, make timely motion.
 (c) fail preserve for appellate review.

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

- (a) any petition in a State Court under South Carolina Law? yes
 (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No
 (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No
 (d) any other petitions, motions or applications in this or any other Court? No

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

(a) the specific nature thereof:

i. Direct Appeal

ii. N/A

iii. N/A

iv. N/A

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

i. South Carolina court of Appeal, post

ii. OFFICE Box 11629, Columbia, S.C. 29211

iii. N/A

iv. N/A

(c) the disposition thereof:

i. Dismissed

ii. N/A

iii. N/A

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 CLERK OF COURT
 S.C.

iv. N/A

(d) the date of each such disposition:

i. June 6, 2012

ii. N/A

iii. N/A

iv. N/A

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

i. No. 2012-48-341

ii. N/A

iii. N/A

iv. N/A

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CLERK OF COURT
HARRIS COUNTY TEXAS

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?

N/A

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

(a) which grounds have been presented:

i. N/A

ii. N/A

iii. N/A

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

i. N/A

ii. N/A

iii. N/A

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) Ineffective assistance is not reviewable on

(b) Direct Appeal

(c) N/A

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

- (a) your arraignment and plea? _____
- (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? Robert M. Dudek Esquire
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Direct appeal

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 M. Dudek Esquire, Division of Appellate Defense
- ii. Post Office Box #1589, Columbia, South Carolina
- iii. 29211-1589

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

- i. Direct Appeal
- ii. N/A
- iii. N/A

2012 MAY 11 PM 1:09
CLERK OF COURT
KERSHAW COUNTY, S.C.
FILED FOR RECORD

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

Vacated sentence.

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

No

STATE OF SOUTH CAROLINA)

VERIFICATION

County of)

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

Tommy Mc Knight

SWORN to and subscribed before me this 16
day of Nov, 2012.

Debra Sines (L.S.)
Notary Public

My Commission Expires: 11-4 2015

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2012 NOV 19 PM 1:09
CLERK OF COURT
FACSIMILE COUNTY, S.C.

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

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

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

Tammy McRae
Applicant

SWORN or affirmed to and subscribed before me this

16 day of Nov., 2012

Debra Sims
Notary Public

My Commission Expires: 11-4-2015

ALL INFORMATION
 2012 NOV 19 PM 1:09
 CLERK OF COURT
 PERSHAW COUNTY, S.C.

Affidavit in support of PCR
 petitioner respectfully request this Honorable
 court to appoint counsel to assist in Motion
 For Discovery and amending P.C.R application.
 The applicant need assistance in this matter.
 I'm unlearned in the law and request
 assistances in this instant action.

RECORDED
 2017 NOV 19 PM 1:09
 CLERK OF COURT
 HARRIS COUNTY, TEXAS

Respectfully submitted
s/ Tommy McNight
 Tommy McNight

8 OF 8

STATE OF SOUTH CAROLINA
COUNTY OF KERSHAW

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

MCKNIGHT Tommy -
00186784,

2012CP281064

Applicant,

RETURN

v.

State of South Carolina,

Respondent.

Respondent, State of South Carolina, making its Return to the application for post-conviction relief (PCR) filed November 19, 2012, would respectfully show this Court:¹

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Kershaw County Clerk of Court. Applicant was true bill indicted at the June 2008 term of the Kershaw County Grand Jury for Murder (2008-GS-28-02183).² He was represented by Cornelius J. Riley, Esquire, and Jason D. Kirincich, Esquire, (hereafter collectively referred to as "counsel") on the charge(s). Applicant proceeded to jury trial before The Honorable J. Ernest Kinard, Jr. and on March 19, 2009, was found guilty of the charge as indicted. Sentencing was deferred at that time. On April 28, 2009, Applicant appeared again before Judge Kinard, at which time he was sentenced to thirty (30) years imprisonment.

¹<http://publicindex.sccourts.org/kershaw/publicindex/PICaseDetails.aspx?County=28+&Casenum=2012CP281064&CourtType=G&CaseType=Civil&CourtAgency=28002>

² <https://sword.doc.state.sc.us/scdc-public/inmateDetails.do?id=+00186784>

Direct Appeal

A notice of appeal was filed and an Anders brief submitted on Applicant's behalf by Robert Dudek of the South Carolina Office of Appellate Defense. By order dated June 6, 2012, the South Carolina Court of Appeals granted appellate counsel's motion to be relieved and the appeal was dismissed. State v. McKnight, 2012-UP-341 (Ct. App. filed June 6, 2012). The remittitur was issued June 25, 2012..

The current application for post-conviction relief (PCR) was filed thereafter on November 19, 2012.

II.

Attached herewith and incorporated herein are the records of the Richland County Clerk of Court regarding the subject conviction(s), Applicant's records from the South Carolina Department of Corrections, and the trial transcript, and Applicant's applicable direct appeal files.³ Respondent reserves the right to amend this Return upon receipt of any relevant materials or submit an amended Return to reflect any amended allegations and/or to provide a more detailed procedural history.

III.

In his application for post-conviction relief, Applicant alleges he is being held in custody unlawfully based on the following:

³ The Respondent will utilize the Record on Appeal if the direct appeal was an Anders appeal.

- 5th, 6th & 14th Amendment U.S. Constitution
- (a) Ineffective assistance of trial counsel
 - (b) Solicitor misconduct & police brutality
 - (c) Ineffective assistance of appellate counsel

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

- (a) Denial of Fundamental due process
- (b) counsel fail to object, make timely motion.
- (c) fail preserve for appellate review.

IV.

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

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

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

professional judgment. Strickland, 80 L.Ed.2d 674. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

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

V.

Each and every allegation contained within the application not hereinbefore either expressly admitted, qualified or explained is hereby denied. Respondent therefore requests this Court convene an evidentiary hearing solely on the issue of ineffective assistance of counsel. As to all other allegations, Respondent moves for summary dismissal pursuant to S.C. Code Ann. §

17-27-70, on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

VI.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held. Respondent will coordinate with the Applicant's attorney who is, according to the Respondent's file, Tara D. Shurling, Esquire regarding when the hearing should be set.⁴

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney
General

ROBERT D. CORNEY
Assistant Attorney General

By: Rut S
ATTORNEYS FOR RESPONDENT

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

January 25, 2013

⁴ The current PCR Roster for the 5th Circuit is available at <http://www.scag.gov/criminal-litigation/postconvictionrelief>

STATE OF SOUTH CAROLINA
COUNTY OF KERSHAW

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

MCKNIGHT Tommy -
00186784,

2012CP281064

Applicant,

v.

CERTIFICATE OF SERVICE

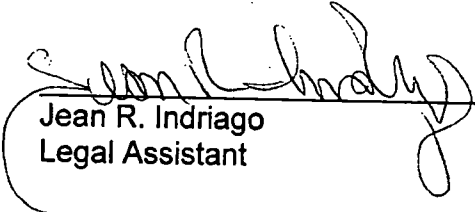
State of South Carolina,

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 a letter in the above-captioned matter on the following person(s) by routing the same to the United States mail, postage prepaid:

Tara D. Shurling, 3614 Landmark Drive - Suite D, Columbia, SC 29204

DATED January 25, 2013.


Jean R. Indriago
Legal Assistant

STATE OF SOUTH CAROLINA)
)
 COUNTY OF KERSHAW)

IN THE COURT OF COMMON PLEAS

TOMMY MCKNIGHT, #186784,)
 Applicant,)
)
 v.)
)
 THE STATE OF SOUTH CAROLINA,)
 Respondent.)
)

2012-CP-28-1064

AMENDED APPLICATION FOR
 POST-CONVICTION RELIEF

The Post-Conviction Relief Application previously filed on November 19, 2012 under docket number 2012-CP-28-1064 is hereby amended to include the following additional allegations:

1. Trial Counsel provided the Applicant ineffective assistance of counsel at trial in that Counsel neglected to preserve on the record an objection to a jury charge which instructed the jury that they could infer malice from the use of a deadly weapon despite the fact that the evidence in this case raised a claim of self-defense.
2. Trial Counsel was ineffective in that they raised an objection to the lower court issuing a jury charge which permitted the inference of malice from the use of a deadly weapon *in camera* and neglected to renew the objection on the record in order to preserve the issue for appellate review. *State v. Tommy McKnight*, Unpublished Opinion No. 2012-UP-341 (Ct. App. Filed June 6, 2012). *State v. Belcher*, filed October 12, 2009.
3. Trial Counsel provided the Applicant ineffective assistance of counsel by failing to object to portions of the State's closing argument in which the prosecutor argued matters not support by evidence introduced at trial. Trial tr. p. 338, ll. 1-2. Defendant ridiculing victim's dog- no evidence. Conversation not "ridiculing" in nature. Trial tr. p. 425, ll 18-19 and Trial tr. p. 442, ll. 11. Erroneously claimed that Debra Joyner testified that the Applicant was picking at the victim. Trial tr. p. 400, ll. 19-20. Argued that Debra Joyner testified that homeowner asked the Applicant to leave at one point and *then he came back*. Not accurate and crucial to self-defense claim. Trial tr. p. 421, ll. 15-21. Inaccurately quotes Debra Joyner as testifying that the Applicant had been asked by the homeowner *three times* to leave that day. Solicitor erroneously argued that the Applicant had been told two or three times to leave and had been told up the street to leave. Trial tr. p. 441, ll. 5-7. What Debra Joyner actually said was that the Applicant came and went three times. She did claim owner of house told him to leave, but did not say he was *asked to leave multiple times*. Trial tr. p. 218, ll. 22-25 and Trial tr. p. 221, ll. 2-5.

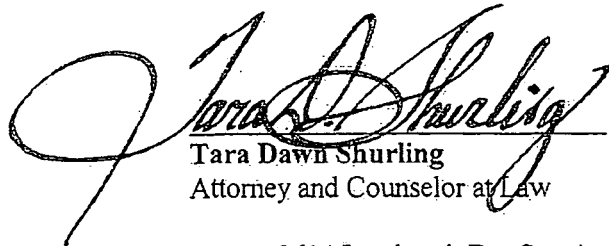
4. Trial Counsel was ineffective for failing to object to hearsay testimony which accused the Applicant of unrelated bad acts which prejudiced the Applicant's ability to receive a fair trial. Trial tr. p. 219, ll. 2-4 Friend came down and told us that he had to run him from his house because he was "starting."
5. Trial Counsel was ineffective for failing to object to repeated references in closing arguments by the State which improperly emphasized inadmissible hearsay testimony concerning what a State witness, Debra Joyner, had allegedly been told by a neighbor who was not a witness at the Applicant's trial. Trial tr. p. 400, ll. 19-20. Trial tr. p. 421, ll. 20-21.
6. Trial counsel was ineffective for failing to object to repeated leading by the prosecution during direct examination of state witness on crucial points. Trial tr. p. 220, l. 5-6.
7. Trial Counsel was ineffective for neglecting to emphasize to the jury the Applicant's right to act on appearances and the related facts that he not only had the Applicant been struck in the head with a beer bottle immediately prior to the victim being injured, but the Applicant had sustained a second wound on his chest, the victim and some of his friends were was advancing toward him, he was outnumbered by the victim's friends and significantly, one of whom had positioned himself *behind* the Applicant during the altercation. Trial tr. p. 355, ll. 7-23. Trial tr. p. 164 l. 5- p. 165 l. 5; Trial tr. p. 193, ll. 3-4.
8. Trial Counsel was ineffective for neglecting to object to a portion of the State's closing argument in which the prosecutor erroneously stated that Debra Joyner had testified on direct examination that it was the Applicant who first hit the victim with the bottle, and erroneously claimed that the State had brought out her error on direct examination as opposed to the defense catching her in her error. Trial Tr. 221, ll. 6-11; Trial Tr. p. 227, l. 16- p. 228, l. 19; Trial tr. p. 434, ll. 4-6.
9. Trial Counsel provided the Applicant ineffective assistance of counsel at trial when they advised the Applicant against testifying at his trial without adequately advising him what impact the decision not to testify would likely have on the jury's determination as to whether he had raised the affirmative defense of self-defense.
10. Trial Counsel was ineffective for failing to specifically object to the trial court's failure to recharge the entire jury instruction on self-defense in addition to the charges repeated by the Court, following a question by the jury during their deliberations. Trial tr. p. 470, l. 5- p. 485, l. 18; Court's Exhibit No. 2.
11. Trial Counsel was ineffective for failing to request a jury instruction which clearly advised the jury that the defense of self-defense could be raised through the facts and circumstances established by evidence introduced by the State and/or by the Defense.

12. Trial Counsel was ineffective for neglecting to request that the jury be instructed that any doubts they had concerning the Applicant's degree of culpability were to be resolved in his favor.
13. Trial Counsel was ineffective for neglecting to motion the trial court to declare Dee Dee Drakeford a hostile witness subject to cross-examination and impeachment.
14. Trial Counsel was ineffective for failing to introduce testimony from Detective Lee Boan to impeach the testimony of Dee Dee Drakeford with evidence of her prior inconsistent testimony to the police.
15. Trial Counsel was ineffective for failing to question witness Dee Dee Drakeford concerning her two calls to Detective Lee Boan and the information she relayed to him concerning the incident for which the Applicant was on trial.
16. Trial Counsel was ineffective for failing to object to hearsay testimony relaying claims that the owner of the residence where the altercation happened had asked the Applicant to leave when the homeowners Stella and Dan Washington, were not witnesses at the Applicant's trial. Trial tr. p. 220, ll. 5-9. Trial tr. p. 221, ll. 2-5. Stella Louise Washington listed as homeowner in incident report; Dan named in statement of Travis Johnson.
17. Trial Counsel was ineffective for failing to assert the Applicant's right to a speedy trial. The Applicant was taken into custody 9-23-05. Indicted 6-11-2008. Trial March, 2009.
18. Trial Counsel was ineffective for failing to object to the Applicant being forced to appear in front of the jury in ankle chains.
19. Trial Counsel provided the Applicant ineffective assistance of counsel by failing to fully argue the Applicant's right to act on appearances in the context of a self-defense claim, and for failing to point out all the evidence that supported appearance that the Applicant was in imminent danger when he acted in self-defense.
20. Trial Counsel was ineffective for failing to object to a statement by the trial judge which may have been construed by the jury as a judicial comment on the facts and which was subsequently capitalized upon by the Solicitor. Trial tr. p. 165, ll. 8-10, Trial tr. p. 195, l. 25, Trial Tr. p. 192, ll. 1-8, Trial tr. p. 239, ll. 9-10.
21. Trial Counsel was ineffective for failing to ensure that the Applicant got a preliminary hearing before he was indicted where on the facts of this case there is a high degree of probability that the charge of murder would have been dismissed for lack of probable cause.

22. Trial Counsel was ineffective for failing to request a jury charge instructing the jury that any doubt as to whether the Applicant was guilty of murder or manslaughter must be resolved in the favor of the accused. **Note: reference to King during discussion on recharge was clarified as reference to Judge Ralph King Anderson. A standard King charge not given.**
23. Trial Counsel was ineffective for failing to object to evidence and testimony introduced at trial concerning a box cutter that was in the Applicant's possession at the time of his arrest where there was no evidence whatsoever connecting that utility knife with the incident for which the Applicant was on trial.

The Applicant has no further amendments at this time. For the reasons set forth herein, as well as those set forth in his original application, the Applicant asserts that his right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14, of the South Carolina Constitution, was violated in the trial court. Copies of these amendments have been served on opposing counsel, Megan Harrigan, Assistant Attorney General, and Trial Counsel for the Applicant, Neil J. Riley, Esquire and Jason D. Kirincich, Esquire.

Respectfully submitted,



Tara Dawn Shurling
Attorney and Counselor at Law

3614 Landmark Dr., Ste. A
Columbia, SC 29204
803-738-8622
803-738-1600 (Fax)

ATTORNEY FOR APPLICANT.

This 3rd day of June, 2013.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF KERSHAW)

IN THE COURT OF COMMON PLEAS

TOMMY MCKNIGHT, #186784,)
 Applicant,)

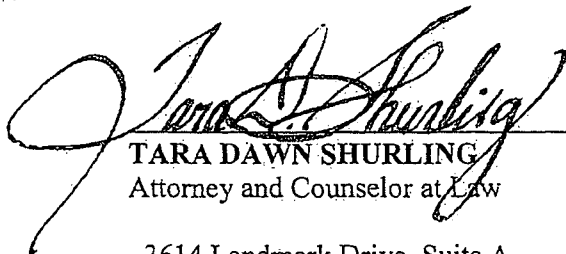
2012-CP-28-1064

v.)

CERTIFICATE OF SERVICE

THE STATE OF SOUTH CAROLINA,)
 Respondent.)

The undersigned attorney hereby certifies that one copy of the Applicant's Amended Post-Conviction Relief Application in the above-entitled cause has been served upon, Jason D. Kirincich, Esquire and Neil J. Riley, Esquire by hand-delivery to the Kershaw County Public Defender's Office on this the 3rd day of June, 2013.

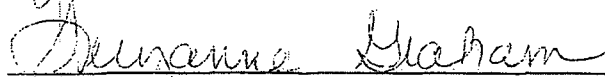

TARA DAWN SHURLING
 Attorney and Counselor at Law

3614 Landmark Drive, Suite A
 Columbia, S.C. 29204
 (803) 738-8622
 (803) 738-1600 Fax

ATTORNEY FOR THE APPLICANT.

SWORN TO BEFORE ME this 3rd day of

June, 2013.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: 2/28/2023

STATE OF SOUTH CAROLINA)
)
 COUNTY OF KERSHAW)

IN THE COURT OF COMMON PLEAS

TOMMY MCKNIGHT, #186784,)
 Applicant,)

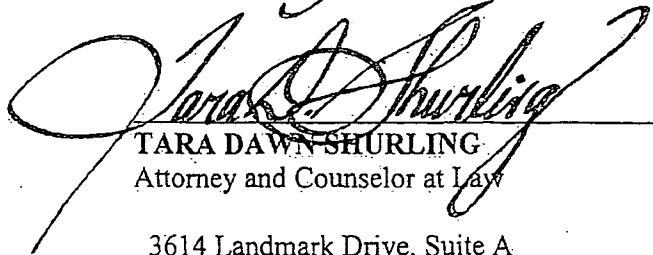
2012-CP-28-1064

v.)

CERTIFICATE OF SERVICE

THE STATE OF SOUTH CAROLINA,)
 Respondent.)

The undersigned attorney hereby certifies that one copy of the Applicant's Amended Post-Conviction Relief Application in the above-entitled cause has been served upon, Megan Harrigan, Assistant Attorney General, by email on this the 3rd day of June, 2013.


 TARA DAWN SHURLING
 Attorney and Counselor at Law

3614 Landmark Drive, Suite A
 Columbia, S.C. 29204
 (803) 738-8622
 (803) 738-1600 Fax

ATTORNEY FOR THE APPLICANT.

SWORN TO BEFORE ME this 3rd day of

June, 2013.

 (L.S.)
 Notary Public for South Carolina
 My Commission Expires: 2/28/2023

STATE OF SOUTH CAROLINA)
)
 COUNTY OF KERSHAW)

IN THE COURT OF COMMON PLEAS

TOMMY MCKNIGHT, #186784,)
 Applicant,)

2012-CP-28-1064

v.)

**SECOND AMENDED APPLICATION
 FOR POST-CONVICTION RELIEF**

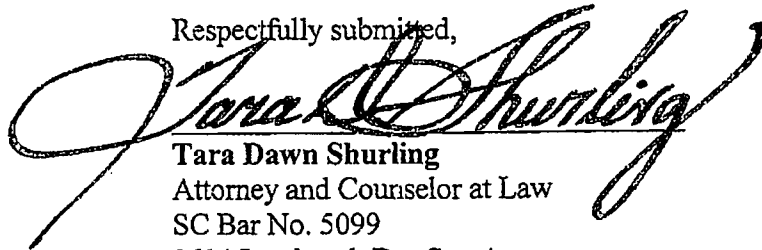
THE STATE OF SOUTH CAROLINA,)
 Respondent.)

The Post-Conviction Relief Application previously filed on November 19, 2012, under docket number 2012-CP-28-1064, is hereby amended to include the following additional specific allegation:

24. Trial Counsel was ineffective for failing to object to hearsay testimony in which the Applicant was characterized as just an old drunk where said testimony was not only hearsay, and as such was inadmissible but, it also improperly impugned the Applicant's character with testimony from a witness he was unable to confront.¹

The Applicant has no further amendments at this time. For the reasons set forth herein, as well as those set forth in his original application, the Applicant asserts that his right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14, of the South Carolina Constitution, was violated in the trial court. A copy of this amendment has been served on opposing counsel, Megan Harrigan, Assistant Attorney General.

Respectfully submitted,



Tara Dawn Shurling
 Attorney and Counselor at Law
 SC Bar No. 5099
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 Columbia, SC 29204
 803-738-8622
 803-738-1600 (Fax)

This 14th day of June, 2013.

ATTORNEY FOR APPLICANT

¹ This allegation is numbered sequentially with the specific allegations raised in the Applicant's previously filed Amended Application for Post-Conviction Relief.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF KERSHAW)

IN THE COURT OF COMMON PLEAS

TOMMY MCKNIGHT, #186784,)
 Applicant,)

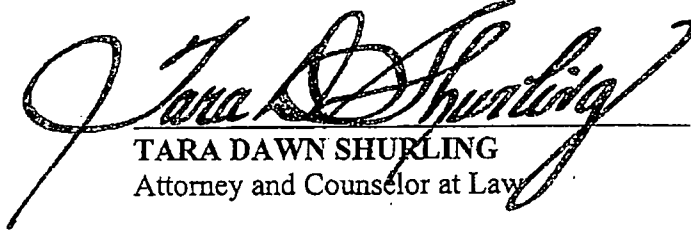
2012-CP-28-1064

v.)

CERTIFICATE OF SERVICE

THE STATE OF SOUTH CAROLINA,)
 Respondent.)
 _____)

The undersigned attorney hereby certifies that one copy of the Applicant's Second Amended Post-Conviction Relief Application in the above-entitled case was served upon, Megan Harrigan, Assistant Attorney General, by email on this the 14th day of June, 2013.

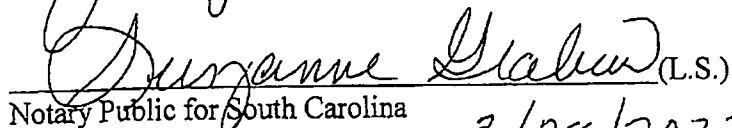

 TARA DAWN SHURLING
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ATTORNEY FOR THE APPLICANT.

SWORN TO BEFORE ME this 11th day of

July, 2013.

 (L.S.)
 Notary Public for South Carolina

My Commission Expires: 2/28/2023

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	
COUNTY OF KERSHAW	)	Case No(s) .: 2012CP2801064
	)	
Tommy McKnight,	)	
	)	
Applicant,	)	
	)	
-VS-	)	TRANSCRIPT OF RECORD
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

August 5-6, 2013
Camden, South Carolina

B E F O R E:

HONORABLE DIANE S. GOODSTEIN, Judge.

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

MEGAN E. HARRIGAN, Esquire
Attorney for the State

TARA D. SHURLING, Esquire
Attorney for the Applicant

Reported by: **MARYANN S. NEVERS**
Circuit Court Reporter

Transcribed by: **TERESA B. JOHNSON**
Circuit Court Reporter

I N D E X

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EXHIBITS PAGE

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(No exhibits offered.)

P R O C E E D I N G S

(WHEREUPON, the proceedings begin on the 5th day of August, 2013 at approximately 12:27 p.m.)

THE COURT: All right.

MS. HARRIGAN: May it please the court?

THE COURT: Yes.

MS. HARRIGAN: The next matter is Tommy McKnight versus the State of South Carolina, docket number 2012-CP-28-1064. The applicant was indicted during the June 2004 term of the Kershaw County Grand Jury for Murder. He was represented by Cornelius Riley and Jason Kirincich.

On March 16th through 19th of 2009, he proceeded to jury trial in front of the Honorable J. Ernest Kinard, Jr. where he was convicted as indicted. Sentencing was deferred. On April 28, 2009, Judge Kinard sentence the applicant to 30 years imprisonment.

A notice of appeal was filed. An appeal was perfected on the applicant's behalf following the submission of an Anders brief. Court of Appeals dismissed the appeal. A remittitur were sent on 3/26/2012.

1 On November 19th, 2012, applicant filed the
2 application of postconviction relief. The
3 state sent its return on January 26th, 2013.
4 The applicant is represented in this action by
5 Tara Shurling. Through his counsel, applicant
6 amended his application on June 3rd, 2013 and
7 again on June 14th with 24 specific allegations
8 that are outlined in the amendment. At this
9 time, I would ask Ms. Shurling to place her
10 allegations on the record.

11 **THE COURT:** Yes ma'am.

12 **MS. SHURLING:** Thank you, Your Honor. For
13 the record, there have been two very specific
14 amended applications for postconviction relief
15 in this case as Ms. Harrigan has noted. They
16 were filed on June 3rd and June -- July 15th
17 respectively. Your Honor, in the longer
18 amended application, the one that was filed on
19 June 3rd, I left many of the page references in
20 the actual application following the
21 allegation. I always do or generally do an
22 amended application with page cites for my own
23 use. This time, we're trying something
24 different. I decided to leave them in the
25 actual copy file that was provided to the court

1 and hope that it would make it in some way
2 easier for the court and everyone to follow
3 along during the hearing. Unfortunately, I've
4 forgotten my new resolved by the time I got
5 around to the June 14th amendment application
6 which was served on Ms. Harrigan in June but
7 not filed until July 15th.

8 The 24th allegation that is dealing with
9 the hearsay reference to my client is found in
10 the testimony of David Hagan at transcript page
11 129 lines 4 through 5.

12 **THE COURT:** 129, 4 and 5?

13 **MS. SHURLING:** Yes, ma'am.

14 **THE COURT:** Okay.

15 **MS. SHURLING:** Your Honor, this case, I
16 think it would be helpful to the court, to give
17 you a little bit of a factual summary before we
18 get started. There are as Ms. Harrigan has
19 noted 24 specific allegations in this case. I
20 think it would be helpful to the court to
21 review the upcoming testimony through the
22 backdrop of some factual familiarity with the
23 case.

24 This was an incident where my client had
25 pulled up on a bicycle outside of a gathering

1 at a residence. Apparently, there were people
2 outside drinking and talking and partying and
3 was engaged in a conversation with one of the
4 guests at the party. There were comments made
5 allegedly by my client about the man's dog
6 which evolved into an altercation. My client
7 was hit in the head with a beer bottle by the
8 victim and was, at some juncture, stabbed or
9 cut in the chest by someone in the group. And
10 at some particular juncture, he pulled a knife
11 that he had secreted away.

12 **THE COURT:** He, being your client?

13 **MS. SHURLING:** My client pulled a knife
14 that he had secreted somewhere on his person.
15 No one was able to give a statement as to where
16 it was produced from. They don't know whether
17 it came out of a boot or out of his waistband.
18 They don't know. But he had a knife.

19 According to the testimony of more than one
20 witness, as the victim was coming toward him,
21 he lashed out with the knife cutting him. I
22 believe the testimony was that the incision was
23 slightly over three inches long and the victim
24 subsequently died from exsanguination from --
25 his intestines actually came out of the wound.

1 Interestingly, given the length of the
2 incision, I would not have thought it was
3 possible. There are photographs that
4 demonstrate that did, in fact, happen. My
5 client left the scene and was subsequently
6 arrested. At trial, there were numerous
7 witnesses who testified against Mr. McKnight.
8 They were notably all among the friends that
9 were gathered at this residence with the
10 victim, Mr. Williams.

11 The homeowners -- and I use the term
12 homeowners to designate the people whose lawful
13 residence it was. I don't know whether they
14 were renters. But they did not testify at
15 trial. There were some problems that will be
16 highlighted through the allegations concerning
17 statements that were attributed to them,
18 hearsay testimony concerning the statements
19 that were attributed to them when they were not
20 present in the courtroom to testify.

21 In addition, there is some problems with
22 discrepancies between pretrial statements and
23 testimony actually given at trial that were not
24 used to the full effect by defense counsel to
25 the benefit of Mr. McKnight. Your Honor, the

1 record will reflect that even Judge Kinard had
2 grave misgivings about this case. I will
3 eventually point out a number of matters to the
4 court. I would from the outset note that, at
5 the conclusion of the trial, Judge Kinard made,
6 in response to the motion to set aside the
7 verdict, he made the comment that although he
8 thought it was closer to manslaughter than
9 murder that he couldn't -- and I am
10 paraphrasing but I will give you the exact. It
11 is on Page 488, that he could not interject his
12 view for that of the jury. Subsequently, when
13 sentencing was held, he repeated that sentiment
14 that it was closer to manslaughter than murder.
15 That is on Page 551.

16 There are quite a few issues in this case,
17 Your Honor. We have two defense attorneys to
18 deal with. I anticipate this hearing probably
19 lasting three hours.

20 **THE COURT:** Okay.

21 **MS. SHURLING:** Possibly longer. At this
22 juncture, it is 25 to 1:00. I do not believe
23 that I will be able to get anywhere close to
24 finished with lead counsel, Mr. Riley's
25 testimony if we began it now with the idea of

1 breaking for lunch at 1:00.

2 **THE COURT:** What I would do is hear any
3 other preliminary matters that either of you
4 need to handle at this point.

5 **MS. SHURLING:** One last statement and then
6 I will be through.

7 **THE COURT:** Yes.

8 **MS. SHURLING:** Your Honor, my client
9 mentioned to me before the hearing that he
10 wanted me to ask for a continuance. My initial
11 reaction was that I am ready and very well
12 prepared and ready to go forward. But he has
13 expressed to me that he doesn't feel ready. He
14 doesn't feel secure. He is afraid to go
15 forward today.

16 I do want to take responsibility to the
17 extent that the gentleman already feels like he
18 has been let down by the system, now that he is
19 convicted of murder and a 30-year sentence. It
20 has been my intent to get back to his
21 correctional institution to visit with him one
22 more time before this hearing. My court
23 schedule was just such that I did not make it
24 out there. In candor with the court, I have
25 fully developed all of these issues. I am

1 prepared for them. But I did tell him I would
2 come back and see him. My schedule prohibited
3 my doing so.

4 I would be being less than fair if I didn't
5 make Your Honor aware that he feels he needs a
6 continuance. Your Honor has known me a long
7 time. I can represent to the court that I am
8 fully prepared on each of the 24 issues that I
9 have prepared.

10 I have been to the Public Defender's office
11 in Camden twice. On the last occasion, I met
12 with Mr. Riley. And much to his pain, I am
13 sure I went over all of the allegations with
14 him except the last one that was raised in the
15 most recent amended application. I think I
16 even told him I was going to raise that. I've
17 been through the entire Public Defender's file.

18 I have had an opportunity to meet briefly
19 with Jason when I went to the Public Defender's
20 office. There were a few questions I had not
21 had an opportunity to cover with him. But this
22 morning, I had the opportunity to meet with him
23 in the hall and cover a couple of matters that
24 were -- things that I did not have adequate
25 opportunity to discuss with him.

1 I am fully prepared. I am ready to go
2 forward. What I would like Your Honor to
3 question him on the record -- him being my
4 client, the applicant, of course -- and ensure
5 that he feels comfortable going forward at this
6 time. If he doesn't, I would ask the court to
7 sincerely entertain his motion for continuance.

8 **THE COURT:** Okay.

9 **MS. HARRIGAN:** The State would like to be
10 heard on that motion for continuance. This is
11 the second time this has been here on the
12 roster. The last time we were here in front of
13 Judge Barber, the evening before, I say
14 evening, I think it was around 5 p.m., the
15 State was served with Ms. Shurling's amended
16 application of 23 allegations that had not been
17 pled before. The State moved for continuance,
18 which Ms. Shurling consented to, because the
19 State felt ambushed. We had never seen these
20 allegations before. Both trial counsel had not
21 had an opportunity to discuss it with me.

22 This case has already been prepared once
23 and continued. Although the state moved for
24 continuance, I did not receive allegations
25 until Monday at 5:00 and it was set for 9:30 on

1 Tuesday morning.

2 The State is prepared to go forward now. I
3 spent hours preparing this case to go forward,
4 rereading the transcript twice and often
5 discussing with Mr. Kirincich and Mr. Riley.
6 The State would vigorously oppose any sort of
7 continuance at this point.

8 **THE COURT:** Very well.

9 **MS. SHURLING:** Your Honor, pardon me. I
10 would like to just be clear for the record. I
11 am not trying to argue counter to my client. I
12 am not desirous of having a continuance either.
13 I am prepared. But as an advocate, I do have
14 to give some weight to his wishes. That is why
15 I ask.

16 **THE COURT:** Let me ask this question. If
17 I examine your client, do you believe it is
18 appropriate that that be done outside the
19 presence of every one, of course other than
20 security, the court reporter and my law clerk?
21 It could be attorney-client matters that could
22 arise?

23 **MS. SHURLING:** A moment's indulgence, Your
24 Honor.

25 **THE COURT:** Sure.

1 **(WHEREUPON, Mr. Shurling confers with the**
2 **applicant.)**

3 **MS. SHURLING:** Your Honor, my client says
4 it doesn't bother him for the --

5 **THE COURT:** Okay. All right. All right.

6 Mr. McKnight -- you are Mr. McKnight,
7 right? Mr. McKnight, first of all, do you
8 solemnly swear from the testimony that you will
9 give me would be the truth and the whole truth?

10 **THE DEFENDANT:** Your Honor, respectfully I
11 understand your question. You are the
12 Honorable Diane S. Goodstein, is that correct?
13 Did I pronounce that right?

14 **THE COURT:** You did a great job, yes.

15 **THE DEFENDANT:** Your court reporter's name
16 is --

17 **THE COURT:** You want that information? I
18 will be happy to provide that to you in
19 writing. That way you will have it, is that
20 fair enough?

21 **THE DEFENDANT:** Fair enough. There is one
22 other thing with respect to the court.

23 **THE COURT:** Sure.

24 **THE DEFENDANT:** I have -- Your Honor, I
25 have a pending motion for discovery.

1 **THE COURT:** Hold on. Hold on a second. I
2 need to be able to know that what you are
3 telling me, you are telling me under oath so
4 that I can rely on the truthfulness of it.
5 That is the reason that I asked you that first
6 question. So I will ask it again if I may. Do
7 you solemnly swear from the testimony that you
8 will give, the statements that you will give,
9 the information that you will give me will be
10 the truth and the whole truth?

11 **THE DEFENDANT:** Correct. Affirm.

12 **THE COURT:** Perfect. Now you asked for
13 discovery. You are concerned that you have not
14 received discovery?

15 **THE DEFENDANT:** That is correct. I have
16 not received discovery. There was no mention
17 of discovery.

18 **THE COURT:** Okay. Okay.

19 **THE DEFENDANT:** But there are several
20 letters that I wrote to Ms. Shurling about
21 discovery. I am not trying to discredit or get
22 rid of Ms. Shurling by no means.

23 **THE COURT:** Yes.

24 **THE DEFENDANT:** I am not ready to move
25 forward, Your Honor.

1 **THE COURT:** Okay.

2 **THE DEFENDANT:** I'm not comfortable.

3 **THE COURT:** I understand. Just so I am
4 clear, there are some issues regarding
5 discovery that you are concerned have not been
6 resolved at this moment, correct?

7 **THE DEFENDANT:** Correct.

8 **THE COURT:** I got it. Any other issues
9 that concern you other than that?

10 **THE DEFENDANT:** Yes. There was a letter I
11 sent to Ms. Shurling on July 24th. There is an
12 issue in there that I feel has risen to the
13 level of constitutional --

14 **THE COURT:** I understand. I'm with you.
15 I got it. I got it. Let me tell you what I'm
16 going to do. Here is what I am going to do. I
17 want you to understand exactly, Mr. McKnight.
18 What I'm going to do is I'm going to ask --
19 other than my security folks, I'm going to ask
20 to have the courtroom -- I want to have a
21 conversation with you about that. I want to
22 preserve your attorney-client privilege. Okay?

23 **THE DEFENDANT:** Okay.

24 **THE COURT:** Look at all these people. Say
25 goodbye.

1 **THE DEFENDANT:** And when you say --

2 **THE COURT:** Hold on. I've got some
3 reasons for doing this. I will explain it to
4 you in just a moment.

5 **(WHEREUPON,** the courtroom is cleared at
6 approximately 12:43 p.m.)

7 **THE COURT:** Security stays. Security
8 stays. Now, here is what we are going to do,
9 Mr. McKnight. I want everyone to please
10 identify themselves for the record. This is my
11 law clerk, Angela Daniels. We have our court
12 reporter who is going to identify herself.

13 **COURT REPORTER:** My name is MaryAnn Nevers.

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

15 **THE DEPUTY:** Deputy McLeod.

16 **THE COURT:** Thank you.

17 **THE BAILIFF:** Bailiff Napoleon Tolbert.

18 **THE COURT:** Yes.

19 **SPEAKER:** Officer Paulette Harvin.

20 **THE COURT:** And of course, Ms. Shurling is
21 present. Now, everyone is under an obligation
22 to not discuss the matter that will arise
23 during this hearing. As of this portion of the
24 hearing, it will be sealed which can be
25 unsealed if it is needed, uh, in the future for

1 whatever reason that it would be unsealed
2 pursuant to a court order.

3 (WHEREUPON, a portion of the record is sealed by
4 the Court.)

5 **THE COURT:** Does the Attorney General have
6 any other preliminary matters?

7 **MS. HARRIGAN:** No, Your Honor.

8 **THE COURT:** Very well. We have made it
9 into the substantiation of the lunch hour.
10 We're going to start at 2:30. I will see
11 everybody at 2:30. Have a good lunch.

12 **MS. HARRIGAN:** Thank you, Your Honor.

13 **THE COURT:** Absolutely. See you then.

14 **THE DEFENDANT:** Your Honor, will I still
15 have an hour with Ms. Shurling?

16 **THE COURT:** I think she is ready and I
17 actually think you are ready as well. She's
18 got to get some lunch and so do you. We will
19 be back and we will be ready to go at 2:30. I
20 understand your concern, but I think you are
21 fine.

22 **THE DEFENDANT:** You said you would think
23 about it.

24 **THE COURT:** No, sir. I think we're going
25 to start at 2:30. I am satisfied that -- I am

1 satisfied to having heard you and having heard
2 from Ms. Shurling that you all are ready. I
3 will see everybody at 2:30. Have a good lunch.

4 (WHEREUPON, a lunch recess is taken.)

5 MS. SHURLING: Thank you, Your Honor. We
6 were briefly discussing how we might could
7 reach an agreement to avoid duplicate
8 presentation of testimony.

9 THE COURT: Okay.

10 MS. SHURLING: And we have done so.

11 THE COURT: Okay. Great. Very well. All
12 right. Now, Ms. Shurling, your client was
13 attempting to address the court. You want to
14 just tell what his issue was for me please?

15 MS. SHURLING: Pardon?

16 THE COURT: Your client was trying to get
17 my attention. I just don't know if you need to
18 address something.

19 MS. SHURLING: I will find out what that
20 was.

21 THE COURT: All right. Very well.

22 (WHEREUPON, Ms. Shurling confers with the
23 applicant.)

24 MS. SHURLING: Stand up.

25 Your Honor, Mr. McKnight -- Pardon me.

1 Mr. McKnight said that the thing that he wanted
2 to discuss with you was something he wanted the
3 record to reflect. That is as much information
4 as he has given me.

5 THE COURT: Okay. All right. Well, in that
6 you are representing him, if you would like the
7 record to reflect something, he needs to tell
8 you. Okay. Very well. Thank you.

9 MS. SHURLING: Speak to the judge.

10 THE COURT: Oh, no, no. No, no, no.

11 MS. SHURLING: Oh, I'm sorry. I
12 apologize.

13 THE COURT: You represent him. If he
14 wishes to make some representation and wants
15 something on the record, he can do that through
16 you, Ms. Shurling.

17 MS. SHURLING: Yes, ma'am.

18 (WHEREUPON, Ms. Shurling confers with the
19 applicant.)

20 MS. SHURLING: Your Honor, my client
21 advises me, Number 1, over the break, he was
22 not provided anything to eat. He has not eaten
23 anything. He is hungry. That is a problem for
24 him trying to be attentive in this proceeding
25 apparently.

1 He also continues to argue that he is not
2 comfortable with proceeding with this matter at
3 this time. I have tried to explain to him that
4 Your Honor has already graciously addressed
5 that issue at great length before the lunch
6 break but that is what he continues to raise
7 and is asserting that -- he demands that I
8 bring that to your attention.

9 **THE COURT:** Thank you very much. Was he
10 not given lunch?

11 **THE DEPUTY:** Your Honor?

12 **THE COURT:** Yes.

13 **THE DEPUTY:** We went to lunch ourselves.
14 At 2:20, we came back up hoping to feed him as
15 well but we were advised that you were waiting
16 on us. So we bought him straight upstairs at
17 2:20. As of 2:20, 2:30, we were in here
18 waiting. Therefore, we did not give him his
19 food.

20 **THE COURT:** I got you. Y'all have a
21 sandwich or something for him? I got you.
22 Normally, I don't let people -- don't like them
23 to eat in the courtroom. I understand his
24 concern. If you don't mind, bring him a
25 sandwich. We will continue to proceed. That

1 would be great. Thank you very much. I
2 appreciate that. We have all been on the tight
3 schedule. Okay.

4 Yes, ma'am.

5 **MS. HARRIGAN:** I will let Ms. Shurling
6 call her witnesses.

7 **THE COURT:** You are okay? In other words,
8 you are ready?

9 **MS. HARRIGAN:** Ready to go, Your Honor.

10 **THE COURT:** And you are ready, Ms.
11 Shurling?

12 **MS. SHURLING:** Yes, ma'am. He was in the
13 middle of telling me something. May I let him
14 finish?

15 **THE COURT:** Yes, indeed.

16 (WHEREUPON, Ms. Shurling confers with the
17 applicant.)

18 **MS. SHURLING:** Your Honor?

19 **THE COURT:** Yes.

20 **MS. SHURLING:** It is my client's position
21 that he put two issues before the court. One
22 was his motion for continuance. The other was
23 his ongoing displeasure with the fact that he
24 had not been given access to adequate discovery
25 opportunities in this case. It is his position

1 that Your Honor only ruled on the former and
2 not the latter and that he should not be forced
3 to go forward without Your Honor having
4 properly ruled concerning the discovery.

5 He has adamantly informed me that he is not
6 prepared to go forward and he doesn't want to
7 go forward. I have tried as professionally and
8 politely as I know how to explain to him that
9 Your Honor has ruled on that issue and that I
10 am prepared to go forward. It is 10 until
11 3:00. It is time to go forward.

12 **THE COURT:** Just so Mr. McKnight is
13 satisfied, I denied the motion for continuance
14 and affirmatively find that counsel is ready to
15 proceed. Counsel on both sides are most
16 competent. I am ready to proceed. If you
17 would, please call your first witness.

18 **MS. SHURLING:** Thank you, Your Honor.

19 **THE COURT:** Uh-huh.

20 **MS. SHURLING:** Lastly, I have asked for
21 Mr. McKnight to refrain from trying to talk to
22 me and interrupt me while I am in the process
23 of examining witnesses ---

24 **THE COURT:** Yes.

25 **MS. SHURLING:** --- and while I am trying

1 to listen to the cross-examination by counsel
2 for the respondent. I have explained to him
3 that it is important that I be able to listen
4 to those answers in order to be able to put up
5 any reply or redirect that will be necessary on
6 my part.

