

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

DEC 12 2016

Appeal from Spartanburg County

SC Court of Appeals

Honorable R. Keith Kelly, Circuit Court Judge

MARION E. STEWART,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001243

APPENDIX

KATHRINE H. HUDGINS
Appellate Defender

ALAN WILSON
Attorney General

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

J. BENJAMIN APLIN
Senior Assistant Deputy Attorney General
Rembert Dennis Building
1000 Assembly Street, Room 519
Columbia, SC 29201

ATTORNEY FOR PETITIONER

ATTORNEYS FOR RESPONDENT

INDEX

INDEX.....	i
TRIAL TRANSCRIPT DATED APRIL 11-13, 2011.....	1
INDICTMENT AND SENTENCE SHEET.....	523
APPLICATION FOR POST-CONVICTION RELIEF FILED JULY 10, 2014.....	526
RETURN DATED APRIL 9, 2015.....	532
POST-CONVICTION RELIEF HEARING DATED MARCH 23, 2016.....	537
PLAINTIFF'S EXHIBIT NO. 2 (E-MAIL).....	604
PLAINTIFF'S EXHIBIT NO. 3 (WRITTEN NOTE).....	605
ORDER OF DISMISSAL FILED MAY 31, 2016.....	606

1 Court of law, the right to have a lawyer present, that if he
2 could not afford a lawyer, a lawyer would be appointed to
3 represent him without any cost, and that he could stop
4 making a statement at anytime.

5 You must consider carefully all of the questioning
6 surrounding the circumstances of a statement before you give
7 any weight to the alleged statement. The State has the
8 burden of proving, beyond a reasonable doubt, that the
9 alleged statement was voluntarily made, and if you determine
10 that it was, you may give the statement any further
11 consideration that you deem proper. Again, you decide the
12 weight, if any, that should be given to the alleged
13 statement. If you determine the alleged statement was not
14 freely and voluntarily given by the defendant, you should
15 not consider the statements at all in reaching a verdict in
16 this case.

17 Now, it is the law in the State of South Carolina that
18 if a crime is committed by two or more people who are acting
19 together in the commission of a crime, that the act of one
20 is the act of all. A person who joins with another to
21 commit an unlawful act is criminally responsible for
22 everything that is done by the other person which happens as
23 a probable or natural consequence of the acts done in
24 carrying out the common plan and purpose.

25 For example, two people could be guilty of killing a

1 person, for example, when only one of them had a gun, of the
2 two had the gun, and there was only one bullet that struck
3 the individual that was killed, and only one of the two
4 fired a shot that caused the death. If two or more people
5 are together, acting together, assisting each other in the
6 commission of an offense, the act of one becomes the act of
7 all, and sometimes it is said that the hand of one becomes
8 the hand of all.

9 Now, prior knowledge that a crime is going to be
10 committed, without more, is not sufficient to make a person
11 guilty of that crime. Mere knowledge that another person is
12 going to commit a crime, even if the defendant is present
13 when the crime is committed, is not sufficient to convict a
14 defendant as a principal. Guilt as a principal is shown by
15 actual or constructive presence at the scene as a result of
16 prior arrangement. Therefore, a finding of a prior
17 arrangement or plan or common scheme is necessary for a
18 finding of guilt as a principal.

19 A State must prove beyond a reasonable -- the State
20 must prove beyond a reasonable doubt, by competent evidence,
21 the theory of the hand of one is the hand of all. A
22 principal in a crime is one who either actually commits the
23 crime or is present acting, aiding, abetting, or assisting
24 in the commission of the crime. When a person does an act
25 in the presence of and with the assistance of another, the

1 act is done by both. Where two or more are acting with a
2 common plan or intent are present at the commission of the
3 crime, it does not matter who actually commits the crime.
4 All are guilty if they participated in some fashion either
5 actually committing the crime or aiding and abetting in the
6 crime.

7 Present at the commission of a crime means sufficiently
8 near to aid, abet, or assist in the commission of a crime.
9 Again, however, mere presence at the scene of a crime is not
10 sufficient to convict one as a principal on the theory of
11 aiding and abetting. Intent is also a necessary element for
12 there must of been a common design or intent to commit the
13 crime, and the crime must have been committed pursuant
14 thereto with the person aiding, abetting by some overt act.
15 Intent means intending the result which actually occurred.
16 Not accidentally or involuntarily. Intent may be shown,
17 again, by acts and conduct of the defendant or other
18 circumstances from which you could reasonably infer
19 someone's intent. Again, the State must prove these
20 elements beyond a reasonable doubt.

21 Now, the charge in this case, and I went over the, the
22 indictment, and the indictment refers to a Code Section.
23 Section 16-11-330(a), and I'm going to talk to you about
24 what that Code Section means. That's 16-11-330. The
25 defendant -- and that's the code section that deals with

1 armed robbery.

2 The defendant is charged with armed robbery, and in
3 order to prove this offense, the State must prove, beyond a
4 reasonable doubt, that the defendant took personal property
5 from the person or presence of another person. Now, when
6 you talk about property, property being in the presence of
7 someone, if the property is within a person's reach,
8 inspection, observation, or within their control so that a
9 person could, if not overcome by violence or prevented by
10 threats or fear, keep possession of their property. The
11 State must also prove, beyond a reasonable doubt, that the
12 defendant carried the property away intending to permanently
13 deprive the owner of the property, and to keep the property
14 for the defendant's own use, and in the law it says that
15 even the slightly removal of property or the complete
16 possession of the property, even if for an instance by a
17 defendant in these circumstances, is, would constitute a
18 carrying away of the property.

19 Taking and carrying away of the property must be done
20 with violence or by putting the owner of the property in
21 fear of violence.

22 Finally, the State must prove, beyond a reasonable
23 doubt, that the defendant was armed while doing, taking the
24 property with a deadly weapon. A deadly weapon is any
25 article or instrument or substance which is likely to cause

1 or could cause death or great bodily harm. Now, whether an
2 instrument which has been used in an event is a deadly
3 weapon depends upon the facts and circumstances of each
4 case.

5 The following are examples of instruments which have
6 been found to be deadly weapons depending on the
7 circumstances of the case. Weapons such as pistols,
8 shotguns, rifles, dirk, dagger, knife, slingshot, metal
9 knuckles, razor, gasoline, fire bomb, Molotov cocktail, and
10 even lighter fluid. A gun can be a deadly weapon even if
11 it's not operating.

12 Now, whether a toy gun, which is, has the appearance of
13 and/or is believed to be a real gun is a deadly weapon is a
14 factual question for you, the jury, to determine based upon
15 the facts and circumstances of the case.

16 Mr. Sharpe, please raise your hand.

17 (Juror complies.)

18 THE COURT: You're going to be the foreperson of the
19 jury. That means that you will be the person presiding over
20 the jury deliberations. If the jury has any questions
21 during deliberations, it will be your responsibility to
22 write those on a piece of paper, pass the paper to the
23 bailiff who's seated outside the door, and that bailiff will
24 deliver the question to me.

25 I'm going to advise the jury I'm not allowed to answer

1 each and every question that you may have during your
2 deliberations. I've explained we have different functions
3 to perform, and I can't enter into your decisions concerning
4 the facts in this case. I can answer questions concerning
5 the procedure that we followed, and certain questions about
6 the evidence, and I can answer questions concerning the law
7 that I charged to you.

8 But, Mr. Foreman, I'm not going to ask you to edit any
9 question that the jury has. Whatever the question is, get
10 the jury to agree on what form that question should take,
11 how it should be worded, and then submit it to the bailiff
12 and I'll decide what the appropriate answer might be to that
13 question if I can answer it at all.

14 Also, there will be a verdict form delivered to the
15 jury. It will be your responsibility to fill out that
16 verdict form once a verdict has been reached in the case.

17 Now, the verdict can not be reached in this case until
18 each and every one of you has agreed upon that verdict. It
19 must be unanimous. That means that every juror has an equal
20 say in the outcome of the case. And so, every juror must
21 agree upon the verdict before there is a verdict reached in
22 the matter and the bailiff, and the, and the foreman would
23 record that verdict at that time.

24 Now, I'm gonna go over a lot of things with you. I've
25 gone over a great deal of the law, and I'm gonna take a

1 short break right now, go over some matters with the
2 attorneys concerning the evidence, and the evidence will be
3 going back with you into the jury room, and, so, I need to
4 discuss some things perhaps about that in my charge.

5 So, Mr. Foreman, I'm going to ask that you have the
6 jury retire one more time. Do not begin any discussion at
7 all about the case until I bring you back for final
8 instructions.

9 You may retire to the jury room.

10 (WHEREUPON, the following takes place outside the
11 presence of the jury.)

12 THE COURT: Objections to the charge from the State?

13 SOLICITOR BARNETTE: None from the State, Your Honor.

14 THE COURT: From the defense.

15 MRS. HODGES: None from the defense, Your Honor.

16 THE COURT: All right. I think we've agreed upon the
17 exhibits and the verdict form, is that correct?

18 SOLICITOR BARNETTE: Yes, sir.

19 MRS. HODGES: Yes, sir.

20 SOLICITOR BARNETTE: I just have to give this back to
21 the court reporter.

22 THE COURT: Return that back to the court reporter.

23 All right. Let's bring them back in.

24 (WHEREUPON, the following takes place within the
25 presence of the jury.)

1 THE COURT: Sir, you'll need to have a seat in this
2 front seat right here, and if, folks, somebody fill in down
3 that way. There we go. Thank you.

4 The jury has returned to the courtroom.

5 Mr. Sharp, I'm going to go over with you at this
6 time -- Mr. Humphries, if you'll pass this over to him for
7 me.

8 BAILIFF: Yes, sir.

9 THE COURT: There we go.

10 This is the verdict form that's going to be in use for
11 this case. Let me go over it with you, sir, so that I'm
12 sure you understand it.

13 At the top, you'll see in all capital it indicates the
14 State and the county and the court that we're serving in.
15 Below that is the caption of the case, The State of South
16 Carolina versus Marion Stewart. To the right of that it
17 indicates it is the verdict form in this case. Below that
18 is the body of the verdict, and it's simply one question
19 asked of the jury. That is as to the indictment, it has the
20 case number for armed robbery, we, the, jury unanimously
21 find the defendant, Marion Stewart, and there's a choice for
22 not guilty and guilty. Once the verdict's been reached,
23 you'll put an X or a check on the line next to the
24 appropriate verdict. And then below that you will sign it
25 and date it today's date. And, again, it should be filled

1 out only once a unanimous verdict has been reached in this
2 case.

3 I'm going to caution the jury that you should not take
4 from the fact that I put these choices in any particular
5 order to indicate somehow I have a preference. This is the
6 way it is in my computer. Every case I've done for seven
7 and a half years I've done the same way. So, it's no
8 indication of any preference. It's simply those are the two
9 choices that you have, and if you'll check the appropriate
10 choice once, once that's been reached.

11 Now, there's a couple of pieces of evidence I need to
12 talk with you about briefly. There is, of course, the video
13 of the scene that was shown to you. It's in evidence.
14 There's also an audio recording of some, some telephone
15 conversations that it's in, it's in the record. The jury
16 room doesn't have the capacity to allow you to play those
17 things in there. The jury has the right to look at and view
18 the evidence in whatever fashion you wish to do so during
19 your deliberations.

20 So, Mr. Foreman, if it becomes necessary for the jury
21 to view the video or listen to the audio records, if you'll
22 inform the bailiff, we'll bring you back into the courtroom
23 where we have the capacity to play those things, and we'll
24 play whatever parts or all of those things you like to hear.
25 So, just let us know if the jury needs that as part of the

1 deliberations.

2 Also, I will caution you, in evidence, there's some
3 controlled substances in that evidence. And, so, the, the
4 bottles, the sealed bottles, I'm cautioning you, don't open
5 those or break the seals. We're leaving the seals on all
6 the bottles that are in the evidence, and the part that was
7 in, places into baggies, we have sealed that with evidence
8 tape. If it becomes necessary for the jury to look
9 physically at that evidence, we will make arrangements to
10 open that for you. I don't want anyone to end up in a
11 situation where someone's accused that the evidence has
12 somehow been taken or tampered with.

13 So, if that becomes necessary, Mr. Foreman, that the
14 jury does need to actually view the, the medications that
15 are in the, in the evidence, let me. We'll make
16 arrangements for that to occur as well.

17 All right. At this point in time, I'm going to ask
18 that the jury, not the alternate, you remain seated, but the
19 jury retire to the jury room, begin your deliberations. The
20 bailiff will deliver the evidence to you for your review.

21 Thank you very much.

22 (WHEREUPON, the following takes place outside the
23 presence of the jury, and the alternate juror was dismissed
24 at this time.)

25 THE COURT: All right. Any objections to my final

1 instructions from the State?

2 SOLICITOR BARNETTE: No, Your Honor.

3 THE COURT: Any from the defense?

4 MRS. HODGES: No, sir. Thank you.

5 THE COURT: All right. We'll be in recess until such
6 time as a verdict has been reached.

7 Defendant remains in custody.

8 MRS. HODGES: Yes, sir.

9 (WHEREUPON, the jury began deliberations at 11:47 and
10 returned with a question at 12:04.)

11 THE COURT: Is the State ready for me to take the
12 question?

13 SOLICITOR BOYD: State's ready, Your Honor.

14 THE COURT: Defense ready?

15 MRS. HODGES: Defense is ready, Your Honor.

16 THE COURT: Bring the jury in.

17 (WHEREUPON, the following takes place within the
18 presence of the jury.)

19 THE COURT: All right. I received a question from the
20 jury.

21 The question is what does the law, what is the law
22 state regarding when Miranda rights should be read.

23 Ladies and gentlemen, I'm gonna to back over a portion
24 of my charge that dealt with statements made by the
25 defendant, and it's my belief that this does address the law

1 as far as the question concerning the statements that might
2 of made by the defendant.

3 The statements alleged to have been made by the
4 defendant have been admitted into evidence in this case.
5 While this Court has determined that the statement is
6 admissible, I instruct you that you, the jury, make the
7 ultimate decision of whether or not the defendant made the
8 statement. If the defendant did make the statement, then
9 you must determine whether the statement was made by the
10 defendant voluntarily and of his own free will. This means
11 that the statement was not caused by pressure, force, fear,
12 threats, coercion, or intimidation, or caused by hope, or a
13 promise of leniency, or a reward of any kind.

14 In determining whether the statement was voluntary, you
15 should consider both the characteristics of the defendant
16 and the details surrounding the questioning. Some of the
17 factors that you, as the jury, must consider are or you may
18 consider are the age of the defendant, the defendant's
19 education or lack thereof, the defendant's mental abilities
20 or capacities when the statement was made, the defendant's
21 intelligence, the defendant's background or environment, the
22 place and length of any detention that accompanied the
23 questioning, the nature of the questioning, and the advice
24 or lack thereof to the defendant of his constitutional
25 rights including but not limited to the right to remain

1 silent, that any statement could be used against him in a
2 court of law, the right to have a lawyer present, and that
3 if he could not afford a lawyer, a lawyer would be appointed
4 to represent him without any cost, and that he could stop
5 making a statement at anytime.

6 You must carefully consider all of the surrounding
7 circumstances before you give any weight to an alleged
8 statement. The State has the burden of proving, beyond a
9 reasonable doubt, that the alleged statement was voluntary.
10 If you determine that it was, then you can give the
11 statement any further consideration that you deem proper.
12 You must decide the weight, if any, should, that should be
13 given to the alleged statement. If you determine the
14 alleged statement was not freely and voluntarily the
15 statement of the defendant, then you should not consider the
16 statement at all.

17 Does that answer your question?

18 FOREMAN: Yes, sir.

19 THE COURT: All right. I'm gonna make you aware of one
20 other thing. I notice it's a little past twelve o'clock.
21 I'm going to be sending someone in from the Clerk's Office
22 shortly to take a lunch order for you. It takes about an
23 hour for lunch to be ordered and delivered to here at the
24 courthouse. But we do provide lunch while you're in
25 deliberations.

1 while the Clerk's officer is in your jury room, you
2 should stop discussion of the case altogether, not discuss
3 the case while that person is present. Simply deal with
4 your lunch order, and then, once that person has left, you
5 may resume your deliberations at that time.

6 You understand how that should be handled?

7 FOREMAN: Yes, sir.

8 THE COURT: All right. I'll ask you to retire to the
9 jury room to resume your deliberations.

10 (WHEREUPON, the following takes place outside the
11 presence of the jury.)

12 THE COURT: Any objections from the State?

13 SOLICITOR BOYD: None from the State, Your Honor.

14 THE COURT: Any from the defense?

15 MRS. HODGES: No, sir. Thank you.

16 THE COURT: All right. The question will be made a
17 Court's Exhibit and part of the record.

18 (WHEREUPON, the note from the jury was marked as
19 Court's Exhibit No. 4 for identification purposes only at
20 this time.)

21 THE COURT: We'll remain in recess until such time as a
22 verdict is reached.

23 Thank you very much.

24 (WHEREUPON, the jury began deliberations again at
25 12:09, and returned with a verdict at 12:56.)

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

2 (WHEREUPON, the following takes place within the
3 presence of the jury.)

4 THE COURT: Mr. Foreman, the bailiff has told me the
5 jury has reached a verdict.

6 Is that true?

7 FOREMAN: Yes, it is.

8 THE COURT: Pass the form to the bailiff please.

9 (Foreman complies.)

10 THE COURT: Thank you, sir.

11 Madam Clerk, you may read the verdict.

12 CLERK: State of South Carolina, in the Court of
13 General Sessions, the State of South Carolina versus Marion
14 Stewart, as to Indictment Number 2010-GS-42-0494 for armed
15 robbery, we, the jury, unanimously find the defendant,
16 Marion Stewart, guilty. Signed by the foreperson the 13th
17 day of April 2011.

18 Ladies and gentlemen of the jury, if this is your
19 verdict and still your verdict, please raise your right
20 hand.

21 (WHEREUPON, all jurors raise their hands at this time.)

22 THE COURT: Thank you, Madam Clerk.

23 Anything further from the State before I release the
24 jury?

25 SOLICITOR BOYD: No, sir, Your Honor.

1 THE COURT: Anything further from the defense before I
2 release the jury?

3 MRS. HODGES: Your Honor, we'd ask the jury be polled.

4 THE COURT: Madam Clerk, proceed with polling the jury.

5 (WHEREUPON, the jury was polled and all jurors answered
6 in the affirmative that this was and is still their
7 verdict.)

8 THE COURT: Thank you, Madam Clerk.

9 Anything further from the defense before I release the
10 jury?

11 MRS. HODGES: No, sir, Your Honor.

12 (WHEREUPON, the jury was dismissed at this time.)

13 THE COURT: All right. If you'll get the paperwork
14 ready please.

15 (WHEREUPON, two affidavits and the notice to seek a
16 life sentence were marked as Court's Exhibit Nos. 5 through
17 7 for identification purposes only at this time.)

18 SOLICITOR BOYD: Your Honor, I'll go get the sentencing
19 sheet. It's printed upstairs.

20 THE COURT: All right. We'll need the documentation
21 too concerning your notice and prior convictions.

22 Do you have that information?

23 SOLICITOR BOYD: I do Your Honor.

24 THE COURT: Thank you.

25 All right. Are we ready to approach the bar?

1 MRS. HODGES: Yes, sir, Your Honor.

2 THE COURT: Come forward please.

3 (Parties comply.)

4 THE COURT: All right. I'll be happy to hear from the
5 State at this time.

6 SOLICITOR BOYD: Thank you, Your Honor.

7 This is Indictment 2010-GS-42-0494. Mr. Stewart was
8 just convicted of armed robbery, and the State served notice
9 on Mr. Stewart, and the defense of life sentence pursuant to
10 17-25-45(a), and served properly on August 26th of this
11 year both on the Public Defender's Office and/or the
12 defendant personally. That's Court Exhibit, been marked as
13 Court Exhibit No. 5 and Court Exhibit 6.

14 THE COURT: Any objection to those documents?

15 MRS. HODGES: No, sir, Your Honor. Just to clarify, it
16 was I believe August 26th of 2010.

17 SOLICITOR BOYD: October 2010.

18 THE COURT: This past year?

19 MRS. HODGES: Yes, sir.

20 THE COURT: All right. Those will be received.

21 (WHEREUPON, Court's Exhibit Nos. 5 and 6 were received
22 into evidence at this time.)

23 THE COURT: You may proceed.

24 SOLICITOR BOYD: Thank you, Your Honor.

25 Attached to the motion, motion for life sentence, Your

1 Honor, is also the copies of the certified convictions from
2 1995. Also attached behind those convictions is the
3 defendant's criminal record. I believe the defendant has
4 looked over this, this packet.

5 THE COURT: Any objection to those documents?

6 MRS. HODGES: I have no objection to those documents,
7 Your Honor.

8 THE COURT: All right.

9 (WHEREUPON, Court's Exhibit No. 7 was received into
10 evidence at this time.)

11 THE COURT: Place on the record the past convictions.

12 SOLICITOR BOYD: Thank you, Your Honor.

13 The State's position that obviously, Your Honor, you've
14 heard the testimony from the trial. I've spoken to the
15 victims. They don't wish to address, address you at this.
16 They believe you heard all the evidence, and they'll leave
17 it up to, Your Honor. Obviously life sentence motion, the
18 State's pursuing this as, as notice, Your Honor.

19 THE COURT: All right. I need for you to put on the
20 record his past convictions.

21 SOLICITOR BOYD: Yes, sir, Your Honor.

22 Your Honor, he was convicted in 1994 of fraudulent
23 check less than \$500 first offense.

24 1995, armed robbery. A second count of armed robbery
25 also in 1995. One count of strong armed robbery in 1995.

1 Another count of strong armed robbery, 1995. Another count
2 of strong armed robbery in '95. One more count of armed
3 robbery in 1995, Your Honor.

4 2007, he was convicted of burglary nonviolent second
5 degree, and financial transaction card fraud.

6 I believe that's the extent of his record, Your Honor.

7 THE COURT: All right. You have the sentencing sheet?

8 SOLICITOR BOYD: Yes, sir, Your Honor.

9 THE COURT: Pass that please.

10 SOLICITOR BOYD: Thank you.

11 THE COURT: All right. Mr. Stewart, you have been
12 convicted by a jury of your peers of the crime of armed
13 robbery.

14 At this time I'll hear from you and your counsel
15 concerning sentencing.

16 Mrs. Hodges.

17 MRS. HODGES: Thank you, Your Honor.

18 May it please the Court.

19 Your Honor, Mr. Stewart stands before you. We're in a,
20 in a position where the Court's going to have no discretion
21 in terms of the sentence to be imposed. Pursuant to
22 17-25-45 there is at least one prior conviction for a most
23 serious offense, a most serious offense. Mr. Stewart is
24 well aware of that.

25 We had, at the beginning of this trial, placed the plea

1 negotiations that had occurred on the record. We did
2 choose -- we did proceed to trial, and Mr. Stewart stands
3 convicted before this Court.

4 Your Honor, during the course of my involvement with
5 Mr. Stewart, he has always been someone that has, always
6 been very -- he's a very gracious person, Your Honor. This,
7 this incident notwithstanding, while that was not a gracious
8 incident for which he has been indicted and now convicted,
9 he is always been someone that has been articulate,
10 intelligent, somebody easy to work with.

11 Your Honor, we did present the, the defense that we
12 had. The jury's made their decision. We respect that.

13 Your Honor, we just ask that, at this time, knowing the
14 sentence that the Court is about to impose, we would make a
15 motion for a new trial based on our arguments and reasons
16 that we have raised previously as well as we feel that
17 there's insufficient evidence for the jury to convict him
18 based on the most recent case based on circumstantial
19 evidence that was posted this week, and the case name begins
20 with a B and I can not remember the rest of it.

21 THE COURT: Bostic.

22 MRS. HODGES: Bostic, yes, sir. Your Honor, we would
23 argue at this point, based on Bostic, that, for, for a new
24 trial.

25 THE COURT: Bostic involved a case that involved solely

1 circumstantial evidence. In this particular case, there was
2 testimony from a participant in the crime directly linking
3 him to the crime. In fact, testified that he was the
4 planner and the executor of the crime, which would be direct
5 evidence. And, so, I find that Bostic doesn't apply and my
6 prior rulings would stand.

7 MRS. HODGES: Yes, sir.

8 THE COURT: Motions are denied.

9 In this case, sir, the Sentence of the Court is
10 required by law, and that is the sentence of life
11 imprisonment without the possibility of parole.

12 Good luck to you, sir.

13 MRS. HODGES: Thank you, Your Honor.

14

15 * * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

16

17

18

19

20

21

22

23

24

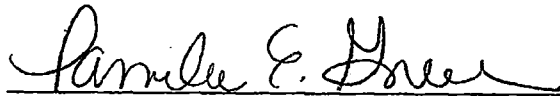
25

C E R T I F I C A T E

1
2
3 I, Pamela E. Green, Official Court Reporter for the
4 Seventh Judicial Circuit of the State of South Carolina, do
5 hereby certify that the foregoing is a true, accurate and
6 complete Transcript of Record of the proceedings had and
7 evidence introduced in the trial of the captioned case,
8 relative to appeal, in the Court of General Sessions for
9 Spartanburg County, South Carolina, on the 11th, 12th, and
10 13th day of April, 2011.

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

13
14 June 22nd, 2011

15
16
17 

18 PAMELA E. GREEN, Court Reporter
19
20
21
22
23
24
25

WITNESSES

Spartanburg County Sherriff's Office

1. SENTENCE MADE ☒

2. REPORT ENDED ☒

3. CARD PULLED ☒

4. INDEXED ☒

5. CHECKED WARRANTS ☒

6. CHECKED SIGNATURE ☒

ARREST WARRANT NO. ☒
FINE CARD MADE

B. TRAFFIC VIOLATION COPY ☒

M089943

ACTION OF GRAND JURY

Foreperson of Grand Jury

Date: 1/15/10

VERDICT

Guilty

Foreperson of Petit Jury

Date: 4-13-11

DOCKET NO.

10-GS-42-0494

The State of South Carolina

County of Spartanburg

Trey Gowdy, Solicitor

COURT OF GENERAL SESSIONS

JAN 18 2010 TERM

THE STATE

vs.

Marion Stewart

Indictment for

ARMED ROBBERY

SC Code: 16-11-330 (A)

CDR Code: 139

Class FEL/A

MARC KITCHENS

2010 JAN 27 PM 2:47

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

INDICTMENT

At a Court of General Sessions, convened on JAN 15 2010, the Grand Jurors of Spartanburg County present upon their oath:

ARMED ROBBERY

That the Defendant, Marion Stewart, did in Spartanburg County, on or about October 14, 2009, while armed with a pistol, dirk, slingshot, metal knuckles, razor, knife or other deadly weapon or while alleging, either by actions or word, he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon feloniously take from the person or presence of Casey Pitts and/or Tara Rice and/or Ericka Duncan and/or Terry Netherton and/or RX Care located at 2510 Boiling Springs Road, Boiling Springs, South Carolina, by means of force or intimidation goods or monies of Casey Pitts and/or Tara Rice and/or Ericka Duncan and/or Terry Netherton and/or RX Care located at 2510 Boiling Springs Road, Boiling Springs, South Carolina, described as follows: medication, with intent to deprive the owner permanently of such property, in violation of Section 16-11-330 (A), Code of Laws of South Carolina (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


DEPUTY SOLICITOR

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

STATE VS.
Marion E Stewart

AKA:

Race: W Sex: M Age: 34

DOB: SS#:

Address: Rd

City, State, Zip: Campobello, SC 29322-8371

DL#: SID#:

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

TO: Robbery / Armed Robbery, robbery while armed or allegedly armed with a deadly weapon

in violation of § 16-11-0330(A) of the S.C. Code of Laws, bearing CDR Code # 0139

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS (CSC w/minor 1st or Lewd Act) ☒ § 17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

BARNETT BARBY SC Bar# 78424 Defendant Kachler SC Bar# 10850 Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☐ State Department of Corrections, ☐ County Detention Center, for a determinate term of Life w/ hard labor days/months/years or ☐ under the Youthful Offender Act not to exceed years and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment of \$; plus costs and assessments as applicable*, the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

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

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered PTUP

Total: \$ plus 20% fee: \$

Payment Terms:

☐ Set by SCDPPPS

Recipient:

*Fine:

§ 14-1-206 (Assessments 107.5 %)	\$	
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ 25.00
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114 (BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCIA Surcharge)	\$5	\$ 5.00
§ 44-53-450(C) (Conditional Discharge)	\$350	\$
3% to County (if paid in installments)		\$ 3.90
TOTAL		\$ 133.90

Clerk of Court/ Deputy Clerk

Court Reporter:

SCCA/217 (06/2010)

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2010GS4200494

A/W#: M089943

Date of Offense: 10/14/2009

S.C. Code § : 16-11-0330(A)

CDR Code #: 0139

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADS

Presiding Judge

Judge Code:

Sentence Date:

STATE OF SOUTH CAROLINA

COUNTY OF SpartanburgMarion Earl Stewart 221024
Full name and prison number (if any) of Applicant.

v.

State of South Carolina

IN THE COURT OF COMMON PLEAS

2014-CP-42-2767

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention McCormick Correctional Institution
2. Name and location of Court which imposed sentence Court of General Sessions Spartanburg Co.
3. Name(s) of co-defendant(s) (if any) Grady Dale Taylor
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2010-GS-42-494
 - (b) _____
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) April 13th 2011 Life without parole
 - (b) _____

FILED
CLERK OF COURT
SPARTANBURG COUNTY
JUL 10 PM 1:58
MC HOPE BLACKLEY

- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty ☒ _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. The South Carolina Court of Appeals
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. denied
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. June 11, 2014
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. N/A
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) Ineffective Assistance of Counsel
- (b) Conflict of Interest
- (c) Miranda rights violated

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

- (a) _____
- (b) _____
- (c) _____

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

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

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

- (a) the specific nature thereof:
- i. N/A
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. _____
- ii. N/A
- iii. _____
- iv. _____
- (c) the disposition thereof:
- i. N/A
- ii. _____
- iii. _____

iv. _____

(d) the date of each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

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

i. _____

ii. _____

iii. _____

iv. _____

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

NO

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

(a) which grounds have been presented:

i. _____

ii. _____

iii. _____

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

i. _____

ii. _____

iii. _____

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

(a) _____

(b) _____

(c) _____

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

- (a) your arraignment and plea? yes
- (b) your trial, if any? yes
- (c) your sentencing? yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? yes
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? yes

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

- (a) the name and address of each attorney who represented you:
- i. Kathy Hudgins 366 North Church Street, Suite 3000 Spartanburg SC 29305
- ii. Katherine Hudgins 1330 Lady Street, Suite 401 Columbia, SC 29201
- iii. _____
- (b) the proceedings at which each such attorney represented you:
- i. Trial
- ii. Direct Appeal
- iii. _____

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

Vacate Conviction And remanded For New Trial - Less time Base Minimum

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

No

STATE OF SOUTH CAROLINA

VERIFICATION

County of Spartanburg

I, Ms., 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.

MARION EARL STEWART 221024

SWORN to and subscribed before me this 08
day of July, 2014

[Signature] (S.S.)
Notary Public

My Commission Expires: 12-10-2019

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2014 JUL 10 PM 1:58
M. HOPE BLACKLEY

Revised 3/2003

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
	)	
Marion Earl Stewart,	)	2014-CP-42-2767
S.C.D.C. No. 221024,	)	
	)	
Applicant,	)	
	)	RETURN
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

In response to the post-conviction relief application filed July 10, 2014, the Respondent would show this Court:

I.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Spartanburg County Clerk of Court's orders of commitment. The Spartanburg County Grand Jury indicted the Applicant at the January 2010 term of General Sessions for Armed Robbery (2010-GS-42-494). Kathy Hodges, Esquire represented the Applicant.