7 I have given him a legal pad and a pen. I
8 gave him one and asked that he write anything
9 that he needs to bring to my attention and just
10 put it here in red so it will catch my
11 attention. That is the way he needs to
12 communicate with me. For that reason, I have
13 told him that I would ask if Your Honor would
14 allow him to have one hand uncuffed so he can
15 write.

16 **THE COURT:** No, he may not.

17 **MS. SHURLING:** Thank you.

18 **THE COURT:** What I will certainly do is
19 before you conclude your direct and before you
20 began your cross, you may have a short
21 reasonable consultation with him if he needs to
22 add anything to what you have already done.
23 We're not going to go into a very long
24 conversation, Ms. Shurling. And you know how to
25 cross-examine. You know how to do direct.

1 While there may be things that may have slipped
2 your mind which it might be of assistance to
3 you, I'm not going to wait while Mr. McKnight
4 schools you on how to proceed.

5 **MS. SHURLING:** Yes, ma'am. As Your Honor
6 is probably familiar ad nauseam, it is my --
7 stylistically, it is my custom at the end of
8 each segment to ask the court to grant me a
9 moment's indulgence while I ask the client if
10 there is any additional questions they wish to
11 ask.

12 Your Honor, at this time, I would call
13 Jason Kirincich. I am butchering your last
14 name, Jason. I apologize. We will get the
15 correct pronunciation when we get you on the
16 stand.

17 **JASON KIRINCICH**
18 having first been duly sworn, testifies as follows:

19 **THE COURT:** Thank you. If you would,
20 please be seated. When you are seated, state
21 your full name for the record.

22 **THE WITNESS:** Jason Kirincich. That's
23 K-I-R-I-N-C-I-C-H.

24 **THE COURT:** Yes, ma'am. Your witness.

25 **MS. SHURLING:** Thank you.

DIRECT EXAMINATION

BY MS. SHURLING:

Q If you don't mind, I am going to refer to you as Jason.

A That's fine.

Q I'm not being disrespectful. I am just for some reason getting tongue-tied with your last name.

A Understandable.

Q Do you recall taking part in the defense of Mr. McKnight on his murder charge?

A I do.

Q Were you lead counsel or second chair?

A Second.

Q The trial in this matter commenced on March 16th then went over to the 19th in 2009. Can you give us -- if you know the exact time, that's great. If not, an estimation of how long you were involved in the defense of this case before you went to trial?

A I was asked probably the week before to help with the trial. I met Mr. McKnight, I believe it was, Friday afternoon before the trial started.

Q And did you have an opportunity to review the discovery materials in this case?

A I never received a copy of the discovery for myself personally. I am sure at some point I

1 looked through it. It would not have been an in-
2 depth examination of discovery.

3 Q Earlier, before lunch, you heard me -- I
4 believe you were in the courtroom and heard me
5 summarize for Her Honor the basic facts surrounding
6 the incident which led to the charge of murder
7 against Mr. McKnight. Were you present when I
8 summarized those facts?

9 A I was, I believe.

10 Q All right. Did you find that factual
11 summary to be basically accurate according to your
12 recollection of the events surrounding this charge?

13 A Yes.

14 Q Some time prior to this trial or at the
15 outset of this trial, did you have occasion to bring
16 to the presiding judge, Judge Kinard's attention the
17 question of whether or not a jury instruction on the
18 inference of malice from the use of a deadly weapon
19 would be appropriate on the facts of this case?

20 A Yes.

21 Q Can you tell us under what circumstances
22 you had that discussion with Judge Kinard and who was
23 present?

24 A It was a bench conference where we had been
25 discussing some jury charges. Looking back through

1 the transcript, I make mention that our prior
2 conversation was not on the record. I bring up
3 another case. During the bench conference, it was
4 Judge Kinard, John Meadors who was the deputy
5 solicitor at the time, and myself.

6 Q And Mr. Riley?

7 A No, he was not there. Mr. Moak was not up
8 there. He was the assistant solicitor helping. Mr.
9 Riley was not there.

10 Q Okay.

11 A And if I can, I think part of the reason
12 for that is it looks like when I looked in my notes I
13 was asked to gather jury instructions.

14 Q Okay. You heard me say earlier that this
15 event, the incident in which Mr. Williams was killed
16 took place September 23, 2005.

17 A Correct.

18 Q That was almost four years before this jury
19 trial correct?

20 A Right.

21 Q Now, at the bench conference -- I will
22 rephrase. At the bench conference on jury
23 instructions that would be appropriate in this case,
24 did you voice your opinion that a charge on the
25 inference of malice from the use of a deadly weapon

1 would not be appropriate on the facts of this case?

2 **A** I did.

3 **Q** Was there any discussion about your request
4 with regard to that charge at the bench?

5 **A** Yeah. Meadors objected there as much as he
6 could. He began talking about a case that he had
7 here in Columbia that involved in a shooting outside
8 of Cornell Arms. The defendant was Jason Dickey.

9 **Q** The Dickey case? State v. Dickey?

10 **A** Yes. State v. Dickey is what it is now.
11 At that point, he and Judge Kinard both told me that
12 was the law of the land and malice could be inferred
13 from the use of a deadly weapon even if self-defense
14 have been raised as an issue.

15 **Q** Okay. But just so that we are clear, you
16 recognize that there was a problem with giving the
17 jury instruction on the facts that gave rise to the
18 potential for a reduced charge or even perhaps the
19 finding of self-defense?

20 **A** Right. In this case. The knife was -- I
21 don't think it was in front of the jury. But the
22 knife had been taken and just sliced a piece of paper
23 in half while holding it. It was a dangerous looking
24 knife. The way that it was shown, I think him saying
25 malice could be inferred was going to be detrimental

1 to Mr. McKnight.

2 Q Are you familiar with the Belcher decision
3 that came out in December following this trial?

4 A Yes. I have read it that fall when it came
5 out.

6 Q Would it be fair to say that the analysis
7 of the Supreme Court in Belcher concerning the
8 reasons why such an instruction should not be given
9 track the objections you raised at the bench
10 conference?

11 A Yes. The Solicitor's office brought it to
12 my attention. They felt that McKnight's case was
13 going to come back. Mr. Riley and I exchanged a
14 couple of emails about it as well that we thought
15 this issue was going to be covered.

16 Q I don't want to get too far ahead of
17 ourselves. At the time of this trial, how long had
18 you been practicing law?

19 A I joined the Public Defender's office under
20 contract in the winter of 2007, December 2007.

21 Q And had you been involved in the trial in
22 any other cases?

23 A Uh, yeah, I had cases of my own that I
24 dealt with. I helped another public defender that
25 was there try a case. I have been involved in some

1 trials.

2 Q Are you aware of what has been referred to
3 as the contemporaneous objection rule in South
4 Carolina?

5 A Yes.

6 Q Tell us briefly what that rule means.

7 A If there is an objectionable question that
8 is asked, before the answer that is given, counsel is
9 required to object to it than. We don't reserve
10 objections until the end of testimony or until later
11 when we discover it. You have to object the end and
12 obtain a ruling from the judge.

13 Q With regard to issue preservation for an
14 appeal, what is your understanding of what must be
15 done in order to preserve an issue for appellate
16 review?

17 A It has got to be objected to. You have got
18 to obtain that ruling by the judge. If there is no
19 matter of law objected to and ruled by the law, there
20 is really nothing for the Court of Appeals to go back
21 and review or overturn.

22 Q When you say objected to and ruled on by
23 the judge, do bench conferences count?

24 A No. It is not on the record. You can see
25 several times in the trial we asked to approach. We

1 asked to approach whether it is state or defense,
2 some things are resolved. Nothing is ever put on the
3 record as far as what anybody says.

4 Q Back in March 2009, even as a fairly
5 fledgling trial lawyer, you were already aware, were
6 you not, that if an issue was not raised and ruled
7 upon on the record, it would not be available for
8 appellate review?

9 A Yes.

10 Q Any particular reason why you did not put
11 your objection and your motion and your arguments
12 concerning that jury charge on the record after the
13 bench conference?

14 A No. The only thing that I think, upon
15 reflection, is being up there with Judge Kinard and
16 John Meadors when they said that is the way the law
17 was, I just kind of let it go there and didn't
18 attempt to put it on later. I did ask for
19 clarification on Fuller, but not on self-defense
20 versus the weapon and implied malice.

21 Q Let's turn back for a little minute. I am
22 always reluctant to do things by case names. But
23 since you referred to Fuller, basically, what is the
24 premise that you were reciting Fuller for?

25 A I haven't read Fuller in a long time. I

1 read the transcript again. Read through it briefly
2 this weekend. I wanted some kind of jury instruction
3 that went along with the facts of this particular
4 case, Mr. McKnight's case to be charged as part of
5 the self-defense instruction. At the time, I think
6 when I read Fuller, that is what Fuller allowed. The
7 judge could actually charge the case and an example
8 for a self-defense instruction.

9 Q Any idea who the appellate lawyer in Fuller
10 was?

11 A I have no idea.

12 Q Okay. Thank you. Well, let's talk about
13 that. Let's look at the jury instruction on self-
14 defense for just a moment.

15 A Would you like for me to refer to my
16 transcript as well when you are asking?

17 Q Oh, okay.

18 A I've got it here.

19 Q You have got it. Okay. Thank you. Look
20 at the portion of the jury charge on self-defense
21 found on Page 462 approximately line 7 through 9.

22 A I am there.

23 Q I'm also going to ask you to take a look at
24 the motion for a new trial or directed verdict that
25 was filed after the conviction but before sentencing

1 in this case. Did you participate in the preparation
2 of this document?

3 **A** I don't think I've ever seen that. I could
4 be wrong.

5 **Q** Okay.

6 **MS. SHURLING:** Your Honor, I would ask
7 whether a copy of this was made a part --

8 **MS. HARRIGAN:** It was not made a part of
9 the record. It was not submitted until the last
10 hearing. It is been pre-marked as Defendant's
11 Exhibit 1 for identification. I intend to enter
12 it in my case.

13 **MS. SHURLING:** Thank you. That is all I
14 needed to know.

15 If I may approach.

16 **THE COURT:** You may.

17 **BY MS. SHURLING:**

18 **Q** At the bottom of the page beginning with
19 the person assaulted, could you read that portion of
20 this motion that is citing State vs. Campbell.

21 **THE COURT:** Tell me where you are again.

22 **MS. SHURLING:** I apologize, Your Honor. We
23 are on the bottom of Page 3 of the motion for
24 new trial or directed verdict.

25 **MS. HARRIGAN:** Your Honor, that is not part

1 of your packet. I have an extra copy. If I
2 could approach?

3 **MS. SHURLING:** For which I am grateful,
4 Your Honor, I didn't have an extra copy.

5 **THE WITNESS:** Your Honor, if yours has the
6 same numbers, it is Page 3 of 5 at the bottom.

7 **THE COURT:** Okay.

8 **THE WITNESS:** A person assaulted being
9 without fault in bringing on the difficulty has
10 the right to use such force as is necessary for
11 his complete self protection. He is not limited
12 to use the same force and no more than that with
13 which he is threatened -- was threatened.
14 Excuse me.

15 **BY MS. SHURLING:**

16 **Q** That is citing State vs. Campbell?

17 **A** Yes, State v. Campbell.

18 **Q** Okay.

19 **A** 111 S.C. 112.

20 **Q** Thank you.

21 **A** Yes, ma'am.

22 **Q** In requesting an additional self-defense
23 instruction under the authority of Fuller, did you
24 consider asking for a jury charge that would make
25 more clear to the jury that an individual defending

1 themselves is not limited to the amount of force or
2 even the mentality brandished toward them in
3 defending themselves?

4 **A** No, I didn't ask for anything else. I
5 believe what I did to get most of these jury charges
6 at the time was just go to Judge Ralph King
7 Anderson's request for charge in criminal procedure
8 to pull from there. Campbell could have been in
9 there or something similar to Campbell. I don't
10 remember doing a whole lot more on it.

11 **MS. SHURLING:** I apologize, Your Honor. I
12 don't have a page cite.

13 **BY MS. SHURLING:**

14 **Q** Do you recall the state's argument was
15 essentially that Mr. McKnight bought a knife to a
16 fistfight?

17 **A** Right. I want to almost say Judge Kinard
18 was the one that said that initially to Mr. McKnight
19 when he was talking to him outside the presence of
20 the jury. I remember it was brought up in closing by
21 Mr. Moak, those exact words.

22 **Q** There was actual testimony though, wasn't
23 there, that the victim had struck Mr. McKnight in the
24 head with a beer bottle?

25 **A** Yeah, there was a lot of conflicting

1 testimony even from the state's witnesses about how
2 Mr. McKnight was struck. Some people said he threw
3 the bottle. Others said he hit him directly with the
4 bottle. The state's witnesses said if the bottle was
5 not thrown, he was struck with it from Mr. Williams
6 hand.

7 Q In fact, evidence was introduced at trial
8 that illustrated the bump on his head from being
9 struck with the beer bottle?

10 A Right. When Mr. McKnight was taken to the
11 hospital, whoever the officer was that took pictures,
12 if it was not Hagan, it was Lee Boan, testified that
13 he had a knot on his head or a cut.

14 Q He also had a cut of some description on
15 his chest, isn't that true?

16 A I remembered it being lower down. It could
17 have been on his chest. Somewhere on his torso.

18 Q There is a description in the record of
19 there being a corresponding cut in the shirt he was
20 wearing?

21 A Right.

22 Q That corresponded with the cut on his
23 torso?

24 A That's correct.

25 Q Okay. Just so that I am clear here because

1 I am getting a little confused. On the Fuller issue,
2 what specifically were you wanting the judge to
3 charge?

4 A Other than to say at this point I wanted
5 the judge, instead of given a legal definition, I
6 wanted him to tie the facts of Mr. McKnight's case
7 back in to say that Mr. McKnight could have acted in
8 self-defense based on these factors and had no duty
9 to retreat. He had to fear for his life or bodily
10 harm.

11 Q Now, you have been practicing quite a few
12 more years since this trial. Have you reviewed the
13 self-defense instruction that was given in this case
14 in preparation for this hearing?

15 A I read everything more fully back in May
16 when we were first scheduled. I just looked through
17 it briefly now.

18 Q Have you seen in other cases jury
19 instructions on self-defense that say something to
20 the effect that once the defendant raises self-
21 defense, the burden shifts to the state to disprove
22 it?

23 A Right. It is not an affirmative defense.

24 Q Judge Kinard did not couch the self-defense
25 charge in this case in those terms, did he?

1 **A** I can't 100 percent say. I don't disagree
2 with you, but...

3 **Q** Well, let's go back to Page 462 ---

4 **A** Sure.

5 **Q** --- and take a look at the first paragraph.
6 Lines 1 through 6.

7 **A** Okay.

8 **Q** Judge Kinard says if there is evidence of
9 self-defense in the case, the state has to prove
10 beyond a reasonable doubt the defendant did not act
11 in self-defense. Everybody is authorized to defend
12 himself or herself from death or serious bodily
13 injury. Do you see that?

14 **A** Yes.

15 **Q** Did you consider in your request for charge
16 for self-defense raising the question of or rather
17 asking for a jury instruction that would make certain
18 the jury understood that they could look to the
19 evidence in its totality, that being including
20 evidence introduced by the state or evidence of self-
21 defense that the evidence of self-defense did not
22 have to come from the defendant and his witnesses if
23 they could look to any evidence introduced at trial
24 including evidence from the prosecution side for
25 evidence of self-defense? Did you consider asking

1 for such a jury instruction?

2 **A** I don't remember specifically asking.
3 There were some written instructions that were
4 submitted. I don't know if they were ever made part
5 of the court record or what happened to those.

6 **Q** Okay. I want to go back to the Belcher
7 issues -- issue for a minute. Then I'm going to let
8 you go. Belcher came out, as we said, just a few
9 months after this trial. I believe you said you had
10 some communication with both the Solicitor's office
11 and Mr. Riley ---

12 **A** That is correct.

13 **Q** --- about the issue. Can you tell us again
14 once Belcher came out what, if anything, was done in
15 relationship to this case concerning Belcher?

16 **A** Concerning this case on my behalf, nothing.
17 I did have a discussion with Ron Moak. We basically
18 read Belcher. Right around the same time, we talked
19 about it. I don't know who started it, if it started
20 from me or if it started from Mr. Moak. And we both
21 agree that on this case, Tommy McKnight's case was a
22 perfect Belcher issue. It wasn't retroactive. The
23 case on appeal would be remanded to a lower court.
24 We really thought at the time that this case was
25 coming back.

1 Q This case was, in fact, on direct appeal at
2 the time the Belcher case was decided, wasn't it?

3 A That's right.

4 Q With regard to the balance of the trial,
5 you were second chair to Mr. Riley?

6 A Correct.

7 Q Did you examine any witnesses?

8 A Yeah, I was asked to handle some of law
9 enforcement witnesses, Camden Police Department. Any
10 experts or lay witnesses, the actual witnesses that
11 were there were handled by Mr. Riley. There was one
12 other issue that Mr. McKnight wanted explored that I
13 ended up handling. That was the two witnesses that
14 were called that were not witnesses to anything --
15 two witnesses called by the defense being Eric
16 Tisdale and Dina Horton. That had to do with Mr.
17 McKnight being a victim in a prior incident.

18 Q Okay. The witnesses that were called by
19 the defense that establish. That Mr. McKnight had, in
20 fact, been the victim in not one but two previous
21 violent assaults was developed and presented by you?

22 A That is right. When I met with Mr.
23 McKnight on the Friday beforehand, he asked me to
24 look into this. Then we met again Monday afternoon
25 after the jury was selected. At that point, I went

1 to the clerk's vault and pulled some old files at his
2 request.

3 Q I understand that it is your position that
4 the requirements for the defense of self-defense were
5 candidly met in this case. I understand that. But
6 there was also a question of whether or not the
7 homicide in this case might have been reduced to
8 voluntary manslaughter based on sudden heat of
9 passion upon sufficient legal provocation, correct?

10 A Correct.

11 Q Under the Belcher decision, that would also
12 be a circumstance that would make it inappropriate to
13 give a jury instruction on the inference of malice
14 from the use of a deadly weapon, correct?

15 A That's correct.

16 Q There was evidence that the deceased and
17 the applicant had begun to argue over a comment that
18 your client had made about a dog, is that correct?

19 A Yeah. We could never figure out exactly
20 what the comment was. It did not seem inflammatory
21 in any way that it came out.

22 Q There was also evidence that the deceased
23 was under the influence, I believe?

24 A Yes, his blood alcohol level was somewhere
25 between .14 and .16.

1 **Q** Were there also other substances found on
2 or near the body of the deceased?

3 **A** At some point, -- I don't know if it was
4 found in his pocket -- there was a tube that had
5 actual crack cocaine or crack cocaine residue in it.
6 I believe Travis Johnson, his friend testified that
7 he tried to remove items from his pocket. They
8 didn't want law enforcement to discover it.

9 **MS. SHURLING:** Thank you, Your Honor, at
10 this time I would pass up to the court -- I'm
11 sure you are very familiar with the Belcher
12 decision -- but for your convenience, a copy of
13 the Belcher decision, a copy of Teague v. Lane
14 -- which we have already many times. But for
15 convenience, we are refreshing your recollection
16 -- and a copy of Brewer vs. Quarterman.

17 Your Honor, there is a flag. I will
18 address this in summation. The Brewer is the
19 case where the officer remarked that counsel is
20 not required to have a crystal ball. It
21 originates from the Brewer decision.

22 **THE WITNESS:** Ms. Shurling, you dropped a
23 tag. I don't know if that was off the paper.

24 **MS. SHURLING:** Thank you very much. I have
25 no further questions. Thank you, Jason.

1 **THE WITNESS:** Yes, ma'am.

2 **THE COURT:** Cross-examination?

3 **MS. HARRIGAN:** Based on my discussions with
4 Ms. Shurling, I will reserve any cross-
5 examination until I get ready to call Mr.
6 Kirincich in my case-in-chief.

7 **THE COURT:** Okay. I think what that means
8 is you may come down but you cannot leave.

9 **THE WITNESS:** Yes, ma'am.

10 **THE COURT:** All right. Call your next
11 witness.

12 **MS. SHURLING:** Your Honor, I would call Mr.
13 Riley.

14 **THE COURT:** Okay.

15 **CORNELIUS RILEY**

16 having first been duly sworn, testifies as follows:

17 **THE COURT:** Thank you. Would you please
18 be seated. And when you are situated, state your
19 name for our record.

20 **THE WITNESS:** Cornelius J. Riley. I go by
21 Neil.

22 **THE COURT:** Your witness.

23 **MS. SHURLING:** Thank you. Your Honor, for
24 the record, I am not trying to be rude by
25 sneaking this close to the witness. I have some

1 hearing loss in one ear and I've got a little
2 bit of some congestion in my ear that is making
3 it impossible for me to hear as clearly as
4 normal. So I'm getting a little closer. All
5 right. Thank you.

6 **DIRECT EXAMINATION**

7 **BY MS. SHURLING:**

8 **Q** Mr. Riley?

9 **A** Yes, ma'am.

10 **Q** You were kind enough to give me an
11 opportunity to come to your office and review your
12 file. Isn't that true?

13 **A** Correct.

14 **Q** And just for the record, when I came over
15 and looked through your file and was given access to
16 your complete file ---

17 **A** Yes, ma'am.

18 **Q** --- were there any file materials that were
19 not included in the materials that I was not
20 permitted to see to your knowledge?

21 **A** Just attorney work product, notes.

22 **Q** Okay. But other than that, everything was
23 still in the file?

24 **A** Yes, ma'am.

25 **Q** Okay. In fact, after I filed the first

1 amended application for postconviction relief, I
2 visited your office for a second time and went over
3 the allegations, the 23 allegations, specific
4 allegation that are raised in that application dated
5 June 3rd, correct?

6 **A** Yes, ma'am.

7 **Q** Okay. Let's go over those. There is no
8 place to start like the beginning. Were you aware
9 that your associate, Jason, was raising an issue with
10 Judge Kinard concerning the propriety of giving a
11 jury instruction on the inference of malice from the
12 use of a deadly weapon in this case?

13 **A** I don't have any specific recollection of
14 that but I feel certain we probably discussed it
15 either before or after. I can't specifically say
16 that I recall any such discussion. I just feel
17 certain there was one.

18 **Q** Would there be any reason, Mr. Riley, why
19 you did not put your objection on behalf of the
20 applicant to that charge being given on the record
21 during this trial?

22 **A** No, other than it wasn't looming on my
23 radar screen at that point. I think that when the
24 bench conference that Mr. Kirincich referred to took
25 place, I probably was conferring with Mr. McKnight

1 about something.

2 Q All right. Let's take a look at various
3 portions of the closing argument made by the
4 prosecution in this case.

5 A Yes, ma'am.

6 Q Let's start out with trial transcript Page
7 338, line 1 and 2.

8 A Okay.

9 Q The --

10 A You want me to read it?

11 Q The defendant was ridiculing the victim's
12 dog. That actually started the confrontation. Do
13 you see that?

14 A Uh-huh.

15 Q Was there any evidence introduced at trial
16 that your client was ridiculing the victim's dog?

17 A Take a look, if you would, at page 157 of
18 the transcript. Travis Johnson's testimony. Uh, --

19 Q What kind of dog is that? Is that a pit
20 mixed with a pit?

21 A Right. Also lines 11 and 12. To me, it was
22 like he came down there because it was like he was
23 trying to make -- start up something. Let me show you
24 also to Page 174 of the transcript, lines 13 to 15.
25 The testimony of Jasmine Floyd. He said something

1 about the dog. He was like if you know what kind of
2 dog this is, why would you ask.

3 Q Uh-huh.

4 A Page 181, line 7. Arguing about a dog.
5 18 to 21, this is Jasmine Floyd's testimony still.
6 What I heard was he asked what kind of dog it was.
7 He was like a pit. Isaac was like if you know what
8 kind of dog it was, why would you ask. Now, I think
9 that you might legitimately criticize Mr. Meador's
10 choice of the word ridicule. But it does sound to
11 me, even the bare words on the printed page found
12 sarcastic to me.

13 Q Well, let me backtrack on that for just a
14 moment.

15 A That was Mr. Moak. I apologize. It wasn't
16 Mr. Meadors.

17 Q You were aware the elements of self-defense
18 were going to be critical issues at this trial?

19 A Of course.

20 Q And whether or not your client was at fault
21 in bringing about the difficulty was probably the
22 threshold question that the jury would be
23 considering.

24 A I understand, or I did understand.

25 Q My question is did you consider that the

1 characterization of the defendant ridiculing the dog
2 was an overstatement or a misstatement of the
3 evidence which you have been gracious enough to
4 summarize for us but that it was an overstatement or
5 misstatement of what your client had in fact said?

6 **A** Well, again, as I said a minute ago, I
7 think the choice, Mr. Moak's choice of the word
8 ridicule may be an overstatement. However, I think
9 the witness testimony that I just cited makes clear
10 that there was some antagonistic comments made about
11 the dog. Crossing a pit with the pit, is that a pit,
12 or is it a pit with a pit. Maybe that doesn't
13 strike you the same way as it does me.

14 **Q** Okay. Well, let's move along. I assume
15 that your answer would be the same with regard to a
16 subsequent reference on Page 400 to the Solicitor's
17 claim that Deborah Joyner testified that the
18 applicant was picking at the victim.

19 **A** Page 400, 19 to 20?

20 **Q** Page 400 lines 19 to 20.

21 **A** I believe Deborah Joyner either testified
22 that the homeowner actually told them to leave at one
23 point and then he came back. Is that what you are
24 referring to?

25 **MS. SHURLING:** Pardon me, Your Honor. I

1 have got my page cite incorrect. 19 through 20.

2 **THE WITNESS:** There is no use --

3 **BY MS. SHURLING:**

4 **Q** I will have to find it.

5 **A** No use of the word pick.

6 **Q** Pardon?

7 **A** There is no use of the word pick or
8 picking.

9 **Q** The page cite was incorrect. I will find
10 the correct one in a moment. Let's talk about that
11 particular portion of the transcript. I have it
12 noted for another reason.

13 **A** Uh-huh.

14 **Q** Deborah Joyner did, in fact, testify that
15 the homeowner previously told Mr. McKnight to leave,
16 didn't she?

17 **A** Correct. As you cite, during closing, the
18 Solicitor's office argued that Deborah Joyner
19 testified --

20 **Q** 218 line 22 through 25.

21 **A** Okay. I think this is Deborah Joyner. I
22 think about three times he was just like coming back
23 and forth.

24 **Q** Okay.

25 **A** Pages 220 to 221, still Deborah Joyner, 5

1 through 9. Had he been told to leave earlier by the
2 homeowners? Yeah, Dan told him to go ahead and
3 leave. Without saying what he said, was he told to
4 leave? Yes, sir. Lines 24 to 25. You know he left
5 and came back again. Over on to 221. Like he was
6 looking for something. He kept on coming back. The
7 owner of the house told him to leave.

8 Q Okay. Was --

9 A You pointed out Deborah Joyner pointed out
10 the homeowner asked the applicant to leave at one
11 point. Then he came back. Those were her exact
12 words.

13 Q Okay. My question is, the homeowner did
14 not testify at trial, did he?

15 A Correct.

16 Q So would that testimony not be hearsay?

17 A Absolutely.

18 Q And --

19 A Objectionable hearsay.

20 Q Is there any particular reason why you did
21 not object to it?

22 A Surely an oversight on my part.

23 Q Okay. Whether or not the defendant had
24 been asked to leave the premises by someone with
25 authority to ask him to leave, would be relevant to

1 your claim of self-defense, wouldn't it?

2 A Correct.

3 Q Okay. Let's look at a couple of other
4 things.

5 A If I could, it wasn't only the homeowner
6 who allegedly told them that, it was the decedent.

7 Q I understand that. I'm going to get to
8 that in a moment. But since you bought it up, let's
9 go ahead and talk about it. The deceased was a guest
10 at Dan and Stella's home, wasn't he?

11 A Yes.

12 Q Was there any evidence introduced at trial
13 that the deceased had any authority to ask anyone to
14 leave Dan and Stella's home?

15 A No, ma'am. Other than the fact that he was
16 there before Mr. McKnight arrived. He was part of
17 the invited group. Mr. McKnight was not. Other than
18 that, no.

19 Q How do you know that he wasn't? Based on
20 this record, what evidence is there based on evidence
21 introduced at trial, what evidence is there that
22 neither Dan or Stella Washington had invited him to
23 this gathering?

24 A I would ask you to point out where in the
25 record there was any indication whatsoever that he

1 was invited.

2 Q Well, the burden of proof is not on the
3 defendant, Mr. Riley. My question is at trial, what,
4 if any, evidence did the state introduce that
5 attempted to establish that either Dan or Stella
6 Robinson had not invited him? Nothing?

7 A I am not aware that there is any.

8 Q Okay. So there is no evidence.

9 A Nor is there any evidence that they did.

10 Q I understand. But you will agree with me
11 that there was no evidence --

12 A And we are talking, of course, about
13 evidence that was elicited by the state. As you quite
14 properly pointed out, we didn't have to prove
15 anything.

16 Q Correct. Going back to my point, the dead
17 man was a guest?

18 A Uh-huh.

19 Q At Stella and Dan's home?

20 A Uh-huh.

21 Q Stella and Dan didn't testify?

22 A Huh-uh.

23 THE COURT: I need you to respond, give me
24 the answer.

25 THE WITNESS: Oh, yes.

1 **THE COURT:** Okay.

2 **BY MS. SHURLING:**

3 **Q** So Ms. Joyner was allowed to supply the
4 allegation that your client have been asked to leave
5 by someone with the authority to ask him to leave,
6 the homeowner, Dan?

7 **A** Uh-huh.

8 **Q** When Dan was not a witness, right?

9 **A** Correct.

10 **Q** Okay. Let's look at something else. Also
11 in closing argument, the portion we were just looking
12 at, let's go back to Page 400 again. Let's look at
13 line 19. I believe Deborah Joyner even testified the
14 homeowner actually told him to leave at one point and
15 then he came back. Then she testified that he told
16 her to leave again. He said out on the sidewalk you
17 can't make me leave, okay?

18 **A** Uh-huh.

19 **Q** Then at some point, Page 441, 5 through 7,
20 he had been told to leave two or three times. Been
21 told to leave up the street. He is looking for
22 trouble.

23 **A** Uh-huh.

24 **Q** What testimony was there at trial that Mr.
25 McKnight had been asked by anyone with the authority

1 to do so to leave the property two or three times?

2 A Page 218, which I have already read.

3 Q Well, let's look at 218.

4 A I think about like three times he was just
5 like coming back and forth. Now --

6 Q But that doesn't state he was asked three
7 times to leave. It says he came back two or three
8 times.

9 A Page 441 that you cited. He had been told
10 to leave two or three times.

11 Q Where is the testimony in the trial record
12 that he had been told to leave two or three times?

13 A I just read it to you, ma'am. Page 218.

14 Q No, you read the testimony that says he
15 kept going back and forth. I think about three times
16 he was just coming back and forth. He would leave.

17 A Uh-huh.

18 Q She says he kept leaving and coming back.

19 A Page 220? Which I think I also read
20 earlier, lines 5 through 9.

21 Q 220, what line?

22 A 220, lines 5 through 9.

23 Q He had been told to leave earlier by the
24 homeowners or somebody. Yeah, Dan told him to go and
25 leave. There again, that's another example of

1 hearsay you didn't object to, isn't it?

2 **A** Yes, although I'm not sure it's not the
3 same one that we pointed to earlier. Also, at the
4 bottom of the same Page 24 through 25, he left and
5 came back again.

6 **Q** I understand, Mr. Riley. But my question
7 is where, if you can show me anywhere, it says he was
8 asked to leave two or three times. I see plenty of
9 places you are pointing me to that says he left and
10 came back and left and came back. But I don't see
11 anywhere where it says he was asked to leave two or
12 three times.

13 **A** Well, you and I apparently are reading the
14 trial transcript somewhat differently.

15 **Q** Okay. Let's move on to something else.

16 **A** Well, let me just point out --

17 **Q** Okay.

18 **A** --- at the top of Page 221, owner of the
19 house told him to leave. Okay. I already
20 acknowledged hearsay. All right? Page 220, Dan told
21 him to go ahead and leave. Now, told and ask are not
22 the same word, grant you. But you are using the word
23 ask. The transcript used the word -- the witnesses
24 used the word told. I don't know if that is a
25 distinction that you are trying to point to or what.

1 **Q** Certainly not. I wouldn't question you
2 like that over a matter of semantics. My point being
3 this witness says that he would leave and come back
4 and leave and come back. Looking at what you just
5 pointed out, 221, line 2 through 3, he kept on coming
6 back so the owner of the house told him to leave.
7 Hearsay again. There is no indication, is there,
8 that the owner of the house supposedly told him
9 multiple times to leave?

10 **A** Not explicitly, you are correct.

11 **Q** We now just wanted to two or three, by my
12 count, times when Ms. Joyner had repeated over and
13 over again that the homeowner asked him to leave.
14 The homeowner, Dan, asked him to leave. None of
15 which were objected to, correct?

16 **A** Now the words that were attributed to Dan,
17 the homeowner, were not objected to.

18 **Q** And you are familiar, I'm sure, with the
19 requirement that you object the first and every time
20 objectionable testimony comes out?

21 **A** Correct.

22 **Q** I bring that up only because a moment ago,
23 you said you thought that that was just the same
24 thing you had already admitted not objecting to.

25 **A** If I were incorrect, I apologize. I

1 thought we had gone over the same quotation.

2 Q I understand. If inadmissible testimony
3 comes in, you have to object the first time it is
4 offered, correct?

5 A Correct.

6 Q And you have to object every time they go
7 to introduce that same inadmissible testimony,
8 correct?

9 A Uh-huh.

10 Q Each time warrants a new objection --

11 A Correct.

12 Q --- in order to preserve the issue. All
13 right.

14 THE COURT: Audible.

15 THE WITNESS: Sorry. The answer is yes.

16 BY MS. SHURLING:

17 Q Let's take a look at 219, lines 2 through
18 4, going back to the same section of testimony we
19 were talking about earlier. 219, lines 2 through 4.
20 His friend came down there and told us that he had to
21 run him from his house because he was starting.

22 A Uh-huh.

23 Q So he came down there. It was like he was
24 looking for something that night. Do you see that?

25 A Yes, ma'am.

1 Q Who was the friend who came down there and
2 claimed Mr. McKnight was starting?

3 A I don't know. They weren't identified.

4 Q That person didn't testify at trial either,
5 did they?

6 A They did not.

7 Q Is there any reason why you did not object
8 to that testimony?

9 A Purely an oversight on my part.

10 Q Would you agree that testimony, improperly
11 admitted testimony that your client was up the street
12 starting, inferring at least starting trouble would
13 be testimony that would be prejudicial to your self-
14 defense claim?

15 A Yes, ma'am.

16 Q On the very first prong, the idea of being
17 without fault and bringing about the difficulty,
18 correct?

19 A I understand, correct.

20 Q All right. Once you didn't object to that
21 during Deborah Joyner's testimony, that created an
22 opportunity, did it not, for the state to hammer home
23 those points in their closing argument, didn't it?

24 A Yes, ma'am.

25 Q Okay. Let's take a look at Page 400, line

1 19 and 20. I believe Deborah Joyner even testified
2 that the homeowner actually told him to leave at one
3 point and then he came back.

4 A Uh-huh.

5 Q And then she testified she told him to
6 leave again, do you see that?

7 A Uh-huh.

8 Q And the reason why you did not object to
9 this line of closing argument?

10 A I consider it to be unprofessional to
11 object during a closing argument.

12 Q No matter what they say?

13 A No, ma'am. I wouldn't go that far. But
14 unless there is a really good reason, I just
15 routinely do not interrupt a lawyer's closing
16 argument.

17 Q Had the homeowner testified at trial
18 regarding --

19 A You seem to keep asking the same questions.
20 That is at least the fourth time that you asked me if
21 the homeowner --

22 Q I don't mean to be discourteous but I will
23 rephrase my question. You admitted that when that
24 line of inquiry, that line of testimony came up
25 repeatedly during Deborah Joyner's testimony, it was

1 an oversight not to object to it. Do you likewise
2 agree that it was an oversight not to object when the
3 prosecution referenced hearsay testimony in their
4 closing argument?

5 A No, ma'am. I do not.

6 Q And why not?

7 A For the reason that I just stated.

8 Q That it would be rude?

9 A No, ma'am. Unprofessional.

10 Q Unprofessional. All right. Let's take a
11 look at 421. Page 421, line 20 through 21. I have
12 to ask although I assume the answer is the same. Why
13 didn't you object when the prosecutor said he had
14 already been told by somebody up the street to leave.
15 He is looking for trouble. Is your answer the same
16 as the previous?

17 A Basically, yes.

18 Q That it would be unprofessional? All
19 right. Let's just take a look at something. Let's
20 look at Page 220, lines 5 through 6.

21 A I have read those lines earlier.

22 Q You did. This is the state's own witness,
23 is it not?

24 A Uh-huh.

25 Q And the question posited at line 5 and 6

1 was he had been told to leave earlier by the
2 homeowners or somebody?

3 A Uh-huh.

4 Q Did you consider that to be a leading
5 question?

6 A Of course.

7 Q Is there any reason why you didn't object
8 to it as being leading?

9 A At the time, I did not respond quickly
10 enough to it being a leading question. Now, it is
11 clearly a leading question as well as the hearsay.

12 Q In your closing argument, you attempted to
13 summarize the testimony that supported self-defense,
14 correct?

15 A Yes, ma'am. Direct me to which of your --

16 Q Look at Page 409.

17 A I mean in your --

18 Q Which allegation?

19 A Yes.

20 Q Number 7.

21 A Okay. Thank you. Okay.

22 Q Okay. Now, you point out that Mr. Sheldon
23 Glover was coming up behind your client, Mr.
24 McKnight, just as he had been hit with a beer bottle
25 and was being -- was in the fight with the deceased,

1 correct?

2 **A** Correct.

3 **Q** At some point over in here, you say that he
4 is entitled to act on appearances, correct?

5 **A** Uh-huh.

6 **Q** Wasn't there some indication that he was
7 also significantly outnumbered at the scene?

8 **A** Uh-huh.

9 **Q** Did you summarize the testimony about that
10 in your closing argument? You may have and I missed
11 it. There is a lot to cover.

12 **A** I know. All I can say in answer to that
13 question is the entirety of the testimony clearly
14 indicated that Mr. McKnight was facing a much larger
15 group of people. In other words, it was not just him
16 and the decedent. There was lots of other people and
17 the decedent. Mr. McKnight was basically by himself.
18 The testimony throughout the trial was clear on that
19 point. As you are asking did I cite or emphasize
20 that in my closing argument, I don't recall seeing
21 that when I was reviewing this, no.

22 **Q** Would the fact that he was significantly
23 outnumbered by the friends of the deceased that were
24 there in the immediate vicinity of altercation be a
25 significant factor and analysis of the self-defense

1 claim?

2 **A** Yes, ma'am. There again, I think the jury
3 was a very attentive jury. I think it was
4 unmistakable throughout the trial that he was
5 outnumbered. I would point out not only on Page 409,
6 lines 9 and 10, someone coming up behind Mr.
7 McKnight. Also for 10, lines 18 to 20, I said the
8 same point again.

9 **Q** Okay. Again, please do correct me if I am
10 wrong. Do you know of anywhere in your closing
11 argument that you point out that these other people,
12 Travis Johnson, Sheldon Glover, there were numerous
13 other males out there that all friends of the
14 deceased that were in the immediate proximity of the
15 fight?

16 **A** I haven't found any explicit reference to
17 that in my --

18 **Q** In your closing argument?

19 **A** Yes.

20 **Q** Specifically in your argument concerning
21 the evidence that supported self-defense?

22 **A** Correct.

23 **Q** All right. Now, the deceased was also in
24 his 20s, wasn't he?

25 **A** Yes.

1 Q And your client was -- well, at trial, your
2 client was 53. He was in his late 40s at the time of
3 this incident, wasn't he?

4 A Yes, ma'am. I remember reading -- I didn't
5 highlight it but I remember in my closing argument
6 somewhere I mention there was a 25-year gap or
7 difference in age between Mr. McKnight and the
8 decedent.

9 Q My question would be similar. Had you
10 mentioned that there were quite a few friends of the
11 deceased, present nearby at the time of the
12 altercation, would it also have been significant to
13 know that they likewise were much younger men than
14 your client?

15 A I believe so.

16 Q Okay. Let's get back on point for a
17 minute. When you were reviewing discovery materials
18 in preparing for this trial, did you have the
19 opportunity to observe or to review whether an
20 incident report that was filled out by an officer
21 concerning a tip that had come in from a confidential
22 informant?

23 A I don't recall seeing that. I mean
24 recently, I don't recall seeing that.

25 Q Well, maybe I am choosing my words poorly

1 for just a moment. Do you recognize this -- this is
2 pages 4 and 5 of actually a five-page investigative
3 report. At the bottom of the first page, could you
4 read us the entry dated September 30, 2005?

5 A Informant, parentheses, D.D. called
6 reporting officer and stated that Travis Johnson,
7 Sheldon Glover and Isaac Williams all attacked Tommy
8 McKnight together on the night of this incident.

9 Q In fact, if you go back a few lines, there
10 was an earlier call entry at 10:00 a.m. on the same
11 date where once again references informant D.D. What
12 does it say then?

13 A Informant, parentheses, D.D. called
14 reporting officer and stated that she heard that
15 Tommy went to incident location and got Shelton to
16 front him some drugs. Isaac got mad because Tommy
17 owed him money for drugs. She also heard something
18 about a dog being what started the fight. Isaac and
19 others jumped on Tommy. Tommy pulled out the knife
20 and started swinging it. Isaac got cut by the knife.

21 Q Now, both of those entries, one being dated
22 -- pardon me. I said they were both the same day.
23 They are not, are they? One is September 29th at
24 10:00 a.m. The other is September 30th at 4:55 p.m.

25 MS. SHURLING: Your Honor, at this time, I

1 would move to introduce page, I think Page 4 is
2 all we need of the investigative officer's
3 report and the investigator report of officer
4 Lee Boan that has been identified.

5 **MS. HARRIGAN:** I prefer all five pages came
6 in. No objection to all five.

7 **MS. SHURLING:** That is fine. Let me find
8 the other pages. A moment's indulgence, Your
9 Honor. (Pause.)

10 Your Honor, at this time, I would move to
11 introduce all five pages of a five-page
12 officer's investigative report injured by
13 Officer Lee Boan, B-O-A-N, in this matter.

14 **THE COURT:** Be sure that you have shown it
15 to counsel. Y'all agree as to five pages?

16 **MS. HARRIGAN:** Yes.

17 **THE COURT:** Have you seen those five
18 pages?

19 **MS. HARRIGAN:** I trust Ms. Shurling that it
20 is the five that she provided to me.

21 **THE COURT:** And that is going to be
22 Applicant's 1? Okay.

23 **MS. SHURLING:** So far.

24 **THE COURT:** So far.

25 **(WHEREUPON, Applicant's Exhibit 1 is marked for**

1 identification and admitted into the record.)

2 **BY MS. SHURLING:**

3 **Q** Okay. As a result of reviewing that
4 information in the file, did you write a letter to
5 the Solicitor's office asking that they disclose the
6 identity of D.D.?