After the State called the case to trial, the Applicant was found guilty. On April 13, 2011, the Honorable Roger L. Couch sentenced the Applicant to life imprisonment without the possibility of parole pursuant to S.C. Code Ann. § 17-25-45, based upon Applicant's prior conviction of a most serious offense.

A notice of appeal was filed at the South Carolina Court of Appeals. Katherine Hudgins, Esquire perfected the appeal. The Court of Appeals affirmed the Applicant's conviction and sentence on December 12, 2012. State v. Stewart, Op. No. 2012-UP-654 (S.C. Ct. App. filed June 30, 2014). Applicant sought a writ of certiorari to with the Supreme Court of South

Carolina. Applicant's petition was denied on June 11, 2014. The Remittitur was sent on June 26, 2014.

Attached herewith and incorporated herein by reference are the records of the Spartanburg County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the trial transcript, and the appellate records.

II.

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

1. Ineffective assistance of counsel.
2. "Conflict of Interest"
3. "Miranda Rights Violated"

III.

The Respondent interprets each of Applicant's allegations as allegations of ineffective assistance of counsel and asserts that the allegations are without merit. The Respondent asserts the Applicant's attorney rendered effective assistance well within the standard of "reasonableness within professional norms" for a defense attorney.

Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel

“rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. The Applicant must overcome this presumption in order to receive relief. See Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under prevailing professional norms.” Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S. Ct. at 2065). 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 trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

The Respondent submits the Applicant cannot satisfy either requirement of the Strickland v. Washington test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983) (citing Norman v. State, 276 S.C. 278, 277 S.E.2d 707 (1981)).

IV.

The Respondent denies each allegation not expressly admitted, qualified or explained.

V.

WHEREFORE, having made its Return, the Respondent requests that a hearing be held.

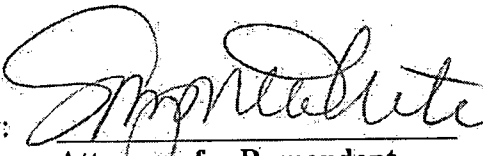
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

SUZANNE WHITE
Assistant Deputy Attorney General

By: 
Attorneys for Respondent
P.O. Box 11549
Columbia, S.C. 29211

April 9, 2015

STATE OF SOUTH CAROLINA)

COUNTY OF SPARTANBURG)

MARION EARL STEWART, #221024)

Applicant,)

vs.)

STATE OF SOUTH CAROLINA,)

Respondent.)

IN THE COURT OF COMMON PLEAS

2014-CP-42-2767

AFFIDAVIT OF SERVICE BY MAIL

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

Ms. Leah B. Moody, Esquire
Law Office of Leah B. Moody, LLC
PO Box 1015
Rock Hill, SC 29730

DATED this 9TH day of April, 2015.


 Ashley Haworth, Legal Assistant
 For Respondent

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF SPARTANBURG) IN THE COURT OF COMMON PLEAS

3
4 MARION EARL STEWART)
5 PETITIONER,) TRANSCRIPT OF RECORD
6 -vs-) 2014-CP-42-02767
7 STATE OF SOUTH) MARCH 23, 2016
8 CAROLINA,) SPARTANBURG, SOUTH CAROLINA
9 RESPONDENT.

10
11 B E F O R E:

12 THE HONORABLE R. KEITH KELLY, JUDGE.
13
14

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

16 LEAH B. MOODY, ESQUIRE
17 ATTORNEY FOR THE PETITIONER

18 ALICIA A. OLIVE, ASSISTANT ATTORNEY GENERAL
19 ATTORNEY FOR THE RESPONDENT
20
21

22 MICHAEL R. WATTS
23 CIRCUIT COURT REPORTER
24
25

INDEX

1		
2		
3	WITNESSES	PAGE
4	MARION EARL STEWART (PW)	
5	DIRECT EXAMINATION BY MS. MOODY	8
6	CROSS EXAMINATION BY MS. OLIVE	34
7	KATHLEEN HODGES, ESQUIRE (RW)	
8	DIRECT EXAMINATION BY MS. OLIVE	45
9	CROSS EXAMINATION BY MS. MOODY	55
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

		EXHIBITS		
	NO.	DESCRIPTION	ID.	EV.
1				
2				
3	P-1	INDICTMENTS		23
4	P-2	E-MAIL		24
5	P-3	WRITTEN NOTE		24
6				
7				
8				
9				
10				
11				
12				
13				
14				
15				
16				
17				
18				
19				
20				
21				
22				
23				
24				
25				

1 (PROCEEDINGS, MARCH 23, 2016)

2 THE COURT: Sir, you are Marion Earl Stewart?

3 THE PETITIONER: Yes, sir.

4 THE COURT: Mr. Stewart, your lawyer tells me you
5 want to ask me a question?

6 MS. MOODY: No, no, he wants to go forward. There
7 is another gentlemen who wants to ask you a question.

8 THE COURT: Oh, okay. I'm sorry. I thought that
9 you wanted --

10 Okay. So it's Mr. Hillstock-Jones who wants to
11 ask me a question?

12 MS. MOODY: Yes, sir.

13 THE COUR: Okay. All right. So Mr. Stewart is
14 here and ready to go forward?

15 MS. MOODY: Yes, sir.

16 THE COURT: Okay. Madam Attorney General, are we
17 ready to go?

18 MS. OLIVE: Yes, Your Honor.

19 May it please the court, this is Marion Earl
20 Stewart, docket number 2014-CP-42-2767.

21 Mr. Stewart was indicted in January 2010 for armed
22 robbery.

23 Kathy Hodges represented him.

24 He proceeded to trial before Judge Couch and a
25 jury and was found guilty as indicted on April 13th, 2011.

1 He was sentenced to life without the possibility
2 of parole based on prior convictions for a most-serious
3 offense.

4 A notice of appeal was filed on his behalf.

5 The Court of Appeals affirmed his conviction and
6 sentence on December 12th, 2012.

7 He then sought a writ of certiorari with the
8 Supreme Court and his petition was denied on June 11th,
9 2014.

10 He filed this application for post-conviction
11 relief on July 10th, 2014. .

12 He alleges three grounds in his application. He
13 alleges ineffective assistance of counsel. He alleges
14 conflict of interests, and Miranda Rights violated.

15 Your Honor, we would move to dismiss the two --
16 the second two claims and go forward on ineffective
17 assistance of counsel, because his PCR -- it's our position
18 he's only entitled to go forward on ineffective assistance
19 of counsel claims. If these other two claims are consumed
20 into that, then he can go forward on those as ineffective
21 assistance of counsel.

22 THE COURT: Ms. Moody, what's his position on
23 that?

24 MS. MOODY: Well, as to the Miranda Rights
25 violation, Your Honor, I think that was also appealed, in

1 all candor to the court, and I believe that Ms. Hodges
2 appealed that issue in the June 30th, 2014 matter.

3 As to the conflict of interests, the conflict of
4 interests actually goes to the judge's recusal, and I'm not
5 sure whether that goes into the ineffective of counsel,
6 because of his testimony he says that -- I think the judge
7 informed them that the judge was related to the property
8 owner or the establishment that was burglarized or robbed,
9 so I would like the court to hear as to whether or not that
10 was ineffective assistance of counsel, whether his lawyer
11 should have moved that the judge recuse himself after
12 hearing this information.

13 THE COURT: No, I'll hear it. I'll hear all of
14 it, but I'm just -- now, what she is saying is that those
15 two are set out as separate, but they are actually part of
16 number one --

17 MS. MOODY: Yes.

18 THE COURT: -- which is ineffective, so he
19 certainly can testify about both of them.

20 MS. MOODY: Okay.

21 THE COURT: Okay. All right. So it's ineffective
22 assistance of counsel. That's where we are?

23 MS. OLIVE: Yes, Your Honor, and nothing has --
24 there have been -- other than the two claims we have just
25 talked about, there have been no other specific claims that

1 have been set forth in the application, just for the record.

2 THE COURT: Right. And so that's what he -- I'm
3 assuming that's what the gentleman is going to come up and
4 testify about is the conflict of interests and Miranda
5 Rights violation that would constitute ineffective
6 assistance.

7 Is there something else?

8 (No response)

9 THE COURT: Is that right?

10 MS. MOODY: That's it. Well, Your Honor, it's the
11 whole representation, but, yes, that is within it, during
12 the trial.

13 THE COURT: Okay. All right.

14 Well, call your first witness.

15 MS. MOODY: I call Mr. Marion Stewart.

16 MARION EARL STEWART, having been first duly sworn,
17 testified as follows:

18 THE COURT: Thank you, sir. Please have a seat.

19 Sir, when you get situated tell us your full name
20 for my court reporter, please.

21 THE WITNESS: Yes, sir.

22 My name is Marion Stewart.

23 THE COURT: All right, Mr. Stewart.

24 Ms. Moody, your witness.

25 MS. MOODY: Thank you, Your Honor.

1 If it please the court.

2 DIRECT EXAMINATION BY MS. MOODY:

3 Q. Mr. Stewart, you are here on your PCR application?

4 A. Yes, ma'am.

5 Q. Okay. And who was your attorney related to your
6 charges of armed robbery and kidnapping?

7 A. Kathleen Hodges.

8 Q. Okay. And was she your only attorney?

9 A. Yes, ma'am.

10 Q. Okay. When did Ms. Hodges begin to represent you?

11 A. I was appointed her at -- like at the preliminary
12 hearing, but I didn't see her until months later. She
13 didn't even represent me in the preliminary hearing on the
14 bond hearing. It was someone else that got -- that's where
15 the ball started rolling. There was confusion.

16 Q. Okay. Well, who was the person that represented you?

17 A. Andrea Price.

18 Q. Andrea Price. From the Public Defender's office?

19 A. Yes, ma'am.

20 Q. Okay. And then you became aware of Ms. Hodges?

21 A. Yes, ma'am.

22 Q. Okay. And just a second ago you said that was where
23 the confusion started running?

24 A. Yes, ma'am.

25 Q. I'm going to come back to that, but your PCR

1 application, can you please state your ground for
2 ineffective assistance of counsel for the court?

3 A. Yes, ma'am. From the beginning?

4 Q. Just state the ground. What are your reasons?

5 A. Okay.

6 THE COURT: What did she do wrong?

7 A. One would be -- I have -- first -- I have two
8 instruments right here, actually six pages altogether.

9 MS. MOODY: May I approach?

10 THE COURT: Yes, ma'am.

11 BY MS. MOODY:

12 Q. Have a seat and talk to me.

13 A. These instruments right here wasn't properly preserved
14 for review by my counsel. She failed to preserve the rights
15 on having me held in custody and tried about the warrant and
16 indictment. According to 17-19-30 the indictment must read
17 "with malice, aforethought, feloniously, willfully," and
18 have a date and time. None of them have that, the warrant
19 or the indictment.

20 On the next one?

21 Q. Wait a minute.

22 So you are -- you are saying that your lawyer allowed
23 you to be indicted on these charges, which were the armed
24 robbery, the kidnapping -- well, actually two kidnappings.

25 A. Four kidnappings.

1 Q. Four kidnapping charges.

2 A. Yes, ma'am.

3 Q. And you are saying that the content of the indictment
4 are not correct --

5 A. Yes, ma'am.

6 Q. -- according to the text?

7 A. Yes, ma'am.

8 Q. Okay. And did you discuss this with your attorney?

9 A. Yes, ma'am, on several occasions.

10 Q. And what did you discuss?

11 A. That there was discrepancies in the indictments and the
12 warrant.

13 The True Bill part of them have the, you know, the date
14 of them where they were True Billed, because I was in a
15 little bit of confusion then. But once I done my research,
16 I realized it was deeper than that, as far as the legality
17 of the language that you are supposed to use inside the
18 wording of it and it was wrote wrong.

19 Q. You are saying that the description in the body of the
20 indictment where it states the charges that you, Marion
21 Stewart, did on or about a certain day while armed, you are
22 saying that language is supposed to be stated in a certain
23 way?

24 A. Yes, ma'am.

25 Q. Can you please tell the court what is the language that

1 should be in the indictment?

2 A. It should read with malice aforethought, feloniously,
3 willfully, and it has none of those but feloniously in only
4 one warrant, and that's the armed robbery warrant. The rest
5 of the warrants nor the indictments have it on them.

6 Q. Okay.

7 A. And according to South Carolina statutes the
8 indictments -- the said indictments, I condemn them to the
9 trial court because of lack of subject matter jurisdiction.

10 Q. Okay. Let's go back.

11 On the four kidnappings you are saying that the
12 indictments should allege feloniously and willfully kidnap?

13 A. Yes, with malice and forethought.

14 Q. Okay. And so you discussed this with your attorney,
15 Ms. Hodges?

16 A. Yes, ma'am.

17 Q. Okay. And what was -- what did she tell you about the
18 indictments when you discussed it with her?

19 A. They were okay, they were fine.

20 Q. So she told you --

21 A. There was nothing -- there was no problems with the
22 writing on them. And we actually walked through the whole
23 entire warrant, which at this point right here, this warrant
24 right here, you will see it's a page, where a warrant is
25 tri-folded, and I didn't even get the whole warrant, but I

1 actually have the request forms here where I wrote for two
2 years asking for warrants, period, and never got one ever.
3 So that's the only warrant that I have ever received where I
4 couldn't read no further into the sentences to find out what
5 the wording was in the warrant.

6 Q. So let's back up.

7 So when you got arrested on 10-20 of 2009, you did not
8 receive copies of the warrants for the four kidnappings and
9 the armed robbery?

10 A. No, ma'am.

11 Q. Okay. And so when you were arrested, can you tell the
12 court how you were arrested? Did you turn yourself in, or
13 were you picked up somewhere?

14 A. They actually came to my house and told me that they
15 were there to question me. And when they -- like a smart
16 aleck, I was a little bit -- I was on drugs at the time, so
17 I actually made the statement -- well, the detective made
18 the statement to me he had DNA of me at the scene. So I
19 threw out my wrists and told them "well, you got me then.
20 You might as well go ahead and arrest me, right? I mean,
21 you got something on me."

22 So the guy didn't lie to me, like "no, I ain't got
23 nothing."

24 I said "I'm free to leave," so I tried to walk off and
25 there were several officers there. They kind of group in a

1 little closer to me, so I didn't feel like I had a way to
2 leave. You know, I had to stay.

3 And the guy said "well, we need to talk to you anyway.
4 We got to ask you questions. Will you step over to here to
5 my truck?

6 So I was like "yeah, it's cold out here anyway." I sit
7 in the truck and he got out of the truck to have a
8 conversation on his cell phone and come right back and told
9 me the warrant was already signed.

10 Q. Okay. So when you were taken into custody, you were
11 obviously brought down to --

12 A. The sheriff's office for -- to give a statement, but I
13 told them I didn't have nothing else to say at this point.

14 Q. But you were under arrest?

15 A. That they told me I was under arrest. I was never
16 Mirandized. I was never told my rights or anything.

17 Q. Well --

18 A. Once I refused to fill out a statement, because I
19 didn't want to go no further, they brung me to the county
20 jail. I signed that, the warrant itself, at 10:20 08 or 09,
21 whatever it was right there, but they had never gave them to
22 me.

23 Q. Okay.

24 A. Or never actually got the warrant.

25 Q. But you came to court and you knew what you were

1 charged with?

2 A. Yes, ma'am.

3 Q. Okay. And so the copies of your discovery, did you get
4 to review that, those discovery documents, with your
5 attorney?

6 A. I'm not even sure. I'm not even sure what's included
7 in the discovery, because I asked them --

8 Q. Your warrant --

9 A. I brung the request forms with me, too, where I wrote
10 numerous request forms from the county jail in '09 and was
11 asking about the stuff, because I have a failure to
12 understand. I also have dyslexia, meaning I have trouble
13 reading, so everything I'm reading is kind of backwards, so
14 I have -- I struggle reading, so I don't know if I actually
15 read the Brady -- the Rule Five -- what was it again?

16 Q. Your discovery. So --

17 A. The discovery --

18 Q. Hold on one second. Let me ask you this.

19 A. I apologize.

20 Q. We will make it like as simple as possible. Did you go
21 over any documents with your attorney?

22 A. Yes, ma'am.

23 Q. Okay. And the documents that you went over with your
24 attorney, were they purported to be documents related to
25 you?

1 A. Yes, ma'am, they were.

2 Q. Okay. And when you went over those documents with your
3 attorney, did you discuss the armed robbery and the four
4 kidnappings?

5 A. Yes, ma'am.

6 Q. Okay. So did you have multiple chances to talk to your
7 attorney about your case, or was it just one time that you
8 went over some documents with your attorney?

9 A. Actually I had one opportunity to go over the
10 documents. Then when we got to trial, it was stuff that was
11 different. She actually pointed it out to me that the stuff
12 was different and then she pointed it out in the trial the
13 stuff was different, that she wasn't sure that that was even
14 the same recorded stuff that we had already looked at, being
15 the phone calls was one of them.

16 Q. Okay. So, now, you don't recall whether you received
17 the arrest warrants, but you do know that you went over some
18 documents with your attorney?

19 A. No, ma'am, I know I didn't receive the arrest warrants,
20 but I do -- I know I did go over stuff with my lawyer, but
21 it wasn't the stuff that we was using in court in trial.

22 Q. Okay. And so when y'all discussed the warrants or your
23 charges in the indictment, she told you there was nothing
24 wrong with them?

25 A. Correct.

1 Q. Okay. Is there anything else as it relates to the
2 indictments and the warrant?

3 A. No, ma'am.

4 Q. Okay. What is the your next issue?

5 A. Ineffective assistance of counsel. Failed to informed
6 me of my -- properly of my plea.

7 Q. Okay.

8 A. She told me of that LWOP, and I was under the
9 perception that when they explained LWOP to me, they brung a
10 paper to me and have me sign it. I want to say it was a
11 person from the solicitor's office, but I can't -- I don't
12 know who they were. All I know is it was two guys, and I
13 signed the paper for LWOP, but I was under the impression
14 that if I got found guilty in trial, or if they sentenced
15 me, the LWOP was the end result, that it was mandatory that
16 that was as far as they could go. They couldn't go life
17 without parole for armed robbery, plus whatever, whatever,
18 whatever for every kidnapping. That's what my understanding
19 was, but then when we got to court at this, when I got found
20 guilty, it changed completely, because at the end of that
21 day I found out that the end result was that the only thing
22 that I could obtain was LWOP.

23 Q. Okay. So when you say your lawyer didn't inform you of
24 your plea, are you stating that -- are you suggesting that
25 there were other plea offers on the table?

1 A. Yes, ma'am.

2 Q. All right. What were those other plea offers?

3 A. One was twenty years and -- pardon the court for one
4 moment, please. I'll grab this paper.

5 This was the recorded document right there.

6 Q. All right. So you had a plea offer that was given to
7 you by your lawyer?

8 A. Yes, ma'am.

9 Q. Okay.

10 A. Well, the solicitor sent it by my lawyer to me.

11 Q. Okay. And what was that plea offer?

12 A. The plea offer was on March 25th, 2011, it says "the
13 offer is plead to one count of armed robbery and one count
14 of kidnapping and life without parole would be taken off the
15 table and the State will not proceed against," my sister,
16 "Leeann Nichols if the offer is accepted by five p.m. today,
17 on March 25th, 2011. Stewart can plead in front of the
18 judge of his choice if the offer is accepted by five p.m..
19 After five p.m. today the plea will have to go in front of
20 Judge Couch, who is the trial judge for next week."

21 Q. Okay. So you received that plea offer?

22 A. Yes, ma'am.

23 Q. And what, if anything, did you discuss with your
24 attorney about the plea offer?

25 A. At first I didn't know what to think of it, because

1 I -- again, I thought L -- I thought the LWOP, life without
2 parole, was the maximum I could get. But after we talked
3 about it I didn't feel that -- and she agreed with me, too,
4 that there wasn't enough evidence against me, no physical
5 evidence, period, against me that would put me anywhere,
6 shape, form, or fashion near that crime when it happened and
7 told me to not take the plea.

8 Q. Okay.

9 A. We could beat it by eighty percent, and I also have
10 that document right here, too, where she wrote it down.

11 Q. Okay. So you received the LWOP first, the life without
12 parole notice first, and you discussed the life without
13 parole with your lawyer?

14 A. Correct.

15 Q. Okay. And you understood it to be the maximum the
16 court could give you was life without parole, but they could
17 give you something less?

18 A. Yes, ma'am.

19 Q. Okay. And then you received the offer where you just
20 read into the record where they indicated they would take
21 the life without parole off the table?

22 A. Yes, ma'am.

23 Q. And allow you to plead?

24 A. Yes, ma'am.

25 Q. And you had to do it by a certain time?

1 A. Yes, ma'am, five p.m. that day.

2 Q. Okay. And you declined that offer and went forward
3 with a life without parole --

4 A. On the table.

5 Q. -- on the table, because?

6 A. I went forward without pleading because my lawyer
7 advised me that that would be a better option for me to
8 take, because I --

9 Q. Okay. Your lawyer advised you that it's better to take
10 the life without parole than take the plea offer that's on
11 the table?

12 A. As backwards as that sounds, yes, ma'am. I actually
13 wrote down the day of the trial "what is our percentage of
14 winning? No BS."

15 And she writes down "eighty percent, not being a smart
16 A, but it is all even. It is who they believe now, us or
17 Dell and Shirley."

18 Q. Okay.

19 A. Now, that was the second time.

20 That day before the trial was started Barry Barnette
21 stated to the judge that he had offered me twenty years, or
22 twenty-five years, I can't remember what it was, but me and
23 her consulted again at that same table right there. And as
24 we spoke, we still didn't believe that they had enough to
25 convict me on armed robbery and kidnapping, and that was the

1 answer, the eighty percent, and we proceeded forward with
2 the trial.

3 Q. So when you say eighty percent, is that the chances of
4 winning, or --

5 A. Chances of winning.

6 Q. Okay.

7 A. I asked her the exact thing, percentage of winning, no
8 BS, and the paper --

9 Q. So you thought -- okay, well, when you say winning, is
10 your understanding that you would be walking out of the
11 courtroom?

12 A. Yes, ma'am.

13 Q. You had an eighty percent chance that you would be
14 walking out of the courtroom?

15 A. Yes, ma'am.

16 Q. Okay. And so you went forward with the trial?

17 A. Yes, ma'am.

18 Q. Is that all it is as it relates to your plea offer?

19 A. Yes, ma'am.

20 Q. Okay.

21 MS. MOODY: Your Honor, if I could have this
22 marked and moved into evidence, this exhibit.

23 THE COURT: Show it to Ms. Olive.

24 MS. OLIVE: Your Honor, I would just object.

25 I mean, all this is is just a handwritten piece of paper. I

1 mean, he's testifying that this is what his attorney wrote,
2 but, I mean, it very well could be his handwriting.

3 THE COURT: Ask him a couple foundation questions.
4 I mean, I -- he can say it's his lawyer, he can say it's
5 somebody else, I don't know, but lay a foundation for it
6 anyway, Ms. Moody.

7 MS. MOODY: Okay.

8 A. May I?

9 THE COURT: Well, let your lawyer ask you
10 questions.

11 A. Yes, ma'am.

12 BY MS. MOODY:

13 Q. Mr. Stewart, I mean, you passed up this piece of paper.
14 What is this piece of paper? Where did you get this paper
15 from?

16 A. She actually gave -- Ms. Hodges, my lawyer that day,
17 gave me a yellow notebook, which this is the contents of
18 those pages, with her handwriting continuously on this stuff
19 explaining to me as I -- she told me to write down questions
20 or any discrepancies that I seen going on in the trial. So
21 every time something would come up I would write it down and
22 point it out to her and she would write back a reply and
23 that's the whole entire trial on yellow notebook paper that
24 she supplied.

25 Q. And so after the trial did you keep your documents that

1 you wrote on?

2 A. Yes, ma'am.

3 Q. Okay.

4 A. That is them right there. That is the actual documents
5 right there that I wrote on.

6 MS. OLIVE: Are you seeking to admit these?

7 MS. MOODY: We can submit the whole thing.

8 THE COURT: I mean, I just for what purpose?

9 MS. MOODY: To say --

10 Well, Your Honor, if --

11 MS. OLIVE: Are you just trying to submit the
12 ones -- the paper that you showed me before?

13 MS. MOODY: Yes.

14 You were asking me lay the foundation. I don't
15 have any other --

16 THE COURT: Any objection now? She's laid the
17 foundation to where they came from.

18 MS. OLIVE: No objection, Your Honor.

19 THE COURT: Okay. They are admitted without
20 objection.

21 (Indictments marked as Petitioner's Exhibit No. 1
22 for identification).

23 (E-Mail marked as Petitioner's Exhibit No. 2 for
24 identification).

25 (Written Notes marked as Petitioner's Exhibit No.

1 3 for identification)

2 THE COURT: Okay. What are you putting into
3 evidence?

4 MS. MOODY: One is the handwritten note as to the
5 eighty percent, and I believe the State wants me to -- she
6 wrote to this sheet. We can enter a clean copy.

7 This is as to the plea offer that he testified
8 that he read into the record.

9 And these are the indictments which you -- I think
10 you have copies of these.

11 THE COURT: I have copies of these.

12 Is there any objection to any of these three?

13 MS. OLIVE: Your Honor, I just want to
14 object to -- and I'm not sure which it was marked court
15 exhibit that paper that was --

16 MS. MOODY: 3.

17 THE COURT: I will just object on the -- in terms
18 of what he has handwritten on there, the relevancy of it. I
19 don't object to the plea offer that he read into the record.

20 THE COURT: Okay. Well, it's without objection.
21 I'm going to let them in. I mean, it is with objection, but
22 I'm going to let them in.

23 MS. OLIVE: Thank you, Your Honor.

24 (Whereupon, Petitioner's Exhibit No. 1 was entered
25 into the record as evidence).

1 (Whereupon, Petitioner's Exhibit No. 2 was entered
2 into the record as evidence).

3 (Whereupon, Petitioner's Exhibit No. 3 was entered
4 into the record as evidence)

5 BY MS. MOODY:

6 Q. I believe the -- as to the eighty percent, that's --
7 that was what your lawyer told you and you went forward with
8 the trial?

9 A. Yes, ma'am.

10 Q. Knowing that you have the LWOP on the table?

11 A. Yes, ma'am, but only knowing that LWOP was the highest
12 number I could reach. I didn't know that it was the only
13 number I could reach or I would have accepted the plea.

14 Q. Okay. So when you talked about the life without parole
15 with your attorney, I mean, did you ask her what that meant,
16 or did she explain to you what that meant? Did y'all
17 have -- or did you just acknowledge that you had life
18 without parole on the table?

19 A. It -- it would benefit me to explain this in detail
20 here for the court.

21 At the Spartanburg County jail, when your attorney
22 comes and sees you, they come in. They might see ten
23 clients, or they might see three clients, or they might see
24 just you, but, at any rate, it's a two or three minute visit
25 and it's over with. You talk to them for a few minutes and

1 they are gone. They bring just what they are going to show
2 you that day and it's over with.

3 The LWOP situation, I would be lying if I told you that
4 I remember the exact conversation. I just know I didn't
5 understand it fully.

6 Now that I look back on it, there is no way I could
7 have understood it, because I was -- a person with my past
8 record would have never accepted an LWOP situation knowing
9 that I had a twenty year plea, a fifteen year plea, or a
10 twenty-five year plea, whatever the plea was that day. I
11 can't remember.

12 Q. All right. So I guess I'm just trying to get to the
13 point did your lawyer ever tell you that this was mandatory
14 that you would get life without parole, period, no questions
15 about it?

16 A. No.

17 Q. Okay. So when you went forward, you denied the plea,
18 what happened next?

19 A. I was found guilty.

20 Q. Okay. I understand.

21 What happened next? What are you saying in terms of
22 what you lawyer didn't do?

23 A. I apologize.

24 The second -- the next one was going to be she
25 failed -- she failed to put me in a neutral lineup.

1 In every statement, everything going on in the whole
2 entire case, I'm the only person in the whole case that the
3 description of the subject don't match me.

4 I would like enter in these three sheets that I will
5 show you. One would be the report that came from the
6 robbery that day from Officer J. Watson and Layton Brown.
7 They stated in here that Terry Netherton and Erica Duncan
8 and the rest of the employees explained that the person was
9 5'7", 5'8" and 160. When we were booked I was 6'1, 187. My
10 co-defendant was 5'5', 150, and even my NCIC sheet says that
11 I'm 5'11", 232.

12 Nowhere in the description of it she failed to put me
13 in the neutral lineup so that the victims could visualize or
14 see who picked me out of it.

15 The day of my jury trial Barry Barnette stood up and
16 asked Terry Netherton to stand up, state how tall the
17 counter was inside the pharmacy. He did. Terry said it was
18 5'1 and a half. Then he asked me to stand up and he said
19 "is that the man -- "is that the man who robbed you?" And I
20 want to say that Ms. Hodges either objected or he caught
21 himself because he automatically changed the statement --
22 his question then right and said "do you see the man who
23 robbed you," and he pointed straight at me, when he had
24 never seen me ever before in his whole life.

25 That same situation that happened with Erica Duncan,

1 and neither one of them had ever seen me.

2 Q. So the issue that you stated with your lawyer is that
3 she didn't put you in the neutral lineup?

4 A. Her, nor the prosecutor. Her nor the solicitor's
5 office.

6 Q. Okay. What's your next issue?

7 A. The recusal of Judge Couch.

8 My attorney nor the prosecutor fully explained to me
9 that when Judge Couch stopped the trial that day and sent
10 everyone out and sent me over to the holding unit over there
11 that he was the brother of the person who owned the QS-1 --
12 who owned the pharmacy. And they took me over there and
13 told me that the judge brung that up because him being kin
14 to the victim was grounds for recusal. And after checking
15 on it, in Schweiker v. McClure, "due process demands
16 impartiality on the part of those who function in judicial
17 or quasi judicial capacities. Similarly, he has the right
18 to have a judge assigned to his case in a manner from a bias
19 or a desire to influence the outcome of the proceedings. On
20 the other hand, he does not have the right to any particular
21 procedure for the selection of the judge. Thus, there is no
22 right to have one judge selected randomly, nor is there one
23 to have a case heard by a particular judge."

24 And in doing this Judge Couch -- I was told the week
25 before that Judge Couch would be my judge, after I was

1 previously asked who I wanted. I didn't know about judge
2 shopping at that time. My lawyer told me that I could
3 get -- try to go in front of Judge Cole, because that's who
4 I wanted, because he's a fact judge. He wanted nothing but
5 facts, so they told me I had to go in front of Judge Couch.
6 And then when I told her I didn't want to go in Judge Couch
7 and I refused the plea that I put into --

8 Q. Your refused the plea offer.

9 A. When I refused the plea offer, then automatically they
10 come back at me with this and it's --

11 Q. Okay. So --

12 A. They didn't -- they didn't explain to me fully, nor did
13 the judge recuse himself when he was -- knew he was kin to
14 the victim of the robbery.