7 **A** Yes, I did, among other things.

8 **MS. SHURLING:** May I approach?

9 **THE COURT:** You may.

10 **BY MS. SHURLING:**

11 **Q** Mr. Riley, I have a letter that I would
12 like you to identify dated March 12, 2009.

13 **A** Uh-huh.

14 **Q** That appears to be Page 1 of what
15 presumably was a multiple page letter. I only found
16 the first page in your file.

17 **A** I believe it was just one page.

18 **Q** I am somewhat concerned about not having a
19 signature line.

20 **A** I tried to do it in the form of a
21 memorandum.

22 **Q** Okay.

23 **A** I only have --

24 **Q** You only have one page?

25 **A** I don't believe it ran beyond one page.

1 **Q** Can you identify that as the document you
2 wrote and I would assume that Ron would be Ron Moak?

3 **A** Yes, ma'am.

4 **Q** Okay.

5 **MS. SHURLING:** Your Honor, I would move to
6 introduce this as Applicant's 2.

7 **THE COURT:** Any objection?

8 **MS. HARRIGAN:** No objection.

9 **THE COURT:** Okay.

10 **(WHEREUPON, Applicant's Exhibit 2 is marked for**
11 **identification and admitted into the record.)**

12 **BY MS. SHURLING:**

13 **Q** Okay. Now going back to Applicant's 1, we
14 already covered the fact that on September 30th,
15 well, first September 27th and then again on
16 September 30th, an individual identified only as an
17 informant, initials D.D. called with information
18 including the fact that Travis Johnson, Sheldon
19 Glover and Isaac Williams all attacked Tommy McKnight
20 together on the night of this incident, correct?

21 **A** Yes, ma'am.

22 **Q** Okay. As a result of this inquiry with the
23 Solicitor's office, were you finally given the name
24 of this confidential informant?

25 **A** Yes, ma'am. By then, I had realized the

1 letter Capital D, Capital D was D.D. Drakeford. I
2 don't know if that was explained to me or if I just
3 realized that D.D. was the same person as D.D.
4 Drakeford. I just don't remember which it was.

5 Q How did you know about D.D. Drakeford if
6 not by -- if her identity as the confidential
7 informant was not disclosed to you by the state, how
8 did you even know D.D. Drakeford had been there?

9 A From talking to Mr. McKnight, I would
10 imagine is how I would have acquired the information.

11 Q Okay. You ultimately called D.D. Drakeford
12 as a witness for the defense?

13 A Yes ma'am.

14 Q Did you not?

15 A Correct.

16 Q And if we look at her testimony -- that
17 begins, Your Honor, on Page 347 of the record. I am
18 not going to waste the court's time going through it
19 line by line. The record will speak for itself. But
20 she does recall seeing the deceased hit Tommy
21 McKnight with a bottle, correct? I will find the
22 page. Just a moment.

23 A She references a thrown bottle hitting Mr.
24 McKnight. That is what she referenced at the bottom
25 of Page 351.

1 Q Okay. But by the time of this trial,
2 nearly four years after the incident, she is saying
3 -- if we look at the bottom of Page 349, she is
4 saying I remember that they started fighting. It was
5 a couple of more people out there. I can't put
6 together who all was out there. Do you see that?

7 A Yes, ma'am.

8 Q Okay. Did you interview D.D. Drakeford
9 before you put her on the stand?

10 A I think so. I don't have any recollection,
11 any clear recollection. I think I did.

12 Q Do you have any notes in your file from
13 interviewing her? I didn't see your attorney work
14 product so I don't know. But wouldn't you have
15 interview notes in your file if you interviewed her?

16 A I don't recall seeing an interview with
17 D.D.

18 Q So you have nothing in your file to
19 indicate that you interviewed her and you don't have
20 any independent recollection of interviewing her?

21 A Yes, that's right.

22 Q Okay. Now, did you consider asking --
23 first of all, did you consider questioning her about
24 whether or not she had given a contemporaneous
25 statement to law enforcement back at the time of the

1 event?

2 **A** No, ma'am. I don't believe I -- I don't
3 think my analysis directed me to ask for that.

4 **Q** Okay. Well, Travis Johnson was a witness
5 against your client at trial, wasn't he?

6 **A** Yes.

7 **Q** So was Sheldon Glover?

8 **A** Uh-huh.

9 **Q** And this witness had at the time fairly
10 contemporaneous with this incident told the police
11 that she was there when they, along with the
12 deceased, attacked her client, right?

13 **A** Right.

14 **Q** Why didn't you question her about the fact
15 that these key witnesses for the state had previously
16 been identified by her as people who had attacked her
17 client along with the deceased?

18 **A** Well, if you would look at Page 355.

19 **Q** Yes, sir.

20 **A** Uh, remember that a number of the state's
21 witnesses said only Mr. McKnight and the decedent
22 ended up out in the street. On Page 355, Ms.
23 Drakeford said there were at least two others out
24 there on the street. Basically, her testimony, I
25 asked her did it appear to you they were taking part

1 in the scuffle, altercation. She says no, not
2 really. I am not sure if -- well, maybe they could
3 have because somebody hit him with a bottle. So even
4 though her recollection is somewhat murky, she
5 certainly creates the impression that it was not only
6 the decedent that was involved in a physical
7 altercation with Mr. McKnight, I think.

8 Q Why did you have to settle for an
9 impression? Why not ask her?

10 A I'm not sure.

11 Q I'm not sure. I really can't remember.
12 Lines 14 and 15.

13 A Uh-huh.

14 Q Why didn't you ask her then and there, Ms.
15 Drakeford, did you, in fact, speak with Investigator
16 Bowman about the activities of the evening very
17 shortly after this incident? Yes, I did.

18 A I should have. You are right. It would
19 have been a good question to ask.

20 Q And it would be, would you agree,
21 particularly crucial to ask where the two people that
22 she reported as having been part of the attack on Mr.
23 McKnight were offered up by the state as witnesses
24 against Mr. McKnight?

25 A Uh-huh. Correct.

1 **Q** It would have not only been directly
2 relevant to your self-defense claim but it also would
3 have gone some ways on potential for bias on two key
4 witnesses for the state, wouldn't it?

5 **A** Yes, ma'am.

6 **Q** Okay. Let's go back to the allegations
7 again.

8 **A** What number are you on?

9 **Q** I think I have meandered far and wide. We
10 are covering them slowly. Do you remember a time
11 when the jury came back and asked a question?

12 **A** Uh-huh.

13 **Q** Let's look at 470. Okay. What was the
14 jury's question?

15 **A** It references Court's Exhibit Number 2. I
16 don't know where that is. Well, it is not attached
17 to the transcript. My recollection is that it is
18 just asking about, asking the judge to recharge self-
19 defense if I remember correctly.

20 **Q** Okay.

21 **A** Ms. Shurling, I am not sure if that is
22 exactly what the question from the jury was.

23 **Q** Well, if you look at Page 471, lines 11
24 through 15, it is about the same thing. But since I
25 didn't read any of these charges, I am just going to

1 read what they asked me to charge on murder and
2 voluntary manslaughter from King verbatim.

3 **A** Uh-huh. So it must've been --

4 **Q** Would you agree that that seems to indicate
5 that the jury asked to hear the definition of murder
6 and voluntary manslaughter again?

7 **A** Yes.

8 **Q** Is there any particular reason why you did
9 not ask that the judge, while in giving those
10 instructions again also give the complete instruction
11 on self-defense again?

12 **A** Well, if you know -- and I am not trying to
13 pass the book or escape my responsibility. But this
14 colloquy on the part of the defense, the colloquy was
15 conducted by Mr. Kirincich on pages 470 and 471. I
16 don't think I was up at the bench.

17 **Q** Well, you were lead counsel, weren't you?

18 **A** Yes. That is why I said I'm not trying to
19 escape responsibility.

20 **Q** When a jury comes back with a question in
21 the midst of deliberation, is it not generally a
22 fairly good indicator of what the jury's thought
23 processes are?

24 **A** And I was involved. On Page 472, line 9, I
25 asked the judge -- I hadn't, at that point, read the

1 note. If you will notice, I asked the judge for the
2 opportunity to read the note.

3 Q Okay. My question again -- if you answered
4 it, I'm sorry. I'm tired at this point. But did you
5 have any particular reason for not asking that he go
6 ahead and recharge the entirety of self-defense as
7 well?

8 A No, ma'am.

9 Q Okay. Let's backtrack for just a moment.
10 Let's look at Page 434, lines 4 through 6. To
11 publish that, he said -- she said, part of me. She
12 said on direct yes, it is the victim that was hit
13 with a bottle first. They did not catch her in that
14 statement. We brought that out on direct and then
15 came back and showed it. Do you see that?

16 A Yes, ma'am. I've got those lines
17 highlighted.

18 Q Have you looked at the various portions of
19 the trial transcript that I cited along with that
20 allegation?

21 A I did.

22 Q Is it, in fact, true that that portion of
23 the argument is not accurate?

24 A I think you -- I am trying to find which of
25 your specific points. Anyway, I believe I wrote in

1 the margin good point or absolutely correct point or
2 something like that. He -- Mr. Meadors, clearly
3 misstated the earlier testimony. No doubt about
4 that.

5 Q And kind of patting himself on the back
6 saying he was the one that pointed out some error in
7 this witness' testimony when he did no such thing,
8 right?

9 A We brought that out on direct. He is
10 bragging, yes, ma'am.

11 Q Again, why would you have objected to that?

12 A I just didn't, Ms. Shurling. Should have
13 but didn't.

14 Q Okay. Let's see. Let's go back to the
15 D.D. Drakeford thing for just a minute.

16 A Uh-huh.

17 Q D.D. Drakeford, at trial, basically said,
18 you know, there were a couple more people out there.
19 I can't remember who they were. She testified about
20 McKnight getting hit with a bottle. But she is very
21 vague about details by the time of trial, right?

22 A Uh-huh.

23 Q Did you consider asking that she be
24 declared a hostile witness so that you could impeach
25 her testimony?

1 **A** No, ma'am. She was the only -- she was
2 really the only helpful witness that I had available.

3 **Q** Well, did you consider asking the court to
4 be permitted to show her documentation to refresh her
5 recollection given the weakness of her memory on
6 those points?

7 **A** No, ma'am. I didn't ask.

8 **Q** In retrospect, is that something you should
9 have done?

10 **A** I think you are correct.

11 **Q** Okay. Let's move along. You heard me with
12 Jason earlier asking about -- I'm sure you have been
13 at this a lot longer than Jason. You have seen jury
14 instructions on self-defense for the court said that
15 once a defendant raises a claim of self-defense, the
16 burden then is on the state to disprove that claim or
17 words to that effect, right?

18 **A** Yes, ma'am.

19 **Q** Now, Judge Kinard didn't use that language
20 which is admittedly somewhat antiquated these days.
21 But he did generally referred to -- let me find my
22 note. I apologize. Let's go to the self-defense
23 charge on 462 beginning at line 1. If there is
24 evidence of self-defense in the case, the state has
25 to prove beyond a reasonable doubt the defendant did

1 not act in self-defense. Everybody is authorized to
2 defend himself or herself from death or serious
3 bodily injury. Do you see that?

4 A Yes, ma'am.

5 Q Did you consider asking for a jury
6 instruction not unlike -- let me backtrack for a
7 minute. Did you consider asking for a jury
8 instruction that would have clarify for the jury that
9 they could look to the totality of the evidence
10 including the testimony presented by the state and
11 the defense when determining whether or not the facts
12 and evidence met the standard for self-defense?

13 A As Mr. Kirincich testified, we did prepare
14 some requested jury charges. I don't remember if
15 that exact wording was one of them. But certainly,
16 that was something that we would have thought about
17 beforehand, yes, ma'am.

18 Q But look at the index to the transcript
19 together.

20 A Uh-huh.

21 Q If you look at the Court's exhibits, they
22 are numbers 1 and 2. Number 1 is an autopsy
23 photograph. Number 2 is a note from the jury.

24 A Uh-huh.

25 Q Okay. So I will take from that that you

1 did not introduce your request to charge or you did
2 not ask that the court preserve your request for
3 charge as a Court's Exhibit at trial?

4 **A** Apparently not. But I feel certain we
5 submitted requests for charges. I don't know why
6 they didn't get made part of the court's file.

7 **Q** I understand.

8 **A** I don't know the answer to that.

9 **Q** Well, you do know what happens to issues
10 that are raised and are not adequately preserved on
11 the record?

12 **A** Yes, ma'am.

13 **Q** Are they available for appellate review?

14 **A** No.

15 **Q** In the record, there is discussion
16 throughout the transcript of the judge's own
17 willingness to give a folder-based additional
18 instruction on self-defense, correct?

19 **A** Well, Judge Kinard, as he proudly stresses
20 many times, before he retired, he was the longest-
21 serving judge on the bench in South Carolina. I
22 respect him enormously. I respect his experience and
23 wisdom. When I once asked him something or discussed
24 something with him, I don't believe in diving back
25 into it again. I don't know if that is responsive to

1 your question or not.

2 Q My question is at a couple of different
3 places in this record, your second seat, your young
4 associate is asking the court to give a more fact-
5 based jury charge on self-defense of a type approved
6 by the court in State v. Fuller, correct?

7 A Yes, ma'am. He was -- I had asked him to
8 deal with the issue of the jury charge.

9 Q Okay.

10 A Yes, ma'am.

11 Q And to your knowledge, is there anywhere in
12 this transcript where it is recorded in any manner
13 exactly what instruction it was that you wanted that
14 you didn't get?

15 A No, ma'am, not that I have seen.

16 Q Failing that, would the issue have been
17 available for Mr. McKnight on appeal?

18 A No, ma'am.

19 Q Okay. You heard me ask Jason earlier about
20 the fact that in your written motion for a new trial
21 on directed verdict, you specifically cited to the
22 Campbell case, a 1918 case, for the cornerstone
23 principle that a person assaulted without being at
24 fault in bringing on the difficulty has the right to
25 use such force as is necessary for his complete self

1 protection. He is not limited to use the same force
2 at no more than that for which he was threatened? Do
3 you recall using that in your motion?

4 A Yes, ma'am.

5 Q Did you consider requesting a jury
6 instruction on that principal at trial?

7 A Not that I recall.

8 Q Now, if you take a look at what the judge
9 did say, and I too share your enormous respect and
10 admiration for Judge Kinard, but all God's children
11 make mistakes, including Judge Kinard. Let's take a
12 look at Page 462, line 7 through 9.

13 A Uh-huh.

14 Q And to do that, any person may take such
15 steps as necessary even to the point of killing
16 someone to protect yourself.

17 A Correct.

18 Q See that?

19 A Uh-huh.

20 Q There again, did you consider at the end of
21 the instruction when the judge asked you if you had
22 anything to add, did you consider asking that he
23 clarify that to include the principles enunciated in
24 the Campbell decision that you would later quote?

25 A I can't tell you whether I considered it or

1 not because I just don't remember. Clearly, I didn't
2 ask.

3 Q Okay. In retrospect, do you believe
4 instruction on that principle would have been
5 necessary and appropriate on the facts of this case?

6 A Appropriate. I don't know about necessary,
7 but certainly appropriate.

8 Q Let's talk about that. Are there several
9 places in this record where the prosecution made
10 cracks about your client basically bringing a knife
11 to a fistfight?

12 A Yes, ma'am.

13 Q Kind of like the old Indiana Jones scene
14 where the guy pulled up the bullwhip and Indiana
15 Jones pulls a knife, I mean, a pistol?

16 A Ms. Shurling, if I objected to everything
17 John Meadors said that I didn't like, I would have
18 been on my feet 100 percent of the time.

19 Q And maybe you would have tried a better
20 case, but let's move on.

21 THE COURT: Ms. Shurling, watch the
22 comments please, ma'am.

23 MS. SHURLING: Pardon?

24 THE COURT: Just watch the comments.

25 MS. SHURLING: I'm sorry.

1 **THE COURT:** Thank you.

2 **BY MS. SHURLING:**

3 **Q** Let's look at -- now, when the judge is
4 talking about recharging the jury after the jury
5 question, he says he is going to charge them straight
6 from King.

7 **A** Uh-huh.

8 **Q** Initially, I thought he was referring to
9 what we all call the King charge, do you know what I
10 mean when I say a King charge?

11 **A** Yes, ma'am.

12 **Q** But that's not what he was talking about,
13 was he?

14 **A** No.

15 **Q** He was referring to another beloved Judge
16 Ralph King Anderson's jury charge book?

17 **A** Exactly.

18 **Q** Okay. Did you consider requesting a jury
19 instruction that any doubts the jury had concerning
20 the applicant's degree of culpability were to be
21 resolved in his favor similar to the charge in King?

22 **A** Well, I really think that Judge Kinard's
23 jury charge covers that. Again, I did not highlight
24 the language. His jury charge covers the issue of
25 resolving doubts in favor of the accused. I am

1 confident of that.

2 Q Can you show us where?

3 A As I said, I didn't highlight it and should
4 have. I fear it would probably take me a half an
5 hour to find it. But I remember reading that in
6 preparation for today.

7 Q Okay. We will let the record speak for
8 itself and move on to the next question.

9 A Yes, ma'am.

10 Q You already addressed the fact that you
11 didn't consider having Ms. Drakeford declared a
12 hostile witness. Did you consider introducing
13 testimony from Lee Boan concerning previous --
14 introducing testimony from Lee Boan to supplement or
15 repeat the testimony of D.D. Drakeford concerning
16 prior information provided to the police?

17 A No. Lee Boan testified before D.D.
18 Drakeford. I don't remember if Lee had been released
19 as a witness or not or whether he was still in the
20 courtroom after D.D. testified. In other words, I
21 think they would have had to call him in rebuttal.

22 Q You knew in advance what his report said
23 about her, right?

24 A Uh-huh.

25 Q So why did --

1 **THE COURT:** That's a yes? That's a yes?

2 **THE WITNESS:** Yes. Sorry, Judge.

3 **THE COURT:** That's all right.

4 **BY MS. SHURLING:**

5 **Q** You knew in advance of Lee Boan's testimony
6 what his incident report's about information provided
7 by confidential informant D.D.?

8 **A** Uh-huh. Yes, ma'am.

9 **Q** Why didn't you question him about
10 information provided by her when you had them
11 available as a witness?

12 **A** I don't know. I can't answer that.

13 **MS. SHURLING:** Okay. I believe Number 16,
14 Your Honor, is somewhat redundant. But to the
15 extent that it isn't -- we have covered that, I
16 believe, thoroughly already. That simply
17 addresses why you didn't object to multiple
18 references to the homeowners having asked Mr.
19 McKnight to leave.

20 **BY MS. SHURLING:**

21 **Q** Why didn't you file a motion for a speedy
22 trial in this case?

23 **A** Well, Mr. McKnight, as you point out in
24 paragraph 17, he was arrested September 23rd of '05
25 -- September 28th of '05. At which time, I wasn't

1 even employed at the Public Defender's office. The
2 Clerk of Court assigned the case to the person who at
3 that time was the only Public Defender in Kershaw
4 county, Mr. Rogers.

5 For some reason, less than a month later,
6 in other words, October 19th of 2005, there was
7 another order of appointment appointing him to Mr.
8 Rogers. Mr. Rogers was the Chief Public Defender. I
9 started October 2006 as an Assistant Public Defender.
10 Mr. Rogers had the case and was handling the case up
11 until around September 2007 at which time thereafter
12 or shortly thereafter, I became the Chief Public
13 Defender. Mr. David Reuwer was hired as an Assistant
14 Public Defender. Mr. Kirincich was -- I think he
15 testified in the winter of 2008 he was hired as a
16 contract attorney and ultimately became a full-time
17 Assistant Public Defender.

18 January 8th of 2008, simply because David
19 Reuwer was brand-new and I needed to split up my
20 caseload, I assigned Mr. Reuwer to handle Mr.
21 McKnight's case which Mr. Reuwer did through
22 September 2008. This case, as you know, was tried
23 March 2009. I really only represented Mr. McKnight
24 for about six months before the trial. I knew about
25 the time that I took over Mr. McKnight's case, I knew

1 it was scheduled for early in 2009.

2 Q If I understood you correctly, in September
3 2007, you were named the head Public Defender?

4 A Thereabout. What happened is, it was either
5 then or sometime near the end of 2007, I was for a
6 while Acting Chief Public Defender. Then I became
7 the Chief Public Defender.

8 Q As Chief Public Defender, you are
9 responsible for supervising all the other public
10 defenders on their work?

11 A I had the good fortune to have really good
12 public defenders who didn't need a whole lot of
13 supervision, including Mr. Reuwer.

14 Q Well, part of your job description as Chief
15 Public Defender was it not to supervise the
16 performance of the other public defenders that worked
17 at the county Public Defender's office?

18 A Well, you get into all kinds of ethical
19 problems if you interfere too directly in the way in
20 which an attorney is defending somebody. So,
21 technically, you are correct. Day to day, where the
22 rubber meets the road, we didn't have weekly status
23 conferences. I didn't go over and never have gone
24 over the status of this case or that case with one of
25 the Assistant PD's.

1 Q Did you keep a list of the oldest cases in
2 the office?

3 A Yes, ma'am.

4 Q And did -- when cases became critically
5 old, did you meet with the attorneys who were
6 handling them and question why they were not being
7 brought to trial?

8 A I did on rare occasions. This was not one
9 of them.

10 Q Mr. McKnight was in jail the whole time,
11 wasn't he?

12 A He was. Prior to -- obviously, I did not
13 start until October 2006. Mr. McKnight had been
14 represented by Glenn for 13 months at that point. I
15 don't really know what went on during that period of
16 time. Of course, up until late 2007, it wasn't my
17 place to again question Glenn as to what was going on
18 in the case.

19 Q Okay. Do you recall during the trial a
20 period of time when the jury was given an opportunity
21 to see your client in ankle chains?

22 A No, ma'am. I don't believe that happened.
23 I don't know where that came from. I don't remember
24 that happening at all.

25 Q Okay. With regard to the argument

1 concerning self-defense relating to the right to act
2 on appearances, did it -- did you consider arguing
3 that it would have appeared to your client that he
4 was being surrounded by the friends of the gentleman
5 he was having the argument with?

6 A Can you repeat that? My mind was
7 wandering.

8 Q I know that you pointed out to the jury
9 that Mr. Glover was coming up from behind ---

10 A Right.

11 Q --- immediately before the stabbing. But
12 with regard to your argument that he was entitled to
13 act on appearances, did you consider arguing that he,
14 at that point, would have felt that his opportunity
15 for egress, his ability to leave was being closed
16 off, that he was being surrounded?

17 A Well, I thought in my choice of words --
18 you are referencing my closing argument, correct?

19 Q Yes.

20 A I thought I did exercise that. Now, I
21 didn't hit on it again and again and again. But I
22 thought -- as I pointed out to you earlier, on two
23 different occasions, I referenced Sheldon Glover
24 coming up behind Mr. McKnight. That was -- the
25 second one was on Page 410. The first one was on

1 Page 409. I didn't use the words around or gang up
2 on or, you know, I didn't pound on it.

3 Q Isn't it true that whether or not you think
4 you can safely withdraw without putting yourself in
5 further danger is one of the specific elements of
6 self-defense?

7 A Yes, ma'am. But I made it clear that he
8 felt like he was surrounded, he knew -- the way I
9 understood it from my client, he knew that he could
10 sense more than see or hear that there was someone
11 behind him, in close proximity to him. Okay. He
12 knew that. I emphasized that to the jury.

13 Q That brings up an important question. What
14 did you advise your client with regard to his right
15 to testify at this trial?

16 A I have no specific recollection. I can
17 tell you what I always advise my clients at trial.
18 They or anyone in the whole world have the exclusive
19 right to choose whether or not to testify. That is
20 my standard language. I feel confident I employed
21 that standard language with Mr. McKnight.

22 Mr. McKnight may have asked me what my
23 opinion was. I don't know if he did. I don't
24 remember him asking me that. Anyway, I make it clear
25 that the decision is strictly up to him. I can't

1 decide for him. Nobody else can. I don't recall
2 having that -- I don't recall the details of when,
3 where, how that conversation took place. But that is
4 what I advise all of my clients.

5 Q We talked earlier about the possibility of
6 having requested a jury charge ---

7 A Uh-huh.

8 Q --- on the fact that the elements of self-
9 defense can be gleaned from any evidence deduced at
10 trial and not any evidence, just deduced by the
11 defendant. Did you talk with your client about the
12 fact that if he didn't elect to tell his story, the
13 jury might infer from that, regardless of what the
14 judge charged, that he wasn't really claiming self-
15 defense?

16 A Well, again, I always make it clear. When
17 that point comes in trial, I make it clear that the
18 jury always prefers to hear from the person charged,
19 from the accused. The natural human tendency on the
20 part of jurors is to think that if he doesn't
21 testify, he's got something to hide. That is just
22 one of the problems defense attorneys confront in
23 just about every trial. Again, that is part of what
24 I advise my clients when they are facing that
25 decision. And I have every confidence I said the

1 same thing to Mr. McKnight.

2 Q Sure. Mr. Riley, Mr. McKnight didn't have
3 a bad prior record, did he?

4 A It wasn't terribly bad, no, ma'am.

5 Q One prior resisting arrest and one for
6 criminal domestic violence and they were back in the
7 early 90s, correct?

8 A And a -- let me -- I have got his record
9 somewhere. Destruction of Private Property that
10 dates way back to 1975. Assault and Battery, 1979;
11 Resisting Arrest and Criminal Domestic Violence,
12 1992.

13 Q Okay. So all of his charges were
14 relatively minor compared to murder?

15 A Yes, ma'am.

16 Q They were from decades earlier, almost
17 decades, nearly two decades earlier.

18 A '09 would have been 17 years. Well, I
19 don't believe I -- the record of Mr. McKnight would
20 not have led me to tell him don't take the stand or
21 they will impeach you.

22 Q You anticipated my next question.

23 A Okay.

24 Q Was his prior record a factor?

25 A I don't remember that even crossing the

1 radar because I knew his record was lacking. It was
2 an old record.

3 Q Did you discourage him from testifying?

4 A No, ma'am. But if you would have asked me
5 my opinion, I would have said --

6 Q Now, if you don't remember --

7 A I don't.

8 Q Okay. Then let's --

9 A All I can do is speculate.

10 Q If you don't remember, let's don't get into
11 it. We love Judge Kinard. But let's take a look at
12 Page 165 lines 8 through 10 where you are cross-
13 examining Travis Johnson about how long this whole
14 incident took. On Page 164, you sort of went between
15 two minutes and four minutes from beginning to end.

16 A Uh-huh.

17 Q And at one point, Judge Kinard interrupts
18 and says, lines 8 through 10, he did not have a
19 stopwatch. He is telling it like he thinks it is, I
20 guess. Go ahead. Do you see that?

21 A Yes, ma'am.

22 Q And then further down the page on line 19
23 through 22, he said, jurors, I am not vouching for
24 the witness at all. Y'all understand that but three
25 minutes, four minutes, five minutes, it was five

1 years ago. Do you see that?

2 A I do.

3 Q Okay. Did you consider --

4 A No, I think that is of piddling importance,
5 to be honest with you. The judge immediately
6 corrected himself.

7 Q Solicitors Moak and Meadors picked it up
8 and ran with it, didn't they?

9 A As they do with most everything or did with
10 most everything.

11 Q There are several references throughout the
12 balance of the transcript where they make a point
13 about, hey, look, these people didn't have a watch
14 out there, right?

15 A Well, it is certainly in regards to Travis
16 Johnson's testimony. I don't remember them making
17 that point in regard to anybody else.

18 Q Okay. You didn't see any point --

19 A I think it is a piddling point. I really
20 do.

21 Q Okay.

22 A Particularly in light of the fact that
23 Judge Kinard -- you know, three minutes, four
24 minutes, five minutes, it was five years ago. He
25 exaggerated or how long ago it was over slightly but

1 he was basically telling the jury to disregard his
2 earlier observation.

3 Q Okay. Let's look at 21 for a minute. When
4 you finally got this case, did you make note of the
5 fact that there had never been a preliminary hearing
6 in this case?

7 A There again, I don't remember even thinking
8 about that. By the time I got the case, it was a
9 case that had a good deal of age on it.

10 Q Okay. Was there any internal mechanism in
11 your office at that time to keep track of people who
12 have been sitting in the jail for a really long time
13 and not been indicted?

14 A Other than frequently reviewing the jail
15 list and checking on which of our clients were still
16 there and how long they've been there, no, ma'am.

17 THE COURT: Your Honor, the Clerk of Court
18 records are part of your judicial packet. They
19 will reflect the indictment for murder. True
20 billed June 11, 2008.

21 BY MS. SHURLING:

22 Q It was quite a long time after your
23 client's arrest, wasn't it?

24 A Yes, ma'am. And before I even got the
25 case. In June 2008, it was being handled by Mr.

1 David Reuwer.

2 Q That was still about seven months after you
3 became the Chief Public Defender for the county,
4 wasn't it?

5 A Yes, ma'am. Somewhere about that length of
6 time.

7 Q As Chief Public Defender, did you conduct
8 any kind of internal audit to determine what old
9 cases were on the books where people had been
10 detained and had not yet been indicted or prosecuted?

11 A At the time I became Acting Chief Public
12 Defender, there was absolutely no, there was no
13 internal mechanism to even tell us who we
14 represented. I had to create that from scratch.
15 Between the time that Mr. Rogers left and the time
16 that I took over Mr. McKnight's case, I had a great
17 deal of other work that I was focusing on in addition
18 to keeping track of old pretrial defendants,
19 defendants in pretrial detention that had been there
20 for a long time. We didn't even know who we
21 represented Ms. Shurling. The clerk's office had no
22 accurate way to provide me with that information. I
23 basically had to kind of invent the wheel in order to
24 determine what our case load was.

25 Q What about this box cutter that was

1 introduced in trial?

2 **A** There again, I think your point on that
3 subject is a very, very good point. I should have --
4 he had nothing to do with the incident whatsoever.
5 It was something that was in his possession when they
6 arrested him. I think it creates -- allowing that to
7 be introduced or testified to creates absolutely the
8 wrong perception on the part of the jury. No
9 question.

10 **Q** It certainly indicates that he was carrying
11 multiple weapons.

12 **A** He had it in his possession when he was
13 arrested but we don't know, there is nothing to
14 indicate that it was in his possession at the time of
15 the incident. The knife had a six or seven-inch
16 blade on it.

17 **Q** Good point. But you concede at this point
18 that that should have been objected to?

19 **A** Abso-toot-ly.

20 **Q** And there was no physical evidence
21 whatsoever tying him to this crime?

22 **A** I don't remember for sure. They did a DNA
23 test on the blade of the knife. I don't know if they
24 did any DNA test on the box cutter. If they did, it
25 was negative.

1 Q The witness statements all reference Mr.
2 McKnight using a knife. Nobody even said anything
3 about him having a box cutter?

4 A No. There again, when he was arrested, it
5 was not anywhere near the incident location. He
6 could have picked up a variety of things and stuffed
7 it in his pocket between the time of the incident and
8 the time of his arrest.

9 Q Sure. Let's take a look at -- I think it
10 is Page 129.

11 A Uh-huh.

12 Q It is. Lines 4 through 5.

13 A Characterized as an old drunk?

14 Q Yes. Officer David Hagan?

15 A Uh-huh.

16 Q Yes, they told me they observed what
17 happened but they did not know the suspect. They
18 merely stated he was a drunk around the area.

19 A Uh-huh.

20 Q Why didn't you object to that?

21 A Again, I most respectfully say that is a
22 relatively tiny point in the overall trial of this
23 case that had negligible, if any, impact. Okay.

24 Q Well --

25 A That's -- as you well know, in the course

1 of the trial, you have to constantly almost minute by
2 minute, if not second by second, you have to make
3 tactical decisions. Okay. I did not think that that
4 was -- rose to the level of something that needed to
5 be objected to.

6 Q Well, there was evidence introduced at
7 trial, was there not, that the victim had a blood
8 alcohol level that nearly doubled the legal limit?

9 A Uh-huh.

10 Q And that cocaine or traces of cocaine were
11 found in a vial found under his body?

12 A Uh-huh.

13 Q It was a pink vial if I recall correctly?

14 A Uh-huh.

15 Q Other than testimony that your client was
16 drinking a beer or had said something about he just
17 wanted to finish his beer or something to that
18 effect, there was no evidence about your client's
19 drinking on the date in question, was there?

20 A No, ma'am.

21 Q But there was hearsay testimony about him
22 behaving badly up the street, right?

23 A Uh-huh.

24 Q Did you not consider that the testimony in
25 question was hearsay?

1 **A** Uh --

2 **Q** They said he was just an old drunk?

3 **A** Well, he was referring to folks who -- he
4 was referring to witnesses who did testify.

5 **Q** How do you know that?

6 **A** Because at the bottom of the previous page,
7 Deborah Joyner, Sheldon Glover, I think Ms. Cornish
8 testified. Yes, she did. He mentions Glover,
9 Cornish and Joyner. He is referencing what they told
10 him. All three of those testified.

11 **Q** But it is still hearsay.

12 **A** I see what you're saying.

13 **Q** At that point.

14 **A** At that point, yes, ma'am.

15 **Q** At that point, you didn't know whether or
16 not they were going to ultimately call those people
17 as witnesses or not?

18 **A** No, but I had a -- I had the state's list
19 of potential witnesses. It was listed on there.

20 **Q** Did you question either of those witnesses
21 for what the factual basis was for their assertion
22 that he was a drunk?

23 **A** No, ma'am. Not that I recall.

24 **Q** Okay.

25 **MS. SHURLING:** Your Honor, a moment's

1 indulgence, please?

2 **THE COURT:** Okay.

3 **(WHEREUPON, Ms. Shurling confers with Ms.**
4 **Harrigan.)**

5 **MS. SHURLING:** Your Honor, may I approach?

6 **THE COURT:** You may.

7 **BY MS. SHURLING:**

8 **Q** Can you identify this document, Mr. Riley?

9 **A** I don't remember seeing that. I mean, from
10 receiving other letters from Mr. McKnight, it
11 certainly looks like it was written by him. I don't
12 know if I was furnished a copy of this or not.

13 **Q** Pardon?

14 **A** The Clerk of Court's cover sheet says it
15 was forwarded to the Solicitor's office.

16 **Q** I understand.

17 **A** Okay.

18 **Q** But --

19 **A** But I don't remember seeing this.

20 **Q** Have you ever seen a copy of that in your
21 file?

22 **A** Not that I remember, no, ma'am.

23 **Q** When you took the case over, did you review
24 the file at the Clerk of Court to determine what
25 documents had or had not been filed prior to your

1 assuming responsibility for the case?

2 **A** Probably. But I have no specific
3 recollection of doing that. I probably did.

4 **THE COURT:** Let's mark the document for
5 identification purposes if for nothing else.

6 **MS. SHURLING:** Thank you. Your Honor, at
7 this point, I wish to mark it.

8 **THE COURT:** For identification purposes at
9 this point.

10 **(WHEREUPON, Applicant's Exhibit 3 is marked for**
11 **identification purposes.)**

12 **BY MS. SHURLING:**

13 **Q** So it is fair to say that you don't recall
14 having seen that document before?

15 **A** No, ma'am.

16 **Q** Okay.

17 **MS. SHURLING:** A moment's indulgence, Your
18 Honor.

19 **THE COURT:** Okay.

20 **(WHEREUPON, Ms. Shurling confers with the**
21 **applicant.)**

22 **MS. SHURLING:** Nothing further, Your Honor.

23 **THE COURT:** Very well. That will conclude
24 what we're going to do for today. We're not
25 going to be able to finish the cross-examination

1 in 10 minutes. Now, we've got more work to do.
2 We're going to have to have a little status
3 conference to see when we're going to be able to
4 conclude this matter. So, we need to do that
5 now. Do you have your schedule with you?

6 **MS. SHURLING:** No, ma'am. But I am flying
7 out of Columbia in the morning at 907 for the
8 National Lawyers Leadership Conference in San
9 Francisco.

10 **THE COURT:** That's not fair. So you will
11 be gone the rest of the week?

12 **MS. SHURLING:** I will be gone the rest of
13 the week. I do have an order of protection, by
14 the way. Shall we stand out in the hallway,
15 Your Honor?

16 **THE COURT:** We're going to have to talk
17 about how were going to finish. We're going to
18 have to do that. Bring your schedule.

19 **(WHEREUPON, a recesses for the day.)**

P R O C E E D I N G S

(WHEREUPON, the proceedings resume on the 6th day of August, 2013 at approximately 11:39 a.m.)

THE COURT: Cross-examination.

MS. HARRIGAN: May it please the Court?

THE COURT: Yes.

CROSS-EXAMINATION

BY MS. HARRIGAN:

Q Good morning, Mr. Riley.

A Good morning.

Q Do you recall becoming involved with Mr. McKnight's case?

A Yes.

Q And I know we reviewed this on direct yesterday. Do you recall the approximate date when you began representing Mr. McKnight?

A September.

THE COURT: Hold on.

Ms. Shurling. Ms. Shurling, we have started. Okay.

Okay. Go ahead.

MS. SHURLING: I apologize. I did not realize we started.

THE COURT: That's okay.

THE WITNESS: Sometime around September

1 2008.

2 **BY MS. HARRIGAN:**

3 **Q** I believe you testified to this yesterday.
4 But you are the first PD to have this case, weren't
5 you?

6 **A** Correct.

7 **Q** Do you recall how many, approximately, had
8 this case before you?

9 **A** Glenn Rogers and David Reuwer.

10 **Q** When did you become Chief PD?

11 **A** Uh, near the end of 2007. And I did not
12 bring up or mention yesterday that I think it was in
13 January 2008 when Mr. Strickler was sworn in as
14 circuit PD. For a while, he had direct involvement.
15 The previous entity, Kershaw County did not cease to
16 exist until January -- excuse me -- June 30th of
17 2008.

18 **Q** Shortly before you --

19 **A** Correct.

20 **Q** And you have had an opportunity to review
21 your file before coming here today?

22 **A** Yes.

23 **Q** Do you recall approximately how many times
24 you met with Mr. McKnight prior to his trial?

25 **A** Not counting the week or two before trial,

1 I know on three times. The week or two before trial,
2 I met with him multiple times. I don't remember how
3 many.

4 Q How long was he incarcerated prior to his
5 trial?

6 A He had been arrested September 23rd, 2005.

7 Q During your representation beginning in
8 September 2008, did he ever request that you make a
9 speedy trial motion on his behalf?

10 A No, ma'am. Not to my recollection.

11 Q I believe you testified to this yesterday,
12 the time that you got this case in September 2008,
13 there were discussions with the Solicitor's office in
14 the case either then or early 2009, correct?

15 A Correct. They informed me that it would be
16 in the spring of 2009.

17 Q Did you start preparing for trial?

18 A Yes.

19 Q Did you discuss the potential sentences Mr.
20 McKnight was facing with him?

21 A Yes.

22 Q Did he ever indicate to you that he wanted
23 to plead guilty to these charges?

24 A No.

25 Q You knew this was a trial from the

1 beginning of your representation in September?

2 **A** Yes. I tried to -- obviously in discussing
3 with Mr. Meadors, I tried to, Number 1, get them to
4 consider a plea to voluntary manslaughter. They
5 would never agree to that. It was always he would
6 plead to the charge of murder straight up was the
7 best offer they had.

8 **Q** You presented these offers to Mr. McKnight?

9 **A** Yes.

10 **Q** By the time you took over head
11 representation in 2008, did he ever indicate to you
12 that he wanted a preliminary hearing?

13 **A** Not that I recall. I don't recall
14 discussing that at all.

15 **Q** How long have you been practicing law?

16 **A** How long what?

17 **Q** You have been practicing law.

18 **A** Since June 2002 -- June 1986.

19 **Q** What percentage would you estimate as
20 criminal defense work?

21 **A** Two-thirds. I was in private practice for
22 15 years and did a variety of things.

23 **Q** Based on your years experience, would you
24 agree that it would be all the time that you would
25 request preliminary hearings in each of those cases?

1 **A** Yes, ma'am. Plus I think -- let me see.
2 By the time I took over the case, he had already been
3 indicted.

4 **Q** Do you think if Mr. McKnight had been
5 afforded a preliminary hearing, it would have
6 resulted in a dismissal of these charges?

7 **A** I don't think so.

8 **Q** Why, in your professional opinion, do you
9 not believe so?

10 **A** Well, any -- obviously, the standard in a
11 prelim is a probable cause standard which has, it is
12 the 51 percent standard, anything over half, to
13 indicate that a reasonable person could conclude that
14 a crime was committed and the person charged
15 committed it is almost necessary in a prelim. I
16 think the state had adequate evidence to meet the
17 probable cause standard.

18 **Q** When you took over direct representation in
19 2008, did the PD's office already have a complete
20 file of discovery from Mr. McKnight's case?

21 **A** Yes.

22 **Q** Did you review the discovery yourself?

23 **A** Yes.

24 **Q** More than once?

25 **A** More than once..

1 Q Did you review the contents of the file
2 with Mr. McKnight?

3 A Yes.

4 Q Could you elaborate on what your procedure
5 is when you go over discovery with your client?

6 A Well, we went over basically all of the
7 State's evidence, the various statements that had
8 been written by witnesses.

9 Q Did you advise him that the persons who
10 made the statements would testify at trial on the
11 State's behalf?

12 A Yes. Incident reports, the autopsy report
13 on the deceased, you know, everything that I had been
14 provided or that was in my file provided from the
15 State, I don't recall giving him copies of everything
16 but I know we went over and discussed everything.

17 Q Were you satisfied that he had ample time
18 to review the discovery with him?

19 A Yes.

20 Q Were you also able to go over his version
21 of facts giving rise to these charges?

22 A Yes, ma'am.

23 Q Would you reflect to the court what his
24 version of events were?

25 A Basically, from the beginning of my

1 involvement with Mr. McKnight, it was clear that
2 there was essentially a self-defense case. He had
3 been attacked and been in on two previous occasions
4 before this incident. On one of the instances, he
5 had been assailed or hit with a baseball bat. He had
6 been seriously injured. He adopted the habit of
7 carrying some sort of weapon as self-defense.

8 He was armed on the incident date with that
9 weapon. It was a hunting knife with a very long
10 blade. He felt that the night of this incident, he
11 was being ganged up on. The offense used to be
12 called lynching. They have now divided it into
13 different degrees of assault and battery by a mob.

14 Q Did you start preparing a self-defense
15 strategy based on these discussions in discovery?

16 A Yes.

17 Q Did the discovery support a period of self-
18 defense?

19 A I think it did, yes. I still to this day
20 think it did. I think the jury reached the wrong
21 verdict.

22 Q Did you hire a private investigator to help
23 with your preparation for trial?

24 A No.

25 Q Does the Kershaw County PD's office have a

1 private investigator?

2 A No.

3 Q Do you traditionally hire private
4 investigators?

5 A Yes. From the time that Mr. Strickler was
6 sworn in, what we have to do is submit a voucher and
7 an estimate of what the cost is going to be, which is
8 absurd. It is a nebulous figure to come up with.
9 But anyway, the voucher or request for the allocation
10 of funds has to be approved by SCCID, the Commission
11 of Indigent Defense. Only then -- that process takes
12 a period of weeks. Only then is the name of the
13 individual who the Columbia office has chosen as
14 investigator provided to us. That person is given is
15 given a heads up.