15 Q. So the judge informed the prosecutor and your attorney
16 that he was related to the victim?

17 A. The owner of QS-1 who owned that pharmacy.

18 Q. All right. And you are saying that it was his brother?

19 A. Yes, ma'am.

20 Q. Okay.

21 A. Ms. Hodges told me it was his brother.

22 They actually took me out of the courtroom into the
23 holding unit next door and then she came over and explained
24 it to me.

25 I told her I felt like it was going to be bias, I

1 didn't want it. She told me to proceed. I told her, I said
2 "I don't want to do this." We come back over here. She
3 actually is telling me what to answer when the judge asked
4 the questions what to actually say. He's asking the
5 questions.

6 Q. So the judge asked you whether you understood that he
7 was related -- there was some relation for him --

8 A. Right.

9 Q. -- to the victim?

10 A. Yes, ma'am.

11 Q. And he explained to you the recusal and you have a
12 choice as to whether he continues on the case?

13 A. Yes, ma'am.

14 Q. What was your position on whether he continue on the
15 case?

16 A. He asked me -- he asked my counsel and my counsel told
17 him we chose to move forward, even though I was stating to
18 her I didn't want to move forward. I didn't -- I didn't
19 want to go forward at all with the judge because I felt like
20 something was wrong right there, right off the top.

21 Q. Okay. And so y'all continued?

22 A. Yes, ma'am.

23 Q. Okay. What's your next issue?

24 A. That was it.

25 Q. So in terms of your ineffective assistance of counsel,

1 you are stating that your lawyer didn't challenge the
2 indictments. The indictments were not properly -- the body
3 of the indictment was not properly stated or listed as to
4 the armed robbery and the four kidnappings?

5 A. Yes, ma'am.

6 Q. And then you also indicated that she did not challenge
7 the time frame of when the indictments were True Billed?

8 A. Yes, ma'am.

9 Q. And then the second issue you talked about --

10 Well, under that you talked about you are not being
11 aware of what you were actually were charged with with the
12 warrants?

13 A. Yes, ma'am.

14 Q. Okay. Then your second issue that you spoke of was you
15 had a plea offer on the table, but you were also given a
16 notice of LWOP?

17 A. Yes, ma'am.

18 Q. Okay. And you took the -- you went forward because you
19 understood the LWOP was the maximum amount of time that you
20 could get?

21 A. Yes, ma'am.

22 Q. And you discussed this with your attorney?

23 A. Yes, ma'am.

24 Q. And then the third issue that you have is the judge not
25 recusing -- or your lawyer not expressing to the judge that

1 you wanted him to be recused, based on his relationship to
2 the owner of the victim?

3 A. Yes, ma'am.

4 Q. I mean the owner of the -- well, the victim being the
5 store -- you wanted him recused?

6 A. Yes, ma'am.

7 Q. And so with all those issues, those three issues, how
8 do you feel that Ms. Hodges prejudiced you in your case?

9 A. I feel that the prejudice was on --

10 I'm failing to understand exactly what you --

11 Q. How is it unfair to you?

12 A. I feel like the outcome of the trial would have been
13 completely different if I had a different judge and the
14 different -- of knowing exactly what was going on, if my
15 counsel would have been more clear in her explanations of
16 everything that was going on in the trial.

17 Q. Well, not the trial -- earlier you testified that you
18 would have pled, taken the offer that the solicitor put on
19 the table versus going to trial?

20 A. Yes, ma'am.

21 Q. All right. So you feel that your decision would have
22 been different?

23 A. I feel like my decision would have been different, yes,
24 one hundred percent.

25 Q. You would have taken the plea offer?

1 A. Yes, ma'am.

2 Q. Did you explain any of this to your attorney at the end
3 of the trial when you got sentenced to life without parole?

4 A. Not in complete detail, but I did stress the fact to
5 her that I didn't like the outcome of this right here; you
6 know, what could we do next; and she said she was going
7 forward with the direct appeal.

8 Q. And so what relief are you seeking from the court?

9 A. Less time. The solicitor was offering twenty years, or
10 twenty-five years, or something like that, and I wound up
11 with life without parole, not knowing what I was walking
12 into.

13 Q. So you realize that this judge cannot give you -- he
14 can't reduce your time.

15 A. Yes, ma'am.

16 Q. So are you asking the court to vacate your sentence and
17 allow you to go back and get the offer from the solicitor?

18 A. Yes, ma'am.

19 Q. Or -- well, and the judge can't tell the solicitor to
20 give you the offer. You would start over as if you were
21 first arrested.

22 A. Yes, ma'am.

23 Q. So you want him to vacate the sentence and you want to
24 start over?

25 A. Yes, ma'am.

1 Q. And you realize that everybody starts over in that
2 regard, meaning the State starts over. They don't have to
3 put an offer on the table.

4 A. Yes, ma'am.

5 Q. And they don't have to put that twenty-five years on
6 the table. Do you understand that?

7 A. Yes, ma'am.

8 Q. But you still want the court to grant you your relief?

9 A. Yes, ma'am.

10 Q. Is there anything else that you want to inform the
11 court of as it relates to the ineffective assistance of
12 counsel or how you feel that you were prejudiced?

13 A. No, ma'am.

14 Q. Okay.

15 MS. MOODY: No further questions for this witness,
16 Your Honor.

17 THE COURT: Okay. I tell you what, ladies and
18 gentlemen. It's ten after twelve. I try to usually break
19 somewhere around this time, or just a little later, for
20 lunch. We have been running all morning. Sir, I know that
21 you been waiting, but we have been at it steady all morning,
22 so let's break for lunch at this time so we have a clean
23 break on the testimony and he will be on cross after lunch.

24 I'm sure want to get some lunch, don't you?

25 THE WITNESS: Yes, sir.

1 THE COURT: Okay. So let's break for lunch and
2 return at two o'clock. Let's be ready to go at two o'clock.
3 That would be good?

4 MS. OLIVE: Yes. Thank you, Your Honor.

5 THE COURT: Everybody be here a couple minutes
6 early, something like that.

7 We will be in recess until then.

8 MS. OLIVE: Your Honor, may I leave my file in the
9 courtroom during lunch?

10 THE COURT: Yes, I think they lock it up. It's
11 going to be locked up.

12 (Whereupon, proceedings were recessed).

13 (Whereupon, proceedings were reconvened)

14 THE COURT: Are we ready to resume the hearing?
15 You remain under oath.

16 THE WITNESS: Yes, sir.

17 THE COURT: Whenever you are ready.

18 You can have a seat. I'm going to let her ask a
19 few questions.

20 Yes, ma'am.

21 MS. OLIVE: If it please the court, Your Honor?

22 THE COURT: Yes, ma'am.

23 CROSS EXAMINATION BY MS. OLIVE:

24 Q. Mr. Stewart, on your -- you testified earlier regarding
25 the warrants, I believe, and the indictments with regard to

1 the kidnapping charges?

2 A. Yes, ma'am.

3 Q. Okay. But you weren't tried for those kidnappings at
4 this trial that we are here for today, correct?

5 A. No, ma'am.

6 Q. Okay. And, in fact, they were dismissed, is that
7 right?

8 A. Actually Barry Barnette wrote me a letter and told me
9 he was going to not try me on those four kidnapping charges,
10 but if I pursued this, what I'm doing right now, then he was
11 going to bring everything back up.

12 Q. Okay. And you do understand that if you prevail here
13 today, you do start back all over from square one?

14 A. Yes, ma'am.

15 Q. Okay. And regarding the -- you were testifying earlier
16 regarding the statement that you made to the officers when
17 they came to your house to -- when they came to your house
18 and asked you some questions --

19 A. Yes, ma'am.

20 Q. -- right?

21 A. Yes, ma'am.

22 Q. But your attorney, she brought that up at trial, did
23 she not?

24 A. Yes, ma'am.

25 Q. And, in fact, it was argued on appeal as well, correct?

1 A. Yes, ma'am.

2 Q. Okay. So that issue has been dealt with already,
3 correct?

4 A. Concerning?

5 Q. Your attorney raised it at trial, right?

6 A. Raised --

7 Q. The -- the -- I apologize.

8 The Miranda issue, in the sense that you gave a
9 voluntary statement to the police. She -- she argued at
10 trial that -- she attempted to exclude the statement,
11 correct?

12 A. Yes, ma'am.

13 Q. Based on involuntariness?

14 A. Yes, ma'am.

15 Q. But the judge disagreed?

16 A. Yes, ma'am.

17 Q. So it came in anyway?

18 A. Yes, ma'am.

19 Q. Okay. And then on your appeal -- your lawyer on appeal
20 argued that the judge erred under allowing that statement
21 in, correct?

22 A. Yes, ma'am.

23 Q. Okay. And the court -- the court ultimately affirmed
24 your conviction, correct?

25 A. Yes, ma'am.

1 Q. Let me just double check and make sure I'm right on
2 that.

3 Right, the court appeals affirmed your conviction?

4 A. Yes, ma'am.

5 Q. Now, regarding the notes -- and I apologize, I don't
6 remember the Court's Exhibit (sic), possibly Exhibit 1, the
7 yellow note pad piece of paper?

8 A. Yes, ma'am.

9 Q. Okay. Has that note been altered in any way since it's
10 been -- from its original state?

11 A. No, ma'am, we -- right now as we were going scribbling,
12 scratching, I mean, I didn't -- I wrote it down and she
13 wrote down -- I wrote down the question and she wrote down
14 the answer.

15 Q. Okay.

16 MS. OLIVE: May I approach, Your Honor?

17 THE COURT: Yes, ma'am. It's right here,
18 Exhibit 3.

19 MS. OLIVE: Thank you.

20 BY MS. OLIVE:

21 Q. Mr. Stewart, I'm showing you Court's Exhibit No. 3
22 (sic). It looks like there is two -- well, there is three
23 different really colors of ink on that page, correct?

24 A. Yes, ma'am.

25 Q. Okay. One is like a lighter --

1 A. One is a pencil, one is black, and one is blue.

2 Q. Pencil, black ink, and blue.

3 And the blue ink is where you say she said eighty to
4 eighty percent, is that right?

5 A. Yes, ma'am.

6 Q. Okay. And that hasn't been altered in any way?

7 A. No, ma'am.

8 Q. Okay.

9 MS. OLIVE: Thank you.

10 THE COURT: Yes, ma'am.

11 BY MS. OLIVE:

12 Q. And you discussed the plea offer that was made. I
13 believe you testified it was for armed robbery and
14 kidnapping?

15 A. Yes, ma'am.

16 Q. And that was a straight-up plea, correct?

17 A. I --

18 Q. Would that have been -- in the sense that it was
19 without recommendation or a negotiated sentence, right?

20 A. I don't understand what any of that meant.

21 Q. Were they recommending any particular sentence, that
22 they give you any particular sentence that you would be
23 getting?

24 A. Like a number? Like a twenty-five, or --

25 Q. Right.

1 A. Like I was telling my attorney earlier, I remember them
2 telling me a number, but I don't remember what it was. It
3 was twenty plus. I remember that.

4 Q. Okay.

5 A. I just know it was above twenty.

6 Q. Do you understand what those charges carried in terms
7 of sentencing?

8 A. Was never told, not once.

9 Q. You testified you were served with a notice that the
10 solicitor's office was going to seek life without parole,
11 correct?

12 A. Yes.

13 Q. Okay. And I believe you testified that the offer was
14 for armed robbery and kidnapping, but they would not seek
15 life without parole, is that right?

16 A. Could you re-ask the questions, please?

17 Q. You testified earlier that an offer was made for you to
18 plead guilty basically to everything, correct, armed robbery
19 and kidnapping?

20 A. Is this the one that was on the paper that was the
21 plea, because I was -- I was made two offers. One was on
22 paper and there was no number on that. She just verbalized
23 it, and then the second offer was right here in this
24 courtroom where you are standing. Barry Barnette leaned
25 over to her and told her a number. She leaned over and told

1 me and then I told her. That is what we was going to do and
2 I wrote down the question and she gave me the answer.

3 Q. So she told you what the plea was, what the number was?

4 A. Yes, ma'am.

5 Q. Okay. And you chose not to take it?

6 A. She told me we had an eighty percent chance of winning.

7 Q. Now, regarding your -- you testified that your attorney
8 failed to put you in a neutral lineup?

9 A. Yes, ma'am.

10 Q. Okay. But she doesn't have -- I mean, that wouldn't
11 have been helpful to you, though, correct?

12 A. Why? Why wouldn't it be helpful?

13 Q. Did you not have a -- I mean, the assailant -- I'm
14 sorry, strike that.

15 Regarding the identification of you, your attorney
16 cross-examined all the witnesses on this, correct?

17 A. (No response).

18 Q. Was her theory not that no one could actually identify
19 you --

20 A. I don't know that --

21 Q. -- as the defendant?

22 A. She never told me what her theory was. She never gave
23 me one premise or theory of what we were going for, except
24 we were going to trial to fight this because they didn't
25 have no physical evidence.

1 Q. Okay. And --

2 A. If that means what you just said?

3 Q. You were present in the courtroom during your trial,
4 correct?

5 A. Yes, ma'am.

6 Q. Okay. Did she not -- she asked the witnesses, who were
7 the victims in this case in the store, who saw the assailant
8 come in the store, and they testified to that. Your
9 attorney crossed them on whether or not they could actually
10 identify the person that came into the store, did she not?

11 A. I believe so, two people, Terry Netherton and Erica
12 Duncan.

13 Q. Okay. And do you recall -- the person that they
14 alleged robbed them was wearing a mask, correct?

15 A. Yes, ma'am.

16 Q. That covered up -- I mean, he was basically covered up
17 from head to toe, right?

18 A. Yes, ma'am.

19 Q. Okay. And do you remember her cross-examining these
20 witnesses on that?

21 A. Yes, ma'am.

22 Q. And none of them could give any specific features about
23 you?

24 A. Other than the person appeared to be taller than the
25 5'1" counter.

1 Q. Okay. But she -- and, again -- and you did testify
2 regarding the disparity and the height between -- I think
3 you said someone wrote down in the report that he was 5'7",
4 and that you are 6'1", but your attorney crossed them on
5 this, did she not?

6 A. Yes, ma'am.

7 Q. Okay.

8 A. She asked them also did they happen -- did they -- did
9 the solicitor's office show them a lineup of any sort.

10 Q. Okay.

11 A. And the answer was no, they didn't.

12 Q. Okay. And then regarding your testimony about -- you
13 testified that you told your attorney that you felt Judge
14 Couch would be biased and that you did not want to go
15 forward, is that correct?

16 A. Yes, ma'am.

17 Q. Okay. But didn't she -- do you remember being in the
18 courtroom when that was discussed on the record?

19 A. Yes, ma'am.

20 Q. Okay.

21 A. Partially. I mean, it's been five -- five years, plus,
22 ago.

23 Q. And she told the judge that she did speak with you and
24 you advised her that you did not feel there was any conflict
25 of -- a conflict of interests sufficient that would rise to

1 the level of asking the court to recuse himself. Do you
2 remember that?

3 A. I -- yes, ma'am, and -- but at the same time that was
4 why we were sitting at the -- the defense sit over there
5 arguing about the same thing, of me telling her I didn't
6 really want to go forward and she said we were okay, that
7 she didn't feel, she didn't feel, that the judge was going
8 to be biased in this case.

9 Q. Well, I mean, the judge -- who ultimately made the
10 decision about whether you are guilty?

11 A. Who made the decision of whether I was guilty?

12 Q. Right.

13 A. The jury.

14 Q. Okay. Yeah, the jury. Okay. Thank you.

15 MS. OLIVE: That's all the questions that I have.

16 THE COURT: What page were you referring to, Ms.
17 Olive?

18 MS. OLIVE: Oh, I apologize, Your Honor. That was
19 page 212 of the transcript, beginning at line two.

20 THE COURT: Okay. Any questions -- any further
21 questions, Ms. Moody?

22 MS. MOODY: No, sir, Your Honor.

23 THE COURT: Okay, sir, you may step down. Please
24 be careful.

25 Yes, ma'am.

1 MS. MOODY: No further witnesses, Your Honor, at
2 this time, and we would ask that -- I can't remember whether
3 we fully moved all those documents, Petitioner's Exhibits 1,
4 2 and 3, into evidence.

5 THE COURT: All right. If not, is there -- I
6 think -- is there any objection -- there was an objection to
7 one of the documents and it was over the objection to that
8 single document, which would be number two, but they are all
9 three in evidence.

10 MS. MOODY: Thank you, sir.

11 THE COURT: Ms. Olive?

12 MS. OLIVE: Your Honor, the State would call Kathy
13 Hodges.

14 THE COURT: Ms. Hodges, come up and be sworn,
15 please.

16 THE WITNESS: Yes, sir.

17 KATHLEEN HODGES, ESQUIRE, having been first duly
18 sworn, testified as follows:

19 THE COURT: Thank you. Please have a seat.

20 Ma'am, tell us your full name for my court
21 reporter and answer any questions that Ms. Olive might have.

22 THE WITNESS: Yes, sir, my name is Kathleen
23 Johnson Hodges, H-O-D-G-E-S, and Kathleen is with a K.

24 THE COURT: All right.

25 Yes, ma'am.

1 MS. OLIVE: May it please the court, Your Honor.

2 DIRECT EXAMINATION BY MS. OLIVE:

3 Q. Ms. Hodges, do you recall when you were appointed in
4 this case?

5 A. Yes, Mr. Stewart was interviewed -- I believe he
6 actually was arrested on October the 20th of 2009.

7 He was qualified for a public defender by the
8 magistrate judge at the time of his arrest when the initial
9 bond hearing was held, and then he was interviewed by the
10 Public Defender's office on October the 27th of 2009, and
11 the notice of appearance was filed November the 2nd of 2009,
12 at which time that was my official appointment to Mr.
13 Stewart, as well as when we filed a request for discovery..

14 Q. Do you recall about how many times that you met with
15 Mr. Stewart?

16 A. I do not. I do have notes in my file that indicate
17 that I met with him several times over the course of my
18 representation, but I do not have an actual number of times
19 that I met with him.

20 Q. Okay. And you represented him -- he was tried
21 April 11th, 2011?

22 A. Yes, the trial began April 11th of 2011, and the
23 verdict and sentencing were on April the 13th of 2011.

24 Q. So you represented him for about a year and a half?

25 A. Yes.

1 Q. Did you file any discovery motions in this case?

2 A. Yes, we did.

3 Q. Did you review all the discovery material with Mr.
4 Stewart?

5 A. Yes, I did.

6 Q. Did you discuss with him all of the charges, including
7 the elements of those charges and what his exposure would be
8 on those?

9 A. Yes, I did.

10 Q. And he was eventually served with a notice for life
11 without parole?

12 A. That is correct.

13 Q. Was that before or after any plea offers had been made?

14 A. That was actually after the first plea offer that was
15 made.

16 I have -- and my records show that on July the 29th of
17 2010, the solicitor, Mr. Barnette, offered that Mr. Stewart
18 could plead straight up to all of the charges. That would
19 be the armed robbery, as well the four kidnapping charges,
20 that there would be no recommendation whatsoever in terms of
21 sentencing, and that upon acceptance of that plea offer and
22 plea, that the solicitor's office would not file the life
23 without parole notice. They gave us a deadline which to
24 either accept that offer; and if not accepted, then it was
25 revoked and Mr. Stewart would be served life without parole.

1 Q. And did you discuss this offer with Mr. Stewart?

2 A. Yes, I did.

3 Q. And what did he decide regarding that offer?

4 A. He chose not to accept that offer.

5 Q. Did he give you a reason?

6 A. Throughout the time that I represented Mr. Stewart he
7 indicated that he was not guilty of the armed robbery, that
8 he had not committed the armed robbery, that actually the
9 co-defendant that testified against him at trial, Mr.
10 Taylor, had committed the offense, and that he was -- that
11 he was not guilty.

12 Q. So essentially he wanted to go to trial?

13 A. Yes.

14 Q. Did you discuss any possible defenses with Mr. Stewart?

15 A. Yes, we did. And, in fact, one of the defenses that we
16 discussed and then actually presented testimony on was alibi
17 defense because of the activities that -- at his dad's house
18 there had been a skunk or something that had gotten up
19 underneath the house and he was actually helping deal with
20 some issues in duct work at his father's house and we
21 actually presented that alibi as a defense at trial.

22 Q. And how -- did you deduct through testimony, how did
23 you present that defense?

24 A. Yes, that was through the testimony of other witnesses
25 that we called.

1 Q. And aside from that defense, did -- was there any --
2 did you and Mr. Stewart ever discuss any other potential
3 witnesses or leads for investigation purposes?

4 A. Yes, there were several people that Mr. Stewart told me
5 had had conversations with Mr. Taylor that were provided to
6 Mr. Stewart some indications of inconsistent statements that
7 Mr. Taylor was providing to law enforcement and to the
8 solicitor's office and what he ultimately testified to at
9 trial. So I followed up on those witnesses to be able to
10 interview them, to be able to develop my cross-examination
11 for Mr. Taylor, as well as develop any potential witnesses
12 on Mr. Stewart's behalf.

13 Q. So you did explore those leads that he gave you?

14 A. Yes, I did.

15 Q. What other kind of investigation did you do?

16 A. One of the investigators with the Public Defender's
17 office and I actually went out to the pharmacy there in
18 Boiling Springs. We took several photographs, walked around
19 the entire outside of the premises, as well as had an
20 opportunity I think to go inside the premises and be able to
21 view the scene itself so that we could have a better
22 understanding in terms of the actual crime scene, as it
23 were, in terms of, you know, what had happened and be able
24 to relate to that what was being shown on the video that we
25 knew was going to be presented to the jury, as well as some

1 of the testimony that was anticipated.

2 Q. Did you feel you had adequate time to prepare for
3 trial?

4 A. Yes.

5 Q. And I know we already spoke about the possible defense
6 you mentioned. Did you have other theories of this case?

7 A. One of the other theories was the concern, and Mr.
8 Stewart is absolutely right, there was really was no
9 physical evidence found on the scene that linked him to the
10 crime itself.

11 The witness testimony that the witnesses testified to,
12 as well as the indication in the police reports and the
13 statements that the investigators obtained were that the
14 person that came in and did the actual robbery was in a
15 hooded sweatshirt, jeans, a pair of white tennis shoes, some
16 sort of gloves and a camo mask on his face, so that all that
17 could be seen was just a portion, like a region of the eyes
18 and maybe a portion of a wrist.

19 Q. Okay. And did you -- did you bring that theory out at
20 trial?

21 A. Yes, we -- there were cross-examination that was
22 designed to show the discrepancies between what was being
23 testified to at trial and what was told to the police when
24 they did their initial report so that -- just trying to show
25 that, you know, that there was -- essentially give the jury

1 a reasonable doubt.

2 Q. Okay. And you also argued about -- did you also argue
3 about that in your closing argument?

4 A. Yes.

5 Q. Going back to what Mr. Stewart testified to.

6 Again, he was -- was -- was he going forward on those
7 kidnapping charges at this trial?

8 A. No, the kidnapping charges were not called for trial.
9 The only charge that was actually called to trial was the
10 armed robbery charge.

11 I do have an e-mail in my file shortly after the trial
12 that I e-mailed to Mr. Barnette asking if the kidnapping
13 charges were going to be dismissed, and I was told by Mr.
14 Barnette that they would be nolle prossed without prejudice.

15 Q. Without prejudice?

16 A. Yes.

17 Q. And that was -- that discussion was before trial?

18 A. That discussion was shortly after the jury returned its
19 verdict on the armed robbery charge, within a day or two
20 after the verdict and sentencing were conducted.

21 Q. Okay. And regarding the -- did you have a -- was there
22 a Jackson v. Denno hearing in this case?

23 A. Yes, there was.

24 Q. Okay. And in that hearing did you challenge the
25 voluntariness of the statement that he made?

1 A. Yes, I did.

2 There essentially is three statements that were -- that
3 the solicitor's office was seeking to introduce and we
4 challenged all three of them.

5 Q. And the judge -- what was the judge's ruling?

6 A. The judge ruled that the statements -- to the extent
7 that one could argue that Mr. Stewart was in custody and,
8 therefore, Miranda applied, that the statements were made
9 voluntarily without coercion.

10 The judge also felt that at that time that the first
11 two statements were made that he was not considered to be in
12 custody at that time and, therefore, Miranda was not
13 required.

14 Q. And is it your understanding -- do you know whether
15 that was addressed on appeal as well?

16 A. Yes, my understanding is that the issue of whether it
17 was error for those statements to have been admitted in
18 violation of the Miranda decision was thoroughly briefed and
19 ruled upon by the Court of Appeals.

20 Q. You were present in the courtroom when Mr. Stewart
21 testified earlier?

22 A. Yes, I was.

23 Q. Do you recall him testifying about the note in which
24 you -- which he alleges that you wrote down eighty to eighty
25 percent?

1 A. Yes.

2 MS. OLIVE: Your Honor, may I approach?

3 THE COURT: Yes, ma'am.

4 BY MS. OLIVE:

5 Q. Ms. Hodges, I'm showing you Court's Exhibit No. 3 (sic)
6 for --

7 A. Yes.

8 Q. Plaintiff's Exhibit No. 3 sic). Do you recognize that?

9 A. I do.

10 Q. Do you recognize any of that writing as being your own
11 handwriting?

12 A. I do.

13 Q. Okay. And which color ink would that be?

14 A. My handwriting would be in the blue ink that's kind of
15 written on the far right-hand side of the page in somewhat a
16 diagonal across.

17 Q. Does it appear to be altered in any way?

18 A. I would argue that it does appear to be altered.

19 Whenever a client asks me "what are the chances of
20 winning or what are my chances of prevailing, or what -- you
21 know, what are our chances," I mean, my standard response
22 has always been "it's 50/50. I mean, either the jury will
23 convict you or the jury won't convict you."

24 And I tend to also kind of follow that up with saying
25 "I'm not trying to be a smart aleck, but, you know, I mean,

1 it is 50/50."

2 And what I see written here is -- what I see is the
3 50/50 in what I would recognize as my handwriting, the 8's
4 are not how I make my 8's. I actually do two circles on top
5 of each other for 8's and that's not what this appears to me
6 to be in my handwriting. The rest of it, this in the blue
7 ink on the right-hand side is.

8 Q. Do you recall telling him eighty to eighty percent?

9 A. No, I absolutely do not recall telling him eighty to
10 eighty percent because I wouldn't.

11 Q. Okay. Ms. Hodges, can you address Mr. Stewart's
12 allegation that you failed to put him in a neutral lineup?

13 Is that something that you would normally do?

14 A. No, that's not something that I normally would do.

15 If perhaps there were some either unique
16 characteristics of a client and some testimony regarding
17 that, then, you know, it might be something that we could
18 have explored doing, but given the fact that everyone was
19 saying he was covered up -- the person that entered the
20 store was covered up from head to toe. All they could see
21 was basically some eyes and a wrist.

22 I think Mr. Netherton testified that he knew it was
23 male simply because of the tenor of the voice.

24 That, you know -- asking for a lineup to give somebody
25 the ability to see my client's face prior to trial, get a

1 better impression to then be able to actually do a positive
2 in-court identification is not something that I would have
3 thought would have been in his best interests.

4 Q. And do you recall -- do you recall whether you
5 cross-examined the witnesses about the identification of Mr.
6 Stewart?

7 A. To be best of my recollection, yes, I did.

8 Q. Do you recall whether you tried to draw a distinction
9 between the description of his height that was initially
10 given versus his actual height?

11 A. Yes, I did.

12 Q. Do you recall discussing with Mr. Stewart the conflict
13 of interests issue regarding Judge Couch?

14 A. Yes. And -- yeah, it was not an issue that I
15 remembered distinctly until reading and re-reading the
16 transcript, but I do remember Judge Couch mentioning the
17 potential for a conflict.

18 The way that I understand that issue is that, you know,
19 the judge's brother was president of a division of James
20 Smith Corporation. The QS-1, which actually owns the
21 pharmacy, was another division of the same corporation. My
22 understanding is that the brother did not have any direct
23 contact or anything dealing with QS-1 or the pharmacy
24 itself, but because they were all part of a division of a
25 larger -- both were divisions or part of a larger

1 corporation, the judge brought to it our attention.

2 I went back and talked to Mr. Stewart about that issue.
3 You know, quite frankly it was his decision to make. If he
4 felt that, you know, he wanted -- that there was a conflict
5 and he wanted to go forward -- or not go forward with the
6 trial and ask the court to recuse itself, then, you know, I
7 would have been in the courtroom asking for that to have
8 happened. The transcript does not reflect that. The
9 transcript reflects that we had a conversation, that he was
10 willing to go forward. In fact, the court asked him and he
11 confirmed that.

12 Q. So he never told you that he didn't want to go forward?

13 A. No.

14 Q. Thank you, Ms. Hodges.

15 MS. OLIVE: That's all the questions that I have.

16 THE COURT: Okay.

17 MS. OLIVE: Please answer any questions of Ms.
18 Moody.

19 THE COURT: Ms. Moody.

20 MS. MOODY: Thank you, Your Honor.

21 THE COURT: Yes, ma'am.

22 MS. MOODY: May it please the court?

23 THE COURT: Yes, ma'am.

24 CROSS EXAMINATION BY MS. MOODY:

25 Q. Good afternoon, Ms. Hodges.

1 A. Good afternoon.

2 Q. As to Mr. -- excuse me, as to Mr. Stewart's indictment
3 and your discussion with him initially, when you all
4 discussed the indictment, what, if anything, did you all
5 discuss in terms of the body of how they describe the actual
6 armed robbery?

7 A. Well -- and I don't have an independent recollection of
8 that specific discussion or any notes, but ordinarily what I
9 do is I go through the indictment of showing this is what is
10 alleged in the indictment; this is what the statute says, or
11 common law says, depending on what type of crime was being
12 alleged in the indictment; these are what the elements are
13 and whether -- essentially whether the indictment has
14 alleged all the elements of the crime or not.

15 Q. Okay. And so in terms of the indictment that you were
16 presented at trial, you didn't see anything to move to quash
17 those indictments or the language didn't appear odd to you?

18 A. That's correct, I did not see anything within the
19 indictments that appeared to me to be -- that would render
20 the indictments defective.

21 I did notice that the indictment for the armed robbery
22 does use the word feloniously. It does not use the words
23 malice aforethought or willfully, but I don't necessarily
24 feel that that's going to rise to the level of defect.

25 Q. Okay.

1 A. That would be an issue for the court to determine.

2 Q. Okay. And as to the plea offer that was made, and I
3 took notes of what you were saying, the plea offer in this
4 was originally plead straight up to all the charges, there
5 was no LWOP on the table?

6 A. Correct.

7 Q. And then --

8 A. That was in July of 2010.

9 Q. Okay. And then when it came down to like, you know,
10 trying to move the case along, they then later served an
11 LWOP notice?

12 A. That's correct.

13 Q. Do you recall how that was served? Were you present
14 with him?

15 A. I was not present with him when it was served.

16 Ordinarily the solicitor's office will send one, if not
17 two, of their investigators over to the jail and serve the
18 defendant at the jail notice and then I'm -- essentially
19 while they are serving him I'm getting served.

20 Q. Okay. And so when you got served and you talked about
21 it with Mr. Stewart, what exactly did you explain to him
22 about LWOP? Did you -- well, go ahead.

23 A. Sure. To the best of my recollection what I would
24 explain to him about LWOP was that because the solicitor's
25 office had served notice to seek life without parole, that

1 upon conviction of a qualifying offense, which armed robbery
2 would have been a qualifying offense, that the court would
3 have absolutely no discretion in terms of sentencing, that
4 the only thing that the court could sentence at that point
5 was life without parole.