16 Q Do you feel a private investigator was
17 necessary in this case?

18 A I did not feel that one was, no.

19 Q Could you expound for the court why you did
20 not believe a private investigator was necessary.

21 A There wasn't a terribly large number of
22 moving parts from the defense perspective in his
23 case.

24 Q Any type witness statements that you were
25 privy to in the state's discovery, correct?

1 **A** Correct.

2 **Q** I believe we touched on this before. But
3 the state's only plea offer of Mr. McKnight was to
4 plea straight up to murder, correct?

5 **A** That's correct. I'm not sure that -- even
6 if the state had agreed or made an offer to allow him
7 to plea to a lesser offense, I am not sure that Mr.
8 McKnight would have taken it.

9 **Q** Would you say he was adamant from the
10 beginning of your representation in September 2008
11 that he wanted to proceed to trial?

12 **A** Yes.

13 **Q** Moving on to the actual trial, Mr. McKnight
14 actually moved to have you relieved as counsel prior
15 to trial starting, is that correct?

16 **A** Say what again?

17 **Q** He moved to have you relieved prior to the
18 trial starting, correct?

19 **A** I can't remember. He may have.

20 **Q** That was taken up before the judge. If the
21 record reflects that, would you dispute that?

22 **A** No, I wouldn't. I just don't recall for
23 sure.

24 **Q** Did you feel prepared to proceed forward
25 when the trial began?

1 **A** Yes, ma'am.

2 **Q** Did Mr. McKnight have leg shackles or
3 chains on during the trial to the best of your
4 recollection?

5 **A** He had -- no handcuffs, but ankle shackles,
6 yes.

7 **Q** What were the reasons for the ankle
8 shackles?

9 **A** Well, when Judge Cooper was the
10 administrative judge, at a time when I was not in
11 court, there was some sort of an incident. At that
12 point on, he ordered that all inmates, whenever they
13 were in the courtroom, had to maintain ankle
14 shackles. That has remained the practice ever since.
15 It is still a practice in Kershaw County.

16 **Q** Were these restraints visible to the jury?

17 **A** No.

18 **Q** How is it that the jury wasn't able to see?

19 **A** The defense table and the prosecution table
20 are just one big long table. At our end, the defense
21 -- well, the entire table including the Solicitor's
22 side has a curtain hanging down from the edge of the
23 table all the way to the floor. Nobody can see what
24 is -- everybody's legs or feet under the table.

25 **Q** Is it a transparent curtain?

1 **A** No.

2 **Q** No way anyone could see through it?

3 **A** No.

4 **Q** Did Mr. McKnight jingle his shackles for
5 anything that you noticed during the trial?

6 **A** I never noticed anything, no.

7 **Q** And Mr. McKnight did not take the stand
8 during this trial, correct?

9 **A** Correct.

10 **Q** So to the best of your recollection, there
11 is no way the jury could have seen the leg
12 restraints?

13 **A** No.

14 **Q** Regarding Mr. McKnight's decision to
15 testify at trial, was it your advice to advise him
16 not to testify?

17 **A** Yesterday, during direct, Ms. Shurling
18 asked me a similar question. Yesterday's
19 proceedings, I don't remember -- typically, as I
20 answered Ms. Shurling's question, I always tell my
21 clients that it is strictly their decision and no one
22 else's. Nobody can make it for them. They have to
23 make up their minds of themselves. Most of the time
24 -- in Mr. McKnight's case, this is what I don't
25 remember. Most of the time defendants will say what

1 is your opinion or what you recommend or what would
2 you do. If asked that question, I tried to give an
3 honest and fair answer based on the evidence
4 testimony that has been presented.

5 This is generally an ongoing discussion
6 with defendants when push comes to shove, a choice
7 has to be made as to whether to take the stand or
8 not. That is where the really serious debate over
9 the issue occurs. I don't remember if he asked me my
10 opinion of what would you do or anything like that.
11 I would have answered it honestly. Not remembering
12 if he asked, I don't remember the answer. I would
13 have probably said that John Meadors is a fairly
14 sharp cross-examiner and it would be difficult if you
15 took the stand.

16 Q I believe we touched on this issue
17 yesterday on Mr. McKnight's criminal record. Based
18 on your review of this record, was there any
19 impeachable defense?

20 A No. They were all more than 10 years old.
21 The worse of it was CDV.

22 Q Are there other factors that play into your
23 decision when you are advising a client whether or
24 not to take the stand beyond their prior record?

25 A Of course. The overall intent and demeanor

1 of the person facing that decision, there -- my
2 assessment of their veracity of how convincing and
3 truthful they are going to appear to the jury. The
4 sum total of my dealings with the individual, how
5 they have dealt-with me, how I think they would
6 respond under the pressure and anxiety of extensive
7 cross-examination. All of those factors, plus others
8 that right at the moment I may be forgetting.

9 Q Based on your experience with Mr. McKnight
10 prior to his trial, did you have any concerns about
11 his demeanor on the stand or how he might appear to
12 the jury?

13 A Yes.

14 Q Could you expound on that for the court?

15 A Mr. McKnight was very volatile. He was a
16 good at talking, not really good at listening.

17 Q Did you first think of the potential
18 pitfall if he was on the stand and cross-examined by
19 Mr. Meadors or Mr. Moak?

20 A Yes. It was easy for me to envision at a
21 critical time during the heat of the cross-
22 examination to envision him losing his temper.

23 MS. SHURLING: Your Honor, I realize there
24 is no jury present but I do have to object.
25 This witness specifically testified he has no

1 independent recollection of any advice he gave
2 the applicant with regards to testifying. He
3 doesn't remember whether the applicant even
4 asked him for his advice or his opinion in
5 testifying. He has indicated that he basically
6 doesn't remember what position he was taking
7 about the applicant testifying. Now he is
8 giving a protractive series of testimony all
9 addressing what he hypothetically believes he
10 would have thought that he doesn't remember.
11 Again, I know we don't have a jury present but I
12 believe it is -- I would object.

13 **MS. HARRIGAN:** If I could briefly respond
14 to that. I believe my line of questioning to
15 Mr. Riley was his overall demeanor in his
16 dealings with him as his client and he often
17 takes into account his client's demeanor on
18 whether or not to take the stand or not.

19 **THE COURT:** Very well. Overruled. You
20 may proceed. You can clarify that on cross if
21 you would.

22 **MS. SHURLING:** Yes, ma'am.

23 **BY MS. HARRIGAN:**

24 **Q** You presented three witnesses in Mr.
25 McKnight's defense, correct?

1 **A** Yes, ma'am.

2 **Q** Do you recall which witnesses those were?

3 **A** Say what now?

4 **Q** Do you recall which witnesses you presented
5 in his defense?

6 **A** D.D. Drakeford, Eric Tisdale and Dina
7 Horton.

8 **Q** What was your rationale behind calling Ms.
9 Drakeford to the stand?

10 **A** Behind calling who?

11 **Q** Ms. Drakeford, D.D. Drakeford.

12 **A** She was the most -- of the folks who were
13 there the night of the incident, she was -- had the
14 most helpful testimony to present from a defense
15 perspective.

16 **Q** Why did you feel that her testimony would
17 have been the most helpful?

18 **A** She was able to testify as to the fact of
19 it wasn't just Mr. McKnight and the decedent who were
20 out on the street, there were others on the street
21 including a person that came up behind Mr. McKnight.
22 She was able to minimize the testimony of other
23 witnesses as to the fact that he was hit with a beer
24 bottle. All of those things were very much in our
25 favor.

1 Q Did you fill she was a hostile witness on
2 the stand?

3 A Did what now?

4 Q Did you feel she was a hostile witness on
5 the stand?

6 A No.

7 Q In your trial strategy, did you think to
8 have her declared as a hostile witness?

9 A I don't believe I ever considered that.

10 Q Did you impeach her regarding her prior
11 inconsistent statement to the police?

12 A I did not.

13 Q Do you have any reason for why you chose to
14 not do so?

15 A It may not have been a choice. It may have
16 been an oversight.

17 Q And her prior statements to the police,
18 were they sworn statements?

19 A No. I don't believe so.

20 Q I believe -- do you have the exhibits?

21 **MS. HARRIGAN:** Your Honor, may I approach?

22 **THE COURT:** You may.

23 **BY MS. HARRIGAN:**

24 Q Mr. Riley, I'm handing you Plaintiff's
25 Exhibit number 1. Do you recall that from yesterday

1 during direct?

2 A Yes, I do.

3 Q And I believe it's page 4 and 5 that
4 notates calls from an informant, D.D. Drakeford?

5 A Yes, ma'am.

6 Q To the best of your recollection -- I know
7 this trial was quite a few years ago. Were those the
8 only statements made by D.D. Drakeford to the police?

9 A I believe so. Bear with me for just a
10 second.

11 Q Certainly.

12 A (Reviewing.)

13 I believe that that was all that I have
14 unlike some of the other ones that did not give a
15 written statement.

16 Q And she is listed as an informant in those
17 statements, correct?

18 A Yes.

19 Q You also called investigator Eric Tisdale
20 and Dina Horton to the stand, correct?

21 A Correct.

22 Q What was your rationale behind calling
23 those two witnesses?

24 A They were able to testify as to the
25 previous assaults by Mr. McKnight.

1 Q To further your theory of self-defense?

2 A Right. To explain for his own personal
3 protection, he needed to carry some sort of --
4 something to protect himself.

5 Q Do you recall who exactly Dina Horton was?
6 What her job title was?

7 A She was the victim's advocate for the City
8 of Camden Police Department. I don't recall exactly
9 what the detail, but had been involved in
10 interviewing Mr. McKnight as a victim of previous
11 assault and she was familiar with the investigative
12 efforts to try to track down the assailants, I think,
13 in the case Ms. Horton was involved in, were never
14 identified. I don't think any arrests were made in
15 that case.

16 Q At this time, I'm going to turn to
17 applicant's specific allegations. I will try to go
18 in order as much as I can. I apologize. Do you have
19 a copy of the amended application in front of you?

20 A Yes.

21 Q Do you also have a copy of your trial
22 transcript?

23 A Yes.

24 Q First, can you describe your overall
25 approach to objections during the trial?

1 **A** Well, I don't object as frequently as many
2 attorneys do. That is perhaps a professional
3 weakness. But at any rate, unless it is something
4 that really I think is egregious, I am always fearful
5 and worried over the years to be fearful of the
6 effect that it has on a jury when a lawyer jumps up
7 and objects.

8 Number 1, it tends to focus the jury's
9 attention rather sharply on what it is that is being
10 objected to. Number 2, from my readings into the
11 psychology of juries, I am convinced that it is
12 merely human nature on the part of the juror to think
13 that a lawyer must be trying to cover up something or
14 hide something when they object.

15 I do object at what I believe to be
16 appropriate terms. But there are lots of things in
17 this trial transcript, I think, and probably any
18 case, any trial I have been involved in where another
19 lawyer who has a different philosophy and a different
20 approach would have objected much more frequently.

21 **Q** Do this overall approach to objections
22 carry into closing arguments?

23 **A** Yes, ma'am.

24 **Q** Would you say it is more or less likely to
25 object during the closing arguments?

1 **A** As compared to direct or cross-examination,
2 if you compare closing arguments to those periods in
3 a trial which are much less likely for me to object
4 during closing argument.

5 **Q** Would you state based on your nearly 30
6 years of criminal defense experience that the
7 solicitor as well as the defense attorney has a fair
8 amount of leeway to comment on the facts presented
9 during the case during their closing arguments?

10 **A** Absolutely.

11 **Q** Your overall approach to this case and that
12 defense based on your testimony so far is to
13 highlight the inconsistencies between the eye
14 witnesses and present self-defense, is that correct?

15 **A** Yes, ma'am.

16 **Q** Turning to the specific portion of the
17 transcript outlined in Applicant's Number 3, could
18 you turn to Page 338?

19 **A** Okay.

20 **Q** Specifically lines 1 and 2. Let me know
21 when you get there.

22 **A** Yes.

23 **Q** Do you know what portion of the trial this
24 actually is?

25 **A** This is Mr. Moak's closing on the law as

1 the transport reflects. Isn't it?

2 Q If you will, take a few moments to look at
3 the pages before and after. It appears this is
4 actually the state's argument against your directed
5 verdict motion.

6 A Okay. Okay. Okay.

7 Q Correct?

8 A That's correct. Yeah, I'm sorry.

9 Q So this was out of the presence of the
10 jury, correct?

11 A Correct.

12 Q In Deborah Joyner's testimony, she
13 testified several times that Mr. McKnight came back
14 and forth throughout the night, correct?

15 A Correct.

16 Q I believe you highlighted those portions
17 during direct yesterday, correct?

18 A Yes, ma'am.

19 Q I believe she specifically testified to
20 three times at least once or twice, correct?

21 A Correct.

22 Q She testified that Mr. McKnight had been
23 asked or told to leave prior, correct?

24 A Yes.

25 Q Had you had an opportunity to review the

1 portions of the state's closing listed as Applicant's
2 Number 3?

3 **A** I have.

4 **Q** Do you believe that these portions of
5 transcript are an assessment on the facts presented
6 during the case?

7 **A** That they are what?

8 **Q** Do you believe that these comments made
9 during Mr. Moak's and Mr. Meador's closing arguments
10 are fair assessments of the testimony presented
11 during the case?

12 **A** I do. But I see the point Mr. Shurling was
13 making yesterday which, as I understood it, the state
14 was trying to create the impression or asked or told
15 to leave three times whereas Ms. Joyner said he had
16 came, he had gone -- I don't know if my English is
17 very good -- left and come back three times.

18 **Q** She did testify he had been told to leave,
19 correct?

20 **A** Yes.

21 **Q** By homeowners she testified one time and by
22 other people, correct?

23 **A** Yes, ma'am. You know, I understand the
24 distinction that Ms. Shurling was pointing to. But
25 overall, why would I want to, at that point when Mr.

1 Meadors said have been told to leave three times, why
2 would I want to emphasize to the jury that the issue
3 of three times or not, that is my thinking.

4 Q Regarding Allegation Number 4, that you
5 were ineffective for failing to object to hearsay
6 testimony on unrelated bad acts?

7 A Uh-huh.

8 Q If you will turn to Page 219, lines 2
9 through 4.

10 A I've got it.

11 Q If you could, read that paragraph to
12 yourself.

13 A Uh, lines 1 to 4?

14 Q If you could read 2 through 7 to yourself.

15 A Uh, to, I guess, one of his friends' houses
16 and he was starting up there. His friend came down
17 there and told us that he had to run from his house
18 because he was starting. I -- you know, I did not
19 then and do not now think that the words starting
20 carries a whole lot of baggage. That could have been
21 anything.

22 Q This is in regards to Mr. McKnight being
23 asked to leave a different location, correct, not the
24 house where the incident occurred, correct?

25 A That's right.

1 **Q** And Ms. Joyner also testified he had been
2 asked to leave the house where the incident occurred
3 several times, correct?

4 **A** Correct.

5 **Q** And Ms. Joyner was an invited guest at the
6 house that evening, correct?

7 **A** Yes. Obviously, I think so, yes.

8 **Q** Was there anything in the discovery or the
9 testimony presented at that point to indicate that
10 Ms. Joyner wasn't an invited guest?

11 **A** No.

12 **Q** Turning to Allegation Number 5, regarding
13 the state using the same statement at its closing,
14 you testified earlier regarding your strategy for not
15 objecting during closing, you don't want to hide
16 anything from the jury, correct?

17 **A** Correct.

18 **Q** If you could, turn to Page 400, lines 19
19 and 20.

20 **A** I believe Deborah Joyner -- this is closing
21 statement by Mr. Moak. I believe Deborah Joyner even
22 testified that the homeowner actually told him to
23 leave at one point and then he came back.

24 **Q** Do you have any reason why you didn't
25 object to this portion of the closing?

1 **A** Well, he says I believe. That is one
2 reason. He doesn't say Deborah Joyner said. The
3 beginning of that statement saying I believe may be
4 the case that maybe he misreclected testimony.

5 **Q** I believe there is another portion listed
6 at Number 5. If you could, turn to Page 421 in your
7 transcript.

8 **A** Yes.

9 **Q** Specifically lines 20 and 21.

10 **A** Okay. He had already been told by somebody
11 up the street to leave. He is looking for trouble.

12 **Q** As we discussed prior, Deborah Joyner
13 testified he had been asked to leave several times,
14 correct?

15 **A** Yes.

16 **Q** Do you believe that statement is a comment
17 on the evidence presented throughout the trial?

18 **A** I don't see it that way.

19 **Q** Do you see this as being an objectionable
20 statement?

21 **A** I really don't.

22 **Q** Can you expound for the court on why you
23 don't believe that to be objectionable?

24 **A** Well, I guess it is hard to isolate certain
25 sentences and put them in the context to follow the

1 evidence. It is -- there have been testimony
2 presented. This is Mr. Meador's closing argument.
3 There have been testimony presented, perhaps
4 objectionable hearsay testimony that he had been
5 asked to leave by a neighbor up the street. So that
6 is not a misstatement of the testimony. He is
7 looking for trouble is an editorial comment no doubt
8 but that is what closing statements tend to be for.

9 Q Moving on to Allegation Number 6. If you
10 could, turn please to Page 220 and the transcript,
11 the direct of Deborah Joyner again.

12 A Uh-huh.

13 Q If you could, please read lines 5 and 6 and
14 a little further down to see her response please.

15 A Question, had he been told earlier to leave
16 by the homeowners or somebody. Answer, yeah, Dan
17 told him to go ahead and leave. Dan, being the
18 homeowner.

19 Q This might require you to look back and,
20 uh, review some of the prior testimony. But at this
21 point in Ms. Joyner's testimony, she already
22 testified that he had been back and forth and asked
23 to leave several times, correct?

24 A Yes. That was on -- there were two pages
25 earlier in the transcript.

1 **MS. SHURLING:** Your Honor, just for the
2 record, I know you will read it yourself, the
3 testimony is that he had been back and forth
4 several times, not that the homeowner asked him
5 to leave several times.

6 **THE COURT:** Okay.

7 **BY MS. HARRIGAN:**

8 **Q** Do you think an objection would have been
9 appropriate to that question?

10 **A** No.

11 **Q** Do you find that question to be a leading
12 thing?

13 **A** To be what?

14 **Q** To be a leading question.

15 **A** Uh, yeah, it is somewhat leading,
16 definitely.

17 **Q** Do you think an objection would have been
18 appropriate there?

19 **A** Well, I tend to be guilty in asking a lot
20 of leading questions. I'm not particularly eager or
21 on the lookout for similar sins on the part of
22 opposing counsel. I -- you know, it is a leading
23 question. I -- you know, certainly an argument could
24 be made that an objection should be put on the record
25 but I did not do so.

1 **Q** Again, at this point in Ms. Joyner's
2 testimony, she had testified prior that he had been
3 back and forth and asked to leave, and maybe not from
4 the homeowners but testimony that he had been asked
5 to leave several times at this point?

6 **A** Yes, ma'am.

7 **Q** Turning to Allegation Number 7 during Ms.
8 Drakeford's testimony. If you could, please turn to
9 the start of Mr. Drakeford's testimony that starts on
10 Page 347.

11 **A** Okay. All right.

12 **Q** I apologize. I may not have the right
13 number. It may not be Allegation Number 7. Ms.
14 Drakeford testified that Mr. McKnight was actually a
15 guest of the party, did she not?

16 **A** Not that I recall.

17 **MS. HARRIGAN:** Court's indulgence on that
18 portion?

19 **THE COURT:** All right.

20 **BY MS. HARRIGAN:**

21 **Q** Okay. If you will, please turn to Page
22 349.

23 **A** All right.

24 **Q** Specific lines on Page 14 through 15. If
25 you will, for context, read before that on 349.

1 **A** The question is about Isaac Williams who is
2 the decedent. The answer, Mr. Drakeford's answer,
3 yes, sir, he was there. Question, was that property
4 his residence? Answer, no, sir. Question, okay. He
5 was a guest of the party also, correct? Answer, yes,
6 sir.

7 **Q** That is in regards to Mr. Williams, not
8 Mr. --

9 **A** That's right.

10 **Q** But she did testify that Mr. McKnight had
11 rode up on a bike and had been there kind of
12 throughout the party, correct?

13 **A** Yes, sir. On Page 348, I asked her if she
14 was acquainted with Mr. McKnight. Ms. Drakeford said
15 he was dating a cousin of hers.

16 **Q** She testified that Mr. McKnight was hit
17 with a beer bottle, correct?

18 **A** Yes.

19 **Q** And that after that, he backed away from
20 the house into the road, correct?

21 **A** Correct.

22 **Q** This is all during your direct examination
23 of her, correct?

24 **A** That's correct.

25 **Q** So her overall testimony, would you

1 characterize it helpful to the defense?

2 **A** Absolutely. Clearly says Mr. McKnight got
3 hit with a bottle. She says the people in the yard
4 were moving towards Mr. McKnight. I asked were there
5 others that Mr. McKnight involved. She said, yes,
6 sir, I can't remember who. It was a place where
7 everybody hung out. So yes, to answer your question
8 is yes.

9 **Q** As we previously discussed at the beginning
10 of cross, she had given a statement to law-
11 enforcement previously?

12 **A** Not that I understand.

13 **Q** Did you speak with D.D. Drakeford before
14 she was on the stand?

15 **A** I did. It may not have been the day she
16 took the stand. It may have been the week before.

17 **Q** Were you aware of what her testimony was
18 likely to be on the stand?

19 **A** Yes, ma'am. Generally, I was, yes, ma'am.

20 **Q** We can move to Allegation Number 8. If you
21 could, turn to transcript Page 221.

22 **A** All right.

23 **Q** Ms. Joyner did testify during her direct
24 examination that Mr. McKnight was hit in the head
25 with a beer bottle, correct?

1 **A** Yes, ma'am.

2 **Q** I believe the testimony was something like
3 I threw a beer bottle but missed, correct?

4 **A** Yes.

5 **Q** Then on cross-examination, you impeached
6 her with her prior statement to the police, correct?

7 **A** Yes, I got her to admit that she was mixed
8 up. Let's see. (Reviewing.)

9 **Q** I believe it was Page 227 where that
10 occurred.

11 **A** She had previously said that Mr. McKnight
12 tried to hit the decedent with a King Cobra. I got
13 her to acknowledge that on cross-examination that
14 that was incorrect, that she had gotten mixed up.

15 **Q** Would you turn to Page 227 in the record
16 please?

17 **A** Yeah, I've got it.

18 **Q** Could you read lines 19 through 2 on the
19 next page please?

20 **A** Question, in that statement, you said you
21 saw the McKnight man tried to hit Ike with a King
22 Cobra bottle, is that correct? Answer, I had it
23 mixed up. Question, today, you were saying it was
24 just the reverse, right? Answer, I had it mixed up.
25 I was telling Mr. Meadors I had that mixed up because

1 I was so nervous and scared and didn't know what was
2 going on.

3 Q If you will, turn to Page 434 during Mr.
4 Meador's closing statement specifically lines 4
5 through 7.

6 A Okay. You want me to read those?

7 Q If you could just read it to yourself.

8 A All right.

9 Q The Solicitor's comment during closing is
10 accurate that Ms. Joyner did testify that the victim
11 was hit in the head with the bottle first, correct?

12 A In her first version.

13 Q Yes.

14 A Yes.

15 Q And then he states they didn't catch her in
16 that statement, we bought it out on direct and then
17 they came back and showed it, correct?

18 A Well, I don't know if that was a typo. We
19 bought that out on direct and then -- maybe it was
20 supposed to be they.

21 Q All right. Did you find that comment
22 objectionable based on the record?

23 A Well, it is a misstatement of the testimony
24 I think. I should've objected to it.

25 Q Going back to your prior testimony on your

1 theory for objection --

2 A Yeah, this was closing argument.

3 Q Was there any strategic reason why you
4 didn't object?

5 A No, ma'am. No specific reason.

6 Q Jumping around a little bit -- I apologize
7 to the court -- to Allegation 1 and 2.

8 A Okay.

9 Q Did you object to the court's jury charge
10 regarding inferred malice from the use of a deadly
11 weapon?

12 A No, there was some testimony yesterday,
13 about that but no.

14 Q I believe the testimony yesterday was that
15 Mr. Kirincich discussed this in chambers possibly,
16 but you weren't present for that discussion.

17 A I thought it may have been in chambers.
18 Apparently, it was a sidebar.

19 Q The charge the court gave regarding the
20 inferred malice for the use of a deadly weapon was
21 consistent with the law at that time, correct?

22 A Yes..

23 Q I believe Mr. Meadors and Judge Cooper
24 discussed it was a Richland County case that malice
25 can be inferred even in self-defense cases, correct?

1 **A** Yes.

2 **Q** At that time, State v. Belcher hadn't come
3 down yet, correct?

4 **A** Correct.

5 **Q** In fact, it hadn't even been argued yet,
6 had it?

7 **A** Not to my knowledge. I don't recall when
8 it was argued. The opinion was handed down some
9 several months after this trial finished.

10 **Q** And you are not clairvoyant, are you?

11 **A** No.

12 **Q** You had no idea that Belcher would be
13 decided that way, correct?

14 **A** I did not.

15 **Q** And at that time, the law of the land was
16 that that was a correct jury charge, correct?

17 **A** Yes, ma'am.

18 **Q** Regarding Allegation Number 10 that you
19 were ineffective for failing to object to the court's
20 failure to recharge the entire jury instructions on
21 self-defense ---

22 **A** Uh-huh.

23 **Q** --- Judge Cooper recharge the jury on
24 involuntary --

25 **A** Kinard. Kinard.

1 Q Kinard -- excuse me -- recharged the jury
2 on -- the note only requested a recharge on murder
3 and voluntary manslaughter, correct?

4 A Correct.

5 Q He also recharged involuntary manslaughter
6 over the state's objection, correct?

7 A Yes.

8 Q So you were able to successfully get the
9 judge to charge more than the jury was asking over
10 the state's objection, correct?

11 A Yes, ma'am.

12 Q Is there any reason you didn't ask him to
13 recharge self-defense?

14 A There was a -- if you would, refer to Page
15 378 and 379. There is -- the transcript reflects an
16 exchange between Judge Kinard and Mr. Kirincich about
17 clarification on the State v. Fuller charge for self-
18 defense. Basically Judge Kinard declined to do that.

19 Q And when this note came back, it was just
20 regarding the recharge of the specific offenses in
21 which Mr. McKnight could be found guilty, correct?

22 A Yes.

23 Q Self-defense wasn't an option available to
24 the jury. It was just a defense, correct?

25 A Yes, ma'am.

1 Q The judge recharged all three possibilities
2 other than not guilty with the jury, correct?

3 A Correct.

4 Q That was over the state's objection to
5 involuntary manslaughter, correct?

6 A Correct.

7 Q Regarding Allegation Number 11 involving
8 the self-defense charge that was raised to the jury,
9 the allegation, in fact, you were ineffective for
10 failing to request an instruction that clearly
11 advised the jury of self-defense could be raised to
12 the facts or circumstances established by evidence
13 introduced by the state and or the defense. Have you
14 had an opportunity to review the self-defense charge
15 given by the court?

16 A I have.

17 Q If you could, please turn to Page 463 lines
18 21 through 23. Would you please read that for the
19 record?

20 A Jurors, you take all the facts presented
21 during the case and decide what the evidence
22 convinces you that he acted in self-defense or not.

23 Q That portion indicates that the jury should
24 look at all the evidence presented, not just the
25 state's evidence, correct?

1 **A** Everything. Everything, yes.

2 **Q** If you will, turn to the next page, 464.

3 **A** Yes, ma'am.

4 **Q** Line 16.

5 **A** Okay. So you take all of the admitted
6 facts --

7 **Q** Does that portion say anything about taking
8 the state's admitted facts?

9 **A** No, it's not limited in any way.

10 **Q** Based on your nearly 30 years experience in
11 criminal defense, would you say that jury charges are
12 construed by the whole, correct?

13 **A** Yes.

14 **Q** Juries are presumed to follow instructions,
15 correct?

16 **A** Yes, ma'am.

17 **Q** Based on --

18 **A** Their oath requires it.

19 **Q** Based on these two portions as well as the
20 self-defense charge as a whole, do you think the jury
21 understood they were to accept, view the state and
22 the defenses evidence as far as self-defense?

23 **A** I am confident that Judge Kinard's
24 instruction to the jury made it crystal clear, yes,
25 ma'am.

1 **Q** If you feel they had not, would you have
2 objected to those based on your experience?

3 **A** What Judge Kinard does is true of every
4 judge. Once he finished charging the jury and the
5 jury is excused from the courtroom, he always ask if
6 there is any objection to the jury charge or any
7 additions or subtractions or corrections or anything.
8 That would've been the point where I would've raised
9 something for him to consider addressing further in
10 his charge to the jury.

11 **Q** The charge highlighted that the statement
12 prove beyond a reasonable doubt that the defendant
13 did not act in self-defense, correct?

14 **A** Yes.

15 **Q** Regarding Allegation Number 12, the jury
16 was instructed several times that it was the state's
17 burden to prove his guilt, correct?

18 **A** Yes.

19 **Q** Including disproving self-defense?

20 **A** Yes.

21 **Q** And Mr. McKnight was presumed innocent
22 until the state met its burden, correct?

23 **A** Yes.

24 **Q** We discussed this but you are familiar with
25 case law that a jury's instruction is presumed to be

1 right from the whole and construed throughout, not
2 piecemeal by each instruction?

3 A Yes, ma'am.

4 Q Based on the charges given by the court, do
5 you believe the jury understood it was wholly the
6 state's burden to prove that Mr. McKnight was guilty?

7 A Unquestionably.

8 Q Including disproving self-defense?

9 A Yes, ma'am.

10 Q And that Mr. McKnight had absolutely
11 nothing to prove including self-defense?

12 A Correct.

13 MS. HARRIGAN: Court's indulgence.

14 THE COURT: All right.

15 BY MS. HARRIGAN:

16 Q If you will, turn to transcript Page 165
17 regarding Allegation Number 20.

18 A Yes, ma'am.

19 Q If you will, read Page 165, line 6 down to
20 line 25 to yourself please.

21 A Okay.

22 Q In lines 8 through 10, the court makes a
23 comment on how the witness didn't have a stopwatch,
24 correct?

25 A Yes, ma'am.

1 Q And then later on down in 19 through 23, he
2 corrects himself, correct?

3 A Yes, ma'am.

4 Q Do you think these comments amount to the
5 court commenting on the facts as to that particular
6 witness's credibility?

7 A No.

8 Q Could you explain to the court why in your
9 30 years of experience you don't believe that is the
10 case?

11 A There is nothing Judge Kinard said that I
12 think -- I mean, he felt -- a matter of seconds, a
13 second or two went by between lines 8 to 10 in lines
14 19 to 22. He felt in lines 19 to 22 that he needed
15 to go back and correct himself. There isn't anything
16 there that really rises to the level of creating an
17 impermissible comment on the facts, I don't think.

18 Q Immediately after the comments -- I know
19 the transcript probably reads differently than in the
20 actual courtroom during the trial, but would you say
21 before there was time to object he instantly
22 corrected himself?

23 A Pretty much.

24 Q In regards to applicant's allegation that
25 the solicitor took this and ran with it and mentioned

1 the word stopwatch several times throughout the rest
2 of the trial, do you feel this prejudiced your
3 client?

4 A I don't think so. Looking at the totality
5 of the trial, that was a rather insignificant point.
6 Using the phrase stopwatch, whether the jury tied
7 that back to Page 165 of the transcript, God knows.

8 Q You don't think it had any impact on your
9 overall theory of self-defense?

10 A No, ma'am.

11 Q Allegation Number 23 regarding the box
12 cutter, could you please turn to Page 266 and 267.

13 A Okay.

14 Q This box cutter or utility knife was found
15 on Mr. McKnight when he was arrested, correct? Or in
16 his car?

17 A Uh, yes.

18 Q At this point of the trial, Mr. McKnight
19 himself stood up and objected, correct?

20 A What page?

21 Q 266 to 267.

22 A Uh, yes, ma'am. He did. Mr. McKnight did.

23 Q And he cited that it was a utility knife,
24 not a box cutter, correct?

25 A Correct.

1 **Q** The victim in this case was stabbed with a
2 knife, correct?

3 **A** Yes.

4 **Q** Do you think it would have been more
5 prejudicial to object and have this reclassified as a
6 utility knife as opposed to a box cutter?

7 **A** I am not -- to be honest, I am not familiar
8 with what the phrase utility knife means. To me, it
9 is a distinction without a difference. I think a box
10 cutter sounds more -- sounds more serious than a
11 utility knife. I don't really know what a utility
12 knife is. I mean, this was -- bear in mind that this
13 was after 9/11. Of course, all of the hijackers were
14 armed with box cutters. Everyone remembers that
15 pertaining to the terror attacks on 9/11.

16 **Q** At that point, your client himself jumped
17 up and objected, correct?

18 **A** That's correct.

19 **Q** Obviously, Mr. McKnight thought it made a
20 difference. As I said, --

21 **MS. HARRIGAN:** Court's indulgence.

22 **THE COURT:** All right.

23 **BY MS. HARRIGAN:**

24 **Q** Regarding applicant's second amended
25 application -- Allegation number 24, could you please

1 turn to Page 129?

2 A Okay.

3 Q This is during Mr. Hagan's testimony during
4 Mr. Kirincich's cross. If you could read 1 to 25 to
5 yourself.

6 A Answer, I did. Question, did they tell you
7 they observed what happened? Answer, yes, they told
8 me they observed what happened but they did not know
9 the suspect. They merely stated he was a drunk that
10 hung around the area. Question, did they tell you
11 where they were when they observed the incident?
12 Answer, yes.

13 Q There was no allegation presented at the
14 trial that Mr. McKnight was drunk, correct?

15 A Correct.

16 Q In fact, there was testimony that the
17 victim in this case, the decedent had been
18 drinking, ---

19 A Correct.

20 Q --- correct?

21 A Based on the toxicology report.

22 Q Quite over the legal limit, correct?

23 A Yes.

24 Q I believe he also has some cocaine or crack
25 in a vial the other witnesses tried to remove from

1 his person, correct?

2 A Correct.

3 Q But no testimony that your client was drunk
4 or under the influence of any other substances at
5 this time, correct?

6 A Various witnesses says that he was drinking
7 beer but that does not indicate he was drunk.

8 Q Do you -- would it be fair that this is
9 sort of a relevant comment --

10 A Say what?

11 Q Would you classify this comment, the
12 statement that he was merely a drunk that hung around
13 the area, do you find that relevant to your self-
14 defense theory?

15 A No.

16 Q Do you think it is prejudicial to your
17 client considering the theory of self-defense?

18 A Minimally. I am not sure it is prejudicial
19 at all.

20 Q At the close of the state --

21 A Even a drunk can defend themselves from
22 attack. Even if it were true, even if there was tons
23 of evidence that Mr. McKnight was drunk, drunks are
24 entitled to defend themselves also.

25 Q Do you believe if you would have objected

1 here, it would've been highlighted at this point to
2 the jury?

3 A I do.

4 Q At the close of the state's case, you move
5 for directed verdict, correct?

6 A Yes.

7 Q What were your grounds?

8 A Bear with me just a minute. (Reviewing.)

9 Q Would it be fair to say to save the court
10 some time in your searching that the state had failed
11 to prove that Mr. McKnight was acting in self-
12 defense?

13 A Yes, I mean that was kind of like the
14 linchpin of my argument for directed verdict.

15 Q And you renew this in the close of your
16 case, correct?

17 A Yes.

18 Q Following the verdict, you made a written
19 motion for a new trial or directed verdict in the
20 alternative, correct?

21 A Correct.

22 MS. HARRIGAN: Your Honor, may I approach?

23 THE COURT: You may.

24 BY MS. HARRIGAN:

25 Q I'm going to hand you what has been pre-

1 marked for identification only as Defendant's Exhibit
2 1.

3 A Okay.

4 Q Do you recognize this document?

5 A Yes.

6 Q At the close of the case, you asked for
7 time to submit a written motion to Judge Kinard,
8 correct?

9 A Correct.

10 Q Do you recognize that as the written motion
11 you prepared?

12 A Yes, this is it.

13 Q Did you prepare it or did Mr. Kirincich put
14 that up?

15 A I think Mr. Kirincich did a majority of the
16 work on it but I certainly participated in it. I
17 think he did the most, the greatest, the bulk of the
18 work on it, the research and citations and that sort
19 of thing.

20 Q And is that motion set forth in the law as
21 well as the evidence presented in the case on why Mr.
22 McKnight should've been acquitted based on self-
23 defense?

24 A Yes.

25 MS. HARRIGAN: I move that into evidence at

1 this time pre-marked as Defendant's Exhibit
2 Number 1.

3 **THE WITNESS:** It is just for ID.

4 **MS. HARRIGAN:** No further questions.

5 **THE COURT:** No objection?

6 **MS. SHURLING:** None. All right. Very
7 well, redirect?

8 **(WHEREUPON, Defendant's Exhibit 1 is admitted**
9 **into the record.)**

10 **MS. SHURLING:** Moment's indulgence, Your
11 Honor.

12 **THE COURT:** All right.

13 **(WHEREUPON, there is a pause.)**

14 **MS. SHURLING:** My apologies, Your Honor.

15 **THE COURT:** No problem.

16 **REDIRECT EXAMINATION**

17 **BY MS. SHURLING:**

18 **Q** Okay. Mr. Riley, I am going to try not to
19 reinvent the wheel but there are a few points that I
20 think we need to go back over.

21 **A** Yes, ma'am.

22 **Q** Yesterday, I asked you whether you had
23 interviewed D.D. Drake -- pardon me, D.D. Drakeford
24 prior to her testimony. It is my recollection that
25 you indicated that you had not. I believe today you

1 said you spoke with her before she testified.

2 **A** I thought I said the same thing yesterday.
3 If there is a discrepancy, I trust your memory, okay?

4 **Q** Okay. Well, let's -- did you interview her
5 prior to her testimony?

6 **A** My recollect -- excuse me. My recollection
7 is that I had an opportunity to talk with her. I
8 couldn't, uh, call it a formal interview but I know I
9 had an opportunity to talk to her before she was
10 sworn as a witness. I thought I talked with her at
11 least a week before trial.

12 **Q** Okay.

13 **A** Again, my recollection of yesterday is
14 that I made similar responses to your question.

15 **Q** Okay.

16 **A** If I am wrong, I am wrong.

17 **Q** When you testified on direct today, you
18 indicated that you knew generally what she was going
19 to testify to a trial in advance of her testimony.

20 **A** Yes, ma'am. I subpoenaed her as a witness.

21 **Q** I understand. Did you review -- you had in
22 the discovery materials --

23 May I approach, Your Honor?

24 You had in the discovery materials a copy
25 of the -- that is in your hand, the multiple pages of

1 the report entered by Lee Boan, correct?

2 A Yes, ma'am.

3 Q He is from Camden Police Department?

4 A Yes, ma'am.

5 Q Where is your office located compared to
6 the courthouse in Camden?

7 A Not far. Maybe half a mile, if that.

8 Q If that. Okay. You knew from this
9 document that has been marked Plaintiff's Exhibit 1
10 that Lee Boan had reported that on two different
11 occasions D.D. Drakeford had made phone calls
12 reporting that your client had been attacked by three
13 people including the victim and two of the others
14 were Travis Johnson and Sheldon Glover.

15 A Uh-huh.

16 Q Okay. When you discussed her testimony
17 prior to the trial with D.D. Drakeford, did she
18 recall at the time of that discussion -- we won't
19 necessarily call it an interview but whatever the
20 discussion was, did she recall at that time having
21 informed the police that Travis Johnson, Sheldon
22 Glover and Mr. Williams had attacked your client?

23 A I don't remember, Ms. Shurling. I don't
24 remember if she said that or not.

25 Q Did you share with her the document that

1 was in the discovery materials that documented her
2 phone calls on September 29th or September 30th, both
3 reporting the others had physically jumped on your
4 client?

5 **A** I don't remember.

6 **Q** Okay. Well, when you said you knew in
7 advance her testimony what D.D. Drakeford was going
8 to testify to at trial, did you know in advance of
9 trial that she was going to claim that she couldn't
10 remember who else was involved in the altercation
11 with your client?

12 **A** Well, no. During the time she was actually
13 on the witness stand, that came as something of a
14 surprise. She did testify that there were other
15 people in the yard moving towards Mr. McKnight.

16 **Q** I understand.

17 **A** She acknowledged that.

18 **Q** But nebulous unknown people, correct?

19 **A** Were there others involved? Yes, sir. I
20 can't remember who.

21 **Q** I understand.

22 **A** All right.

23 **Q** My -- Mr. Riley, my question is did you
24 know in advance of trial that she was going to claim
25 not to know who else those people were?

1 **A** No, I did not know that.

2 **Q** When you talked to her in advance of trial,
3 did you discuss with her what she had seen on the
4 night of the incident?

5 **A** Ms. Shurling, to the best of my
6 recollection, I talked with her before she testified.
7 The particulars of what I talk with her about at this
8 point in time, I truly don't remember. I would
9 assume I would had covered the substance of what she
10 would've prepared to testify to. Even if she had told
11 me during my conversation with her prior to her
12 testimony that she as of that moment could not
13 remember who the individuals were, I would have
14 wanted her to testify because she was able to say
15 that there was others who was approaching and acting
16 in a threatening manner towards Mr. McKnight. I
17 would have wanted to present her testimony even if
18 that was all she had told me she could remember.

19 **Q** Certainly. But my question --

20 **A** You --

21 **Q** Are you through?

22 **A** Go ahead.

23 **Q** All right. I am not disputing that her
24 testimony was helpful but my question is Travis
25 Miller was a witness against your client at the

1 trial --

2 A Travis -- Travis Johnson.

3 Q I mean Travis Johnson.

4 A Uh-huh.

5 Q I have a client name Travis Miller. I
6 apologize. Travis Johnson was a witness against Mr.
7 McKnight at trial. So was Sheldon Glover.

8 A Uh-huh.

9 Q And the information contained in the Boan's
10 report indicated that those gentlemen had actually
11 physically attacked Mr. McKnight along with the
12 deceased, correct?

13 A Uh-huh.

14 THE COURT: Yes? That's a yes?

15 THE WITNESS: Yes, ma'am.

16 BY MS. SHURLING:

17 Q The fact that they had been reported while
18 D.D. Drakeford participated in an attack on your
19 client would have been relevant on a couple of
20 scores, wouldn't it?

21 A Yes, ma'am.

22 Q One being the self-defense claim, true?

23 A Uh-huh.

24 Q And it also would have gone to their
25 credibility as witnesses, would it not?

1 **A** Yes, ma'am.

2 **Q** Now, I asked you yesterday why you didn't
3 and call Lee Boan as a witness for the defense and
4 ask him whether or not their investigation yielded
5 any information that Travis Johnson was involved in
6 an attack on your client or whether or not their
7 investigation had turned up any leads that Sheldon
8 Glover was involved in an attack.

9 **A** Uh-huh.

10 **Q** And your response was, if I understood you
11 correctly, that he had been excused from the
12 courtroom.

13 **A** I didn't say that flatly. I said he may
14 have been at that point. All I know is Lee Boan
15 testified before D.D. Drakeford. I don't know if he
16 was excused from attendance at court or not. I don't
17 think the transcript reflects that.

18 **Q** How far away did --

19 **A** To answer your question, I did not ask Lee
20 Boan that question, you're right.

21 **Q** Let's, at this point, stick with my
22 question about calling him as a defense witness. How
23 far away did you say that Camden Police Department is
24 from the courthouse?

25 **A** Very close.