6 Q. Okay. And so was that the only discussion that you
7 had, do you recall?

8 A. We had -- we discussed it several times. I mean, there
9 throughout the course of my representation I do have notes
10 of things that Mr. Stewart was asking me to try and approach
11 the solicitor's and the sheriff's office with in terms of
12 information that he might have to be able to reduce the
13 sentence or be able to reduce the charges. Those were
14 things that -- you know, I have notes showing that, you
15 know, he kind of would get some counter-offers I would like
16 to plead to, you know, this amount of time, or a range of
17 this amount of time, and, you know, and be able to provide
18 some of this information. Neither the solicitor's office or
19 the sheriff's office were interested in that information.

20 Q. So is it your testimony that he understood what LWOP
21 meant, that it meant mandatory sentence of life without
22 parole?

23 A. That's correct. That was my understanding that was his
24 understanding --

25 Q. Okay.

1 A. -- that he was clear on that.

2 Q. Okay. And so then in terms of -- you indicated that
3 the counter-offer -- so he got the life without parole and
4 then he would offer information as to other events that
5 might have taken place totally unrelated to the armed
6 robbery?

7 A. Not necessarily totally unrelated to the armed robbery.
8 It did involve others that were involved in the distribution
9 of pills throughout the Upstate and Piedmont of North
10 Carolina.

11 Q. I'm saying like after this armed robbery, you are
12 saying it had something to do with what was stolen from this
13 pharmacy, or did it --

14 A. There would have been -- there would be have been
15 testimony -- there would have been testimony that he would
16 be able to provide in terms of what was stolen from the
17 pharmacy, the co-defendant's greater involvement in that
18 than what the co-defendant testified to, and others that
19 were involved in the distribution of pills illegally.

20 Q. Okay. But during that time when he was offering all of
21 this information, and obviously he's countering with this --
22 you tell me if this is correct. He's countering with
23 another number of years that he's willing to plead to, or
24 just dismissal of all of the charges?

25 A. He was countering with essentially a range of years

1 that he was willing to plead to and in exchange for either
2 reduction of the charges or dismissal of some of the
3 charges.

4 Q. Okay. And so -- well, in terms of making these
5 offerings or counter-offers, did it ever get to the point
6 where they came down on the years and removed the LWOP, or
7 it's just the LWOP never came off the table?

8 A. Well, the final offer that I have a record of was the
9 one that has been admitted that was the March 25, 2011
10 offer, which was plead to one count of armed robbery and one
11 count of kidnapping, LWOP, or life without parole, would be
12 off the table and the State would not proceed against Leeann
13 Nichols, who my recommendation is is Mr. Stewart's sister,
14 with any charges.

15 Q. Okay. And you communicated that to Mr. Stewart?

16 A. Yes, I did.

17 Q. And at that point when you communicated all that, did
18 you all have any meaningful conversation about that offer,
19 the chance to being convicted at trial and the LWOP is
20 there?

21 A. Yes.

22 Q. Okay. And what was his response?

23 A. His response was that, you know, essentially we had to
24 accept that offer by five o'clock that day. And if we did,
25 that he could plead in front of whatever judge of his

1 choice; or if it was accepted after five p.m. that day, it
2 would have be pled in front of Judge Couch.

3 I have both an indication that he was not interested in
4 that offer. He didn't -- he still didn't want to accept
5 that offer, as well as I had communication from family
6 members that had indicated that he was not interested in
7 that offer.

8 Q. Do you have specific family member names?

9 A. It would be Billy Stewart.

10 Q. And who is Billy Stewart?

11 A. His father.

12 Q. Okay. So you all -- he said that he doesn't want the
13 offer and you all proceed to trial, and there was testimony
14 earlier that Mr. Barnette made the offer again?

15 A. There was testimony earlier that Mr. Barnette made an
16 offer again, or that he offered a number during the midst of
17 the trial. I just reviewed my trial notes and I did not see
18 that, so if he -- I don't have a recollection of that
19 happening, so I can't confirm or deny that.

20 Q. At any point during trial did he indicate that he
21 wanted to plead?

22 A. Not to my recommendation, no, ma'am.

23 Q. And if he indicated during the trial that he wanted to
24 plead, would the LWOP be off the table?

25 A. I honestly don't know. That would have been something

1 that I would have had to have, you know, talked to Mr.
2 Barnette about.

3 There was some colloquy in the beginning of the trial
4 transcript that talks about the plea offers and things that
5 had been rejected and I do not remember at that point
6 whether Mr. Barnette officially put on the record that all
7 offers were revoked or not.

8 Q. Okay. So y'all go on through with the trial and at
9 this point -- at some point during the trial, which I think
10 was alluded to page 212, the conflict of interests. Your
11 testimony is that your client, even outside the courtroom,
12 had no problems with Judge Couch with presiding or
13 continuing to preside over the trial?

14 A. That's my recollection, yes, ma'am.

15 Q. And so what you said on the record is what was
16 discussed with your client and there was never any question
17 as to whether he wanted to go forward or not with Judge
18 Couch?

19 A. That's correct.

20 Q. As to the note that I believe you said was the eighty
21 percent --

22 A. Yes.

23 Q. -- chance of winning, you indicated that it was -- you
24 don't write that way in terms of how you make your 8's?

25 A. Correct.

1 Q. So you never tell your client whether or not they
2 should like continue on down the road in a case like this?

3 A. I mean, I can never tell anybody, you know, if the
4 ceiling is going to fall in in the next five minutes or so.
5 I can tell them the chances are it's probably not going to
6 happen, but I also -- I mean, I always indicate to them
7 that, you know, it is totally -- once the trial starts, "it
8 is totally up to you whether we continue with the trial, or
9 we don't continue with the trial. And, you know, in terms
10 of asking me your chances about whether you are going to win
11 or prevail, I mean, it's 50/50 if the jury does convict you
12 or they don't." And, you know -- and --

13 I mean, I kind of tell them, and in this case it was.
14 It was a credibility question of, you know, who does the
15 jury believe, the State's witnesses or do they believe the
16 defense witnesses.

17 Q. And did you think that the alibi witnesses that you had
18 come in to testify, did you think they were strong enough?

19 A. They -- well, they were who they were. And so, I mean,
20 you know, they were the alibi witnesses that we had.

21 Q. So what do you mean by they were who they were?

22 A. Well, I mean, you know, I mean, each witness in this
23 case, you know, had some sort of issue in terms of some
24 credibility issues. Their credibilities -- there were
25 credibility issues on, you know, the co-defendant who is

1 testifying that based on, you know, an expectation of
2 leniency from the solicitor's office.

3 You know, there were some concerns in terms of, you
4 know, some of the, you know, other family members, you know,
5 of the defendant that are testifying, you know, because
6 obviously they are testifying, you know, in behalf of, you
7 know, their loved one.

8 You know, one of the State's witnesses had basically
9 been telling us, and us meaning me and Mr. Stewart, all
10 along that he was not there, he was not guilty, and then
11 somehow miraculously on the eve of trial to all of the
12 sudden he becomes and turns into a State's witness.

13 So, you know, I mean, there were credibility issues to
14 share.

15 Q. All right. So you go on with the trial, and at the
16 trial during this time then you -- the LWOP is still on the
17 table. You are clear your client understands that if he
18 doesn't request a withdrawal from this trial and plead?

19 A. That's correct.

20 Q. Okay.

21 MS. MOODY: I beg the court's indulgence.

22 THE COURT: Yes, ma'am.

23 (Off the record).

24 (Back on the record).

25 MS. MOODY: No further questions for this witness.

1 THE COURT: All right. Anything, Ms. Olive?

2 MS. OLIVE: No, Your Honor.

3 THE COURT: All right. Thank you.

4 You may step down. Please be careful.

5 THE WITNESS: Yes, sir. Thank you.

6 THE COURT: Thank you.

7 MS. OLIVE: Your Honor, that would be the State's
8 showing.

9 THE COURT: Okay. Anything in rebuttal or reply,
10 Ms. Moody?

11 MS. MOODY: I beg the court's indulgence.

12 THE COURT: Yes, ma'am.

13 (Off the record).

14 (Back on the record).

15 MS. MOODY: Nothing further, Your Honor.

16 THE COURT: Okay.

17 All right. That would conclude this hearing.

18 Now, Mr. Stewart, the way we do this is -- you may
19 remain seated. The way we do this is we got to go do some
20 reading, we being me and my law clerk and I, who is seated
21 right here to my right, and we are going to do some reading
22 and some studying and read some cases and some other things,
23 so it's going to take us, you know, a little bit for us to
24 do some of that because I have got another hearing to get
25 to.

1 THE PETITIONER: Yes, sir.

2 THE COURT: Whenever we make a decision, I will
3 send that to your lawyer and to the government's lawyer
4 simultaneously. And when I say I, I mean my law clerk will,
5 okay?

6 THE PETITIONER: Yes.

7 THE COURT: She will send an e-mail. We do
8 everything by e-mail, so she will send it to your lawyer and
9 to the government's lawyer at the same time. Okay?

10 THE PETITIONER: Yes, sir.

11 THE COURT: And then your lawyer will be in touch
12 with you, okay?

13 THE PETITIONER: Yes, sir.

14 THE COURT: All right. Thank you Mr. Stewart.

15 THE PETITIONER: Thank you, sir.

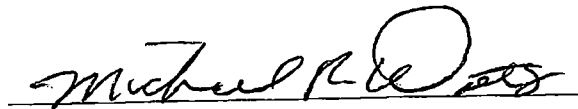
16 (END OF REQUESTED TRANSCRIPT OF RECORD)
17
18
19
20
21
22
23
24
25

CERTIFICATE

I, the undersigned, Michael R. Watts, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and the evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for SPARTANBURG County, South Carolina, on the 23rd day of March, 2016.

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

JULY 8, 2016



Michael R. Watts
Circuit Court Reporter

Offer:

Plead to one count of Armed Robbery and one count of Kidnapping. Life without parole will be taken off the table and the State will not proceed against Lee Ann Nichols. If offer is accepted by 5 pm today, March 25, 2011, Stewart can plead in front of judge of his choice. If offer is accepted after 5 p.m. today, the plea will have to go in front of Judge Couch who is the trial judge for next week.

↑ ~~Lee Ann Nichols~~ ~~Kidnapping~~

At the time, The State instructs
State to not proceed - they know
it wasn't me. I was in the car
to take Ann, it was the wrong M.O.
And the person at the time of the
I know to do this to you I need the money

- 1- Direct evidence - I need
- 2- Circumstantial
evidence to me + bids to put





Percentage of winning No Bullshit?

Will you Be Able to talk
to Dad Afterward I HAVE
A visit tomorrow At 8pm Also

~~10/23/88~~
NO

you're doing Great! ☺

80% 80%
not his
Smart
not in
all over
we wish
they
split
450
back 151

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

Marion Earl Stewart, #221024,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE SEVENTH JUDICIAL CIRCUIT

Case No. 2014-CP-42-2767

ORDER OF DISMISSAL

2016 MAY 31 AM 9:24
M. HOPE ELACHILEY

This matter comes before the Court by way of an Application for Post-Conviction Relief filed July 10, 2014. Respondent made a Return on or about April 9, 2015. The Court convened an evidentiary hearing into the matter on March 23, 2016, at the Spartanburg County Courthouse. Applicant was present at the hearing and represented by Leah B. Moody, Esquire. Alicia A. Olive, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsel, Kathleen J. Hodges, Esquire, ("Counsel") also testified. The Court had before it a copy of the trial transcript, the records of the Spartanburg County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the pleadings, the return, and the exhibits introduced at the hearing. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. In January 2010, the Spartanburg County Grand Jury indicted Applicant for Armed Robbery (2010-GS-42-494). Kathleen J. Hodges, Esquire, represented Applicant. On April 13, 2011, Applicant proceeded to

trial before the Honorable Roger L. Couch and a jury. The jury found Applicant guilty as indicted. Judge Couch sentenced Applicant to life imprisonment without the possibility of parole pursuant to S.C. Code Ann. § 17-25-45, based upon Applicant's prior conviction of a most serious offense.

Applicant filed a timely notice of appeal. Katherine Hudgins, Esquire, of the Office of Appellate Defense, perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on December 12, 2012. State v. Stewart, Op. No. 2012-UP-654 (S.C. Ct. App. filed June 30, 2014). Applicant filed a petition for writ of certiorari in the Supreme Court of South Carolina. Applicant's petition was denied on June 11, 2014. The Remittitur was returned to the Circuit Court on June 26, 2014.

II. ALLEGATIONS

In his application, Applicant alleged he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel.
2. "Conflict of Interest"
3. "Miranda Rights Violated"

At the evidentiary hearing, Applicant alleged that Counsel was ineffective for (1) failing to properly advise Applicant regarding a plea offer; (2) failing to challenge the indictment; (3) failing to challenge the voluntariness of Applicant's statement; (4) failing to place Applicant in a neutral line-up, and (5) failing to request the recusal of the trial judge.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the evidentiary hearing. The Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. The

RKK

NO HOPE BLA...
2016 MAY 31 AM 9:14

Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80.

A. Summary of Testimony

Applicant testified that Counsel was appointed at his preliminary hearing but that he did not see her until much later. Applicant testified that his grounds for his PCR application were that Counsel allowed him to be indicted where the language in the indictment was incorrect. Applicant testified the indictments for the four kidnapping charges should have said "with malice aforethought." Applicant testified that he was taken to the sheriff's office and was asked questions. Applicant testified that he felt his statements should not have been admitted. Applicant admitted that Counsel argued the voluntariness of his statements at trial and that it was also raised and ruled upon in his direct appeal. Applicant testified that Counsel went over all documents with him. Applicant testified that Counsel failed to inform him of a plea offer. Applicant testified that the plea offer was to plead to armed robbery and kidnapping straight up and the State would not seek life without parole. Applicant testified that he had to accept the plea by 5:00 PM. Applicant testified he did not think there was enough evidence. Applicant agreed that he was not tried for kidnapping. Applicant introduced an exhibit showing a handwritten note that he alleged was Counsel's handwriting. Applicant testified the note showed that Counsel told Applicant he had an "80%-80%" chance of succeeding at trial. Applicant testified he did not understand what the life without parole notice was. He testified he did not know that he would receive a mandatory sentence of life imprisonment without the possibility of parole if he was convicted. Applicant testified that he did not remember whether Counsel explained what life without parole meant, but that there was no way he could have understood. Applicant testified that Counsel failed to put him in a neutral line-up. However, Applicant also testified that Counsel

cross-examined the witnesses regarding the identity of the assailant. Applicant testified the officer's report stated that the assailant was 5'7" or 5'8" but that he was 6'1" and weighed 187 pounds. Applicant also testified that Counsel cross-examined the witnesses on the height and weight discrepancies. Applicant testified he felt that the trial judge should have recused himself because he had some relation to the victim. Applicant testified he did not want to go forward with that judge. Applicant testified he told Counsel that he felt it would be biased.

Counsel testified that she represented him for about a year and a half. Counsel testified she met with Applicant several times. Counsel testified that the first plea offer was made July 29, 2010, and a final offer was made March 25, 2011, in which the solicitor offered that Applicant could plead straight up with no recommendation to one count of armed robbery and one count of kidnapping, and that life without parole would be off the table. Counsel also testified that as part of that plea deal, the solicitor would drop charges against Applicant's sister. Counsel testified that there was a deadline of 5:00PM to accept the plea. Counsel testified that before Applicant could have had his judge of choice, but after it would have to be in front of Judge Couch. Counsel testified that she discussed the plea with Applicant, but that he chose not to accept. Counsel testified that the solicitor said he would call the kidnapping charges after the armed robbery charge. Counsel testified Applicant indicated he was not guilty. Counsel testified that Applicant's codefendant testified against him at trial. Counsel testified that she discussed Applicant's potential defenses with him, including an alibi defense. Counsel testified that Applicant gave her the names of several people but that they had made inconsistent statements and had credibility issues. Counsel testified that as part of her investigation of the case she went to the pharmacy where the robbery occurred and walked around the store and took photographs, watched the video, and interviewed potential witnesses. Counsel testified that her theory was that

RKK

there was no physical evidence that linked Applicant to the crime. She testified that witnesses testified that the assailant was wearing a hooded sweatshirt, jeans, white tennis shoes, and a mask. Counsel testified that her cross-examination was designed to point out the discrepancies in the identification of the assailant. Counsel testified that Applicant never told her he did not want to continue with the proceedings with the trial judge. Counsel testified if she felt there was a conflict of interest she would have asked the judge to recuse himself.

Counsel testified she did not see anything in the indictment that would render it invalid. Counsel testified that the plea offer made in July 2010 was straight up to all charges and the State would not seek life without parole. Counsel testified that regarding advising Applicant about life without parole, she would have explained that the trial judge would have no discretion in sentencing and would have to sentence him to life without parole. Counsel testified they discussed this several times. Counsel testified she tried to discuss a range of sentencing with the sheriff's office and solicitor's office but that neither was interested. Counsel testified that Applicant maintained his innocence. Counsel testified that the defense witnesses had credibility issues. Counsel testified that on the eve of trial one of the witnesses turned into a State's witness. Counsel reviewed Applicant's exhibit showing her handwriting that stated 80-80% and she testified that it looked like her handwriting but that she thinks it may have been altered. She testified that she always tells her clients that the jury decides and that the chances of succeeding at trial are 50-50%.

B. Ineffective Assistance of Trial Counsel

In a PCR action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so

RKK

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. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. Courts must strongly presume that trial counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). The Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. 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.

This Court finds Applicant has failed to satisfy his burden of proving Counsel was ineffective. The specific allegations of ineffective assistance that were raised at the hearing are addressed below.

Failure to properly advise Applicant regarding a plea offer

During plea negotiations defendants are "entitled to the effective assistance of competent counsel." Lafler v. Cooper, 132 S. Ct. 1376, 1384 (2012) (citing McMann v. Richardson, 397

U.S. 759, 771 (1970)). If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it. Id. In the context of pleas a defendant must show the outcome of the plea process would have been different with competent advice. Id. If that right is denied, prejudice can be shown if loss of the plea opportunity led to a trial resulting in a conviction on more serious charges or the imposition of a more severe sentence. Lafler, 132 S. Ct. at 1387.

This Court finds Counsel relayed the correct statement of law to Applicant regarding his options to accept the plea or proceed with a jury trial. Counsel testified that Applicant maintained his innocence and that he did not wish to accept a plea offer. Counsel testified she discussed all plea offers with Applicant and her notes reflect that she pursued counter offers on Applicant's behalf and attempted to negotiate a more favorable offer. Counsel testified that at that point neither the solicitor's office nor the sheriff's office was interested in offering a plea. Counsel testified she met with Applicant on several occasions over the course of a year and a half and discussed the life without parole notice after Applicant rejected the plea offer. Counsel testified that it is her usual and customary practice to explain the nature of a notice of life without parole to her clients. This Court finds Applicant has failed to show that Counsel failed to relay any plea offers to him or failed to adequately advise Applicant on the nature of a notice of life without parole. Accordingly, the Court finds Applicant has failed to show any deficiency in Counsel's performance in advising him of any plea offers. Furthermore, this Court finds Applicant has failed to demonstrate that any alleged deficiency prejudiced him because Applicant maintained his innocence and did not wish to plead guilty. Therefore, this allegation is denied and dismissed.

Failure to challenge indictment

Applicant testified Counsel should have prevented him from being indicted and alleged that Counsel should have challenged the indictment. An "indictment is a notice document." State v. Gentry, 363 S.C. 93, 102, 610 S.E.2d 494, 500 (2005). In considering a timely challenge to the sufficiency of an indictment, the trial judge should determine whether:

- (1) the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon; and (2) whether it apprises the defendant of the elements of the offense that is intended to be charged.

Id. at 102-103, 610 S.E.2d at 500 (citing State v. Wilkes, 353 S.C. 462, 578 S.E.2d 717 (2003); see also S.C. Code Ann. § 17-19-20 (2003) (sufficiency of indictment)).¹ A court reviewing an indictment for sufficiency should consider the indictment "on its face," and consider the events at trial." State v. Reddick, 348 S.C. 631, 636, 560 S.E.2d 441, 443 (Ct. App. 2002). The court must also observe the indictment with a practical eye in view of all the surrounding circumstances. Gentry, 363 S.C. at 103, 610 S.E.2d at 500 (citing State v. Adams, 277 S.C. 115, 283 S.E.2d 582 (1981)). In other words, a court should examine "the totality of the circumstances" to determine if Petitioner was cognizant of the crimes for which he was charged. Reddick, 348 S.C. at 636, 560 S.E.2d at 443. Moreover, a challenge to the indictment on the ground of insufficiency must be made before the jury is sworn. Gentry, 363 S.C. at 102, 610 S.E.2d at 500; S.C. Code Ann. § 17-19-90.

This Court finds that Counsel made no errors in advising Applicant on the sufficiency of the indictment and Applicant produced no evidence to support his allegations that the indictment

¹ Section 17-19-20 provides:

Every indictment shall be deemed and judged sufficient and good in law which, in addition to allegations as to time and place, as required by law, charges the crime substantially in the language of the common law or of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood and, if the offense be a statutory offense, that the offense be alleged to be contrary to the statute in such case made and provided.

S.C. Code Ann. § 17-19-20.

is defective. Counsel testified that she reviewed the indictment and advised Applicant that she did not see any errors to support a motion to quash and that the language contained in the indictments was sufficient to place Applicant on notice of the charges against him. Counsel also testified that it is her belief that the omitted words do not rise to the level of the indictment being defective. Accordingly, this Court finds Applicant has failed to satisfy his burden of proving that Counsel's performance in not challenging the sufficiency of the indictment was deficient.

Furthermore, Applicant has failed to show that a challenge to the indictment would have been successful. This Court finds there is no reasonable probability that had Counsel challenged the sufficiency of the indictment, the result of the trial would have been different. Accordingly, this Court finds Applicant has failed to satisfy his burden of proving he was prejudiced by any alleged error of Counsel. Therefore, this allegation is denied and dismissed.

Failure to place Applicant in a neutral line-up

Applicant testified Counsel should have placed him in a neutral line-up. This Court finds this allegation is without merit. Counsel testified no one could identify the assailant because there was clothing almost completely covering his body. The testimony of the witnesses at trial was largely consistent with their prior statements. To the extent there were inconsistencies, Counsel brought those out on cross-examination. Applicant acknowledged that Counsel cross-examined witnesses regarding identification and performed her duties to illicit testimony to refute witnesses who testified that Applicant was the assailant. Applicant has failed to show any deficiency in Counsel's performance in not conducting a neutral line-up. Further, the Court finds that Applicant failed to substantiate this allegation with any evidence of probative value demonstrating how the failure of Counsel to conduct a neutral line-up prejudiced the defense or how the lineup would have yielded a different result at trial. See Palacio v. State, 333 S.C. 506,

RKK

512, 511 S.E.2d 62, 66 (1999) (citing Jackson v. State, 329 S.C. 345, 349, 495 S.E.2d 768, 770 (1998) ("Mere speculation and conjecture on the part of respondent is insufficient.")). Accordingly, this Court finds that Applicant has failed to demonstrate deficiency in Counsel's performance or any resulting prejudice with regard to this allegation. Therefore, this allegation is denied and dismissed.

Failure to investigate

Applicant alleged Counsel failed to properly investigate. This Court finds this allegation is without merit. To show ineffective assistance in this regard, Applicant must present evidence to show what counsel could have discovered had she been more fully prepared for the trial. Jackson v. State, 329 S.C. 345, 354, 495 S.E.2d 768, 772 (1998). Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result. Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)). Furthermore, "[A]pplicant's mere speculation" as to what an additional investigation would have shown "cannot by itself, satisfy the applicant's burden of showing prejudice." Glover v. State, 318 S.C. 496, 499, 458 S.E.2d 538, 540 (1995). Here, Counsel reviewed all the evidence in the case, including eye-witness statements. She also reviewed the State's evidence with Applicant prior to trial. This Court finds Counsel properly investigated and prepared for trial, exploring and explaining possible defenses, and adequately conferred with Applicant. Counsel testified that she went over and presented an alibi defense at trial. Counsel also testified that she interviewed witnesses and went to the pharmacy, took pictures, viewed the scene, and walked the perimeter. Such an investigation was reasonable under the circumstances. Edwards v. State, 392 S.C. 449, 457, 710 S.E.2d 60, 65 (2011) (citing Daniels v. State, 676 S.E.2d 13 (Ga.

KKK

2009)). Accordingly, this Court finds Applicant has failed to satisfy his burden of proving Counsel's performance in conducting an investigation was deficient. Furthermore, Applicant has failed to produce any evidence to indicate what an additional investigation would have shown or how any additional investigation would have affected the outcome of trial. See Moorehead, 329 S.C. at 334, 496 S.E.2d at 417 (finding applicant cannot prove ineffective assistance where allegation supported only by mere speculation as to result); Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998) ("Respondent failed to present any evidence of what counsel could have discovered or what other defenses respondent would have requested counsel pursue had counsel more fully prepared for the trial."). Therefore, this allegation is denied and dismissed.

Failure to challenge voluntariness of Applicant's statement

This Court finds this allegation is without merit. This Court finds the record is dispositive as to this allegation. Both Counsel and Applicant acknowledged that Counsel moved to suppress Applicant's statements through a pretrial Jackson v. Denno² hearing. Ultimately, the trial judge admitted all three statements and the ruling was affirmed on appeal. Accordingly, not only did Counsel challenge the admissibility of the statements, but the issue was fully litigated at trial and in Applicant's direct appeal. See Foran v. USAA Cas. Ins. Co., 311 S.C. 189, 427 S.E.2d 938 (Cl. App. 1993) ("A final judgment on the merits in a prior action bars subsequent consideration of those issues in a new action."); Bell v. Bennett, 307 S.C. 286, 414 S.E.2d 786 (Cl. App. 1992) ("*Res judicata* prohibits subsequent actions by the same parties on the same issues."). Therefore, this Court finds Applicant has produced no evidence with regard to this allegation and it is denied and dismissed.

Failure to request recusal of the trial judge

Applicant alleged that the trial judge's failure to recuse himself violated Applicant's due process rights. Based on the testimony at the hearing, this Court interprets this as an allegation that Counsel was ineffective for not asking the trial judge to recuse himself. This Court finds Applicant has failed to show that Counsel's performance in not requesting a recusal was deficient.

"Pursuant to Canon 3(E)(1)(a) of Rule 501, SCACR, a judge should disqualify himself . . . in a proceeding in which the judge's impartiality might reasonably be questioned. It is not enough for a party seeking disqualification to simply allege bias or prejudice. The party must show some evidence of that bias or prejudice. The alleged bias or prejudice must stem from an extra-judicial source and result in a decision based on information other than what the judge learned from his or her participation in the case as a judge."

State v. Jackson, 353 S.C. 625, 627, 578 S.E.2d 744, 745 (Ct. App. 2003).

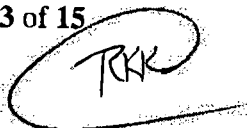
Counsel testified, and the transcript reflects, that the trial judge's brother was the president of the drug division of JM Smith Corporation, of which QS1 Data Systems (the owner of the pharmacy in question) was a division. The trial judge also advised that he had no financial interest in and no direct contact with QS1 or the pharmacy. The trial judge stated on the record that he did not see a conflict in the matter. Counsel advised the trial judge that she had discussed the matter with Applicant and stated that he advised her he did not feel there was any conflict of interest and did not wish to seek recusal. (Tr. p. 212). The trial judge then asked Applicant if what Counsel had said was true and Applicant said "Yes, sir." (Tr. p. 212). At the PCR hearing, Applicant testified he felt that the trial judge should have recused himself because he had some relation to the victim. Applicant testified he did not want to go forward. Applicant testified he told Counsel that he felt it would be biased. Counsel testified that she discussed the matter with Applicant and that Applicant never told her he did not want to continue with the proceedings.

² 378 U.S. 368 (1964).

with the trial judge. Counsel testified if she felt there was a conflict of interest she would have asked the judge to recuse himself. Applicant produced no evidence that any bias or prejudice stemmed from the trial judge's loose connection with the pharmacy, nor has he shown that such alleged bias or prejudice resulted in a decision based on other than what he learned from his participation in the case as a judge. See State v. Jackson, 353 S.C. at 627, 578 S.E.2d at 745. Furthermore, Applicant confirmed at the trial, on the record, that he told Counsel he did not feel there was a conflict of interest. State v. Stroman, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984) (A party "cannot complain of an error which his own conduct has induced."). Accordingly, this Court finds applicant has failed to satisfy his burden of proving that Counsel's performance in not requesting a recusal was unreasonable. Based upon Counsel's testimony, the trial judge's statements, and Applicant's own statement to the trial judge, this Court finds there is no reasonable probability that but for the alleged deficiency, the outcome of the proceeding would have been different. Therefore, this Court finds Applicant has failed to satisfy his burden of proving either prong of Strickland, and this allegation is denied and dismissed.

C. Due Process Violation

Applicant alleged that the trial judge's failure to recuse himself violated Applicant's due process rights. This Court finds Applicant raised this allegation as an ineffective assistance claim, which is addressed above. To the extent Applicant attempted to raise the issue as a violation of due process, this Court finds this is a direct appeal issue and cannot be raised in an application for post-conviction relief. See Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993) ("A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal."). Regardless, this Court finds Applicant has failed to produce any evidence in support of this allegation. Accordingly, this allegation is without merit and is therefore denied



2016 MAY 31
 10:59 AM
 M. HOPKINS
 CLERK

and dismissed.

D. Violation of Miranda Rights

This Court finds this allegation is barred by the doctrine of *res judicata*. *Res judicata* prohibits subsequent actions by the same parties on the same issues. Bell v. Bennett, 307 S.C. 286, 414 S.E.2d 786. A final judgment on the merits in a prior action bars subsequent consideration of those issues in a new action. Foran v. USAA Cas. Ins. Co., 311 S.C. 189, 427 S.E.2d 918. *Res judicata* also bars any issues that could have been raised in the former action. Id. As discussed above, this matter was addressed to the trial court in a Jackson v. Denno hearing, the trial court ruled on the issue, and the ruling was affirmed in Applicant's direct appeal. Therefore, Applicant had a full opportunity to litigate these allegations in his direct appeal. Accordingly, pursuant to Rule 12(b)(6), SCRCP, this Court finds that this claim is barred by *res judicata*, and this allegation is therefore denied and dismissed.

E. All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this order, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

IV. CONCLUSION

Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

RKK

2016 MAY 31 AM 9:24
H. HOE BLANCHLEY

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 27 day of May

R. Keith Kelly
 THE HONORABLE R. KEITH KELLEY
 Presiding Judge
 Seventh Judicial Circuit

Spartanburg South Carolina

M. HOPE BLADEY
 2016 MAY 31 AM 9:24

Spartanburg County

Spartanburg County Court House
180 Magnolia Street
P. O. Box 3483
Spartanburg, SC 29304-3483



Phone (864) 596-2591
Fax (864) 596-2239

M. Hope Blackley
Clerk of Court

June 2, 2016

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

Marion Earl Stewart

Applicant

22024

7TH JUDICIAL CIRCUIT

CASE # *2014CP42-2767*

CERTIFICATE OF SERVICE

VS

Steele

Respondent

I certify that, on this date, I served a copy of the

Order of Dismissal

In this action dated

May 21, 2016 on

June 2, 2016

By mailing to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

Adrienne H. H. H.

Heath H. H.

Marion Stewart

June 2, 2016
(Date)

Cecilia J. J.
(Signature)