1 Q Less than a half-mile, isn't it?

2 A In driving distance, it might be even less
3 than that.

4 Q Why didn't you make an attempt to get Mr.
5 Boan back in the courtroom once you saw what the
6 testimony of D.D. Drakeford was going to be or what
7 it have been?

8 A At this point, I could not account for
9 that.

10 Q Okay. Now, if as you say today you had
11 already interviewed D.D. Drakeford and you knew what
12 her testimony was going to be, then why didn't you go
13 ahead and ask Lee Boan questions about whether or not
14 their investigation had unearthed information of
15 other individuals involved in an attack on your
16 client while you had him on cross-examination?

17 A At this point, Ms. Shurling, I can't
18 account for -- I can't give you a good reason for
19 that.

20 Q Okay. Now, let's back up for a minute and
21 try to go a little bit in order with regard to the
22 Belcher issue. I understand your testimony that
23 Belcher had not been decided yet, it wasn't stated
24 law. You didn't have a crystal ball, as the court
25 has been known to note, and anticipate that ruling.

1 **A** Yes, ma'am.

2 **Q** But your bright young associate did, didn't
3 he?

4 **A** Yes, ma'am. I think Mr. Kirincich pointed
5 that out, yes.

6 **Q** So your co-counsel, right?

7 **A** Yes, ma'am.

8 **Q** Albeit somewhat fresh an objection, he did
9 recognize the problem with an instruction and raised
10 it with the court, he just didn't do it on the
11 record?

12 **A** Yes, ma'am.

13 **Q** So somebody on the defense team did and
14 simply did not preserve the record in a manner that
15 it could be raised on appeal?

16 **A** Well, correct.

17 **Q** And --

18 **A** The judge's ruling was the law of South
19 Carolina at the time.

20 **Q** I understand. Are you familiar with the
21 law concerning retroactivity?

22 **A** Yes, ma'am.

23 **Q** And under Teague v. Lane and related cases,
24 the standard is that a new pronouncement of law like
25 that applies to any case that is still on direct

1 appeal, correct?

2 **A** At the time, Belcher was -- the opinion was
3 forthcoming. Mr. McKnight's case was on direct
4 appeal, yes.

5 **Q** So if the issue have been preserved, he
6 would have received the benefit of that ruling?

7 **A** I, to this day, don't know why he didn't on
8 appeal. But anyway...

9 **Q** Well, the objection wasn't made on the
10 record.

11 **A** I understand what you are saying, yes,
12 ma'am.

13 **Q** All right. Let's move along. I don't want
14 to go back over each and every incident but we talked
15 a good bit yesterday about the fact that Deborah
16 Joyner was allowed multiple times to refer to the
17 homeowner having asked your client to leave without
18 objection, correct?

19 **A** Uh-huh.

20 **Q** And you acknowledge that was objectionable
21 hearsay?

22 **A** Right, because the Washingtons did not
23 testify.

24 **Q** Neither Dan or Stella testified?

25 **A** Correct. I don't know if -- it would not

1 have made any difference. It just occurred to me, I
2 don't know if they were listed as potential state
3 witnesses or not but they did not testify.

4 Q They did not testify?

5 A Correct.

6 Q And certainly had not testified at the
7 point in time when Deborah Joyner testified?

8 A Correct.

9 Q So whether they were on the list or not,
10 you do not know whether or not they were going to
11 testify?

12 A Correct.

13 Q Again, under the elements of a self-defense
14 charge of being without fault in bringing about the
15 difficulty, correct?

16 A Correct.

17 Q And if you have been asked to leave by
18 someone in a position of authority to ask you to
19 leave, that could undermine that threshold element of
20 your self-defense claim, correct?

21 A Correct.

22 Q Now, once you failed to object to the first
23 mention of that, the solicitor highlighted that
24 testimony by asking a leading question about the fact
25 that the homeowner had already asked you to leave,

1 had he?

2 A Uh-huh.

3 Q Okay?

4 A Yes, ma'am.

5 Q And yet again at another juncture after
6 that. There were multiple records as to this issue.
7 Okay. Now, then you get to the closing argument.
8 Now I grant you you didn't object to Deborah Joyner's
9 testimony but when the Solicitor's referring to the
10 homeowners having asked your client to leave, he
11 still -- he is, in closing argument, reliant on
12 hearsay to hammer home with the jury the fact that
13 your client had been asked by the homeowner to leave,
14 wasn't he?

15 A Uh-huh.

16 Q And you didn't object?

17 A Huh-uh.

18 Q Because you thought it would be
19 unprofessional?

20 A Well, true, but it have been -- it wasn't
21 -- the only testimony about Mr. McKnight being asked
22 to leave was not attributed to -- attributed only to
23 the Washingtons. The deceased had been quoted as
24 saying to Mr. McKnight, leave or go away or why don't
25 you get out of here or something like that. Okay?

1 In other words, the allegation that Mr. McKnight had
2 been asked to leave was not attributed solely to Dan
3 and -- was it Stella Washington?

4 Q Correct.

5 A It wasn't attributed solely to the
6 Washingtons. That is the only addition I would make
7 to my answer to your question. But you are right.
8 That was stated by Mr. Meadors in his closing
9 argument. I did not object to it.

10 Q I'm scared. I don't want to talk over you
11 but I'm having a hard time figuring out when your
12 answers are finished.

13 A Okay.

14 Q But there was testimony that it was the
15 home of Dan and Stella Washington?

16 A Uh-huh.

17 Q Mr. Williams was an invited guest. There
18 was testimony he was a guest. So Mr. Williams was
19 not the person in authority to ask someone to leave
20 the property, was he?

21 A No. There was also testimony that the
22 Williams were there at the time in the house.

23 Q But that doesn't establish that they asked
24 your client to leave the property, does it?

25 A I understand.

1 Q Now, you asked D.D. Drakeford or someone
2 did, pardon me, about Mr. Williams, the deceased
3 being an invited guest. Was there -- I believe we
4 covered this yesterday. There was no testimony that
5 your client wasn't an invited guest, was there?

6 A You are right. No explicit evidence or
7 testimony.

8 Q There is no evidence.

9 A Well, Ms. Shurling, I know you studied the
10 transcript carefully. You cannot possibly make the
11 argument that Mr. McKnight was welcome there. You
12 can't possibly make that argument.

13 Q Well, let's back up for a minute. There is
14 testimony inadmissible hearsay testimony that the
15 homeowners had asked him to leave, correct?

16 A Uh-huh.

17 Q Other than that, the only testimony you
18 have got is that the victim had told him to leave ---

19 A Uh-huh.

20 Q --- who was an invited guest.

21 A And you have got D.D. Drakeford's testimony
22 that the people that were in the yard would have been
23 moving towards Mr. McKnight.

24 Q That is not germane to my question, Mr.
25 Riley.

1 **A** Sure it is. If your argument is that his
2 presence was unobjectionable to everybody there, sure
3 it is germane to your claim.

4 **Q** That was not my question, sir. My question
5 was there is no evidence before this jury that Mr.
6 McKnight was not an invited guest to this gathering.
7 True or false?

8 **A** Again, let me repeat. If you read the
9 complete transcript of the trial, there isn't any
10 person on earth who can conclude that Mr. McKnight's
11 presence was welcome there by the folks who were
12 there. Okay? You know that.

13 **Q** Mr. Riley, there is evidence, testimony in
14 this case to indicate that your client had a
15 disagreement, even an altercation given what we know
16 today about the reports from Investigator Boan's
17 incident reports with other guests at the party.

18 **A** Uh-huh.

19 **Q** Is it fair to say that's what the evidence
20 shows?

21 **A** Uh-huh.

22 **Q** That bears no logical relevance to whether
23 or not he had been a guest at the same party. If two
24 guests at my Christmas party get into an argument in
25 my living room, it doesn't alter the fact that they

1 were both invited guest, does it?

2 **A** The fundamental element of logic that you
3 can't disprove a negative, you are saying there is no
4 evidence that he was not an invited guest. How do
5 you disprove something, a statement like that? You
6 can't. There is -- there is -- on the other side of
7 that coin, there is absolutely no evidence in the
8 record that he was an invited guest.

9 **Q** And again, the defendant has no burden of
10 proof, correct?

11 **A** Yes, ma'am.

12 **Q** Now even if he were originally an invited
13 guest, once a homeowner had asked him to leave, his
14 lawful right to be present would be terminated,
15 correct?

16 **A** Yes, ma'am.

17 **Q** So the fact that the homeowners allegedly
18 told him to leave was very pertinent to your claim of
19 self-defense, damaging to your claim of self-defense.

20 **A** It was pertinent.

21 **Q** Okay. I'm going to move on. The
22 respondent asked you to take a look at the testimony
23 on Page 219, the hearsay testimony of Deborah Joyner
24 where she said that the man had come down and said
25 that -- I don't want to paraphrase. His friend came

1 down there and told us that he had to run him from
2 his house because he was starting. We came down
3 there and it was like he was looking for something
4 that night.

5 **A** Uh-huh.

6 **Q** Okay?

7 **THE COURT:** Is that a yes?

8 **THE WITNESS:** Yes, ma'am.

9 **BY MS. SHURLING:**

10 **Q** Okay. Now, usually, you don't know that
11 starting necessarily was intended to imply bad
12 behavior, is that your position?

13 **A** I believe what I said earlier was that the
14 word starting doesn't carry a whole lot of baggage
15 with it to my way of thinking. But again, you asked
16 me if I believe it was objectionable hearsay for them
17 to refer to something, an unidentified neighbor.

18 **Q** Well then I apologize. I thought I
19 understood you on cross to suggest that you would not
20 have objected to that because it was harmless in some
21 way.

22 **A** Well, if that is the way you understood my
23 answer, I don't --

24 **Q** That is not what you intended?

25 **A** I don't -- my recollection is in answer to

1 the Attorney General's question, I may not have -- I
2 think I would have said I would -- I'm not sure now
3 that I would have objected at that point. But --
4 because of the word starting. But I still don't
5 think the word starting conveys a whole lot -- has a
6 whole lot of negative connotations or necessarily
7 suggests illegal behavior. I mean, starting an
8 argument, starting the bonfire, starting what?
9 Starting can refer to a whole bunch of things.

10 Q Okay, Mr. Riley, once again, threshold
11 question in self-defense is you were with -- were you
12 without fault in bringing about the difficulty,
13 correct?

14 A Yes.

15 Q This here says statement indicates that
16 someone was not in court testifying had said that he
17 had had to run him out of his house -- away from his
18 house, correct?

19 A Yes, ma'am.

20 Q Because he was starting?

21 A Yes, ma'am.

22 Q So taken in context, that statement, the
23 word starting at least means there was some sort of
24 behavior that prompted him to be asked to leave, run
25 away from the house, correct?

1 **A** Well, I think that is reading into it.

2 **Q** Well, and I quote, he had to run him from
3 his house does he was starting.

4 **A** The homeowner.

5 **Q** Correct.

6 **A** Yes.

7 **Q** And my question is taken in context, does
8 that not, could that not readily be interpreted by a
9 jury to me that he was engaged in some sort of bad
10 behavior that was starting some sort of bad behavior
11 characterized as starting that was bad enough to get
12 him to run from the house.

13 **A** Yes, ma'am.

14 **Q** And would that not damage your argument
15 that your client was without fault in bringing about
16 the difficulty at the next stop he went to which is
17 where the deceased was killed?

18 **A** Well, there again, it depends on how you
19 read the word starting. Okay. Starting could have
20 been -- as mentioned just a minute ago, starting an
21 argument, starting to use four letter words, starting
22 to criticize the interior of the neighbor's house,
23 starting to pick on the homeowner's wife or one of
24 his children or his dog. Starting can cover an
25 enormous range of things. It doesn't necessarily

1 mean starting illegal or lawbreaking behavior.

2 Q Did you make those arguments that you just
3 articulated in your closing argument?

4 A No, ma'am. No, ma'am, I didn't.

5 Q Didn't point out to the jury that that
6 hearsay testimony you let in without objection did
7 necessarily mean anything?

8 A I did not.

9 Q Okay. I will move on. Uh, you indicated
10 correctly that you pointed out to this jury that
11 there was some testimony that Sheldon Glover was
12 returning from the store or something, coming up
13 behind your client just as this thing reached a fever
14 pitch with the decedent, correct?

15 A Yes, ma'am.

16 Q And you pointed out to the jury that your
17 client had the right to act on appearances ---

18 A Yes, ma'am.

19 Q --- in your closing argument?

20 A Yes.

21 Q We discussed yesterday the fact that there
22 were other people that were friends of the deceased
23 there at the party?

24 A Yes, ma'am.

25 Q But you knew from the report indicated by

1 you as being in the discovery, in fact, documented,
2 you wrote the solicitor a letter that has been marked
3 as Applicant's 2, you knew that D.D. Drakeford had
4 reported that these people were just there, they had
5 jumped on your client, they attacked your client?

6 **A** Yes, ma'am.

7 **Q** Wouldn't the fact that your client had
8 actually faced physical action, being attacked, being
9 jumped on by other people in addition to the decedent
10 had greatly strengthen your self-defense claim?

11 **A** Well, let me just point out in the course
12 of answering that question, I did point out in my
13 closing argument that he had a knot on his head. I
14 emphasized that to the jury with the picture of the
15 knot, obviously. I emphasized to the jury that Mr.
16 McKnight had a cut on his chest, around his torso,
17 again, I think with a picture. So, you know, if your
18 question is specifically about a gang of people
19 surrounding him, I mean, I think I made reference to
20 that in my closing.

21 **Q** Well, what evidence was there -- I concede
22 there was testimony for more than one state witness
23 that the deceased had hit your client with a beer
24 bottle, right?

25 **A** Uh-huh.

1 Q Either thrown it was the expression that
2 was used.

3 A Right. Ms. Drakeford said it hit him. Some
4 of the witnesses said he ducked and it broke in the
5 street. But I think the knot on his head clearly
6 indicates it hit him.

7 Q Okay. Without exploring what D.D.
8 Drakeford had reported to the police, what evidence
9 was there a trial that your client had faced physical
10 danger from more than one person? From at least two
11 other people other than the deceased?

12 A Are you saying excluding --

13 Q Well, that didn't come out at trial.

14 A Sure he did.

15 Q Really? Let's look at her testimony.

16 A Just a minute ago --

17 Q I know. She said there were two other
18 people out there.

19 A Uh-huh.

20 Q I apologize. Let me find --

21 A Page 353.

22 Q 353. Okay. Uh, were there -- okay. The
23 people that were in the yard that would have been
24 moving toward Mr. McKnight, yes, sir. Your Honor, I
25 am on 353, starting at line 2. Do you think one of

1 those people was Ike Williams? Yes, sir. There were
2 others? Yes, sir. I can't remember who. It was
3 like a place like where everybody hung out at. I
4 can't remember who all was there. Okay. I can
5 remember Ike and Thomas because of -- okay -- the
6 fact that that happened. But I cannot put the place
7 where who was everybody else that was there. So she
8 indicates that there were people moving toward your
9 client. At some point, she said there were a couple
10 of others but she cannot identify them, right?

11 **A** And she also -- at the bottom of the
12 previous page, this had moved from a sidewalk out
13 into the street. There were others that were
14 following him out into the street.

15 **Q** I understand. If you were in a crowded
16 outdoor area and a fistfight breaks out, what
17 happens?

18 **A** I don't understand your question.

19 **Q** People are going to look, don't they? They
20 rubberneck.

21 **A** It draws attention first and foremost.

22 **Q** Right. The fact that there were people
23 moving toward this altercation between Mr. McKnight
24 and the deceased, it was helpful to your argument but
25 it did not necessarily prove that the people that

1 were moving in that direction had posed a physical
2 threat to your client, right?

3 **A** Well, one of my questions was there were
4 others involved. She said yes sir. Involved doesn't
5 mean looking or kibitzing.

6 **Q** In the previous question, you had been
7 talking about who was walking toward Mr. McKnight.

8 **A** Uh-huh. Then I kind of upped the ante by
9 using the word involved.

10 **Q** Why did you -- Mr. Riley, at that point,
11 you read Mr. Boan's investigative report. At that
12 point, why wasn't your next question and how were
13 they involved?

14 **A** You are right. Absolutely right.

15 **Q** Why didn't you ask if you seen anybody else
16 physically touch, attack, jump on?

17 **A** You are right. I understand your point.

18 **Q** You knew that she had previously reported
19 that to the police, right?

20 **A** She had.

21 **Q** And that would have really been essential
22 to a self-defense claim, wouldn't it?

23 **A** Yes, ma'am.

24 **Q** Okay. Now, let's go back to this incident
25 report. Confidential informant, D.D.

1 **A** Uh-huh.

2 **Q** There is no discussion of why information
3 from D.D. Drakeford is in the incident report as a
4 tip from a CI.

5 **A** Well, I think it was -- do you have that
6 exhibit?

7 **Q** Here it is and I will help you out here.
8 On 9/27/2005 at 2:30 -- pardon me. 9/29/2005, 10 AM,
9 informant D.D. called reporting officer and stated --
10 and it goes on. Again on 9/30/2005, 4:55 P.M.,
11 informant D.D. called reporting officer and stated
12 that Travis Johnson, Shelton Glover and Isaac
13 Williams all attacked Tommy McKnight together on the
14 night of this incident.

15 **A** Uh-huh.

16 **Q** Why -- other people were interviewed --
17 other guests at this gathering were interviewed and
18 witness statements were taken from them, right?

19 **A** Yes, ma'am.

20 **Q** Why is it that D.D. Drakeford's information
21 is jotted down as an informant identified only by
22 initials giving this a really crucial information
23 about your case. Why did that happen that way?

24 **A** Well, first of all, as you pointed out
25 already, the word confidential doesn't --

1 **Q** Excuse me. Informant D.D.

2 **A** I think the plain and obvious answer is --
3 nor did she write out a written statement like other
4 witnesses did. She didn't want to be involved. She
5 didn't want to be personally identified. She was
6 asking that he protect her identity which is why he
7 only used initials. Which is why I asked who D.D.
8 was. Either he answered me or I figured it out on my
9 own. I don't remember which. She did not want to be
10 involved. That is the clear obvious answer to me.

11 **Q** How do you know that? You just assuming?

12 **A** No, ma'am. I don't know if it was an
13 assumption or if I had -- back in 2009 at the time of
14 this trial whether that was something that she
15 herself said to me. I don't know.

16 **Q** Did you ask Lee Boan a single question
17 about D.D. Drakeford?

18 **A** No, ma'am. No.

19 **Q** No question about having talked to her, no
20 question about why you didn't take her witness
21 statement, no question about why she was only
22 identified as an informant?

23 **A** She did not give a written statement
24 because she did not want to. I remember at some
25 point in time her saying that.

1 Q Pardon?

2 A I remember at some point in time hearing
3 her say that, that she did not want to give a written
4 statement.

5 Q Mr. Riley, I thought you just said moments
6 ago it was just obvious that she did not want to get
7 involved. I asked you if you had asked. You said --
8 I thought I clearly heard you indicate that you
9 hadn't asked anybody, you just assumed that was true,
10 that it was obvious.

11 A It is an assumption. Okay.

12 Q Okay. Now, lawyers don't like to do it but
13 we subpoena witnesses all the time that don't
14 particularly want to be involved, don't we?

15 A And I did subpoena her.

16 Q You did.

17 A Yes, ma'am.

18 Q But you didn't question her about prior
19 inconsistent statements that were very potentially
20 not just helpful but crucial to your claim of self-
21 defense, right?

22 A Correct.

23 Q Are you familiar with the Supreme Court's
24 ruling on prior inconsistent statements?

25 A It has been a while. But I am, yes.

1 **Q** The Copeland case, State v. Copeland.

2 **A** I don't recall that opinion.

3 **Q** Well, isn't it a fact, Mr. Riley that a
4 prior inconsistent statement may be considered for
5 its substantive value?

6 **A** Yes, ma'am.

7 **Q** So if you had pursued impeaching her with
8 the fact that she had given a previous inconsistent
9 statement, the fact that she previously reported that
10 these other two state witnesses were part of an
11 attack on your client could have been considered as
12 substantive evidence of your claim of self-defense,
13 right?

14 **A** Yes, ma'am.

15 **Q** Okay. I will move on.

16 **THE COURT:** And this would be a good time
17 for lunch.

18 **MS. SHURLING:** Yes, ma'am.

19 **THE COURT:** Unless you are very close to
20 being finished.

21 **MS. SHURLING:** No, ma'am.

22 **THE COURT:** Okay. It is 1:30. It is time
23 for lunch. How long are we going to need for
24 you all to get lunch and to also provide lunch
25 for Mr. McKnight?

1 **THE DEPUTY:** About 30 minutes.

2 **THE COURT:** You can do it in an hour, you
3 think, and you get some lunch as well?

4 **THE DEPUTY:** Yes, ma'am.

5 **THE COURT:** You think you can be ready to
6 go at 2:30?

7 **THE DEPUTY:** Yes, ma'am.

8 **THE COURT:** You get lunch and he get
9 lunch?

10 **THE DEPUTY:** We bought his lunch.

11 **THE COURT:** I will bet you didn't bring
12 your lunch though, did you?

13 **THE DEPUTY:** No, ma'am.

14 **THE COURT:** Someone is going to have to
15 scoot and get you guys lunch, right?

16 **THE DEPUTY:** Yes.

17 **THE COURT:** We're going to take an hour
18 break and then we'll reconvene at 230. Thank
19 you so much.

20 Of course, Mr. Riley, I don't need to tell
21 you, but you are not to discuss your testimony.
22 You on the stand.

23 **THE WITNESS:** All right. Thank you.

24 **THE COURT:** Thank you. Have a good lunch.

25 **MS. SHURLING:** Your Honor, I don't

1 anticipate being a great deal longer but it
2 would be longer than what Your Honor would want
3 to break for lunch. I just didn't want you
4 to --

5 **THE COURT:** How many more witnesses do you
6 believe you will have?

7 **MS. SHURLING:** My client. But my line of
8 inquiry with my client, assuming that I am with
9 in control of the situation should be very
10 brief.

11 **THE COURT:** I understand. Okay. Very
12 well. And you all have additional witnesses?

13 **MS. HARRIGAN:** Likely, Your Honor.

14 **THE COURT:** Very well.

15 **MS. HARRIGAN:** But no more than one or two.
16 We certainly will wrap up today. I can be
17 brief.

18 **THE COURT:** That's okay. Do what you need
19 to do. Not a problem. Thank you so much.

20 (WHEREUPON, a lunch recess is taken.)

21 **THE COURT:** All right.

22 **MS. SHURLING:** All right, Your Honor.

23 **BY MS. SHURLING:**

24 **Q** Mr. Riley, let me see if I can figure out
25 where we were before the break. We discussed

1 yesterday the fact that I had been to review your
2 file.

3 A Yes, ma'am.

4 Q And you indicated that the only thing that
5 was not in your file was attorney work product, your
6 notes.

7 A Yes, ma'am.

8 Q Have you subsequently returned those notes
9 to the file or made them part of the file that you
10 have with you here today or how are your attorney
11 notes maintained?

12 A I don't think that they are unitedly with
13 the rest of the file.

14 Q When you close a file, what do you do with
15 your attorney work product notes? Do you leave them
16 in the file or destroy them? What is your policy on
17 that?

18 A When we close the file -- of course, I knew
19 it was on appeal so it had not yet been closed. We
20 scan it. The hard part is destroyed. As part of the
21 scanning process, everything in the file including
22 each of our notes is included in the scan.

23 Q Okay. Let's go for a moment to the
24 question of your advice to Mr. McKnight concerning
25 testifying.

1 **A** Yes, ma'am.

2 **Q** Just so that I am clear, you have no
3 independent recollection of your discussion with him
4 concerning whether or not he should testify, is that
5 correct?

6 **A** That is correct.

7 **Q** You -- we discussed briefly yesterday his
8 prior record ---

9 **A** Yes, ma'am.

10 **Q** --- was rather old.

11 **A** Correct.

12 **Q** Do you recall that testimony?

13 **A** Yes, ma'am.

14 **Q** I believe in response to questions from the
15 respondent, you acknowledged this morning that these
16 charges did not represent impeachable defenses. Even
17 if they had, they were more than 10 years old?

18 **A** Right.

19 **Q** So if he had taken the stand, he would not
20 have been subject to cross-examination concerning any
21 prior criminal record?

22 **A** Right. I am sure Judge Kinard would have
23 instructed the prosecution they couldn't have gone
24 into his priors.

25 **Q** Okay. And as a practical matter, you

1 already lost the right to closing argument ---

2 A Yes, ma'am.

3 Q --- by virtue of presenting D.D. Drakeford
4 and the other two law enforcement witnesses?

5 A Yes, ma'am.

6 Q Sorry, Your Honor. I am trying to check my
7 notes real quickly. We may have covered this prior
8 to the break. I apologize. I lost my train of
9 thought. But you didn't question either Shelton
10 Glover or Travis Johnson about whether or not they
11 had physically been involved in an altercation with
12 your client, did you?

13 A No, ma'am.

14 Q Any particular strategic or tactical reason
15 for not doing so?

16 A Not that I can remember now.

17 Q Okay. Let's see. With regards to the
18 error that the solicitor explained you didn't catch
19 and that they bought out with regard to the testimony
20 of Deborah Joyner, you had an opportunity now at the
21 direction of the state to see that Ms. Joyner, in
22 fact, at trial testified that the deceased had hit
23 your client with the beer bottle.

24 A Right.

25 Q It was in her previous statement that she

1 had claimed that the deceased was struck by your
2 client?

3 A Correct.

4 Q Okay. So the Solicitor's claim that you
5 didn't catch -- that first off, the solicitor claimed
6 that she testified on direct that it was the
7 applicant who first hit the victim, that is not
8 accurate, is it?

9 A Right.

10 Q And the fact that you didn't catch it and
11 they were the ones who bought it out, that was also
12 incorrect?

13 A Right.

14 Q And the respondent questioned you
15 concerning the significance of that but what would
16 you -- we talked a lot about what you think. What do
17 you think would have been the reason the solicitor
18 would have had for telling the jury that you didn't
19 catch it but they did, they did the right thing and
20 corrected it?

21 MS. HARRIGAN: Your Honor, objection. That
22 calls for speculation. We don't have Mr. Moak
23 or Mr. Meadors on the stand. We don't know
24 their mindset.

25 BY MS. SHURLING:

1 Q Well, let me rephrase my question. What
2 inferences do you think the jury logically might draw
3 from the claims made by the solicitor in this portion
4 of his closing argument?

5 A Obviously my overall answer to your
6 question as to the specific point in the closing
7 argument in general, each side of each advocate is
8 trying to sway the jury that they have the better of
9 the facts and the law. That is what Mr. Meadors was
10 attempting to do, score another point for his side so
11 to speak to put it in plain language.

12 Q Would it not also be fair to know that this
13 line of argument was suggesting that the prosecution
14 was being particularly meticulous about not
15 presenting false testimony?

16 A In fact, I believe Mr. Meadors said we are
17 not trying to mislead anybody or words to that
18 effect.

19 Q Again, your reasoning for not objecting to
20 that portion of the closing argument was the same for
21 not objecting to the others?

22 A Yes, ma'am.

23 Q Moving along quickly, did you -- if you
24 remember and I know you said you don't remember a lot
25 but did you ever discuss with your client at all the

1 fact that or what impact it would be likely to have
2 on the jury that he did not get up and personally
3 claim that he was acting in self-defense when the
4 deceased was cut?

5 **A** Well, I think there may have been questions
6 yesterday along those lines. All I can tell you is
7 that I stress and I'm confident that I did with Mr.
8 McKnight the fact that it is strictly his decision.
9 I think yesterday as I reiterated today, an important
10 part of the decision of whether to testify or not is
11 that in my opinion the juries like to hear from the
12 person accused. The old saying is if he didn't do
13 anything wrong, why does he get up and say so.
14 Whether I said words of that nature to Mr. McKnight,
15 I don't remember. My standard operating procedure is
16 to cover the ground. Okay?

17 **Q** Well, let's back up just a moment to your
18 testimony yesterday since you are referencing it.
19 You said that although you don't have any independent
20 recollection of your discussions with your client
21 about testifying that one of the factors that you
22 would always take into account is the personality and
23 demeanor of the person you are counseling about
24 testifying, correct?

25 **A** I think that was today's testimony.

1 Q I'm sorry. But in any event, that has been
2 your testimony?

3 A Yes, ma'am.

4 Q How many times did you meet with Tommy
5 McKnight?

6 A In the weeks -- many, several times in the
7 weeks leading up immediately to the trial. Prior to
8 that, three times, from September to probably mid to
9 late February, three times. I think in the week or
10 two prior to the trial, I don't remember how many
11 times. But I think we met at least two or three more
12 times.

13 Q What would be the duration of those
14 meetings?

15 A I don't time my conferences so I really
16 don't know. I would guess a minimum, a half an hour.
17 But that is purely a guess.

18 Q Have you ever represented Tommy McKnight on
19 anything else before these charges?

20 A No, sir. No, ma'am.

21 Q Okay. Moving along. All right. Uh, now
22 obviously you could not have bought out hearsay
23 testimony from investigator Lee Boan any more than
24 the state should have brought out hearsay testimony
25 from their witnesses, right?

1 **A** Right.

2 **Q** Are you familiar with South Carolina cases
3 that allow law enforcement officers to give testimony
4 that at least approaches hearsay by testifying to
5 matters discovered in the course of their
6 investigation, in other words, statements like in the
7 course of our investigation, we became aware that,
8 uh, certain other individuals have been implicated,
9 that sort of thing?

10 **A** Yes, ma'am.

11 **Q** There are many cases, are they not, where
12 the Supreme Court said as long as they are not saying
13 somebody said it, they can testify to evidence
14 gleaned in the course of their investigation without
15 it hitting head on with a hearsay objection?

16 **A** My understanding of the law in that area is
17 characterized law enforcement as being pushed right
18 up against the boundary as long as they don't cross.

19 **Q** That is a rule that you could have used or
20 precedence that you could have used to your advantage
21 when questioning Lee Boan concerning whether or not
22 their investigation had yielded other information or
23 other leads concerning other individuals physically
24 involved in an attack on your client?

25 **A** Correct.

1 Q Including Travis Johnson and Sheldon Glover
2 who had been witnesses in this trial?

3 A Correct.

4 Q Uh, moving along. What was your reason for
5 not asking for self-defense to be retried along with
6 the definition of murder and manslaughter?

7 A To be recharged?

8 Q Recharged.

9 A Okay. I think earlier I pointed out there
10 was an exchange regarding Judge Kinard recharging the
11 jury. He basically declined to do that.

12 Q I didn't hear that testimony earlier. My
13 understanding from your earlier testimony, sir, was
14 the question was for the definition of murder and
15 manslaughter and you prevailed upon the judge to also
16 recharge involuntary, correct?

17 A Can you bear with me just a minute? On
18 pages -- I think it was in Ms. Harrigan's questions
19 on Page 378 and 379.

20 Q Got it. But that was in response to your
21 second chair's, renewing your second chair's previous
22 request for an instruction under the lines of a
23 Fuller charge which related something to the facts of
24 the case.

25 A Correct.

1 Q Okay. The judge previously ruled on
2 letting him do that?

3 A Right, and didn't.

4 Q Okay. This was renewing that motion.

5 A He did again decline.

6 Q That was, if I understand it correctly,
7 renewing that motion after the jury was charged,
8 correct?

9 A Uhm...

10 Q On Page 378.

11 A No, ma'am. I think the charge --

12 Q Pardon me. That was before the jury is
13 charged.

14 A Right. The charge to the jury don't begin
15 until Page 444.

16 Q Pardon?

17 A Judge Kinard's jury charge doesn't begin
18 until Page 444 of the transcript.

19 Q Got you. That is my point. Page 378, this
20 is before the main charge to the jury that Jason is
21 renewing his previous motion for a Fuller charge on
22 self-defense.

23 A Correct.

24 Q A Fuller type charge on self-defense which
25 is denied.

1 **A** Yes.

2 **Q** That is before the jury is charged at all.
3 Not only was it after the jury question but it was
4 before the jury even got a jury charge?

5 **A** Correct.

6 **Q** Okay. After the jury came back and asked
7 to hear about murder involuntary manslaughter, the
8 question was why didn't you say Your Honor if they
9 are going to hear the law on the crimes of murder and
10 involuntary manslaughter again, I would ask that Your
11 Honor also charge on the defense of self-defense
12 again so that they hear it all again.

13 **A** Okay. Let me -- if you don't mind, let me
14 find -- unless you have a -- what page is where the
15 jury question was handed up?

16 **Q** I will find that for you. Let's look at
17 470. If that is not exactly, it is close. 470 is
18 where the note was discussed. Following the
19 introduction of the note as Court's Exhibit Number 2,
20 the jury is recharged. And the court notes on Page
21 471, line 21 through 23 that they don't ask for it
22 but I have to charge them on involuntary manslaughter
23 too. At which point, the state objects and says they
24 only asked for the murder and manslaughter. The
25 judge goes ahead and gives involuntary manslaughter,

1 correct?

2 **A** What page?

3 **Q** 471, lines 11 through 23. The judge says I
4 am just going to read what they asked me to charge on
5 murder and involuntary manslaughter.

6 **A** Correct.

7 **Q** Down at the bottom of the page, line 21
8 through 23, he said they didn't ask for it but I
9 think I'm going to charge them on involuntary
10 manslaughter too. I am paraphrasing that. But that
11 is what he says, correct?

12 **A** Correct.

13 **Q** So the judge is going to go beyond what
14 they asked for by also charging involuntary
15 manslaughter, right?

16 **A** Correct.

17 **Q** My question was why didn't you at that
18 point ask that Your Honor if you want to recharge the
19 crimes we want self-defense recharged as well?

20 **A** I don't know. I don't know the answer to
21 that at this point.

22 **Q** Was it a strategic or tactical reason you
23 just didn't think to do it?

24 **A** I think that is a fair characterization.

25 **Q** Okay. That is fair. Let's move on. Your

1 Honor, I apologize for taking a moment. I am trying
2 to go through the list quickly. All right. You were
3 asked by the respondent about the portion of the
4 closing argument by the state where Mr. Meadors was
5 highlighting Deborah Joyner's claim that the
6 homeowner asked Mr. McKnight to leave?

7 A Yes.

8 Q And you, as I understood it, cited the fact
9 that he only, he said I think she testified as reason
10 for not objecting. Did I understand you correctly?

11 A As part of the reason for not objecting. I
12 don't think I said that was the whole reason.

13 Q She had, in fact, testified without
14 objection that the homeowner asked him to leave,
15 right? And so --

16 A You are talking about Mr. Moak's opening on
17 the law?

18 Q No, I'm talking about Mr. Meadors, I
19 believe. Page 400, we are already into Mr. Meador's
20 closing.

21 A This is Mr. Moak, 400 beginning on line 19.

22 Q 419 --

23 A 400 at line 19.

24 Q Line 19?

25 A Yes.

1 Q I may be incorrect about where -- no, I
2 think that is right. 19. I believe Deborah Joyner
3 even testified that the homeowner actually told him
4 to leave at one point but then he came back.

5 A Uh-huh.

6 Q It wasn't I think. It was I believe.
7 Nevertheless, she had, in fact, testified to that
8 without objection, correct?

9 A Yes. Ms. Joyner's -- excuse me.

10 Q Joyner.

11 A Joyner the words were something like, at
12 one point, Dan asked him to leave. Something to that
13 effect.

14 Q In fact, there are multiple places during
15 her testimony where that testimony is elicited.

16 A Uh, --

17 Q Correct?

18 A Yeah, more than once. I didn't count them.
19 I don't know how many.

20 Q Okay. Regardless of whether he said I
21 believe or not, wouldn't it be fair to say that this
22 portion of the state's closing argument would draw
23 the jury's attention back to the fact that the
24 homeowner had asked him to leave?

25 A No doubt about it.

1 Q And again --

2 A Anything and everything that is mentioned
3 in closing argument is an attempt to draw the jury's
4 attention to it.

5 Q I understand.

6 A It isn't customary to mention things you
7 want the jury to forget about.

8 Q Okay. Uh, Your Honor, I have got a note
9 here that I have got to look at because I can't
10 recall what my point was. With regard to the
11 statement that your client was just a drunk that hung
12 around, I realize in isolation the point you were
13 making your answers to respondent's questions. But it
14 is fair to say that without objection, she was
15 allowed, the officer was allowed to say that he was
16 told by witnesses that he was just a drunk that hung
17 around, correct?

18 A Correct.

19 Q And through hearsay testimony from Deborah
20 Joyner, they hear more hearsay testimony that he had
21 been up the street acting out so badly he had been
22 asked to leave somebody else's house?

23 A Correct.

24 Q Isn't it fair to submit that this testimony
25 put together was inviting the jury to infer that he

1 was just a drunk and troublemaker?

2 **A** That is certainly a fair interpretation.

3 **Q** And wouldn't that bear directly on the
4 prong of self-defense that has to do with whether or
5 not he was at fault in bringing about the difficulty?

6 **A** Yes, ma'am.

7 **Q** And again, no different reason for not
8 objecting to that then we heard yesterday?

9 **A** Correct.

10 **Q** It is sort of along the same line that we
11 have already covered, but you knew from Investigator
12 Boan's incident report that had been introduced that
13 he had characterized D.D. as an informant, correct?

14 **A** Yes.

15 **Q** Why did you not question Investigator Boan
16 as to whether or not the information provided by her
17 was entered as informant testimony by an unidentified
18 or at least an individual identified only by
19 initials, why didn't you question him about why
20 investigative information gleaned from her was
21 entered in his report in that manner?

22 **A** I don't have an answer to that. The way
23 that he wrote those notes, you know, you have
24 introduced, I think you had introduced them as an
25 exhibit. As I read those, as I read those, indicate

1 to me that it was someone that was calling and did
2 not want to be openly involved in was conveying
3 information. I didn't ask him about it. You are
4 right. That essentially was your question.

5 Q You are getting it where -- and this is
6 essentially my last line of questions. But you are
7 inferring from the inference ---

8 A I didn't ask him about it.

9 Q --- she did not want to identify herself.

10 A Right.

11 Q And she called, gave information perhaps
12 only identified herself as D.D. That is just an
13 assumption on your part.

14 A Right. He may have asked her. She may
15 have said my name is, and given her full name but
16 please keep my information or my identity
17 confidential. But you are right, I did not ask Lee
18 Boan about that.

19 Q If somebody is not an employee of law
20 enforcement are actively working with law enforcement
21 as an informant, do the police, in your experience,
22 normally allow people to give statements against
23 people on the condition of anonymity?

24 A I have seen it happen many times. I know
25 this is directly responsive to your question. At

1 least in Kershaw County, if it is somebody with an
2 ongoing relationship with law-enforcement, they
3 always refer to that person as a CI. They don't just
4 use the word informant by itself. It is always a CI.

5 Q So an ongoing relationship with law
6 enforcement?

7 A Uh-huh.

8 Q Did you do anything to investigate whether
9 or not Ms. Drakeford had an ongoing relationship with
10 law-enforcement?

11 A No. She wasn't identified as a CI.

12 Q She was identified as an informant?

13 A Yes, ma'am.

14 Q But they clearly knew her name, didn't
15 they?

16 A I think Lee Boan did, yes.

17 Q That's where you got it, isn't it?

18 A Well, remember, I wrote that memo?

19 Q I know. Demanding her identity.

20 A Yes.

21 Q And you were subsequently given her full
22 name, right?

23 A Well, either I was given the full name by
24 the prosecution or I figured it out myself in talking
25 with Mr. McKnight and provided based on his

1 information.

2 Q Do you have any independent recollection of
3 Mr. McKnight telling you that D.D. Drakeford was
4 involved?

5 A We met and talked about a lot of things,
6 Ms. Shurling.

7 Q We have got a memo from you written to the
8 Solicitor's office saying your investigative report
9 says this, I want her name, correct?

10 A Correct.

11 Q And you, subsequently, got her name from
12 some source and were able to subpoena her as a
13 witness in this case.

14 A Correct.

15 Q Do you have anything in your file that
16 indicates refused to respond to the memo, they
17 refused to give you her name?

18 A No.

19 Q Is it fair to infer that in response to
20 your inquiry, they gave up your name and told you who
21 she was?

22 A Except -- I mean, you are right except that
23 Ron Moak can sometimes not be very forthcoming. I
24 don't know where it came from but I got it.

25 Q Okay. No further questions, Your Honor.

1 **THE COURT:** All right. Recross?

2 **MS. HARRIGAN:** Briefly, Your Honor.

3 **THE COURT:** All right.

4 **RECROSS-EXAMINATION**

5 **BY MS. HARRIGAN:**

6 **Q** Mr. Riley, to establish a claim of self-
7 defense, you only need a threat of harm from one
8 person, correct?

9 **A** Yes.

10 **Q** You don't need a group of people to
11 establish self-defense?

12 **A** Right.

13 **Q** And there was uncontroverted testimony in
14 this case that the decedent had attacked or thrown a
15 beer bottle at Mr. McKnight, correct?

16 **A** So it is really irrelevant to your claim of
17 self-defense whether or not others were involved in a
18 physical altercation, correct?

19 **A** Correct.

20 **Q** Additionally, once the bottle was thrown at
21 Mr. McKnight, he had a legal authority to defend
22 himself, correct?

23 **A** Yes.

24 **Q** And he was either on the sidewalk or the
25 public street at this time on his bike, correct?

1 **A** Yes.

2 **Q** So whether or not he had been actually
3 prior to the bottle being thrown is really irrelevant
4 to his claim of self-defense, is it not?

5 **A** Well, it is not -- I don't know about
6 irrelevant but it is not key in my opinion. I don't
7 think it is not critical. It is not the cornerstone
8 but I agree with you.

9 **MS. HARRIGAN:** No further questions.

10 **THE COURT:** Okay. Thank you. I don't do
11 re-re-redirect.

12 **MS. SHURLING:** Your Honor, I beg the court
13 to let me ask two quick questions because she
14 bought us something very critical.

15 **THE COURT:** I don't do re-re-redirect.
16 Sorry. I think I've got the issue.

17 Come on down, Mr. Riley.

18 Okay. Call your next witness please,
19 ma'am.

20 **MS. SHURLING:** Your Honor?

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

22 **MS. SHURLING:** I have no further witnesses
23 at this time. However, because this has been a
24 hard reach decision by my client, I would like
25 to state for the record that I have talked with

1 him extensively about his right to present
2 testimony in this PCR proceeding. I have advised
3 him in my professional opinion there are a
4 number of allegations in this case, strong
5 allegations that would be very clearly
6 established by the testimony already presented
7 here today which would not require input from
8 him.

9 I have also advised him that there is, in
10 my judgment, at least one issue on which I think
11 some testimony could potentially add to the
12 weight of his case. But I have also advised him
13 that, unfortunately, I don't get to put him up
14 and then he gets to sit down. By testifying,
15 once he gets up and takes the oath and answers
16 my questions, he is then required to answer any
17 question posed to him within legal limits, of
18 course, by the respondent. I have gone over
19 that with him as carefully as I know how.

20 One of those issues I would note for the
21 record, it was my intention to question him
22 concerning how many times he had met with Mr.
23 Riley prior to trial. And I have now ascertained
24 that on Page 33 of the transcript, in a portion
25 of the trial that had been referenced by the

1 respondent, the fact that the client had asked
2 to have Mr. Riley relieved, Your Honor, at lines
3 4 through 8. The defendant states for the record
4 that the attorney here, I talked to Mr. -- the
5 attorney here for the first time Friday the 13th
6 of this month. The case went to trial on the
7 16th.

8 There is no -- if I am incorrect, I trust
9 respondent will correct me. But there, uh, --
10 the only response I see is on Page 34 when Mr.
11 Riley says Judge, just for the record, Mr.
12 Kirincich and I are meeting with him on Friday
13 which is the fifth meeting between him and the
14 attorneys from my office. He does say it is the
15 fifth, but he does not provide the court any
16 further information concerning the duration of
17 those meetings or the coverage of the issues
18 with the client at that time.

19 I believe I have a record on which to argue
20 those issues without calling him. I would ask
21 -- I would remind my client that he has
22 previously been sworn in one part of this
23 proceeding and therefore he is still under oath.
24 I would ask the court to question him on the
25 record about his decision to waive his right to

1 testify.

2 **THE COURT:** Absolutely. All right. Mr.
3 McKnight, you have been sitting here. Of
4 course, you have heard everything that Ms.
5 Shurling had to tell me about her conversations
6 with you regarding your decision on whether you
7 wish to testify or not. You've heard that.
8 That wasn't too clear a sentence. I will try
9 again. In other words, you have been here
10 throughout these proceedings, right?

11 **THE DEFENDANT:** Correct.

12 **THE COURT:** And you certainly have been
13 here as Ms. Shurling questioned the two
14 attorneys who represent you at trial, right?

15 **THE DEFENDANT:** Correct.

16 **THE COURT:** You have been right here. You
17 have been very attentive. I've watched you
18 every time there has been a reference like in
19 the transcript, if you had not had it memorized,
20 you went right to it. In other words, you had
21 not just been sitting here. You have been
22 engaged in looking at the transcript also. Is
23 that fair to say?

24 **THE DEFENDANT:** Correct.

25 **THE COURT:** Okay. And so, of course, you

1 have been right here as Ms. Shurling has
2 discussed with me your conversations about your
3 absolute right to testify if you want to. This
4 is your hearing. You are the applicant. You
5 are aware of that, right?

6 **THE DEFENDANT:** Yes, Your Honor.

7 **THE COURT:** And you are -- have you -- I
8 will just ask this question. Have you had
9 sufficient time to make up your mind on whether
10 you want to testify or not in your PCR?

11 **THE DEFENDANT:** Yes, I have.

12 **THE COURT:** And tell me about that.

13 **THE DEFENDANT:** My mind has been made
14 up ---

15 **THE COURT:** Okay:

16 **THE DEFENDANT:** --- not to testify.

17 **THE COURT:** Okay. Very well. Let me just
18 tell you, Mr. McKnight, as we proceed through
19 the state's case, this is not a jury, if you
20 change your mind, would you let me know?

21 **THE DEFENDANT:** I will also let you know
22 had I known that my record cannot be bought up
23 at trial, I would have testified.

24 **THE COURT:** Okay. You just testified.
25 Ms. Shurling?

1 **MS. SHURLING:** Thank you, Your Honor.

2 **THE COURT:** All right. Anything further

3 you would like to ask of him?

4 **THE DEFENDANT:** No, ma'am.

5 **MS. SHURLING:** Just, Your Honor, I would

6 ask that it be clear that he has not been

7 coerced, threatened or in any way induced to

8 waive his right not to testify at this

9 proceeding, that he has made that decision of

10 his own free will.

11 **THE COURT:** I think he just testified, Ms.

12 Shurling.

13 **MS. SHURLING:** Yes, ma'am.

14 **THE COURT:** I think he just opened himself

15 up for cross-examination.

16 **MS. SHURLING:** Yes, ma'am.

17 **THE COURT:** Is there anything else you

18 want to ask him before I open it up for cross-

19 examination?

20 **MS. SHURLING:** May I have a moment with my

21 client?

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

23 **MS. SHURLING:** Your Honor?

24 **THE DEFENDANT:** Your Honor?

25 **THE COURT:** Yes, sir? Yes, ma'am?

1 **MS. SHURLING:** Your Honor, I thought he was
2 through --

3 **MS. HARRIGAN:** Your Honor, may we approach
4 for just a second?

5 **THE COURT:** Yes.

6 (WHEREUPON, a bench conference is held off the
7 record.)

8 **THE COURT:** All right. Based on my
9 sidebar, it is my understanding that based upon
10 that representation which I consider to be
11 testimony, with regards to the issue, the state
12 would have no cross-examination on that issue.
13 Is that correct?

14 **MS. HARRIGAN:** Correct, Your Honor. Not
15 regards to the testimony he just gave. I
16 believe the allegations go for record issues. I
17 don't have any cross-examination based upon pre-
18 testimony.

19 **THE COURT:** Okay. Thank you.

20 **MS. SHURLING:** Your Honor, if I could just
21 explain that?

22 **THE COURT:** Yes. Certainly.

23 (WHEREUPON, Ms. Shurling confers with the
24 applicant.)

25 **MS. HARRIGAN:** Your Honor, may we have a

1 brief restroom break.

2 **THE COURT:** Thank you. Comfort break.
3 I'm going to be right here. Everybody be at
4 ease. Take a comfort break.

5 (WHEREUPON, a short recess is taken.)

6 **THE COURT:** Now, you may proceed. Ms.
7 Shurling, do you have any additional witnesses?

8 **MS. SHURLING:** Your Honor, I had inquired
9 at the break whether or not the respondent
10 intended to call Jason -- I am still getting his
11 name wrong. I am sorry -- Kirincich.

12 **THE COURT:** Kirincich?

13 **MS. SHURLING:** Kirincich. Thank you. Now
14 I can say it right -- as a witness and they
15 indicated they are not certain. At this point,
16 because it appears that they may not call him
17 and in response to some information just
18 provided to me at the break, I would ask to
19 recall Mr. Kirincich as a witness for the
20 applicant for two or three brief questions.

21 **MS. HARRIGAN:** The state would object to
22 that. Ms. Shurling already had the opportunity
23 to call him and question him on whatever she
24 would like to do. I would object to him being
25 recalled during her case.

1 **THE COURT:** Okay.

2 **MS. SHURLING:** All I can answer to that,
3 Your Honor, is to give the court my word that I
4 questioned him about everything that I had a
5 foundation for asking at the time he was on the
6 stand. The inquiries that I would now ask to
7 put on the record is related to matters about
8 which I had no information at the time of his
9 original questioning.

10 **MS. HARRIGAN:** The state would respond to
11 that by saying it was Ms. Shurling's decision to
12 put up her case in the matter she would like.
13 She decided to call the second chair first as
14 opposed to waiting to calling him after the
15 initial witnesses.

16 **THE COURT:** I'm with you. I have got it.
17 Let me ask you this question just so our record
18 is clear. Tell me a little bit more about the
19 information you received just so that I can get
20 a sense on whether or not you could have
21 received it, you know what I mean, for today.

22 **MS. SHURLING:** No, ma'am. The information
23 I received was prompted by testimony from Mr.
24 Riley. So without the testimony of Mr. Riley,
25 that information would not become relevant.

1 **THE COURT:** Okay.

2 **MS. SHURLING:** Or at least it was, the
3 information was disclosed to me based on the
4 testimony presented in these proceedings from
5 Mr. Riley.

6 **THE COURT:** Okay. You interviewed Mr.
7 Riley pretty extensively, pretty extensively
8 before the hearing began yesterday. What you
9 are telling me is despite that, there is
10 information that was new to you based upon his
11 testimony that you had not realized the
12 importance of all was disclosed to you prior to
13 these proceedings and Mr. Riley's testimony?

14 **MS. SHURLING:** Yes, ma'am. I can add to
15 that. I did go to Camden to interview Mr. Riley
16 and wasn't able to interview him unfortunately
17 at that time. Jason was -- Mr. Kirincich was in
18 a jury trial. He had gone longer than expected
19 and was unable to meet with me. I returned
20 either the next day or the day after -- I
21 believe it was the next day -- and discussed the
22 case further with Mr. Riley and made a second
23 attempt to interview Mr. Kirincich at that time.
24 Because his trial had gone late into the
25 previous night and then wrapped up, he had gone

1 home early before I got there. So despite two
2 attempts on my part to interview him prior to
3 this proceeding, I have been unable to do so.

4 **THE COURT:** Okay. I will let you go in
5 for that limited purpose.

6 **MS. SHURLING:** Thank you.

7 **THE COURT:** So recall him for that limited
8 -- knowing that the state will catch you.

9 **MS. SHURLING:** I promise, Your Honor, I
10 have much to do this afternoon.

11 **MS. HARRIGAN:** Your Honor, can we approach?

12 **THE COURT:** Sure.

13 **(WHEREUPON, a bench conference is held off the**
14 **record.)**

15 **JASON KIRINCICH**

16 having previously been sworn, testifies as
17 follows:

18 **DIRECT EXAMINATION**

19 **BY MS. SHURLING:**

20 **Q** Mr. Kirincich, I want to make this as quick
21 as I can. With regard to the testimony of D.D.
22 Drakeford, ---

23 **A** Yes, ma'am.

24 **Q** --- when did the defense team become aware
25 of the identity of Ms. Drakeford, her name?

1 **A** Looking back at my trial notes, it doesn't
2 appear that we learned Ms. Drakeford's actual
3 identity until the 17th. That was after the jury had
4 been selected. It is the first thing that is on my
5 notes from the 17th. I got a full name. It is boxed
6 out. At that point, we became aware of Ms.
7 Drakeford.

8 **Q** In preparing for trial, you had been aware
9 that there was an informant identified as D.D. Do
10 you recall that?

11 **A** I remember talking with Tommy for the first
12 time on the 13th which is the Friday before the case
13 was scheduled at trial. One of the things that he
14 wanted that he had not been given during this time is
15 he wanted a list of people who were actually there at
16 the scene and he wanted to know who D.D. was.

17 **Q** It is your recollection that you and Mr.
18 Riley learned for the first time the identity of D.D.
19 the second day of the trial, the 17th?

20 **A** Right. That is when we actually started
21 arguments. It was the first thing before Mr.
22 Meador's -- my brief notes of Meador's opening
23 argument.

24 **Q** Thank you. Looking at Page 32 of the trial
25 record down at the bottom, Mr. Riley states --

1 **A** One second please.

2 **Q** Oh, I apologize. I'm looking at the wrong
3 page. Page 34.

4 **A** Okay. Yes, ma'am.

5 **Q** Page 34, lines 21 through -- it says,
6 Judge, just for the record, Mr. Kirincich and I
7 meeting with him on Friday was the fifth meeting
8 between him and the attorneys from my office. Do you
9 see that?

10 **A** Yes, ma'am.

11 **Q** Have you previously met with Mr. Riley with
12 Mr. McKnight before that Friday before trial?

13 **A** No, Friday was the first time.

14 **Q** Did you meet with him any additional times
15 after Friday but before the trial on Monday?

16 **A** After we selected the jury, I think Mr.
17 McKnight had already made a motion to relieve us as
18 counsel. He felt like he had not been adequately
19 prepared. Judge Kinard indicated he could meet with
20 us that afternoon, which I will make a comment on
21 that. It appears from my notes that we at least had
22 some brief discussion with him that afternoon.

23 **Q** Thank you. But between the meeting on
24 Friday, the 13th and Monday morning when the trial
25 was scheduled to begin, there were no additional

1 meetings?

2 **A** No, we didn't -- at least I did not visit
3 him at the jail over the weekend.

4 **Q** Is it your recollection that you weren't
5 aware of any additional meetings between Mr. Riley
6 and Mr. McKnight between Friday and the morning for
7 trial?

8 **A** I'm not aware of any.

9 **MS. SHURLING:** Thank you. No further
10 questions.

11 **MS. HARRIGAN:** Briefly, Your Honor.

12 **THE COURT:** Sure.

13 **CROSS-EXAMINATION**

14 **BY MS. HARRIGAN:**

15 **Q** When were you asked to second share this
16 case, Mr. Riley?

17 **A** From my best recollection, it was that
18 Friday morning, the 13th.

19 **Q** I am assuming that you carried your own
20 caseload at that time, correct?

21 **A** Yes.

22 **Q** How many assistant PD's do you have at your
23 office, overall attorneys at the PD's office for
24 Kershaw County?

25 **A** At the time and currently, there were just

1 two of us.

2 Q So Mr. Riley had his own caseload and you
3 had your caseload, correct?

4 A That's correct.

5 Q Were you privy to everything that was going
6 on and all of Mr. Riley's cases at this time?

7 A No.

8 Q So up until your involvement, you really
9 don't know what was happening on the case?

10 A That's correct.

11 Q And you met with Mr. McKnight the first
12 time on March 13th, correct?

13 A That's right.

14 Q So Mr. Riley had been representing him
15 since September of '08?

16 A Whenever Mr. Reuwer left the office.

17 Q Again, you had your own case files. You
18 weren't looking over his shoulder or actively
19 involved in what was happening in all of those cases?

20 A That's correct.

21 Q Correct. So you personally met with Mr.
22 McKnight the first time the Friday before?

23 A That's right.

24 Q But you really don't have any personal
25 knowledge like how many times Mr. Riley may have met

1 with him or other PD's from your office, correct?

2 **A** No, I know Mr. Reuwer met with him one
3 time. He came back and told me they played together.

4 **Q** But that is the only personal knowledge you
5 had of other attorneys in your office?

6 **A** Yes.

7 **Q** In regards to your testimony that D.D.
8 Drakeford was not known until March 17th, do you --
9 were you actively involved in the investigation in
10 this case before you were asked to second chair it on
11 March 13th?

12 **A** No.

13 **Q** So you didn't do any investigation on your
14 own because you weren't involved in this case,
15 correct?

16 **A** That's right.

17 **Q** So you don't really know what investigation
18 went on before you became associated with this case,
19 correct?

20 **A** I know that one of the problems that Mr.
21 McKnight had is that nobody had been up to the scene,
22 nobody attempted to interview any of the witnesses.
23 One of the things that became an issue when Mr.
24 McKnight talked about is I actually did go to the
25 scene and located his house. There was the issue of

1 the search warrant. He lived in Camden but not
2 within the city limits. It is a small pocket that is
3 not within the city. He had an issue with city
4 officers getting a search warrant for his house.

5 Q These are issues that Mr. McKnight told you
6 he personally had with his representation, correct?

7 A Right, that they were not being
8 investigated.

9 Q According to Mr. McKnight, correct?

10 A Yeah.

11 Q But as you previously testified, you didn't
12 really know what was going on in all of Neil's cases
13 and he did not know what was going on in yours,
14 correct?

15 A No, I just got it directly from Mr.
16 McKnight when I met with him the Friday before.

17 Q But not Mr. Riley, correct?

18 A No.

19 Q No further questions, Your Honor.

20 A All right.

21 THE COURT: Okay. Redirect?

22 REDIRECT EXAMINATION

23 BY MS. SHURLING:

24 Q On Friday the 13th, did I understand
25 correctly -- you correctly to say one of the concerns

1 that Mr. McKnight was expressing in your presence and
2 the presence of Mr. Riley was that you did not know
3 the identity of who D.D. was?

4 **A** That was one of his concerns, yes.

5 **Q** Did Mr. Riley indicate at that time, yes,
6 he did, he knew who D.D. was?

7 **A** No.

8 **Q** And is it your recollection of the events
9 at trial that when the identity of D.D. Drakeford was
10 disclosed, that was the first time the defense team
11 knew her name?

12 **A** Yes.

13 **Q** And when you met with Mr. McKnight with Mr.
14 Riley, was there discussion in your presence about
15 matters that they didn't discuss in previous
16 meetings?

17 **A** Not that I can recall, no.

18 **Q** Was there any discussion during that
19 meeting of matters that Mr. McKnight had previously
20 asked him to look into and requested for status on
21 those things? Do you recall anything like that that
22 would tend to indicate that there had been previous
23 meetings?

24 **A** No. Mr. McKnight asked me to look into
25 something. I don't know if he ever expressed that to

1 anyone else or had an opportunity to do that.

2 Q When you were bought in, you said your
3 recollection is that Friday morning before that first
4 meeting with Mr. McKnight?

5 A That's right.

6 Q Do you recall being given any reason for
7 why you were being bought in at the 11th hour to
8 participate in the defense of Mr. McKnight?

9 A It is not 100 percent clear. The
10 conversation I seem to remember, again, this was a
11 long time ago, getting word from Mr. Riley that he
12 been told by Mr. Reuwer that Mr. McKnight can be a
13 difficult client.

14 Q So Mr. Riley was describing the demeanor or
15 personality of the client based on what he was told
16 by the previous lawyer?

17 A Right. He wanted me to go down into the
18 jail to talk with Mr. McKnight with him.

19 Q To the best of your recollection, he wasn't
20 describing any personal interaction with Mr. McKnight
21 that led him to reach those conclusions?

22 A I don't remember him saying anything about
23 meeting with them previously or anything like that.

24 Q Again, he was signing to the observations
25 and opinions of the previous lawyer is the reason he

1 needed you to go with them?

2 **A** I remember him referring to Mr. Reuwer. As
3 I told Ms. Harrigan, I remember Mr. Reuwer met with
4 Mr. McKnight. There were particular incidents that
5 helped me to remember that.

6 **MS. SHURLING:** Thank you, Mr. Kirincich.
7 No further questions.

8 **MS. HARRIGAN:** Briefly, Your Honor.

9 **RECROSS-EXAMINATION**

10 **BY MS. SHURLING:**

11 **Q** There are often second chairs on murder
12 trials, correct?

13 **A** It depends. We don't get a lot of cases in
14 Kershaw County, but sure.

15 **Q** Would you say overall, based on your
16 experience practicing criminal law, that it is not a
17 rarity to have second chair on a murder trial?

18 **A** Yeah, or on any number of trials, sure.

19 **Q** So it wasn't uncommon that you were asked
20 to second chair, correct?

21 **A** No.

22 **Q** How much notice do you normally -- was this
23 your first time second chairing a case?

24 **A** No. It might have been with Mr. Riley, the
25 two of us, but no, it was not.

1 Q What would you say the purpose of a second
2 chair is? Just overall based on your experience in
3 criminal defense work.

4 A It depends. I guess you could -- it
5 depends on the situation.

6 Q Sometimes it is to help take notes during
7 the trial objections? Would that be a fair
8 characterization of what a second chair might do?

9 A Right. I mean, I can give you the one that
10 occurred before about what I was asked to do her
11 since then. Previously, I have been asked to just
12 sit there during trial and listen for things, kind of
13 be the go-between between the client and the lead
14 attorney. I have actually actively participated in
15 the investigation of a case that has led to being
16 more involved during the actual trial.

17 Q Would it be fair to characterize that
18 sometimes you're more involved as the second chair
19 and sometimes you're less involved as the second
20 chair?

21 A Yeah.

22 Q And it is not uncommon to second chair
23 again in a serious charge as murder, correct?

24 A In my opinion, it is uncommon to be
25 involved in a case, a murder case three days

1 beforehand and being given the task of actually
2 cross-examining witnesses. That is uncommon.

3 Q How much notice do you usually get when you
4 were asked to second chair a case?

5 A It depends again. I have been asked --
6 truthfully, we don't do it a whole lot in our county
7 anymore.

8 Q As you only have two attorneys, correct?
9 It is not Richland County where you have a whole lot
10 of assistant PD's, correct?

11 A Right.

12 Q It is just the two of you over there,
13 correct?

14 A Right. Our boss Doug Strickler comes over
15 and represents people as well. I have been involved
16 from the day people have been arrested in cases with
17 Mr. Strickler.

18 Q In regards to your questioning from
19 applicant that Mr. Riley wanted you involved because
20 he heard Mr. McKnight was difficult, did he ever tell
21 you specifically or would it just be the opinion from
22 Mr. Reuwer that this client might be difficult?

23 A I'm sorry. Can you repeat that?

24 Q Did Neil ever tell you directly I never met
25 with him?

1 **A** No, no.

2 **Q** And again, you are not privy to all of Mr.
3 Riley's meetings because you were carrying your own
4 caseload, correct?

5 **A** That's right.

6 **Q** You just got involved in this case the
7 Friday before, is that correct?

8 **A** That's correct.

9 **Q** And in regards to your testimony that D.D.
10 Drakeford's identity wasn't discovered until March
11 17th, correct?

12 **A** That's correct.

13 **Q** And that would've been the second day of
14 the trial, correct?

15 **A** Before any testimony, before any opening
16 arguments, yes. The second day, after the jury have
17 been selected.

18 **Q** Okay. But before any testimony was taken,
19 correct?

20 **A** That's correct.

21 **Q** Certainly before D.D. Drakeford took the
22 stand, correct?

23 **A** Yeah, I believe she took the stand the next
24 day.

25 **Q** There would have been opportunity either at

1 a recess or in the evening for someone to speak with
2 D.D. Drakeford about her testimony, correct?

3 A Not on that day because I believe that it
4 is referenced in the trial record that she wasn't,
5 her name wasn't given and she was found immediately.
6 Both of us being involved in the trial having it that
7 morning, I don't know if we asked the secretary. One
8 of the Solicitor's investigators may have gone out
9 and found her for us. It is not uncommon for that to
10 happen, a little bit of teamwork from law enforcement
11 and the Solicitor's office. But she was not found as
12 soon as we got the name.

13 Q But it was discovered that she was
14 discovered on March 17th. You know that D.D. from
15 the investigative reports was D.D. Drakeford on the
16 17th, correct?

17 A Her name was known at that point.

18 Q And she wasn't called until your case,
19 correct?

20 A That's right.

21 Q Which was on the last day of the trial,
22 correct?

23 A That's correct. I don't know if it was the
24 18th or 19th. I'm sorry.

25 Q But it certainly wasn't March 17th,

1 correct?

2 **A** Correct.

3 **Q** And you did break for the day on the 17th,
4 correct? There was an evening recess?

5 **A** We didn't spend the night there. That's
6 correct.

7 **MS. HARRIGAN:** No further questions, Your
8 Honor.

9 **THE COURT:** All right. You can come down.

10 **THE WITNESS:** All right. Thank you.

11 **THE COURT:** All right. Call your next
12 witness please.

13 **MS. SHURLING:** Your Honor, I have no
14 further witnesses. I do have one matter I would
15 like to put on the record. This is my first
16 experience with having reviewed a trial
17 attorneys file. Actually, that isn't true, I
18 had at one other time with Richard Breibart, but
19 this is only the second time I have ever been in
20 a position of having made arrangements to go and
21 review an attorneys file and not found out until
22 the hearing that any attorney notes concerning
23 the case had been removed from the file prior to
24 my viewing of the file.

25 I understand certainly what the court's

1 rulings have been with regard to the client's
2 right to obtain their full file from an attorney
3 and certainly there have been rulings with
4 regard to the attorneys right to not provide
5 attorney work product. However, in the context
6 of a postconviction relief case when you are
7 alleging ineffective assistance to appellate
8 counsel, it is my position that the notes of
9 counsel are relevant to the inquiry and
10 certainly would be relevant to my ability to
11 adequately question and cross-examine in certain
12 limited circumstances trial attorney concerning
13 actions that were and were not taken in a case.

14 So I would ask that I be provided access to
15 those records to review and that I be given an
16 opportunity to submit to the court a memorandum
17 perhaps or, if necessary, we be allowed to do a
18 deposition of Mr. Riley if there is anything in
19 those records that gives me cause to revisit any
20 of his testimony.

21 **MS. HARRIGAN:** The state would object to
22 that. I believe that the notes would be Mr.
23 Riley's own work product. Initially, there was
24 no motion for discovery. It was at his own
25 professional courtesy that he allowed Ms.

1 Shurling to come and look at his file, I
2 believe, his testimony was multiple times. She
3 had ample opportunity to ask him before whether
4 there were any notes in the file.

5 I personally did not go and look at his
6 file. I just spoke with him on the phone
7 several times. I would imagine that looking
8 through the file, one would readily see that
9 there are notes there. This issue certainly
10 could have been addressed prior to this lengthy
11 hearing.

12 I don't think there is any necessity to
13 leave the record open to get these notes. I
14 believe he testified as to his recollection on
15 the stand. I don't think they need a record
16 open for a deposition or subsequent testimony.

17 **MS. SHURLING:** Your Honor, I can only say
18 is that it is my habit that it is what I do in
19 these cases is always when I'm given a file say
20 this is it? This is all of it? Is everything
21 kept -- is this all of your file? I was told
22 that it was. I apologize if it did not occur to
23 me after having made the inquiry to ask if notes
24 germane to the attorney work on the case were
25 kept separately. But it honestly didn't. That

1 would be my motion.

2 **THE COURT:** Well, a couple of things come
3 to mind. Let me be sure that I am clear. Ms.
4 Shurling, what you are telling me is that you
5 did not know that Mr. Riley had moved his work
6 product until he was on the stand?

7 **MS. SHURLING:** That's correct.

8 **THE COURT:** Okay. And obviously the
9 motion could've been made at that point but we
10 are not so far down the road from your
11 understanding of that. Normally and typically,
12 work product of the attorney is, belongs to the
13 attorney not to the client.

14 **MS. SHURLING:** Yes, ma'am.

15 **THE COURT:** That's what comes to my mind.
16 Although I must in all candor tell you that I'm
17 not prepared on this issue. I didn't know this
18 issue would present itself. But I know that
19 there is absolute immunity within an attorney's
20 work product which is the attorney's own thought
21 processes and impressions and personal notes
22 with regards to a file. What I don't know is --
23 I know those are not the property of the
24 attorney. The question is whether or not, in
25 the case such as this, whether or not they are

1 reviewable by a PCR applicant. I don't know.

2 **MS. SHURLING:** Your Honor, if I could
3 clarify, I would agree that any professional
4 memorandum that might have disclosed counsel's
5 reasoning or analysis or whatever would clearly
6 be attorney work product. I am not certain the
7 court has overruled whether or not I would have
8 access to it. What I realize -- and
9 respondent's point is well taken. I don't have
10 his entire file with me here today. I don't
11 remember as I went through it. I went through
12 every page of it.

13 I don't remember noticing the absence of,
14 for example, witness interview notes. I
15 honestly just -- it would not be like me not to
16 notice that. But I can as an officer of the
17 court say whether or not there were perhaps some
18 notes in the file sufficient to make me think
19 maybe he wasn't a very prolific recordkeeper as
20 opposed to that the record had been cleared of
21 attorney notes. I just know that I wasn't aware
22 until this proceeding that I had not, in fact,
23 seen, for example, attorney notes from previous
24 meetings with the client.

25 If you look in my files, you are going to

1 have my notes from when I interviewed the
2 client. Even if I had not kept a running tally
3 of how many times I met with them, you can
4 certainly put my notes together and see notes
5 from the meetings. Likewise, I have had cases
6 where attorneys have said they are certain they
7 interviewed someone, yet, you would have a file
8 that would have detailed notes taken from
9 interviews with every other witness and not a
10 thing on paper from a witness that was in
11 contest. That is why in an abundance of
12 caution, I would be asked to review those
13 matters. Of course, I serve at the pleasure of
14 the court.

15 **THE COURT:** I know that obviously the
16 state's -- they are in a different position in a
17 PCR. Obviously the Solicitor's notes are not
18 discoverable as work product. I've never had
19 the issue, whether or not a defense counsel's
20 notes are discoverable. I'm inclined to say
21 they are not but I don't know that. I don't
22 know that. I'm not prepared to rule.

23 **MS. SHURLING:** Your Honor, I wouldn't swear
24 to it but as Your Honor knows, I do work
25 probably more private postconviction relief work

1 than any lawyer I know. I am not aware of any
2 -- I can't swear that there is not but I'm not
3 aware of any precedent on point on that issue.

4 **THE COURT:** Oh goody.

5 **MS. HARRIGAN:** Your Honor, if I can briefly
6 place on the record this is not a capital
7 postconviction relief case. There has been no
8 motion for discovery. There has been no report
9 to take discovery. There are attorneys that are
10 in our postconviction section that deals with
11 who absolutely refuse to let PCR counsel see
12 their file. I think it is a professional
13 courtesy for Mr. Riley to allow Ms. Shurling to
14 see the file without any sort of court order.

15 I understand that the documents in the file
16 that he could've sent to Mr. McKnight, he
17 could've made Ms. Shurling have Mr. McKnight
18 request them. But he out a professional
19 courtesy let her look at all of the things.
20 There's no right to discovery in PCR. There is
21 no discovery motion here as well.

22 **MS. SHURLING:** Your Honor, as she pointed
23 out, taking the pragmatic approach, he certainly
24 could have refused, in theory, to give me
25 volunteer access. I could have gotten a court

1 order granting leave to review the file or taken
2 the indirect route. The client certainly has
3 the right to demand his entire file at which
4 point I could've then reviewed the files
5 provided to the client.

6 **THE COURT:** I've got you. Here is what we
7 will do. For some reason, I don't believe that
8 Mr. Riley needs to be instructed not to destroy
9 this. I don't think he would anyway. I think
10 he would take good care of them. There is
11 certainly no harm that, as you will give me
12 proposed orders, that you include the discussion
13 of the issue in your proposed order. In the
14 event that the notes are discoverable, I think
15 we can kind of cross that bridge when we get
16 there. I feel fairly confident but I don't
17 know. I don't know. What comes to mind is the
18 lawyers impression of the work case, I think you
19 are entitled to absolute immunity is what comes
20 to mind. But we will see.

21 **MS. SHURLING:** Your Honor, so I understand
22 you clearly and maybe your suggestion, if we are
23 to be permitted to present proposal orders on
24 all of the issues in the case and then perhaps
25 simultaneously before an order is signed submit

1 a brief memorandum on the question of whether or
2 not the record should be examined, trial counsel
3 notes should be examined, then if Your Honor
4 determines that they should be, then you can
5 allow us an opportunity to amend our proposed
6 orders.

7 **THE COURT:** Would that work?

8 **MS. HARRIGAN:** That makes perfect sense. I
9 would ask that, Your Honor, if you are so
10 inclined to determine that those are
11 discoverable that the application cannot be
12 amended at that point. I think if you go down
13 that road, new allegations, and we are hearing
14 a-whole-nother hearing.

15 **THE COURT:** I would not be inclined to do
16 that because we have been at this and there has
17 been a full and fair hearing. However, if I say
18 no, then next, in my experience, I can assure
19 that we are going to be saying yes, we can. It
20 depends on what it is. That is way too long to
21 prejudge it so I won't prejudge it.

22 So let's do this. I want proposed orders.
23 Then I want another little skinny, skinny on
24 that issue. I want the little issue first but
25 continue with your proposed orders. If there is

1 something that is just absolutely earth-
2 shattering that we need to have another hearing,
3 we will do that. We won't do a deposition. We
4 will get together. We will zip over and we will
5 do what we need to do.

6 **MS. SHURLING:** Your Honor, I can state for
7 the record that I am not looking for new issues
8 in this case. I have fairly thoroughly plowed
9 this field. I am not looking to bring up
10 anything else barring some shocking disclosure.
11 Obviously, I am only looking for information
12 germane to the issues that have already been
13 presented.

14 In reference to the proposed order issue,
15 this is been a very long detailed proceeding
16 with a lot of testimony. I do not have the
17 second seat taking notes for me in this
18 proceeding. OID will not pay for a legal
19 assistant or paralegal or anyone to sit with me
20 and take notes. This is a court-appointed case.
21 Win, lose or draw, we'll more than likely be
22 appealing this case. Certainly if Your Honor
23 blesses us with a favorable ruling granting him
24 a new trial, it is statistically a high
25 probability that the state will appeal it. If

1 Your Honor does not see fit to grant relief,
2 then certainly Mr. McKnight will appeal it. So
3 the transcript is going to have to be ordered at
4 some juncture anyway. As an indigent, it is
5 going to be required.

6 I would ask for this and I have done this
7 and quite a few other cases, by the way. I
8 would ask Your Honor to grant me, give me an
9 order allowing me to go ahead and order the
10 transcript from the court reporter and have
11 SCCID pay for it which I would note that they
12 would already be paying -- they will have to pay
13 for it any way at some point. It is just a
14 matter of timing. And that we then be permitted
15 30 days from when we get the transcript to do
16 the proposed order.

17 **THE COURT:** I'm going to put you on the
18 spot. This is what I would understand. Help me
19 understand this is that what that would
20 encompass is it would encompass transcript, copy
21 and then copy for OID, copy for Appellate
22 Defense, yes? I mean, as I understand the
23 rules, the copies are not supposed to be shifted
24 around. Copies are supposed to come from the
25 court reporter.

1 **MS. SHURLING:** I can answer that from
2 previous cases.

3 **THE COURT:** Hold on. I know from my court
4 reporter friend that there is nothing that will
5 wrangle our court reporter then free copies.
6 Now, maybe the OID world don't know that but it
7 is my understanding if we did this, you would
8 get the original, OID would want it. Then you
9 would need a copy.

10 **MS. HARRIGAN:** Yes, Your Honor I believe it
11 is when it is our office and Appellate
12 Defense, --

13 **THE COURT:** Y'all can share?

14 **MS. HARRIGAN:** I think so. But there needs
15 to be some clarity. We certainly would order a
16 copy.

17 **THE COURT:** It is just a copy.

18 **MS. HARRIGAN:** And our office will plan on
19 ordering one as well although Ms. Shurling has
20 been appointed, she is still private counsel.

21 **MS. SHURLING:** Your Honor, my proposed
22 order that I use in these situations clearly
23 states that I am authorized to obtain an
24 original and that the respondent is directed to
25 order a copy from the court reporter. Your

1 Honor's copy, as I understand it, that presiding
2 circuit court judges have the right to ask a
3 court reporter to transcribe all or part of any
4 trial proceeding, believe it or not, under the
5 rules and they don't have to pay for it. So, I
6 would ask Madame Court Reporter if she would
7 have a problem with when I get my copy, the
8 original, which would be paid for under the
9 order, if it would be kosher to use Your Honor's
10 expression, to give Your Honor a copy along with
11 my proposed order.

12 **THE COURT:** Don't do it. Say no.

13 Here is what I want, I have no problem with
14 you getting it now that we're talking about a
15 copy at the time of his appeal. If you share
16 it, the court reporter is going to --

17 **MS. HARRIGAN:** In our office, where a vast
18 majority of the transcripts are from court
19 reporters, certainly in my dealings with Ms.
20 Shurling, we both order separately and we intend
21 to do that.

22 **THE COURT:** Okay. Great. Here is what we
23 will do. Then what I will ask you to do is the
24 portions that are relevant, you need to pop
25 those, you need to make those a part of your

1 order.

2 **MS. SHURLING:** Yes, ma'am. I would get the
3 order to Your Honor as soon as I get back Monday
4 because I'm leaving in the morning. For the
5 transcript, I will get the order for Your
6 Honor's signature to Your Honor Monday on that.

7 **THE COURT:** And you will get to it as soon
8 as you can get those other 5600 and something
9 pages that you have to do.

10 **MS. SHURLING:** Your Honor, the other thing
11 that I routinely do is request that once Your
12 Honor has reviewed the proposed orders for both
13 sides, whichever side you adopt, that the losing
14 party have the right to submit a copy of their
15 proposed order. What I usually do is I take the
16 front cover where it says order, I put
17 memorandum in the form of a proposed order. On
18 the last page, below where the judge's signature
19 is, it says the above proposed order has been
20 filed with the Clerk of Court as plaintiff's
21 memorandum in support of PCR application. What
22 that does is save us from listening to two hours
23 of closing argument is now and puts our final
24 argument, whichever side loses, final positions
25 in the record.

1 **THE COURT:** Got it.

2 **MS. SHURLING:** And my only remaining
3 inquiry is one that concerns funding for me and
4 I believe that is a matter that we can take up
5 with or without the state. They are welcome to
6 stay.

7 **MS. HARRIGAN:** The state doesn't take a
8 position on that issue.

9 **THE COURT:** I know that -- tell me what
10 your cap was.

11 **MS. SHURLING:** Your Honor, the cap have
12 been raised from the statutory cap of 1000 to
13 3000 by previous order of Judge Barbara. I have
14 not yet tallied my hours in this matter. As
15 Your Honor can tell from these proceedings, I
16 spent an enormous amount of time of this case.
17 I am concerned that at this point I may be
18 approaching or may have even already --

19 **THE COURT:** Let me ask you what is the
20 hourly rate that --

21 **MS. SHURLING:** \$40. I didn't ask for an
22 increase in the rate, Your Honor. Just \$40 an
23 hour out and 60 in.

24 **THE COURT:** Okay. All right. Absolutely.

25 **MS. SHURLING:** Thank you, Your Honor. At

1 this time I would ask that the cap be raised to,
2 in an abundance of caution, six although I think
3 in all probability it will come in under five,
4 to be honest. I just want to be careful. I
5 don't know yet. I haven't added it up. I would
6 ask that the cap be raised to six.

7 **THE COURT:** Why don't you do that?

8 **MS. SHURLING:** Yes, ma'am.

9 **THE COURT:** Why don't you when you get
10 back to your office and you do your tally, why
11 don't you do your tally to see how long it takes
12 you to review your record in the old order, why
13 do you take a look at that first and not tie
14 yourself down to a number at this point.

15 **MS. SHURLING:** Thank you. I will do just
16 that, Your Honor. Thank you.

17 **THE COURT:** If you get there and you
18 realize -- I just think that is fair to you.
19 Hold on. Do your tally, estimate realistically
20 what it is going to take you knowing that you
21 have got to memos -- not one to do -- you have
22 got a proposed order and a memo to do. And then
23 submit it.

24 **MS. SHURLING:** And as Your Honor has raised
25 another valid point, in light of the complexity

1 of this case and the amount of time spent on the
2 case, I would ask the statutory rate is \$40 an
3 hour out of court and 60 in. I would ask for
4 Your Honor to approve fees in this case to be
5 set at the 60 an hour across the board for out
6 and in. Would you have the authority to do
7 that?

8 **THE COURT:** I cannot do it. Pre-Judge
9 Barber --

10 **MS. SHURLING:** You are required to do that.

11 **THE COURT:** Pre-Judge Barber. But post-
12 Judge Barber, I cannot change his order.

13 **MS. SHURLING:** For any hours after that
14 time.

15 **THE COURT:** Any hours after those
16 contemplated by Judge Barber.

17 **MS. SHURLING:** Thank you, Judge.

18 **MS. HARRIGAN:** Can I approach briefly
19 regarding the rest of the week?

20 **THE COURT:** Sure.

21

22 **(WHEREUPON, the proceedings conclude at**
23 **approximately 4:17 p.m.)**

24

25

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF KERSHAW	)	FOR THE FIFTH JUDICIAL CIRCUIT
Tommy McKnight, #186784,	)	2012-CP-28-1064
	)	
Applicant,	)	Respondent's Memorandum of Law Re:
	)	Attorney Work-Product Privilege
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

The South Carolina Rules of Civil Procedure, Rule 26(b)(3), lays out the circumstances in which discovery may compel an attorney's work product created for trial preparation. SCRPC, clearly states:

[O]nly upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

SCRPC, Rule 26(b)(3). "The attorney work product doctrine protects from discovery documents prepared in anticipation of litigation, unless a substantial need can be show by the requesting party." Tobaccoville USA, Inc. v. McMaster, 387 S.C. 287, 294, 692 S.E.2d 526, 530 (2010). In the instant case, Applicant requested that trial counsel, Neil Riley, Esquire (hereafter "Counsel"), be required to turn over all notes from his file regarding the case; Applicant's counsel had already thoroughly reviewed the remaining portions of the file numerous times in preparation of and in anticipation of the hearing. Applicant failed to state with any specificity why the documents were necessary or how these attorney notes would aid him in proving any of his

twenty-four allegations as set forth in his original or two amended applications for post-conviction relief. Applicant merely stated that he would like to review these notes to see what information might be gleaned. When the request was made, Counsel had just finished lengthy testimony spanning two days regarding his representation of Applicant. Anything that was in Counsel's notes would have been discovered through his extensive testimony before this Court.

The Fourth Circuit has defined the differences in attorney work product. According to the Fourth Circuit Rule 26(b)(3):

[D]ivides work product into two parts, one of which is "absolutely" immune from discover and the other only qualifiedly immune...the pure work product of an attorney insofar as it involves "mental impressions, conclusions, opinions, or legal theories...concerning the litigation" is immune to the same extent as an attorney client communication.

National Union Fire Ins. Co. v. Murray Sheet Metal Co., 967 F.2d 980, 984 (4th Cir. 1992). The work product requested by Applicant is clearly within this protect realm. Counsel's notes dealing with the litigation of the case inherently involve mental impressions, conclusions, and opinions. To ask for discovery regarding Counsel's notes would be tantamount to forcing Counsel to break the attorney-client privilege.

South Carolina District Court has also addressed the issues relating to attorney work product. In AVX Corp. v. Horry Land Co., Inc., 2010 WL 4884903 (D. S.C. Nov. 24, 2010). The District Court reiterates the difference in "fact" work product and "opinion" work product as stated by the Fourth Circuit. According to the court:

Fact work product, which consists of documents prepared by an attorney that do not contain the attorney's mental impressions, "can be discovered upon a showing of both a substantial need and an inability to secure the substantial equivalent of the materials by alternate means without undue hardship." In re Grand Jury Proceedings, 33 F.3d at 348; see also In re John Doe, 662 F.2d 1073, 1076 (4th Cir.1981) (defining fact work product). Opinion

work product, which does contain the fruit of an attorney's mental processes, is absolutely protected. National Union, 967 F.2d at 984.

AVX Corp, 2010 WL at *11. Under the definition outlined by the District Court, Counsel's notes would fall under the absolutely protected category for discovery. All of the fact-based work product has already been discovered by Applicant through Counsel's testimony and through Applicant's thorough review of Counsel's file multiple times prior to the hearing. To force Counsel into turning over his notes would be against public policy and the protections established by the attorney work product privilege.

In conclusion, under the particular facts of this case, Respondent submits that the documents requested are opinion work product therefore, are absolutely protected under the attorney work product doctrine. Applicant has failed to provide any evidence to the contrary. Furthermore, even if the documents could be shown to be fact-based work product, all of the information provided by those documents could be discovered by Counsel's testimony and Applicant's review of his file multiple times. Therefore, Counsel's work product is protected from discovery against Applicant's request.

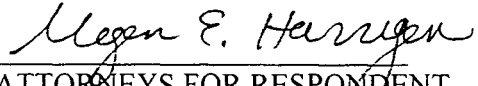
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August 29th, 2013

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF KERSHAW	)	
TOMMY MCKNIGHT, #186784,	)	
	)	2012-CP-28-1064
Applicant,	)	
	)	
v.	)	Applicant's Memorandum of Law
	)	Re: Attorney Work-Product Privilege
	)	
THE STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
_____	)	

This matter is before the Court on Applicant's Motion to Require Disclosure of Trial Counsel's Work-Product. In the instant case, PCR Counsel had access to Trial Counsel's file but not to any of his file notes or other work-product. Furthermore, PCR Counsel was unaware this material had been removed from the file until Trial Counsel's testimony during the evidentiary hearing held on August 5-6, 2013 in this case. Trial Counsel testified that his notes were removed from the case file prior to review by PCR Counsel. Tr. p. 181. Applicant asserts that the notes and other work-product notes of Trial Counsel were necessary and crucial to PCR Counsel's ability to adequately examine Trial Counsel and potentially impeach the Trial Counsel concerning actions that were, or were not, taken in the case.

Based on Applicant's numerous claims alleging ineffective assistance of counsel, he asserts that it is imperative for Trial Counsel to disclose all file materials for inspection and

review. Everything requested by Applicant, in the context of his PCR action, is necessary to adjudicate his claims of ineffectiveness of counsel. Therefore, PCR Counsel's motion for production of all the contents of his case file, even those which were removed prior to PCR Counsel's review of the file, should be granted.

The South Carolina Rules clearly state that an attorney's work-product may be obtained,

[O]nly upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

SCRPC, Rule 26(b)(3). "The attorney work product doctrine protects from discovery documents prepared in anticipation of litigation, unless a substantial need can be shown by the requesting party." Tobaccoville USA, Inc. v. McMaster, 387 S.C. 287, 294, 692 S.E.2d 526, 530 (2010).

Federal courts have long recognized that the work-product doctrine is related to the protection of the attorney-client privilege. They have long ago found the protections afforded by the work-product privilege, like the rights extended by the protection of attorney-client communications, are waived by a claim of ineffective assistance of counsel pursuant to the Sixth Amendment to the United States Constitution. See, *Bittaker v. Woodford*, 331 F.2d 715, 716 (9th Cir. 2003) (*en banc*). Generally speaking, "[t]he burden is on the proponent of the attorney-client privilege to demonstrate its applicability. The proponent must establish...that the particular communications at issue are privileged and that the privilege was not waived." *United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982). The Court in *Bittaker* found, "that the same concerns that dictate waiver of the attorney-client privilege by a habeas petitioner raising an ineffectiveness claim *also*

dictate the waiver of the work-product protection.” See, *Bittaker*, 331 F.3rd at 722 N. 6; see also, *Alvarez v. Woodford*, 81 F.App’x 119, 120 (9th Cir 2003) (unpublished).

Here, the party seeking to review Trial Counsel’s work-product is not Applicant’s adversary in the original trial, the State, it is the Applicant. Therefore, the party entitled to the protections afforded by both the work-product doctrine and the attorney-client privilege is the party seeking access to these materials. There is no basis in the law for anyone else to assert these privileges; neither the State nor Trial Counsel have standing to do so.

On the narrow issue addressed herein, South Carolina law affords Applicant protections which exceed those recognized by the federal court system. Federal case law supports a rather broad waiver of attorney-client privilege once a defendant raises a claim of ineffective assistance of counsel. *Johnson v. Alabama*, 256 F.3d 1156, 1178 (11th Cir. 2001); *Tasby v. United States*, 504 F.2d 332 (8th Cir. 1984); *Laughner v. United States*, 373 F. 2d 326 (5th Cir. 1967). South Carolina Code Ann. § 17-27-130, however, takes a narrower view of such waivers. Specifically, that section, found within the Uniform Post-Conviction Procedure Act, states in relevant part;

Where a defendant alleges ineffective assistance of prior trial counsel or appellate counsel as a ground for post-conviction relief or collateral relief under any procedure, the applicant shall be deemed to have waived the attorney-client privilege with respect to both oral and written communications between counsel and the defendant, and between retained or appointed experts and the defendant, to the extent necessary for prior counsel to respond to the allegation. This waiver of the attorney-client privilege shall be deemed automatic upon the filing of the allegation alleging ineffective assistance of prior counsel and the court need not enter an order waiving the privilege. Thereafter, counsel alleged to have been ineffective is free to discuss and disclose an aspect of the representation with representatives of the State for purposes of defending against the allegations of ineffectiveness, *to the extent*

necessary for prior counsel to respond to the allegation. (Emphasis added).

Thus, South Carolina Law deems the attorney-client privilege to be waived only “to the extent necessary” to respond to the Sixth Amendment claims raised by a PCR Applicant against his prior counsel. For this reason, Applicant asserts that his request for access to review his trial attorney’s “work-product” *does not* throw the door wide open, for Respondent to have access to all of Trial Counsel’s work-product.

In light of the above, there are two issues before this Honorable Court. First, it is Applicant’s position that the work-product doctrine, particularly in the context of a PCR case, is intended to protect the interests of the Defendant. Closely tied to the right to privileged communication within the defense team and with the client, the work-product doctrine should apply to an adverse party seeking access to material directly related to that privilege. For that reason, Applicant asserts that the work-product doctrine should not be applied to him; or to any other PCR Applicant. Secondly, even if the doctrine applies to an Applicant for PCR, there is ample case law supporting the position that the work-product doctrine, not unlike attorney-client privilege, may be waived by the assertion of a Sixth Amendment violation. Inasmuch as Applicant has alleged numerous specific claims of ineffective assistance of counsel against his trial attorney, the prohibition against access to work-product material has been waived to the extent those materials are relevant to the specific claims raised by Applicant’s allegations on collateral review. Applicant would argue that the doctrine would likewise not be applicable to evidence of any errors and omissions of Trial Counsel not apparent until Applicant had access to the materials in question.

Applicant respectfully seeks this Honorable Court's order directing Trial Counsel to permit her to review any and all attorney work-product stored separately from the main file which PCR Counsel has already been afforded the opportunity to review. PCR Counsel requests access to this material in order to determine what, if any, material contained in Trial Counsel's work-product is directly relevant to the specific allegations addressed by Applicant in his PCR action, or to, any allegations discovered through the review of that material.

Inasmuch as South Carolina law limits the waiver of attorney-client privilege to matter relevant to Sixth Amendment claims raised by Applicant, he would assert that it would not be appropriate for Respondent to have access to all of Trial Counsel's work-product clearly there maybe matters addressed therein which are not relevant to the allegations previously raised by Applicant or to new claims developed through Applicant's review of them. To the extent that there may be material contained within Trial Counsel's work-product which is not directly related to Applicant's allegations, Applicant reserves his right to claim attorney-client privilege regarding those materials and asserts that the State's access to those materials is expressly limited by the scope of § 17-27-130. Applicant submits that Respondent's unrestricted access to all of Trial Counsel's work-product could result in a violation of attorney-client privilege and that, regardless of whether the irrelevant portions of the materials were used by the State in this PCR action, Applicant could be irreparably prejudiced in the future by such a violation of his right to keep those matters privileged against revelation to the State.

CONCLUSION

Applicant recognizes that the dilemma for the Court is how to provide the opportunity to review his lawyer's attorney work-product without providing Respondent an unfettered opportunity to review portions of those materials which may not be relevant to the allegations

raised in this PCR action. Clearly, under §17-27-130, Applicant's right to attorney-client privilege is not waived with regard to matter not necessary for review of the specific allegations addressed in his collateral action.

Applicant asks for this Court's Order providing the following,

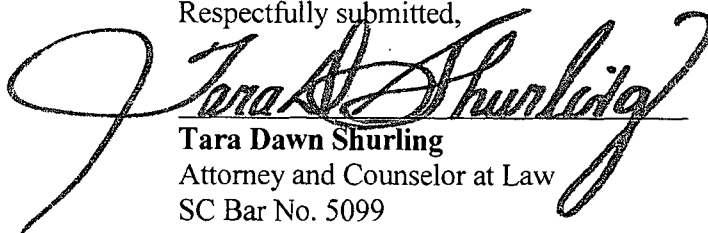
- This Court's ruling that it is necessary and appropriate to allow PCR Counsel to review all the attorney work-product in this case and to be permitted to copy those materials for Applicant's potential use in this PCR action.
- PCR Counsel be permitted to then, depending upon what her review of these materials yields, request that the evidentiary hearing in this matter be reconvened for further testimony in light of any relevant materials found in the attorney work-product.
- That, alternatively, PCR Counsel be permitted to serve opposing counsel with a copy of the material in question and file a motion with this Court asking that those materials be introduced as an Applicant's Exhibit in addition to any exhibits introduced during the original PCR proceeding.
- Applicant asks for this Court's Order directing Trial Counsel to review his work-product and advise Respondent if, in his opinion, additional portions of the materials in question are relevant to his *defense* against the allegations raised by Applicant.
- Applicant asks that Counsel for the Respondent then have the option to move this Court to either reconvene this PCR proceeding or admit the additional material suggested as relevant by Trial Counsel as a Respondent's Exhibit.
- Applicant asks that Trial Counsel be expressly reminded of the language of §17-27-130 and directed not to disclose to counsel for the state any material that is not relevant to his defense against the allegations mounted by Applicant.
- In the event either side asks that materials be admitted as exhibits in lieu of further proceedings, Applicant asks that the opposing party then have the opportunity to petition this Court for further hearing if in their view additional testimony is warranted in light of this evidence.
- In the unlikely event PCR Counsel's review of the work-product materials were to yield information which in the view of Applicant warranted the request to add additional claims to his previous allegations, PCR Counsel could move this Court for leave to amend the

allegations and serve both Respondent and Trial Counsel with the proposed additions. PCR Counsel's Motion to add new issues would be directed to include copies of any portion of the work-product materials which supported such a request.

- Following a Motion to Enlarge the PCR Allegations, Trial Counsel would be asked to advise the Court and Respondent if in his judgment additional portions of the work-product materials, not referenced by PCR Counsel in her motion, were necessary to a full and fair review of the issues in question and a decision on Applicant's request to enlarge the allegations in his case to include those additional issues.

Applicant respectfully submits that the procedure outlined herein protects Respondent from having to take PCR Counsel's word for whether she has disclosed all the relevant portions of the work-product materials. It also protects Applicant, and his Trial Counsel, from the exposure of Respondent to all the work-product materials; parts of which may not apply to the allegations to be considered in this case and therefore, are not subject to waiver of attorney-client privilege pursuant to §17-27-130.

Respectfully submitted,



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ATTORNEY FOR APPLICANT

This 29th day of July, 2015.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF KERSHAW	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
Tommy McKnight, #186784,	)	Case No. 2012-CP-28-1064
	)	
Applicant,	)	Respondent's Reply to Applicant's
	)	Memorandum of Law Re: Attorney
v.	)	Work-Product Privilege
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

Procedural History

This matter is before the Court on Applicant's post-conviction relief application, filed November 19, 2012. Respondent made its Return on January 25, 2013, requesting an evidentiary hearing be held. Thereafter, Applicant, through his counsel Tara D. Shurling, filed an amended application on June 3, 2013, and a second amended application on June 14, 2013.

A hearing on this application and its subsequent amendments was held on August 5 and 6, 2013, at the Richland County Courthouse. Testimony was taken from trial counsels Cornelius J. Riley and Jason D. Kirincich. At the start of his testimony, trial counsel Riley revealed that he had removed "attorney work product, notes" from his file. (PCR Tr. pp. 45, 71, 181). He testified that he made the remainder of his file available for post-conviction relief counsel's review several times, including after Applicant had amended his application. (PCR Tr. pp. 45-46).

At the conclusion of the hearing, Applicant, through his counsel, moved for the Court to order trial counsel Riley to grant Applicant access to his notes and other attorney work-product. (PCR Tr. pp. 225-226, 231). The State objected based on Mr. Riley's previous contention that the material was protected under attorney work product, that there was no discovery motion in this case, and the motion was untimely. (PCR Tr. pp. 226-227). After discussion with both

parties, the Court requested both parties submit a brief memorandum of law on this issue prior to the submission of proposed orders on the merits.¹ (PCR Tr. pp. 227-234). The Court indicated it would rule on the attorney work product issue first, then instruct the parties as to the next course of action and whether an additional hearing would be necessary. (PCR Tr. pp. 227-234).

Respondent served the Court and Applicant with its Memorandum of Law Re: Attorney Work Product Privilege on August 29, 2013 by U.S. Mail and electronic mail.² Applicant sent Respondent a signed copy of his memorandum of law on August 29, 2015, by electronic mail.³ Respondent requested an opportunity to respond to Applicant's memorandum and requested relief; this Court granted Respondent until July 31, 2015, to respond over Applicant's objection. This reply follows.

Additional Arguments

In addition to the arguments as set forth in its Memorandum of Law Re: Attorney Work Product Privilege previously served on this Court and Applicant on August 29, 2013, Respondent would add the following:

In his memorandum of law, Applicant asserts that his waiver of attorney-client privilege pursuant to S.C. Code §17-27-130 is not a full and complete automatic waiver, but rather, is only limited to the specific allegations raised and "to the extent necessary" to allow trial counsel and Respondent to respond to his allegations. Applicant argues because the waiver of attorney-client

¹ Respondent's notes from the hearing indicate that after going off the record, discussion between the Court and the parties clarified the short memorandum of law regarding the attorney work product issue was to be submitted as expediently as practical, with the proposed orders on the merits due after a ruling from the Court on Applicant's motion as to the attorney work product issue and any further instruction from the Court.

² Thereafter, Applicant's counsel emailed the Court on September 4, 2013, informing the Court that his memorandum of law would be submitted at the beginning of the following week; there was no mention of needing the post-conviction relief transcript to complete this memorandum of law.

³ In correspondence with Respondent and the Court, Applicant asserts that the nearly two year delay in submitting this memorandum of law was due to an "argument with the court reporter regarding the hearing transcript." Notably, this memorandum of law does not cite to or reference any specific testimony from the post-conviction relief transcript other than a general cite to Riley's testimony that he had removed his notes from the file.

privilege is narrowly tailored to only his specific allegations, Respondent is not entitled to a full review of trial counsel's file and/or work product, but rather, only those documents Applicant determines are responsive to his claims. Applicant specifically argues that his request "*does not* throw the door wide open for Respondent to have access to all of trial counsel's work-product" but instead only allows Respondent to access materials that Applicant deems appropriate based on his latest batch of allegations.⁴ In essence, Applicant is attempting to use attorney-client privilege as both a sword and a shield, allowing him access to all materials, including protected work-product, from trial counsel's file but at the same time hindering Respondent from refuting these allegations by limiting access to the very materials pertinent to refute these claims. Respondent asserts that this approach is flawed, in direct contravention to precedent, prejudicial to Respondent's ability to defend against these claims, and the incorrect course for this Court to follow.

Rather, Respondent asserts that the approached set forth in Binney v. State is instructive and should be followed in this case should this Court be inclined to grant access to trial counsel's attorney work product. 384 S.C. 539, 384 S.C. 539 (2009). In Binney, a capital post-conviction relief action, applicant filed a *pro se* application for with extremely broad allegations for relief. In response, trial counsel provided a complete copy of his casefile to respondent to allow respondent to refute the allegations and prepare for a hearing on the merits of the application.⁵ Thereafter, applicant, through his counsel, made more specific allegations for relief through amended applications. Applicant then moved for the return of his trial file from respondent's

⁴ Applicant lists nine different alternatives or plans for moving forward with this case should the Court grant discovery. Respondent submits that the procedures set forth by Applicant in his memorandum of law are confusing, hard to follow, and would not lead to an effective and timely resolution for this case. Rather, Respondent submits the most efficient course of action, should the Court grant Applicant access to trial counsel's attorney work product, would be to allow trial counsel to decide what materials to turn over to Respondent to refute the allegations as set forth in Binney, discussed further below.

⁵ There is no dispute in Binney that applicant was provided with a full and complete copy of his file, including all notes and attorney work product. Binney, 384 S.C. 539, 683 S.E.2d 478.

office and the disqualification of any attorneys or staff from respondent's office who viewed the file. The circuit court denied applicant's motion and applicant petitioned for certiorari to the South Carolina Supreme Court before a full merits hearing. The Court granted certiorari and after full briefing and argument, held that the statute that waived attorney-client privilege to extent necessary for prior counsel to respond to allegations of ineffective assistance of counsel automatically waived privilege to defendant's entire trial file, and that applicant's trial counsel was justified in disclosing entire trial file to respondent. Binney, 384 S.C. 539, 683 S.E.2d 478.

Specifically, the Binney Court held:

We find that the language of S.C. Code Ann. § 17-27-130 (1996) is plain and unambiguous. Section 17-27-130 clearly states that an applicant's "waiver of the attorney client privilege shall be deemed automatic upon the filing of the application alleging ineffective assistance of prior counsel...." In so far as it applies to this case, we find that Petitioner's waiver of the attorney-client privilege was automatic upon the filing of his application for PCR on April 7, 2006. In order to determine the scope of a PCR applicant's waiver pursuant to S.C. Code Ann. § 17-27-130 (1996), the specific allegations made in the initial application are controlling. Due to the automatic nature of this waiver, its scope cannot be whittled down by the subsequent amendment of the application.

Furthermore, § 17-27-130 states that an applicant's waiver is made "to the extent necessary for prior counsel to respond to the allegation." It is clear from the language of this provision that the General Assembly did not intend for the scope of this waiver to be entirely limited or automatically complete. We find that the plain language of § 17-27-130 makes clear that the General Assembly intended for the scope of the automatic waiver to be directly proportional to the breadth of the allegations made in each individual PCR application.

Turning to the facts of this case, upon application, Petitioner waived his attorney-client privilege "to the extent necessary for prior counsel to respond to the allegation[s]" of ineffectiveness. S.C. Code Ann. § 17-27-130 (1996). We find that the particular allegations made in Petitioner's application for PCR were so broad as to effectuate a complete waiver of his attorney-client privilege. Although Petitioner's application alleged many grounds of

ineffectiveness, we find that the breadth of three particular allegations constituted a complete waiver of Petitioner's attorney-client privilege.

Binney, 384 S.C. 544-45, 683 S.E.2d 480-81. The Binney Court further determined that trial counsel was justified in disclosing his entire file for respondent's review in light of applicant's extremely broad allegations. Id. "[S.C. Code Ann. § 17-27-130] permits prior counsel, when faced with extremely broad allegations of ineffectiveness, to provide representatives of the State with any information he deems necessary for the defense of his representation." Id.

The facts of the present case are akin to Binney. In his original post-conviction relief application, Applicant made extremely broad allegations against trial counsel, including "ineffective assistance of trial counsel" for "denial of fundermental [sic] due process" and "fail[ure] to object, make timely motion." As in Binney, Applicant later filed more specific allegations of ineffective assistance of counsel. However, these subsequent amendments should not foreclose on his absolute waiver of attorney-client privilege based on his original application. Applicant had made broad, sweeping allegations against trial counsel's performance and therefore, Respondent is entitled to fully refute these allegations without Applicant cherry-picking what materials Respondent may access without any input or guidance from trial counsel, who ultimately is called on to defend his professional reputation against Applicant's claims.

Based on Binney and S.C. Code Ann. § 17-27-130, Respondent submits that if the Court is inclined to grant Applicant's motion for full access to trial counsel's file, that trial counsel, *not Applicant*, should determine what materials are responsive to the allegations and should be provided to Respondent.

Conclusion

Based on the foregoing, Respondent submits that if this Court is inclined to order trial counsel to turn over his attorney work product to Applicant, that trial counsel be permitted to independently decide what materials to provide to Respondent to refute the allegations made in his originally application and the subsequent amendments.

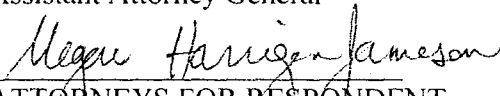
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

MEGAN HARRIGAN JAMESON
Assistant Attorney General


ATTORNEYS FOR RESPONDENT

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

July 31, 2015

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF KERSHAW	)	
	)	
	)	2012-CP-28-1064
	)	
TOMMY MCKNIGHT, #186784	)	
	)	
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 **Respondent's Reply to Applicant's Memorandum of Law Re: Attorney Work-Product Privilege** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

**Tara Dawn Shurling, Esquire
 Law Office of Tara Dawn Shurling, PA
 3614 Landmark Drive, Suite A
 Columbia, SC 29204**

DATED this 31st day of July, 2015.



Sara B. Moore, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF KERSHAW	)	
TOMMY MCKNIGHT, #186784,	)	
	)	2012-CP-28-1064
Applicant,	)	
	)	Response to State's Reply to
v.	)	Applicant's Memorandum of Law
	)	Re: Attorney Work-Product Privilege
	)	
THE STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
_____	)	

Applicant served his Memorandum concerning the disclosure of attorney work-product on July 29, 2015. Counsel for Applicant was served with Respondent's Reply to that Memorandum on July 31, 2015. This Response follows.

Applicant submits that Respondent's reliance upon *Binney v. State*, 384 S.C. 539, 683 S.E.2d 478 (2009), while predictable, is misplaced. The facts in *Binney* are distinguishable from the present case. In *Binney*, PCR Counsel responded to Trial Counsel having turned the entire case file over to the Office of the Attorney General by moving, *prior to the evidentiary hearing on the merits of Binney's claims*, for

- An Order directing that *Binney's* entire file be returned to Trial Counsel, and
- That Order to disqualify any attorneys for the Office of the Attorney General who had reviewed the file from participating in Applicant's PCR proceedings.

The circuit court denied *Binney's* motion, finding that the breath of his application justified a complete waiver of the attorney-client privilege. *Id.* 384 at 543, 683 S.E.2d at 480. The Supreme Court of South Carolina heard *Binney's* interlocutory appeal, finding

that the issues addressed therein were both novel and capable of repetition in every PCR proceeding. *Id.*, at fn 1.

While the original application in *Binney* had been narrowed by subsequent amendments the case had not been heard at the time of PCR Counsel's motion. Thus, there remained a real possibility that *Binney* might further amend his application prior to his evidentiary hearing and/or argue for the inclusion of additional allegations based upon evidence developed during the evidentiary hearing. In the case before the Court, the facts are quite different. Applicant filed a *pro se* application which was extensively amended by his court-appointed PCR lawyer. His *pro se* application, although less sophisticated than that filed in the *Binney* case,¹ does raise general claims of ineffective assistance of trial counsel and ineffective assistance of appellate counsel. Applicant filed two extremely detailed Amended PCR Applications on June 3, 2013 and July 15, 2013 which list Applicant's specific allegations. The allegations addressed in these two applications were numbered sequentially with allegations 1-23 being set forth in the Amended Application filed on June 3, 2013, and allegation 24 being set forth in the Second Amended Application filed on July 15, 2013.

Applicant acknowledges that the Court in *Binney* expressly found that the narrowing of that applicant's claims in his subsequent amendments did not "whittle down" the scope of the waiver made by filing the general Sixth Amendment claims made in *Binney*'s initial application. *Id.*, 384 S.C. at 544-545, 683 S.E.2d at 480 and fn. 2.

Unlike *Binney*, however, Applicant raises this issue *after* his collateral claims have been heard at his evidentiary hearing held on August 5-6, 2013. In the *Binney* case,

¹ The records of the Supreme Court of South Carolina reflect that the initial application filed in the *Binney* case was filed by John H. Blume, Esquire, and Sheri L. Johnson, Esquire.

the evidentiary hearing was yet to be held. Therefore, *Binney* could easily have filed further amendments prior to the evidentiary hearing, and could have argued that the evidence developed during the PCR hearing justified review of additional issues raised by that evidence. *Simpson v. Moore*, 367 S.C. 587, 627 S.E.2d 701 (2006). Thus, the very real possibility existed that additional allegations would still be raised by *Binney* under the umbrella of his original general Sixth Amendment claims. In Applicant's case, those opportunities have passed. Our Supreme Court has found that even issues raised in an application for relief may be deemed waived if not *both* addressed to the PCR judge and ruled upon by the Court. *See, Marlar v. State*, 375 S.C. 407, 409, 653 S.E.2d 266, 266 (2007); *Plyler v. State*, 309 S.C. 408, 424 S.E.2d 477, 478-480 (1992). Thus, unlike *Binney*, Applicant herein is no longer proceeding under the broad generalized claims raised in his original application; his claims have been raised and argued. All that remains in this case is the submission of proposed orders by both sides and a ruling by this Honorable Court.²

In light of the above, Applicant asserts that the *Binney* decision is not on all fours with the facts of his case, and would strongly object to Respondent being given access to any file materials not relevant to the allegations already raised and presented to this Court by him. In the unlikely event a review of the attorney-work product from this file yields a basis for a new allegation, Applicant has proposed an opportunity for Trial Counsel to advise the Court of any additional relevant material he feels PCR Counsel has neglected

² Applicant has argued that review of the work-product materials he was previously denied access to could give rise to additional allegations. Applicant notes, however, that in order to raise such a claim at this late stage of collateral review, he would have to have a basis for claiming the issue is not one which could have been raised before or during his PCR hearing. Nor could he raise such new claims in a subsequent application if the allegation(s) could have been brought in Applicant's original PCR action. S.C. Code Ann. § 17-27-90; *Aice v. State*, 305 S.C. 448, 409 S.E.2d 392 (1991).

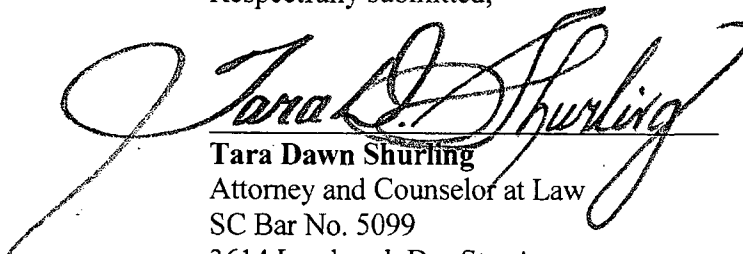
to bring to the Court's attention. Respondent has stated that Applicant has offered nine (9) different alternatives or plans for moving forward. *Reply, fn. 4*. That assertion reflects Respondent's failure to either thoroughly review the procedure proposed by Applicant, or, a failure to understand it. Likewise, Respondent continues to assert that the work-product doctrine protects the material at issue from the *client*, as distinguished from protecting it from discovery by an adversary. Applicant would reiterate his position that there is no legal basis for protecting these materials from the owner of the case file; Applicant. The State is Applicant's adversary in this action, and it is, therefore, the State who must meet the standard set forth in Rule 26 (b)(3), SCRCF, not Applicant.

Respondent submits that Trial Counsel alone should determine what, if any, portions of Trial Counsel's work-product are relevant to Applicant's claims. Without reference to this particular trial lawyer, Applicant would respectfully submit that this position is generally tantamount to allowing the fox to guard the henhouse. While it is the State, not the trial lawyer, who is technically the Respondent in a PCR action, Trial Counsel is the subject of the Sixth Amendment claims raised by a PCR Applicant. Common sense would therefore dictate that Trial Counsel, acting in isolation, would have a conflict of interest in deciding what material is relevant to the allegations made against him. While Trial Counsel might logically determine what evidence would aid him in defending against allegations against him, he can hardly be expected to be unbiased in his assessment of evidence which potentially supports those claims. Having both PCR Counsel and Trial Counsel review these materials protects Applicant against any such inherent bias.

CONCLUSION

Applicant submits that he has a right to the work-product materials at issue inasmuch as they are part of his file. Assuming, *arguendo*, that an exception to the work-product doctrine is required, Applicant asserts that, like attorney-client privilege, such a waiver clearly would apply to any material relevant to the allegations raised by him at his PCR hearing. He respectfully submits that the procedure proposed in his memorandum, 1) affords him appropriate access to materials which may support the claims presented on his behalf during his PCR evidentiary hearing, 2) affords him the opportunity to discover any claims the foundation for which may have been concealed from him when his attorney's work-product was removed from the file that was provided to PCR Counsel, 3) it provides a check on whether either side is presenting a biased view as to what material is relevant to the allegations already raised, and 4) it preserves the attorney-client privilege with regard to any material not relevant to the allegations *already heard* in this PCR case, and any material giving rise to previously undiscoverable allegations as protected by the limiting language found in § 17-27-130.

Respectfully submitted,



Tara Dawn Shurling
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803-738-1600 (Fax)

ATTORNEY FOR APPLICANT

This 3rd day of August, 2015.

STATE OF SOUTH CAROLINA)
COUNTY OF KERSHAW)

Tommy McKnight, #186784,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Case No. 2012-CP-28-1064

**Order Denying Applicant's Motion to
Compel Trial Counsel to Provide
Work-Product**

FILED FOR RECORD
2015 SEP 11 AM 11:38
JOYCE HODGKINS
CLERK OF COURT
KERSHAW COUNTY, S.C.

This matter is before this Court on Applicant's post-conviction relief application filed November 19, 2012. Respondent made its Return on January 25, 2013, requesting an evidentiary hearing be held. Thereafter, Applicant, through his counsel Tara D. Shurling, filed an amended application on June 3, 2013, and a second amended application on June 14, 2013. A hearing on this application and its subsequent amendments was held on August 5 and 6, 2013, at the Richland County Courthouse. At the conclusion of the hearing, Applicant moved for this Court to compel trial counsel turn over his notes and other attorney work-product. This Court requested legal memoranda from both parties on the issue. After reviewing all documents submitted, the Court denies Applicant's motion.

Procedural History

The Kershaw County Grand Jury indicted Applicant during the June 2008 term for murder (2008-GS-28-2183). Kershaw County Public Defender Cornelius J. Riley and Assistant Public Defender Jason D. Kirincich represented Applicant. On March 16-19, 2009, Applicant proceeded to a jury trial before the Honorable J. Ernest Kinard, Jr., where the jury convicted Applicant as indicted. Sentencing was deferred to allow Applicant's counsel to file post-trial

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Clerk of Court Kershaw County

motions. On April 28, 2009, all parties reconvened for a sentencing hearing, at which Judge Kinard sentenced Applicant to thirty years imprisonment.

Applicant appealed his conviction and an appeal was perfected on his behalf by Chief Appellate Defender Robert M. Dudek. Following the submission of an Anders¹ brief, the South Carolina Court of Appeals dismissed Applicant's appeal. State v. Tommy McKnight, 2012-UP-341 (Ct. App. filed June 6, 2012). The Remittitur was issued on June 25, 2012.

Current Post-Conviction Relief Action

Thereafter, Applicant filed his post-conviction relief application on November 19, 2012. Respondent made its Return on January 25, 2013, requesting an evidentiary hearing be held. Thereafter, Applicant, through his counsel Tara D. Shurling, filed an amended application on June 3, 2013, and a second amended application on June 14, 2013.

A hearing on this application and its subsequent amendments was held on August 5 and 6, 2013, at the Richland County Courthouse before this Court. Testimony was taken from trial counsels Riley and Kirincich. At the start of his testimony, trial counsel Riley revealed that he had removed "attorney work product, notes" from his file. (PCR Tr. pp. 45, 71, 181). He testified that he made the remainder of his file available for post-conviction relief counsel's review several times, including after Applicant had amended his application. (PCR Tr. pp. 45-46). Applicant made no protestation or other objection at this time.

Motion before this Court

At the conclusion of all testimony on the second day of the hearing, Applicant, through his counsel, moved for this Court to compel trial counsel Riley to turn over his attorney work-product. (PCR Tr. pp. 225-226, 231). Respondent objected based on Mr. Riley's previous contention that the material was protected under attorney work product, that there was no

¹ Anders v. California, 386 U.S. 738 (1967).

discovery motion in this case, and the motion was untimely. (PCR Tr. pp. 226-227). After discussion with both parties, this Court requested both parties submit a brief memorandum of law on this issue prior to the submission of proposed orders on the merits. (PCR Tr. pp. 227-234).

Respondent served this Court and Applicant with its Memorandum of Law Re: Attorney Work Product Privilege on August 29, 2013. In this memorandum, Respondent asserted that “Applicant failed to state with any specificity why the documents were necessary or how these attorney notes would aid him in proving any of his . . . allegations” and that “Applicant merely stated that he would like to review these notes to see what information might be gleaned” following extensive testimony from both trial counsel’s spanning more than two days. Respondent further asserted that the requested materials were immune from discovery; this Court notes that discovery has not been granted in this non-capital post-conviction relief action.

On July 29, 2015, Applicant served this Court and Respondent with his Applicant’s Memorandum of Law Re: Attorney Work-Product Privilege. In this memorandum, Applicant asserted that “the work-product notes of trial counsel [are] necessary and crucial to [Applicant]’s ability to adequately examine trial counsel and potentially impeach trial counsel concerning actions that were, or were not, taken in the case.” However, beyond this broad declaration, Applicant did not state with any specificity why these documents were necessary to his case or any particular allegation in which they would have proved beneficial. Applicant asserted that everything in his file is necessary for the adjudication of his post-conviction relief claims, and therefore, he is entitled to review all materials, including attorney work-product. However, Applicant asserted that his waiver of attorney-client privilege pursuant to S.C. Code §17-27-130 is not a full and complete automatic waiver, but rather, is only limited to the specific allegations

raised and “to the extent necessary” to allow trial counsel and Respondent to respond to his allegations. Applicant argued because the waiver of attorney-client privilege is narrowly tailored to only his specific allegations, Respondent is not entitled to a full review of trial counsel’s file and/or work product, but rather, only those documents Applicant determines are responsive to his claims. Applicant specifically argued that his request “*does not* throw the door wide open for Respondent to have access to all of trial counsel’s work-product” but instead only allows Respondent to access materials that are appropriate based Applicant’s allegations.

Respondent submitted its reply to Applicant’s memorandum on July 31, 2015. In this reply, Respondent argued that “Applicant is attempting to use attorney-client privilege as both a sword and a shield, allowing him access to all materials, including protected work-product, from trial counsel’s file but at the same time hindering Respondent from refuting these allegations by limiting access to the very materials pertinent to refute these claims.” Further Respondent asserted that this approach was prejudicial to its (and trial counsel’s) ability to defend against these claims, and the incorrect course for this Court to follow. Rather, Respondent asserted that the approach set forth in Binney v. State was controlling and should be followed in this case if this Court be inclined to grant access to trial counsel’s attorney work product. 384 S.C. 539, 384 S.C. 539 (2009).²

² In Binney, a capital post-conviction relief action, applicant filed a *pro se* application for with extremely broad allegations for relief. In response, trial counsel provided a complete copy of his casefile to respondent (as well as the applicant) to allow respondent to refute the allegations and prepare for a hearing on the merits of the application. Thereafter, applicant, through his counsel, made more specific allegations for relief through amended applications. Applicant then moved for the return of his trial file from respondent’s office and the disqualification of any attorneys or staff from respondent’s office who viewed the file. The circuit court denied applicant’s motion and applicant petitioned for certiorari to the South Carolina Supreme Court before a full merits hearing. The Court granted certiorari and after full briefing and argument, held that the statute that waived attorney-client privilege to extent necessary for prior counsel to respond to allegations of ineffective assistance of counsel automatically waived privilege to defendant’s entire trial file, and that applicant’s trial counsel was justified in disclosing entire trial file to respondent. Binney, 384 S.C. 539, 683 S.E.2d 478. The Binney Court further determined that trial counsel was justified in disclosing his entire file for respondent’s review in light of applicant’s extremely broad allegations. Id. “[S.C. Code Ann. § 17-27-130] permits prior counsel, when faced with extremely broad allegations of ineffectiveness, to provide representatives of the State with any information he deems necessary for the defense of

In response to Respondent's reply, Applicant served his "Response to State's Reply to Applicant's Memorandum of Law Re: Attorney Work-Product Privilege" on August 4, 2015, arguing that Respondent's reliance on Binney was misplaced, as Applicant raised this issue *after* the evidentiary hearing.

After reviewing the record in its entirety, along with the various memorandums supplied by both parties on this issue, this Court finds that Applicant's motion to compel trial counsel to produce his notes and other documents he removed from his file as work-product must be denied. This Court finds that Applicant's motion is untimely, arising after two days of testimony from when the issue first arose. Furthermore, this Court finds that Applicant has failed to establish sufficient cause as to why this Court should compel the production of these notes and other work-product documents. This Court notes that this is a non-capital post-conviction relief action and that Applicant failed to establish that such materials are necessary to the adjudication of this action with any of the required specificity necessary to grant his motion. The court further finds that to require a defense attorney to turn over his mental impressions would frustrate the ability of an attorney to defend his client. If this type of material was discoverable in a PCR action or otherwise defense attorneys would more likely than not take fewer notes during the pendency of discovery and trial. This court is further concerned that should the PCR be granted and a new trial held there could be collateral damage done to the defendant on retrial by divulging attorney work product.

Based on the foregoing, this Court finds that this motion must be **DENIED**.

his representation." Id. This Court agrees with Respondent that if it were so inclined to grant discovery, the approach set forth in Binney would be the proper procedure to follow. However, as discussed below, this Court is denying Applicant's motion and therefore does not superfluously address the full procedure to be follow if if Applicant's motion were so granted.

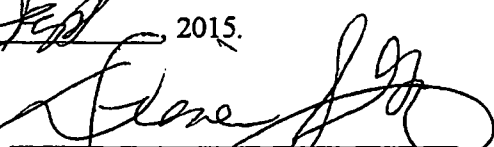
Conclusion

This Court finds that Applicant's motion to compel trial counsel to turn over his notes and work-product must be denied.

IT IS THEREFORE ORDERED THAT Applicant's motion to compel trial counsel to turn over his work-product to Applicant is **DENIED**.

IT IS SO ORDERED this 1 day of Sept 2015.

, South Carolina


DIANE S. GOODSTEIN
Presiding Judge
Fifth Judicial Circuit

STATE OF SOUTH CAROLINA
COUNTY OF KERSHAW

Tommy McKnight, #186784,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Case No. 2012-CP-28-1064

ORDER OF DISMISSAL

FILED
2015 MAR 16 AM 9:48
JOYCE McDONALD
CLERK OF COURT
KERSHAW COUNTY, S.C.

This matter is before this Court by way of an application for post-conviction relief filed on November 19, 2012. Respondent made its Return on January 25, 2013, requesting an evidentiary hearing be held. Thereafter, Applicant, through his counsel Tara D. Shurling, filed an amended application on June 3, 2013, and a second amended application on June 14, 2013. A hearing on this application and its subsequent amendments was held on August 5 and 6, 2013, at the Richland County Courthouse. Applicant was present at the hearing and was represented by Tara D. Shurling, Esquire. Respondent was represented by Assistant Attorney General Megan Harrigan Jameson of the South Carolina Attorney General's Office. After a thorough review of all testimony and evidence presented at the hearing, along with a review of the records from Applicant's trial and direct appeal, this Court finds that there are no constitutional deprivations or other grounds on which to grant relief and is denying and dismissing this application with prejudice.

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Court

[Signature]
Clerk of Court Kershaw County

PROCEDURAL HISTORY

Applicant is presently confined within the South Carolina Department of Corrections pursuant to orders of commitment from the Kershaw County Clerk of Court. During its June 2008 term, the Kershaw County Grand Jury indicted Applicant for murder (2008-GS-28-2183). Kershaw County Public Defender Cornelius J. Riley and Assistant Public Defender Jason D. Kirincich represented Applicant. On March 16-19, 2009, Applicant proceeded to a jury trial before the Honorable J. Ernest Kinard, Jr., where the jury convicted Applicant as indicted. Sentencing was deferred to allow Applicant's counsel to file post-trial motions. On April 28, 2009, all parties reconvened for a sentencing hearing and Judge Kinard sentenced Applicant to thirty years imprisonment.

Applicant appealed his conviction and an appeal was perfected on his behalf by Chief Appellate Defender Robert M. Dudek. Following the submission of an Anders¹ brief, the South Carolina Court of Appeals dismissed Applicant's appeal. State v. Tommy McKnight, 2012-UP-341 (Ct. App. filed June 6, 2012). The Remittitur was issued on June 25, 2012.

CURRENT POST-CONVICTION RELIEF ACTION

Thereafter, Applicant filed a *pro se* application for post-conviction relief on November 19, 2012, alleging he was being held in custody unlawfully based on the following allegations:

1. Ineffective assistance of counsel for the denial of fundamental due process and for counsel's failure to object and preserve for appellate review;
2. Prosecutorial misconduct and police brutality; and
3. Ineffective assistance of appellate counsel.

¹ Anders v. California, 386 U.S. 738 (1967).

Respondent made its Return on January 25, 2013, requesting an evidentiary hearing be held.

Thereafter, Applicant, through his counsel Tara D. Shurling, filed an amended application on June 3, 2013, alleging the following:

1. Ineffective assistance of trial counsel for neglecting to preserve on the record an objection to a jury charge which instructed the jury that it could infer malice from the use of a deadly weapon when self-defense was raised;
2. Ineffective assistance of trial counsel for only objecting to the jury instruction on the inference of malice from a deadly weapon *in camera* rather than on the record, thereby failing to preserve the issue for appellate review;
3. Ineffective assistance of trial counsel for failing to object to portions of the State's closing argument in which the prosecutor argued matters not supported by evidence introduced at trial;
4. Ineffective assistance of trial counsel for failing to object to hearsay testimony accusing the Applicant of unrelated bad acts;
5. Ineffective assistance of trial counsel for failing to object to repeated reference in the State's closing argument that improperly emphasized inadmissible hearsay testimony from State's witness, Debra Joyner;
6. Ineffective assistance of trial counsel for failing to object to repeated leading by the State during its direct examination of State's witnesses;
7. Ineffective assistance of trial counsel for failing to emphasize to the jury that Applicant's right to act on appearance and the related facts that he was struck in the head with a beer bottle immediately prior to the victim's stabbing, that Applicant sustained a second wound to his chest, and that the victim and his friends (who outnumbered Applicant) were approaching Applicant from all sides.
8. Ineffective assistance of trial counsel for failing to object to a portion of the State's closing argument where the prosecutor erroneously stated that State's witness Debra Joyner testified on direct examination that the Applicant first hit the victim with the bottle and that the State had brought this error out during its direct examination as opposed to the defense during cross examination;

9. Ineffective assistance of trial counsel for advising Applicant against testifying at trial without adequately advising him of the ramifications on his self-defense claim;
10. Ineffective assistance of trial counsel for failing to specifically object to the trial court's failure to recharge the entire jury instruction on self-defense in addition to the instructions recharged by the trial court following a jury question;
11. Ineffective assistance of trial counsel for failing to request a jury instruction clearly advising the jury that the defense of self-defense could be raised through facts and circumstances established by evidence introduced by either the State or defense;
12. Ineffective assistance of trial counsel for failing to request a jury instruction that any doubts concerning Applicant's degree of culpability were to be resolved in Applicant's favor;
13. Ineffective assistance of trial counsel for failing to request permission to treat DeeDee Drakeford as a hostile witness;
14. Ineffective assistance of trial counsel for failing to introduce testimony from Detective Lee Boan to impeach DeeDee Drakeford with her prior inconsistent statements to law enforcement;
15. Ineffective assistance of trial counsel for failing to question DeeDee Drakeford as to her two calls to Detective Lee Boan;
16. Ineffective assistance of trial counsel for failing to object to hearsay testimony relaying claims that the owner of the residence where the altercation took place had asked Applicant to leave when the homeowners did not testify at trial;
17. Ineffective assistance of trial counsel for failing to assert Applicant's right to a speedy trial;
18. Ineffective assistance of trial counsel for failing to object to Applicant being forced to appear in front of the jury in ankle chains;
19. Ineffective assistance of trial counsel for failing to fully argue Applicant's right to act on appearance in the context of his self-defense claim and for failing to argue that all the evidence supported an appearance that he was in imminent danger when he acted in self-defense;

20. Ineffective assistance of trial counsel for failing to object to the trial court's statement that may have been construed by the jury as a judicial comment on the facts that was capitalized on by the State;
21. Ineffective assistance of trial counsel for failing to ensure that Applicant received a preliminary hearing prior to indictment;
22. Ineffective assistance of trial counsel for failing to request a jury charge instructing that any doubt as to whether Applicant was guilty of murder or manslaughter must be resolved in favor of the accused; and
23. Ineffective assistance of trial counsel for failing to object to the introduction of a box cutter on Applicant when arrested and testimony about the box cutter when there was no evidence connecting the knife to this incident.

Thereafter, Applicant filed a second amended application on June 14, 2013, alleging that trial counsel was ineffective for failing to object to hearsay testimony characterizing Applicant as "just an old drunk." At the evidentiary hearing, Applicant proceeded forward on the twenty-four allegations as set forth in his two amendments.

A hearing on this application and its subsequent amendments was held on August 5 and 6, 2013, at the Richland County Courthouse before this Court. Testimony was taken from trial counsels Riley and Kirincich. At the start of his testimony, trial counsel Riley revealed he had removed "attorney work product, notes" from his file. (PCR Tr. pp. 45, 71, 181). He testified he made the remainder of his file available for post-conviction relief counsel's review several times, including after Applicant had amended his application. (PCR Tr. pp. 45-46). Applicant made no protestation or other objection at this time. However, at the conclusion of the hearing, Applicant, through his counsel, moved for the Court to order trial counsel Riley to grant Applicant access to his notes and other attorney work-product. (PCR Tr. pp. 225-226, 231). The State objected based on Riley's previous contention the material was protected under attorney work product, there was no discovery motion in this case, and the motion was untimely. (PCR Tr. pp. 226-227).

After discussion with both parties, the Court requested both parties submit a brief memorandum of law on this issue. Following a review of the memorandum submitted, this Court denied Applicant's motion by written order filed September 11, 2015.

SUMMARY OF TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING

At the evidentiary hearing, Applicant presented testimony from trial counsels Kirincich and Riley. Kirincich, who was second chair, testified first at the evidentiary hearing. He testified he became involved in Applicant's case a week before trial at the request of lead counsel Riley. He testified he had been practicing law for approximately two years prior to Applicant's trial and had previously handled numerous other trials. He testified he first met with Applicant the Friday before trial and he looked through the discovery materials before trial. He testified he did not meet with Applicant additional times before trial. He testified he was not involved whatsoever in the investigation of this case and has no knowledge of any investigation completed by Riley or other attorneys from his office.

Kirincich testified the State's argument was essentially that Applicant brought a knife to a fist-fight and escalated the situation. He testified the trial court made a similar comment outside the presence of the jury that was then used by the State during its closing argument. He testified there was evidence Applicant was struck in the head with a beer bottle prior to Applicant stabbing him, but testimony varied as to exactly how Applicant was struck. He testified this was supported by pictures showing a knot on Applicant's head when he was taken to the hospital immediately after the stabbing. He testified Applicant also had another wound on his torso. He testified the altercation between Applicant and the victim initially began with Applicant making derogatory comments about the victim's dog.

Kirincich testified he was primarily responsible for handling jury instructions and that he used the Honorable Ralph King Anderson, Jr.'s widely-use book on criminal jury instructions to formulate his charge requests. He testified a bench conference was held during the trial to discuss jury charges, and in particular, whether to charge inferred malice from the use of a deadly weapon. He elaborated he argued to the trial court that an inferred malice charge was not appropriate in Applicant's case because he was asserting self-defense. He testified the prosecutor disagreed, citing to a recent case in Columbia where the defendant argued self-defense and an inferred malice charge was appropriately given. The trial court agreed with the State and instructed the jury on inferred malice. He testified although he objected to this charge during a bench conference, but acknowledged neither he nor Riley objected contemporaneously on the record. Kirincich testified Applicant's trial was months before the opinion in State v. Belcher, where the South Carolina Supreme Court held charges instructing the jury that malice may be inferred from the use of a deadly weapon is no longer good law in South Carolina where evidence is presented that would reduce, mitigate, excuse or justify the homicide. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). He testified after the Belcher opinion came out, he and Riley discussed its possible applicability to Applicant's case with the prosecutors to see if it would have any impact on Applicant's case, but ultimately determined the Belcher decision was not retroactive. He testified Applicant's appeal was pending when Belcher was decided.

Kirincich testified he also asked for a specific self-defense charge that would tie the law of self-defense to the facts and evidence presented in Applicant's case. He testified the trial court declined to give this charge. He testified he also requested a jury instruction that self-defense is an affirmative defense, which if raised, shifts the burden to the State to disprove self-defense, but his particular request to charge was denied by the trial court. He did acknowledge the trial court

gave a similar jury instruction explaining if there is evidence of self-defense in the case, the State has to prove beyond a reasonable doubt the defendant did not act in self-defense and everyone is authorized to defend himself or herself from death or serious bodily injury.

Kirincich testified he handled a few witnesses on behalf of the defense, but lead counsel Riley was responsible for bulk of witnesses, including any expert witnesses. He testified he was responsible for the two defense witnesses, Eric Tisdale and Dina Horton, who testified Applicant had been a victim in a prior altercation. Kirincich testified he did not learn the identify of DeeDee Drakeford until March 17, 2009, after the jury had been selected.

Kirincich testified a written post-trial motion was filed requesting a new trial or directed verdict, citing Applicant was being assaulted without fault and did not bring on the difficulty, therefore entitling him to use force for his own protection pursuant to State v. Campbell, 111 S.C. 112, 96 S.E. 543 (1918). Kirincich testified the trial court denied this motion.

Applicant also called lead counsel Riley to testify. He testified he met with Applicant numerous times, including several times the week before trial to prepare the case. He testified he reviewed possible sentences with Applicant. Riley testified he reviewed all discovery materials with Applicant, including any witness statements.

Riley testified he did not file a speedy trial motion because he only represented Applicant for six months prior to trial and when he was appointed to represent Applicant in September 2008, he was already aware the case would be moving to trial in early 2009. He elaborated numerous other public defenders handled the case before it was assigned to him. He testified he was named acting Chief Public Defender for Kershaw County during 2007 and then later officially became Chief Public Defender for Kershaw County. He testified although he supervised all Assistant Public Defenders in his office as Chief Public Defender, he avoided

directly interfering with any of his attorney's representation of clients to avoid ethical problems. He also elaborated he had the utmost confidence in the "really good public defenders" in his office while he was Chief. He similarly testified he did not request a preliminary hearing because Applicant had already been indicted when he assumed representation. He further testified he believes the State had sufficient probable cause, so a preliminary hearing would not have had any impact on Applicant's case. Riley testified when he became Chief Public Defender, there was no internal mechanism for auditing what cases were being handled by the Kershaw County Public Defender's Office or the age of each case and the clerk's office could not provide information to him when he took over as Chief Public Defender. He testified he had to create a system to allow his office to keep track of such information from scratch and this was a primary focus when he became Chief Public Defender. He testified Applicant never requested he move for a speedy trial.

Riley testified the defense Applicant asserted at trial was self-defense. He testified that in their discussions, Applicant informed Riley that he had been attacked twice before and had a habit of carrying a weapon with him for self-defense. He testified on the night in question, Applicant had a "hunting knife with a very long blade" and this was used to fatally wound the victim. He testified it was his strategy throughout trial and he also argued self-defense during his closing argument. He testified he focused on Applicant being hit with a beer bottle and the victim and his friends surrounding Applicant immediately before the assault—including from behind the victim. He testified all testimony presented at the trial showed Applicant was significantly outnumbered by the victim and his friends. He testified he perceived the jury to be "very attentive" and it was "unmistakable throughout the trial that [Applicant] was outnumbered." (PCR Tr. p. 64-65). He testified he also stressed the noticeable age discrepancy

between Applicant and the victim during his closing argument. He also stressed to the jury that Applicant had been injured and had a knot on his head.

Riley testified Applicant did not have on handcuffs during trial, but was wearing ankle chains in accordance with Kershaw County policy that all inmates be restrained with ankle chains while in the courtroom. He testified the jury never saw Applicant in ankle chains. He testified he is certain the jury never saw the ankle chains because both counsel tables had long curtains hanging from the edge of the table to the floor, so the jury was unable to see the legs or ankles of anyone sitting at counsels' tables, including Applicant. He testified Applicant did not testify or otherwise enter the courtroom after the jury, so the jury never had an opportunity to view Applicant's ankle chains. Riley further testified he did not recall Applicant's ankle chains making any sort of noise or any other sound to alert the jury.

He testified he had no specific recollection as to his discussion with Applicant about his right to testify at trial. He testified he always advised his clients they have the right to testify and it is exclusively their right whether or not to testify. He testified he is confident he employed this standard strategy in Applicant's case. He elaborated he also advises clients his or her testimony is especially important when asserting self-defense. He testified Applicant did not have a significant prior record and he likely discussed whether he could be impeached on his prior record with Applicant. Riley testified he did not believe Applicant could have been impeached with his prior record due to the nature of the prior offenses and time lapse. He testified he also discusses courtroom demeanor with clients and how the jury will likely perceive the client. He testified based on his relationship with Applicant, he found Applicant to be very volatile and had trouble listening—a potential problem should he subject himself to cross examination by the State.

Riley testified there was an investigative report prepared by Officer Lee Boan referencing an informant "D.D." who provided information on the incident. According to this report, Riley testified D.D. told law enforcement the victim and several of his friends attacked Applicant. He testified there was another entry later in the day indicating Applicant and the victim got into the altercation because Applicant owed the victim money for drugs and wanted the victim to front him additional drugs. Riley testified based on this report, he requested in writing the Solicitor's office reveal D.D.'s identity. He testified he later discovered the informant was DeeDee Drakeford, whom he had previously discussed with Applicant. He testified he spoke with Drakeford before Applicant's trial in anticipation of calling her as a defense witness, which he ultimately did. Riley testified Drakeford testified a thrown beer bottle hit Applicant shortly before he stabbed the victim. He testified he did not ask Drakeford about her two prior conversations with law enforcement or attempt to impeach her with these prior statements. He testified he did not consider asking the trial court to declare Drakeford a hostile witness because she was a beneficial witness for the defense and was testifying favorably without any need to have her declared hostile.

He testified in addition to Drakeford, he also presented Eric Tisdale and Dina Horton as defense witnesses. He testified Tisdale and Horton were able to testify as to Applicant's prior assaults and provide an explanation or rationale for why Applicant was armed the evening of the altercation. He testified Tisdale was a law enforcement officer who had been involved in the prior attack on Applicant. Similarly, he testified Horton was the Camden Police Department victim's advocate who was involved in Applicant's prior attack.

Riley testified his overall approach to objecting during trial is to only do so when the conduct is egregious and he perhaps objects less frequently than other attorneys. He elaborated

this approach is based on a two-fold strategy. First, he testified objections tend to focus the jury's attention on the matter subject to the objection, having a detrimental impact on his client's case. Second, he testified based on his study of the psychology of juries, he is convinced it creates an impression that the attorney is trying to cover something up or hide the truth from the jury. However, he reiterated he does object when he believes necessary, including during closing arguments.

Riley testified he believes he and Kirincich discussed an anticipated objection to the inferred malice charge. He testified he does not specifically recall why he did not object on the record following Kirincich's bench conference regarding jury instructions, but opined it was likely because Kirincich was handling jury instruction issues and it "wasn't looming on [his] radar screen at that point." He elaborated Belcher had not been argued or decided at that time and the charge as given by the trial court was a correct statement of law at the time.

Riley testified the State argued during closing the quarrel between Applicant and the victim began over Applicant's disparaging comments about the victim's dog. He testified he did not object to this argument as it was based on testimony from State's witnesses Travis Johnson and Jasmine Floyd. He likewise testified the State's argument during closing that the homeowner's asked Applicant to leave was also supported by testimony from State's witnesses, including Debra Joyner. He testified the homeowners did not testify at trial and he does not know why he did not object to this testimony, but perhaps, it was to not draw attention to this testimony. However, he testified the victim, who was a guest of the homeowners, had also asked Applicant to leave several times to no avail. He also testified there was similar testimony from State's witnesses that Applicant had been asked to leave another home up the road for harassing guests and acknowledged none of those guests testified and therefore, he should have objected to

this testimony. Riley testified as a matter of practice, he tries to refrain from objecting during closing argument unless the argument is blatantly improper.

Riley testified Kirincich was primarily responsible for the jury instructions, although they did discuss the proposed charges submitted to the trial court. He testified several of the defense's requests to charge, including on the burdens of establishing self-defense, were denied by the trial court. He testified he is not sure why the defense's requests for charge were not made court's exhibits. He testified he thought the trial court's jury instruction appropriately covered the law, but acknowledged there were additional charges that could have been requested—but were not necessary.

Riley testified during deliberations, the jury sent a note indicating it needed clarification on the law of murder, voluntary manslaughter, and self-defense. He testified he could not recall the exact language of the note.

In response to the allegation that the trial court commented on the facts when he made a comment that State's witness Travis Johnson "didn't have a stopwatch," Riley testified the comment was of "piddling importance" and was immediately corrected by the trial court. Riley further testified he did think this was objectionable. He elaborated this did not amount to a judicial comment on the facts and the trial court instantly clarified or explained the comment, reducing any impact on Applicant. He testified he does not believe this comment nor the State's use of this comment during its argument prejudiced Applicant. Riley similarly testified he did not believe the comment that his client was a "drunk" was prejudicial to Applicant nor had any bearing on the outcome of the case.

He also testified it was improper for the State to introduce the box cutter found on Applicant when he was arrested and he should have objected. He acknowledged all the witnesses

testified consistently that Applicant used a knife to cut the victim and made no mention of a box cutter. However, he testified the knife that Applicant used to fatally wound the victim had a six or seven inch blade, so the box cutter was of little importance. Riley also testified he did not object to the comment made by Officer David Hagan that witnesses described the suspect as a drunk who frequented the area. He testified this comment was "a relatively tiny point in the overall trial that had negligible, if any, impact." He elaborated throughout the trial he was making tactical and strategic decisions and he did not feel that this minor comment was objectionable in light of the overall testimony presented. He testified there was evidence Applicant indicated he wanted to finish his beer. Riley also acknowledged the State presented evidence the victim had been drinking and cocaine was found in a vial underneath his body.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

Ineffective Assistance of Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRPC; Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she 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 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and 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. Strickland, 466 U.S. at 689. "[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood, 338 S.C. at 110, 525 S.E.2d at 517).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result

is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

After careful review of the entire record, including the testimony and exhibits presented at the evidentiary hearing, and based on the standard discussed above, this Court finds that Applicant has failed to carry his burden in this action. Below are this Court's rulings in regards to each of Applicant's specific allegations of ineffective assistance of counsel:

Allegations 1 and 2. Trial counsel was ineffective for neglecting to preserve on the record an objection to a jury charge which instructed the jury that it could infer malice from the use of a deadly weapon when self-defense was raised, and for failing to only make the record during an in-camera hearing

Applicant alleges counsel was deficient for neglecting to object to the trial court's inferred malice instruction on the record, thereby failing to preserve it for appellate review and resulting in prejudice. Applicant acknowledged Kirincich objected to this charge during an off-the-record bench conference, but asserts the issue was not properly preserved for appellate review. In support of this allegation, Applicant cites to State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (S.C. 2009), decided by the South Carolina Supreme Court on October 12, 2009. Applicant concedes the Belcher opinion was decided after his trial, but argues his case was on appellate review when Belcher was decided and he therefore would have benefited from the decision.

In Belcher, the South Carolina Supreme Court announced that after "carefully scrutinize[ing] the historical antecedents to this permissive inference, we hold today that a jury charge instructing that malice may be inferred from the use of a deadly weapon is no longer good law in South Carolina where evidence is presented that would reduce, mitigate, excuse or justify

the homicide.” *Id.* at 600, 685 S.E.2d at 803-04. The Court recognized the Belcher ruling “represents a clear break from our modern precedent” approving of the jury charge on inference of malice from use of a deadly weapon, expressly overruling some twenty-six cases decided over the course of more than a hundred years, ranging in date from 1894 to 2006. *Id.* at 612, 685 S.E.2d at 810. The Court held “[b]ecause our decision represents a clear break from our modern precedent, today’s ruling is effective in this case and for all cases which are pending on direct review or not yet final where the issue is preserved.” *Id.* at 612-13, 685 S.E.2d at 810. However, the Court expressly stated “[o]ur ruling, however, will not apply to convictions challenged on post-conviction relief.” *Id.* at 613, 685 S.E.2d at 810.

This Court finds counsel was not ineffective for failing to preserve the issue for appellate review. Applicant proceeded to trial on March 16-19, 2009, six months before the Supreme Court issued its opinion in Belcher and three months before the oral argument was held before the Court. As the Court acknowledged in its opinion, Belcher “represent[ed] a clear break from our modern precedent.” *Id.* at 612, 685 S.E.2d at 810. At the time of Applicant’s trial, the jury instruction as given by the trial court was a correct statement of law and counsel cannot be deemed deficient for failing to preserve an objection on such a ground. As appellate courts have consistently recognized, trial counsels are not required to be clairvoyant or anticipate changes in the law which were not in existence at time of trial. *See Harden v. State*, 360 S.C. 405, 408, 602 S.E.2d 48, 49 (2004) (holding an attorney is not required to anticipate potential changes in the law which are not in existence at the time of the conviction) (citing Gilmore v. State, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994) overruled on other grounds by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999)). While Kirincich’s objection to the inferred malice charge was creative and forward-looking argument, this Court finds counsel was not deficient for neglecting

to preserve the argument for appellate review. This allegation is denied and dismissed with prejudice.

Allegations 3 and 5. Trial counsel was ineffective for failing to object to portions of the State's closing argument where the State argued matters not supported by evidence introduced at trial

Applicant alleges counsel was ineffective for failing to object to several portions of the State's closing argument that he asserts were improper. Specifically, Applicant alleges counsel should have objected to the following portions of the State's closing argument:

- Trial tr. p. 338, lines 1-2., where he claims the State improperly argued that he ridiculed the victim's dog;
- Trial tr. p. 425, lines 18-19, p. 442, line. 11, where he claims the State improperly argued that Debra Joyner testified that the Applicant was picking at the victim;
- Trial tr. p. 400, II. 19-20, where he claims the State improperly argued that Debra Joyner testified that homeowner asked the Applicant to leave at one point and then he came back;
- Trial tr. p. 421, II. 15-21, where he claims that the State inaccurately quotes Debra Joyner as testifying that the Applicant had been asked by the homeowner three times to leave that day; and
- Trial tr. p. 441, II. 5-7, where he claims the State inaccurately quotes Debra Joyner as testifying that the Applicant had been asked by the homeowner three times to leave that day.

This Court has reviewed the portions of the trial transcript as cited by Applicant, as well as the record in its entirety, and finds this allegation must be denied and dismissed as to each portion of the closing argument in question. Each section is discussed below.

The first section where Applicant alleges counsel should have objected is when the State argued: "There is [sic] at least two witnesses that are to the effect the Defendant was ridiculing the victim's dog that actually started the confrontation." (Trial tr. p. 337 line 25–p. 338 line 2).

As an initial matter, this Court notes this comment was *not* made before the jury, but rather, was made during the State's reply to Applicant's motion to dismiss, well before the State's closing argument to the jury and out of the jury's presence. Therefore, this allegation must be denied and dismissed as it lacks merit. Furthermore, this Court finds this argument is a reasonable inference to facts in the record and therefore was proper. See Brown v. State, 383 S.C. 506, 515, 680 S.E.2d 909, 914 (2009) ("The argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences that may be drawn therefrom." (quoting Von Dohlen v. State, 360 S.C. 598, 609-10, 602 S.E.2d 738, 744 (2004))); Humphries v. State, 351 S.C. 362, 570 S.E.2d 160 (2002) (holding a solicitor has a right, during closing arguments, to state his version of the testimony and to comment on the weight to be given such testimony).

The second section where Applicant alleges counsel should have objected is when the State argued: "And Ms. Debra stays, you know, like he was picking." (Trial tr. p. 425, lines 18-19) and "He chose to pick and pick." (Trial tr. p. 442, line. 11). Applicant alleges the State erroneously claimed that Debra Joyner testified Applicant was picking at the victim despite a lack of testimony stating this in the record. However, after reviewing these two portions of the State's closing argument in conjunction with the record as a whole, this Court finds Applicant has failed to establish any deficiency of counsel, as these arguments made by the State are based on reasonable inferences from the record and were proper. See Brown, 383 S.C. at 515, 680 S.E.2d at 914; Humphries, 351 S.C. 362, 570 S.E.2d 160.

The third section where Applicant alleges counsel should have objected is when the State argued: "I believe Debra Joyner even testified that the homeowner actually told him to leave at one point, and then he came back." (Trial tr. p. 400 lines 19-21). Applicant alleges this

misconstrued Joyner's testimony and harmed his self-defense claim. However, after reviewing these two portions of the State's closing argument in conjunction with the record as a whole, this Court finds Applicant has failed to establish any deficiency of counsel, as these arguments made by the State are based on reasonable inferences from the record and were proper. See Brown, 383 S.C. at 515, 680 S.E.2d at 914; Humphries, 351 S.C. 362, 570 S.E.2d 160.

The fourth section where Applicant alleges counsel should have objected is when the State argued: "You heard Debra, and I am going to talk about it in a minute, say he had already been told three times by the homeowner that day to leave. No question on that. They didn't cross him one time on that and say, really? He had already been told by somebody up the street to leave. He is looking for trouble." (Trail Tr. p. 421, lines 15-21). Applicant alleges this argument inaccurately quotes Joyner as testifying that the Applicant had been asked by the homeowner three times to leave that day and the State erroneously argued that the Applicant had been told two or three times to leave and had been told up the street to leave. However, after reviewing these two portions of the State's closing argument in conjunction with the record as a whole, this Court finds Applicant has failed to establish any deficiency of counsel, as these arguments made by the State are based on reasonable inferences from the record and were proper. See Brown, 383 S.C. at 515, 680 S.E.2d at 914; Humphries, 351 S.C. 362, 570 S.E.2d 160.

The fifth section where Applicant alleges counsel should have objected is when the State argued: "He had been told to leave two or three times, been told to leave up the street. He is looking for trouble." (Trial tr. p. 441, lines 5-7). Applicant argues this also inaccurately quotes Joyner and misconstrues the testimony in the record. However, after reviewing these two portions of the State's closing argument in conjunction with the record as a whole, this Court finds Applicant has failed to establish any deficiency of counsel, as these arguments made by the

State are based on reasonable inferences from the record and were proper. See Brown, 383 S.C. at 515, 680 S.E.2d at 914; Humphries, 351 S.C. 362, 570 S.E.2d 160.

This Court finds all of the portions of the State's closing argument that Applicant alleges were objectionable were based on proper inferences to the record and therefore, counsel was not deficient for failing to object. Additionally, this Court finds Applicant has failed to satisfy his burden of establishing prejudice, as there is no reasonable likelihood the result of the proceedings would have been different absent counsel's failure to object. Therefore, this allegation must be denied and dismissed in its entirety.

Allegation 4. Trial counsel was ineffective for failing to object to hearsay testimony accusing Applicant of unrelated prior bad acts

Applicant alleges counsel was ineffective for failing to object to hearsay testimony accusing Applicant of bad acts, specifically testimony Applicant had been asked to leave a house up the street for causing trouble. The particular testimony in question is as follows: "He went up the road to a friend's house, to I guess one of his friend's houses, and he was starting up there, and his friend came down there and told us that he had to run him from his house because he was starting." (Trial tr. p. 218 line 25 – p. 219 line 4). Applicant alleges this testimony is improper hearsay and counsel should have objected. He further argues he was prejudiced by this testimony because it hampered his ability to raise a self-defense claim.

This Court finds Applicant is unable to show any requisite prejudice from this alleged deficiency and therefore, this allegation must be denied and dismissed with prejudice. Strickland, 466 U.S. 668 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed."). Here, Applicant is unable to show the result of his proceeding would have been different had counsel objected. The testimony of which Applicant complains is minor and did not directly relate to the events leading up the

confrontation between Applicant and the victim, therefore, was not crucial to his self-defense claim. This Court is confident it had no bearing on the outcome of Applicant's trial, and therefore, no prejudice can be shown. This allegation is denied and dismissed with prejudice.

Allegation 6. Trial counsel was ineffective for failing to object to repeated leading by the State of its witnesses during direct examination

Applicant alleges trial counsel was ineffective for failing to object to "repeated leading by the prosecution during direct examination of [a] state witness on crucial points." Specifically, Applicant cites to the following portion of the direct testimony of States witness Joyner:

Q. And had [Applicant] been told earlier by the homeowners or somebody?

A. Yeah, Dan told him to go ahead and leave.

(Trial Tr. p. 220 lines 5-7). When questioned regarding this allegation at the evidentiary hearing, Riley noted the State had already questioned Joyner about the homeowners asking Applicant to leave earlier in her testimony and this question was not revealing any new information. (PRC Tr. 130-32). He testified although the question was "somewhat leading," he did not object as the information had already been developed previously.

This Court finds Applicant is unable to show any requisite prejudice from this alleged deficiency and therefore, this allegation must be denied and dismissed with prejudice. Strickland, 466 U.S. 668 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed."). Here, Applicant is unable to show the result of his proceeding would have been different had counsel objected. The questioning Applicant refers to was a summary of information previously elicited from the witness and therefore, was not revealing any "crucial point" for the first time as Applicant complains. This Court is confident it had no bearing on the outcome of Applicant's trial, and therefore, no prejudice can be shown. This allegation is denied and dismissed with prejudice.

Allegations 7 & 19. Trial counsel was ineffective for failing to emphasize to the jury Applicant's right to act on appearances and the related facts

Applicant alleges counsel was ineffective for failing to emphasize to the jury that Applicant had the right to act on appearances and highlight the relevant facts supporting this claim, including he was struck in the head with a beer bottle immediately prior to the victim's stabbing, sustained a second wound to his chest, and the victim and his friends (who outnumbered Applicant) were approaching Applicant from all sides. In support of this allegation, Applicant cites to a portion of DeeDee Drakeford's testimony where she discusses the number of men with the victim and their position in relation to Applicant. (Trial Tr. p. 355).

After reviewing the closing argument, along with the record in its entirety, this Court finds Applicant has failed to satisfy his burden of establishing both deficiency and prejudice. This Court finds counsel sufficiently raised self-defense and Applicant's right to act on appearances throughout his closing argument, including that Applicant was struck with a beer bottle, approached from behind by the victim's friends, and outnumbered. (Trial Tr. p. 408-417). Therefore, counsel was not deficient. This allegation is denied and dismissed with prejudice.

Allegation 8. Trial counsel was ineffective for failing to object to a portion of the State's closing argument erroneously stating that it elicited an inconsistency in Joyner's testimony

Applicant alleges counsel was ineffective for failing to object to a portion of the State's closing argument in which the prosecutor erroneously stated Joyner had testified on direct examination that Applicant had first hit the victim with the bottle and the State brought out her inconsistency and corrected it, when in fact, it was counsel on cross-examination who elicited this inconsistency. This Court finds this allegation must be denied and dismissed, as Applicant has failed to carry his requisite burden of proof, as there is no reasonable likelihood the result of the proceeding would have been different absent counsel's alleged failure. The record reveals

counsel impeached Drakeford on her prior inconsistent statement to law enforcement. (Trial tr. p. 227-28). However, the State's argument it brought out this inconsistency rather than the defense is miniscule and of very little importance when compared to the testimony and record as a whole. This Court is confident it had no bearing on the outcome of Applicant's trial, and therefore, no prejudice can be shown. This allegation is denied and dismissed with prejudice.

Allegation 9. Trial counsel was ineffective for advising Applicant against testifying at trial without adequately advising him what impact not testifying would likely have on his self-defense claim

Applicant alleges counsel advised him not to testify and failing to advise him of the ramification this could have on his self-defense claim. Specifically, Applicant alleges the jury was unable to have a full picture of why he was in fear for his life and acted in self-defense without his testimony and it was therefore ineffective for counsel to advise him against testifying. This Court finds this allegation is without merit and must be denied and dismissed with prejudice.

At the evidentiary hearing, Riley testified he had no specific recollection as to his discussion with Applicant about his right to testify at trial, but he always advises his clients that they have the right to testify and it is exclusively their right whether or not to testify. He testified he is confident that he employed this standard strategy in Applicant's case. He elaborated he also advises clients his or her testimony is especially important when asserting self-defense. Applicant presented no testimony to rebut Riley's assertions. Furthermore, this Court finds Riley's testimony was credible. Therefore, there is nothing in the record to indicate counsel advised Applicant against testifying as alleged. This allegation must be denied and dismissed with prejudice.

Allegation 10. Trial counsel was ineffective for failing to object to the trial court's failure to fully recharge the jury on self-defense in response to a jury question during deliberations

Applicant alleges counsel was ineffective for failing to object and/or request the trial court fully recharge self-defense when the jury asked to be recharged.. See Trial Tr. p. 470-485. This Court finds Applicant has failed to meet his requisite burden of proof as to this allegation, as there is no reasonable likelihood the result of the proceeding would have been different absent counsel's alleged error. The record indicates the jury sent a note shortly after beginning its deliberations asking the trial court provide additional instructions on the charged offense and lesser included offenses. (Trial Tr. p. 470-485). The record reflects in response to this note, Kirincich requested additional jury instruction on self-defense, including inferences giving rise to self-defense. (Trial Tr. p. 471). The State objected to any additional instruction beyond the two charges specifically requested by the jury. (Tr. p. 472). Over the State's objection, the trial court recharged the jury on murder (including malice and reasonable doubt), voluntary manslaughter, involuntary manslaughter, and inferences being resolved in favor of the defendant, but did not recharge self-defense. However, the trial court fully charged self-defense to the jury less than two hours prior during its full just instruction. See Todd v. State, 355 S.C. 396, 585 S.E.2d 305 (2003) (holding that South Carolina law dictates that jury instructions, when analyzed, must be considered in their entirety). There is no reasonable likelihood the trial court's decision to not recharge self-defense, and counsel's failure to object on this ground, had any effect on the outcome of Applicant's case. This allegation is denied and dismissed with prejudice.

Allegation 11. Trial counsel was ineffective for failing to request a jury instruction advising that self-defense could be raised through all facts and circumstances presented

Applicant alleges counsel was ineffective for failing to request a jury instruction advising the jury the defense of self-defense could be raised by the facts and circumstances established by evidence introduced by the State or the defense. After a review of the jury instruction as a whole,

as required by South Carolina law, this Court finds this allegation must be denied and dismissed with prejudice. See Todd, 355 S.C. 396, 585 S.E.2d 305 (holding that South Carolina law dictates that jury instructions, when analyzed, must be considered in their entirety). The instructions clearly informed the jury it could use any evidence presented when determining if Applicant acted in self-defense. See Trial Tr. p. 463 (“Jurors, you take *all the facts presented during the case* and decide whether the evidence convinces you that he acted in self-defense or not.” (emphasis added)); p. 464 (“ So you take *all the admitted facts*.” (emphasis added)). This allegation must be denied and dismissed with prejudice.

Allegations 12 & 22. Trial counsel was ineffective for failing to request a jury instruction advising that any doubts as to Applicant's culpability must be resolved in his favor

Similarly, Applicant alleges counsel was ineffective for failing to request a jury instruction advising the jury any doubts it had regarding Applicant's degree of culpability must be resolved in his favor, including when determining if Applicant was guilty of the lesser rather than the greater offense. After a review of the jury instruction as a whole, as required by South Carolina law, this Court finds this allegation must be denied and dismissed with prejudice. See Todd, 355 S.C. 396, 585 S.E.2d 305 (holding that South Carolina law dictates that jury instructions, when analyzed, must be considered in their entirety). The instructions (and recharge after the jury's note) clearly informed the jury Applicant was presumed innocent, the burden was on the State, and Applicant was entitled to every inference in his favor that could reasonable be drawn from the evidence. See Trial Tr. p. 481-482. This allegation must be denied and dismissed with prejudice.

Allegation 13. Trial counsel was ineffective for failing to move for Drakeford to be declared a hostile witness subject to cross-examination and impeachment

Applicant alleges counsel was ineffective for failing to move the court to declare Drakeford a hostile witness subject to cross-examination and impeachment. Trial counsel testified at the evidentiary hearing he did not move for her to be declared a hostile witness because she gave beneficial testimony for the defense and therefore such a motion was not needed. A review of Drakeford's testimony supports counsel's testimony that such a motion was not necessary, as counsel was able to glean beneficial information from Drakeford on direct examination. Therefore, counsel was not deficient and this allegation must be denied and dismissed with prejudice.

Allegations 14 & 15. Trial counsel was ineffective for failing to introduce testimony from Detective Lee Boan to impeach Drakeford with her prior inconsistent statements and two prior calls to law enforcement

Applicant alleges counsel was ineffective for failing to introduce testimony from Det. Boan to impeach Drakeford with prior inconsistent statements and two prior calls made to law enforcement. When questioned about Drakeford, Riley testified there was an investigative report prepared by Officer Lee Boan referencing an informant "D.D." who provided information on the incident. According to this report, Riley testified D.D. told law enforcement the victim and several of his friends attacked Applicant. He testified there was another entry later in the day indicating Applicant and the victim got into the altercation because Applicant owed the victim money for drugs and wanted the victim to front him additional drugs. Riley testified based on this report, he requested in writing the Solicitor's office reveal D.D.'s identity. He testified he later discovered the informant was DeeDee Drakeford, whom he had previously discussed with Applicant. He testified he spoke with Drakeford before Applicant's trial in anticipation of calling her as a defense witness, which he ultimately did. Riley testified Drakeford testified that a thrown beer bottle hit Applicant shortly before he stabbed the victim. He testified he did not ask

Drakeford about her two prior conversations with law enforcement or attempt to impeach her with these prior statements.

Based on Riley's recollection, Drakeford's prior statements to law enforcement implicated Applicant as a drug user and possible drug seller, it is reasonable for trial counsel to avoid questioning Drakeford on these prior statements. Therefore, counsel was not ineffective and these allegations must be denied and dismissed with prejudice.

Allegation 16. Trial counsel was ineffective for failing to object to hearsay testimony that Applicant had been asked to leave by the homeowners who did not testify

Applicant alleges counsel was ineffective for failing to object to hearsay testimony from State's witnesses relaying that the owners of the residence where the altercation took place had asked Applicant to leave when neither homeowner testified. See Trial Tr. p. 221 lines 2-5 ("And so he kept on coming back. So the owner of the house told him to leave. So he said, I'm not in your yard, I'm on the sidewalk, which he was. He was on the sidewalk.") Counsel testified that he was unsure why he did not object to this testimony.

This Court finds Applicant has failed to meet his burden of proof as to this allegation, as there is no reasonable likelihood Applicant would not have been convicted absent this alleged deficiency. The record in its entirety clearly establishes Applicant left and came back to the incident location several times and was getting into verbal altercations with members of the gathering, independent of any testimony concerning the homeowners asking him to leave. Therefore, any objection by counsel would not likely have had an impact on Applicant's trial. This allegation must be denied and dismissed with prejudice.

Allegations 17 & 21. Trial counsel was ineffective for failing to move for a speedy trial or for a preliminary hearing

Applicant alleges counsel was ineffective for failing to move for a speedy trial. The record indicated Applicant was taken into custody on September 23, 2005, was indicted on June 11, 2008, and was tried beginning on March 16, 2009. Riley testified he did not file a speedy trial motion because he only represented Applicant for six months prior to trial and when he was appointed to represent Applicant in September 2008, he was already aware that the case would be moving to trial in early 2009. He elaborated numerous other public defenders handled the case before it was assigned to him. He testified he was named acting Chief Public Defender for Kershaw County during 2007 and then later officially became Chief Public Defender for Kershaw County. He testified although he supervised all Assistant Public Defenders in his office as Chief Public Defender, he avoided directly interfering with any of his attorney's representation of clients to avoid ethical problems. He also elaborated he had the utmost confidence in the "really good public defenders" in his office while he was Chief. He similarly testified that he did not request a preliminary hearing because Applicant had already been indicted when he assumed representation. He further testified he believes the State had sufficient probable cause, so a preliminary hearing would not have had any impact on Applicant's case. Riley testified when he became Chief Public Defender, there was no internal mechanism for auditing what cases were being handled by the Kershaw County Public Defender's Office or the age of each case and the clerk's office could not provide that information to him when he took over as Chief Public Defender. He testified he had to create a system to allow his office to keep track of such information from scratch and that this was a primary focus when he became Chief Public Defender. He testified Applicant never requested he move for a speedy trial.

Based on the circumstances of this case, this Court finds counsel's performance was reasonable, as counsel testified Applicant was assigned a trial date shortly after he assumed

representation and Applicant never requested he file a motion for a speedy trial. See State v. Langford, 400 S.C. 421, 445, 735 S.E.2d 471, 484 (2012) (internal citations omitted) (“[F]ailure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.”). These allegations must be denied and dismissed with prejudice.

Allegation. 18. Trial counsel was ineffective for failing to object to Applicant being forced to appear before the jury in ankle chains

Applicant alleges counsel was ineffective for failing to object to his presence before the jury in ankle chains. This Court finds this allegation must be denied and dismissed with prejudice, as Applicant has failed to satisfy his requisite burden of proof as to both deficiency and prejudice. Riley testified Applicant did not have on handcuffs during trial, but was wearing ankle chains in accordance with Kershaw County policy that all inmates be restrained with ankle chains while in the courtroom. He testified the jury never saw Applicant in ankle chains. He testified he is certain the jury never saw the ankle chains because both counsel tables had long curtains hanging from the edge of the table to the floor, so the jury was unable to see the legs or ankles of anyone sitting at counsels’ tables, including Applicant. He testified Applicant did not testify or otherwise enter the courtroom after the jury, so the jury never had an opportunity to view Applicant’s ankle chains. Riley further testified he did not recall Applicant’s ankle chains making any sort of noise or any other sound to alert the jury. This Court finds counsel’s performance as to this allegation was not deficient. Furthermore, as there is no evidence the jury was even aware Applicant was in ankle chains during the trial or what impact this had on his case, if any, this Court finds Applicant cannot establish any prejudice. This allegation is denied and dismissed with prejudice.

Allegation. 20. Trial counsel was ineffective for failing to object to the trial court’s comment on the facts

Applicant alleges counsel was ineffective for failing to object to a statement by the trial court which the jury could have construed as a judicial comment on the facts and was subsequently used by the State. Specifically, Applicant alleges the following objectionable during the cross-examination of State's witness Travis Johnson:

Q. And how long would you estimate the fight lasted?

A. Four minutes.

Q. No, no, I mean -you said it didn't start for two minutes.

A. Like—see, you, you, you trying to—you trying to get in my head.

Mr. Meadors. I would object. I think at one time he said start to finish was four minutes. Now he is going back and trying to—

The Court: Well, he—

A. Four minutes.

The Court. He didn't have a stop watch. He is telling it like he thinks it is, I guess. Go ahead.

A. The whole thing started from the beginning to the end in four minutes., from that first piece when the bottle got swing, from what he said about the dog till the bottle got swing, that is probably like two minutes, the other part like two minutes, so four minutes in time all together.

Q. Okay. That is great. That is what I was driving at.

The Court. Jurors, I'm not vouching for the witness at all, y'all understand that. But you know, three minutes, four minutes, five minutes. It is five years ago.

(Trial Tr. p. 164 line 22-p. 165 line 22). Later, the State asked witnesses questions focusing on their lack of a watch in relation to the exact time of the altercation. See Trial Tr. p. 192, 239. Applicant alleges the trial court's comments amount to judicial comments on behalf of the State, thereby causing him prejudice. When questioned at the evidentiary hearing, Riley testified the

trial court instantaneously clarified himself to the jury and he did not think an objection was necessary.

This Court finds Applicant has failed to establish any deficiency of counsel. As Riley testified, the trial court corrected itself almost immediately, thereby reducing any possible effect of the comment. This Court finds counsel performed reasonably in not objecting, as no objection was necessary, particularly in light of the court's additional clarifying comments. Furthermore, this Court finds Applicant has failed to establish any resulting prejudice, as it is not likely that this comment had any effect on the outcome of Applicant's trial. Therefore, this allegation is denied and dismissed with prejudice.

Allegation. 23. Trial counsel was ineffective for failing to object to the introduction of a box cutter that was not used during the altercation

Applicant alleges counsel was ineffective for failing to object to the introduction of a box cutter found on Applicant when arrested and testimony about the box cutter because the box cutter was not alleged to be the weapon used to fatally wound the victim. Applicant alleges this was prejudicial to his case, causing the jury to believe he was armed with an unrelated weapon. This Court finds this allegation must be denied and dismissed, as there is not reasonable likelihood this had any impact on the outcome of his case. The record reveals the jury was informed Applicant had been attacked previously and typically armed himself for protection. In light of this testimony, it is highly unlikely that the introduction of a weapon found on Applicant when arrested had any impact on the jury when it was already aware Applicant was typically armed for personal protection. Therefore, this allegation must be denied and dismissed with prejudice. See Strickland, 466 U.S. 668 (holding that a court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as

a result of the alleged deficiencies, for if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed).

Allegation. 24. Trial counsel was ineffective for failing to object to testimony that Applicant was an "old drunk"

Applicant alleges counsel was ineffective for failing to object to testimony from State's witness David Hagan with the Camden Police Department that witness had described the suspect as "a drunk that hung around the area." (Trial Tr. p. 129). Applicant alleges this testimony was objectionable hearsay that improperly impugned his character without a chance to reply. This Court finds Applicant cannot establish any resulting prejudice from this alleged deficiency and therefore, this allegation must be denied and dismissed with prejudice. See Strickland, 466 U.S. 668 (holding that a court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies, for if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed). The record is replete with testimony Applicant and the victim, as well as bystanders, were drinking on the night of the altercation. It is unlikely the jury used this minor line of testimony to improperly convict Applicant in light of these references throughout the trial. Applicant has failed to establish prejudice and this allegation is denied.

CONCLUSION

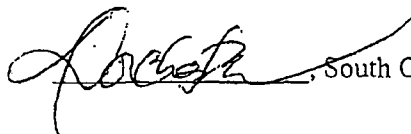
Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

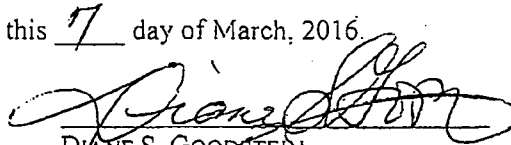
This Court notes that Applicant must file and serve a notice of appeal within thirty days from the receipt of this Order by counsel of record to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That this application for post-conviction relief must be denied and dismissed with prejudice; and
2. The Applicant shall remain in the custody of the State.

AND IT IS SO ORDERED this 7 day of March, 2016.

 South Carolina


DIANE S. GOODSTEIN
Presiding Judge
Fifth Judicial Circuit

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

00 JUN 11 PM 2:44

CLERK OF COURT
KERSHAW COUNTY, S.C.

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

[Signature]
Clerk of Court Kershaw County

The State of South Carolina

County of Kershaw

COURT OF GENERAL SESSIONS

June TERM 2008

THE STATE
vs.

Tommy McNight

Indictment for

MURDER

SC Code: 16-3-10
CDR Code: 0116
Class FEL/EXM(V)

WITNESSES

Corey, CAPD

ARREST WARRANT NUMBER

1131996

ACTION OF GRAND JURY

TRUEBILL

[Signature]
Foreperson of Grand Jury

Date: JUN 11 2008

VERDICT

Foreperson of Petit Jury
Date:

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

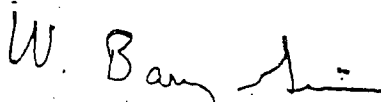
INDICTMENT

At a Court of General Sessions, convened on June 11, 2008, the Grand Jurors of
Richland County present upon their oath:

MURDER

That Tommy McKnight did in Kershaw County on or about September
23, 2005, feloniously, willfully and with malice aforethought, kill one Isaac
Williams by means of stabbing him with a knife and that the said victim died
as a proximate result thereof. All in violation of SC Code of Laws § 16-3-10

Against the peace and dignity of the State, and contrary to the statute in such case
made and provided.



Warren B. Giese, SOLICITOR